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June 1, 2009

Jim Bohl, Jr., Alderman
5th District
City Hall, Room 205

Re: Application of the "But For" Test – Tax Incremental Financing

Dear Alderman Bohl:

In an April 30, 2009 letter we were asked to provide a legal opinion concerning the proper application of the "but for" provision set forth in Section 66.105(4m)(c)1.a. of the Wisconsin Statutes. That section of the statutes sets forth the criteria upon which boards of review shall base decisions to approve or deny individual tax incremental districts and amendments to such districts. The criteria include making the following finding, commonly referenced as the "but for" test:

- a. Whether the development expected in the TID would occur without the use of tax incremental financing.

It is likewise significant to note that in Section 66.105(4m)(b)2., a Joint Review Board may not approve the resolution creating a tax incremental district ". . . unless the Board's approval contains a positive assertion that, **in its judgment**, the development described in the documents the Board has reviewed under subd. 1. would not occur without the creation of a tax incremental district. (Emphasis added).

The real thrust of your request for a legal opinion is whether the "but for" test is more a policy decision for the Council and the Joint Review Board rather than a stringent boundary applicable to the approval of projects proposed under the amendments created by 2007 Act 57. That Act, which was enacted on March 5, 2008, amends Wis. Stat. §66.1105 to include Wis. Stat. § 66.1105(2)(f)1.n., which authorizes project costs for tax incremental districts to be incurred "within a one-

half mile radius of the district's boundaries and within the city that created the district."

Initially, we note that the "but for" test is to be determined in the judgment of the Joint Review Board reviewing each resolution creating or amending an individual tax increment district. Although the Common Council frequently considers the "but for" analysis in its deliberations with respect to the approval of a resolution creating or amending a tax increment district and the analysis provided by the City Comptroller's Office also frequently addresses the "but for" test, it is significant to note that only the Joint Review Board is required to make the "but for" determination, no similar determination is required on the part of the Common Council.

"The purpose of the Joint Review Board is to ensure that the development proposed by the project plan would occur but for the creation of the district and to assess the economic benefits likely to accrue to the overlying taxing districts."

David N. Farwell, *A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose in Wisconsin's Tax Increment Financing Law*, 89 Marq. L. Rev. 407 (2005). In addition, the courts in the State of Wisconsin provide significant deference to local legislative decisions reached by joint review boards. *Id.*, 89 Marq. L. Rev. 425, citing *State ex rel. Olson v. Baraboo*, 643 N.W. 2d 796 (2002).

In reaching the determination to approve a particular tax increment district or amendment the Joint Review Board must assert that "... in its judgment the development described in the documents that Board has reviewed under subd. 1 would not occur . . ." Wis. Stat. §66.1105(4m)(b)2. This language underscores the fact that the Joint Review Board is required to make a case-by-case determination for each such approval based on the particular tax increment district under consideration and the actual information contained in the common council file to be evaluated.

The precise question to which you seek an answer ultimately lies within the discretion of the Joint Review Board. In some instances, it may be fairly easy for the Joint Review Board to make such a determination where, for example, street improvements outside TID boundaries are essential to provide access to a particular project. In other instances that determination may be very difficult for the Board to justify, for example, situations where all development within the TID

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boundary has been completed prior to adoption of an amendment providing for the funding of new projects outside the TID boundary, as permitted by 2007 Wisconsin Act 57.

In summary, the statutory provisions creating the "but for" test requires the Joint Review Board to exercise individual judgment on a case-by-case. Thus, that decision is more similar to a "policy decision" for the Board than a stringent boundary restricting the Joint Review Board's decision in acting upon the creation and amendment of tax increment districts to finance projects of the type made possible by 2007 Wisconsin Act 57.

Very truly yours,



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