CITY OF MILWAUKEE
Office of the City Attorney

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MEMORANDUM

TO: Tearman Spencer, City Attorney
Scott Brown, Deputy City Attorney

FROM: James M. Carroll, Assistant City Attorney
Gregg Hagopian, Assistant City Attorney

DATE: March 22, 2021

RE: Uniformity and Anti-Displacement Fund

Issue: Does the Uniformity Clause permit the City of Milwaukee to condition approval of development contracts on developers contributing to the MKE United Anti-Displacement Fund?

Short Answer: Requiring developers to donate money to the Anti-Displacement Fund violates the Uniformity Clause.

BACKGROUND

A. The Uniformity Clause

Article VIII, section 1, of the Wisconsin Constitution states:

The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe. Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property. Taxation of merchants' stock-in-trade, manufacturers' materials and finished products, and livestock need not be uniform with the taxation of real property and other personal property, but the taxation of all such merchants' stock-in-trade, manufacturers' materials and

> finished products and livestock shall be uniform, except that the legislature may provide that the value thereof shall be determined on an average basis. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided.

This constitutional provision is known as the Uniformity Clause. In *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 429 (1967), the Wisconsin Supreme Court established an analytical framework for the Uniformity Clause that has endured to the present day. That standard is:

1. For direct taxation of property under the uniformity rule, there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an *ad valorem* basis.
3. All property not included in that class must be absolutely exempt from property taxation.
4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.
6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation is borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property.

Wisconsin courts have consistently indicated that the Uniformity Clause mandates consistency of taxation between properties in a taxing district. *See, e.g., Paul v. Town of Greenfield*, 232 N.W.2d 770, 774, 202 Wis. 257 (1930) ("Want of uniformity in taxation does not exist, unless a different rate of taxation is imposed on like kinds of property within the taxing district."). "Article VIII, section 1 of the Wisconsin Constitution requires that the method or mode of taxing real property must be applied uniformly to all classes of property within the tax district." *U.S. Oil Co., Inc. v. City of Milwaukee*, 2011 WI App 4, ¶ 22, 331 Wis. 2d 407, 424-25.

The above Wisconsin constitutional uniformity requirement is supported, and buttressed, by Wisconsin statutory provisions. The general statutory rules are that all property is taxed (Wis. Stat. § 70.01) except that which is specifically exempt (Wis. Stat. § 70.11) so long as the property owner proves entitlement to tax exemption (Wis. Stat. §§ 70.109 and 70.11), understanding that the presumption is in favor of taxation (Wis. Stat. § 70.109). So, unless an owner proves entitlement to a property tax exemption that the legislature has statutorily allowed, that owner's property must be taxed by the City, on a basis of equality and uniformity, so that taxable property bears equal tax burden with all other taxable property on an *ad valorem* basis.

B. <u>The Anti-Displacement Fund</u>

As stated on its website, the MKE United Anti-Displacement Fund was created "to provide grants to help ensure that long-time, income eligible homeowners living in near downtown neighborhoods are not displaced due to increasing property taxes associated with rising property values and new development." https://www.mkeunited.com/antidisplacementfund. As further described on the website:

> "In response to significant input about the urgency of this issue from neighborhood residents, MKE United partners[1] have come together to launch the MKE United Anti-Displacement Fund to assist eligible homeowners. The Fund will be available to offset property tax increases for eligible homeowners in neighborhoods adjacent to Downtown Milwaukee that have experienced significant property tax increases above city averages during the past five years and where long term homeowners may be at risk of displacement due to rising property taxes. This is one of multiple strategies being advanced by MKE United partners to address the issue of displacement in Milwaukee neighborhoods.
>
> The MKE United Anti-Displacement Fund will be available to assist income eligible homeowners beginning with their 2019 property taxes. Applications will be accepted beginning in November 2019.
>
> The Fund will operate for an initial five year pilot period and MKE United is committed to continued fundraising efforts with a goal of extending the program to have a 15-20 year lifespan."

Of particular interest, a "Frequently Asked Questions" portion of the MKE United website includes the following questions & responses:

> *"Why can't the City reduce the taxes of low-income or elderly residents directly?*
>
> *The Wisconsin Constitution prohibits that. Local governments cannot provide relief to specific groups of homeowners or create rebates or programs to reduce property taxes for groups of property owners."*
>
> *"Are any government funds used in the program?*
>
> *There are no federal, state or local government funds being use to provide assistance in the program."*

The Anti-Displacement Fund only provides property-tax relief grants to homeowners in certain areas of the City; namely, the Halyard Park/Brewers Hill/Harambee neighborhood and the Walker's Point neighborhood east of I43/I94. Grant recipients are subject to income limits and must have owned their property since at least January 1, 2015.

MKE United's flyer for the Fund states:

[1] The MKE United Partners, from information from the internet, appear to be comprised of the Greater Milwaukee Committee, the City of Milwaukee, the Greater Milwaukee Foundation, and the Milwaukee Urban League.

> "For new applicants, if you meet program eligibility requirements and your application is approved, the program will make a tax payment on your behalf in an amount that is the difference between your tax bill for 2019 and your tax bill for 2020. For example, if your property taxes were $2,000 in 2019 and are $2,400 in 2020 – the program will pay the difference of $400…"

ANALYSIS

As this office noted in a relatively recent opinion regarding the constitutional implications of a County sales tax-funded property tax credit, Uniformity Clause cases fall into two main categories: challenges to property assessments and challenges to specific taxation schemes. (*See* June 17, 2019 Legal Opinion, "Uniformity Clause Implications of Local Property Tax Credit"). To our knowledge, no case directly addresses the particular Uniformity Clause issue considered in this memo. However, the following Wisconsin Supreme Court Uniformity Clause cases provide some insight:

- In *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408 (1967), the Court held that state statutory provisions (known collectively as the "Urban Redevelopment Law") permitting municipalities to partially exempt properties held by a local "redevelopment corporation" from property taxes for up to 30 years violated the Uniformity Clause. The Court concluded that the Urban Redevelopment Law resulted in property taxes that were "not uniform in their impact on property owners." *Id*. at 429. "[I]f redevelopment corporations are assessed at a figure less than that which would be assigned to other taxpayers holding equally valuable property, other taxpayers will be paying a disproportionately higher share of local property taxes." *Id*.

- While the partial exemption from property tax deemed unconstitutional in *Gottlieb* was achieved directly—by partially exempting certain properties from property taxes—subsequent decisions have considered less direct means of providing property tax relief. For example, in *State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94 (1978), the Court held that a law granting tax credits to owners of certain residential properties in a taxation district—but not to others—violated the Uniformity Clause. The law in question, the Improvements Tax Relief Law, provided homeowners who placed garages and other improvements on their properties with an income tax credit. The Court explained that "[t]he fact that a rebate credit is paid to certain property owners and not to others leads to the indisputable conclusion that taxpayers owning equally valuable property will ultimately be paying disproportionate amounts of real estate taxes. This is not uniformity." *Id*. at 108.

- Not long after *Torphy*, the Court discussed how Wisconsin's Tax Incremental Financing ("TIF") laws align with the Uniformity Clause. *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392 (1980). The Court clarified that "[w]ith respect to the question of uniformity of taxation among individual taxpayers, the Tax Increment Law is clearly distinguishable, both in form and effect, from the tax provisions struck down by the court in *Gottlieb* and in *Torphy*." *Id*. at 411. The Court noted that

> "[i]n both of those cases, the court based its conclusion that the provisions were unconstitutional upon its finding that taxpayers owning equally valuable property were required to pay disproportionate amounts of taxes. Under tax increment financing, however, there is no such disproportionate impact upon taxpayers within the same territorial boundaries of the unit imposing the tax." *Id*. In other words, TIF laws do not violate the Uniformity Clause because their effect on taxpayers in a given district is proportionate.

Gottlieb, *Torphy*, and *Sigma Tau Gamma* thus suggest that government actions will run afoul of the Uniformity Clause when they provide partial property tax exemptions, or rebates, or offsetting credits, to some—but not all—taxpayers within a taxation district. Consequently, the City cannot, under the above Uniformity Clause analysis, directly provide rebates, or credits, or offsets, to some taxpayers of taxable residential property thereby creating lack of uniformity. This is recognized by the MKE United Fund itself in the "Frequently Asked Questions" provisions on its website, which state that the Wisconsin Constitution "prohibits Local governments" from providing relief to specific homeowner groups to reduce their property taxes.

But what about the Uniformity Clause implications of the scenario addressed by this memo? May a municipality require a developer to contribute to a fund like MKE United[2] as a condition to the municipality approving a development project? To answer this question, we start with two related points.

First, a private fund or private donor, not connected with government, has far greater latitude with respect to making charitable donations because neither government, nor governmental power, nor restrictions on governmental power[3], are involved. Private donors thus have more freedom to make charitable contributions of non-public (non-government) funds. The fact that the MKE United Anti-Displacement Fund <u>does not</u> use public dollars (or government-mandated dollars), and does use private (non-governmental, non-public, non-governmentally mandated) funds to offset residential property taxes of only certain, limited and select taxpayers does not appear to violate the Uniformity Clause. The private, non-governmental, nature of those funds removes them from the purview of the Uniformity Clause. That is, if private donors, of their own volition, wish to give money to individual taxpayers to assist them with property taxes—or for any other legally permissible reason—the Uniformity Clause does not stop them from doing so.

Second, a public entity (such as the City) very likely <u>does</u> violate the Uniformity Clause if it directly subsidizes some, but not all, taxpayers' property tax bills. In the words of the *Torphy* Court, such a payment to certain taxpayers but not to others "leads to the indisputable conclusion that taxpayers owning equally valuable property will ultimately be paying disproportionate amounts of real estate taxes" and, therefore, "is not uniformity."

So, what about the scenario considered by this memo? Does it more closely resemble the first or the second situation outlined above? The City of Milwaukee's requiring developers (whether,

[2] While the City of Milwaukee may be a partner behind the MKE United Fund, the website for the Fund does state that no local government funds are being used to provide assistance in the program.

[3] Such as the Uniformity Clause, the Public Purpose Doctrine, Equal Protection constraints.

for example, by ordinance or by contractual commitment) to donate money to the Anti-Displacement Fund is more like the second situation, and thus probably violates, and becomes problematic under, Wisconsin's Constitutional Uniformity Clause. Technically the developer, and not the City, is "donating" the developer's money (and not government/public dollars) to the MKE United Anti-Displacement Fund. However, that "donation" of private dollars is only occurring as the cost of doing business with the City, and as a City-mandated requirement, with the knowledge and intent that those government-mandated contribution dollars will work as a partial rebate, or partial credit, or partial offset, or grant, to certain, eligible, owners of certain, eligible, taxable real estate in certain, eligible, discrete geographical areas. In other words, by the City requiring a payment and direction of funds toward certain limited taxpayers for the purpose of easing their property tax burdens and combating gentrification—no matter how laudable that goal might otherwise be—the City is impermissibly using government authority to disrupt uniformity of taxation. Practically speaking, by requiring contributions to the MKE United Fund, the City would be undermining the private and independent nature of the existing donations to that Fund, and the City would be disrupting uniformity.

CONCLUSION

In its current state, as we understand it, the Fund – funded by private, non-government, dollars, being dollars not *compelled or contractually required by the City of Milwaukee* – should withstand Uniformity analysis and scrutiny. To avoid Uniformity problems, the City of Milwaukee should not mandate or require public or private funds to be paid to the Fund. Government should refrain from acting in a manner that disrupts Uniformity, or that has, as the net result, different owners paying disproportionate amounts of property taxes on like valued real estate.