

CITY OF MILWAUKEE

Form CA-43

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Assistant City Attorneys

January 21, 2004

Mr. W. Martin Morics
Comptroller
Room 404 - City Hall

Re: Estimated Tax Incremental District Expenditures

Dear Mr. Morics:

In a January 16, 2004 e-mail from Mr. Li of your office, we were forwarded a draft procedure that the Department of City Development, the Budget Office and the Common Council's Fiscal Section have agreed upon in order to release funds for a particular Tax Incremental District ("TID") that are in excess of the estimated project cost in the Project Plan for that district.

As you know, we have opined: "... that the alterations in those elements of the project plan, which sec. 66.46(4)(f) [now, sec. 66.1105(4)(f)] permits to be cast in terms of 'estimates' and which were in fact characterized as 'estimated' in the TID 5 project plan, do not constitute amendments to the project plan." 85 O.C.A. 361. We came to the same conclusion in a February 6, 1989 opinion, stating:

"Therefore, an increase in the already specified estimated project cost does not, in our opinion, constitute an 'additional project cost' within the meaning of sec. 66.46(5)(c) [now, sec. 66.1105(5)(c)], Stats.; and such an expenditure could be incurred without amending the project plan. This conclusion presumes that the expenditure can be made within the initial five-year period, and that there are sufficient TID-7 funds available to fund the expenditure."

89 O.C.A. 71.

Mr. W. Martin Morics
January 21, 2004
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We made the following suggestion in our 1985 opinion:

"While we have concluded that alterations of estimated project costs and methods of financing those costs do not constitute an amendment to a TID project plan, we would suggest that members of the City Plan Commission, the Common Council and the Joint Board of Review be apprised, on an informational basis, of the financing modifications for TID 5."

We again addressed the estimated TID project cost issue in an April 30, 1990 opinion to your predecessor. In that opinion, we observed:

"Your question focuses on the desirability of imposing a cap on the estimated project costs. The cap could either be on individual project costs or, as you suggest, on the overall project cost total. With such a cap in place, any increase beyond that ceiling would require a formal project plan amendment. Section 66.46(4)(h) and (4)(m), [now, sec. 66.1105(4)(h) and (4)(m)] Stats. There may also have to be a redetermination of the tax incremental base if the amendment would permit project cost expenditures beyond the initial five year period. Section 66.46(5)(c), [now, sec. 66.1105(5)(c)] Stats.

"The issue of imposing such a cap involves more policy, rather than legal, considerations. However, we believe that placing such an upper limit on TID expenditures would provide more clarity to the otherwise definitionally murky situation which is presented by 'estimated project costs.' The ultimate decision on the advisability of imposing such expenditure limitations must be left to the Common Council and the Joint Review Board."

90 O.C.A. 290.

The eight step procedure forwarded under Mr. Li's e-mail* does not precisely embrace either our 1985 or 1990 suggestions on how to deal with the issue of exceeding estimated TID project costs. We recognized in both opinions that the method, if any, for addressing that issue

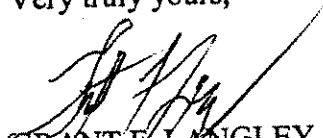
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- *1. DCD determines that in order to complete TID Approved Planned Activity which exceeds the original Common Council approved estimated TID expenditures, an additional appropriation is required.
 2. DCD verifies that there is sufficient annual TID budget authority to allocate an additional appropriation to a specific approved TID plan.
 3. DCD verifies that there will be sufficient increments collected to cover the additional appropriation.
 4. DCD meets with the Budget Office and the Common Council-Fiscal Division to inform both parties of the required appropriation request.
 5. DCD provides a confirming E-Mail to the Budget Office and Common Council-Fiscal Section.
 6. The Budget Office and Common Council-Fiscal Section forward their approval to the Comptroller's Office.
 7. DCD request release of funds based on their approval.
 8. Annually, DCD submits to the Common Council an annual report of each TID status.

Mr. W. Martin Morics
January 21, 2004
Page 3

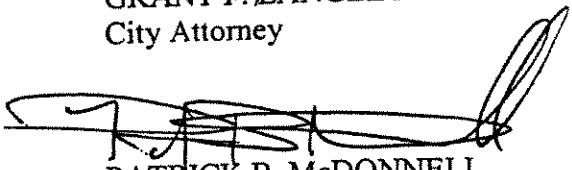
"involves more policy, rather than legal, considerations." However, we note, as we did in our 1989 opinion, that any procedure for dealing with expenditures in excess of the Project Plan estimates must at a minimum be predicated upon the availability of funds in the annual City Budget. Point No. 2 of the proposal at issue addresses this concern. Therefore, since that procedure at issue addresses the minimum requirement for any such policy, we are of the opinion that the eight step process that Mr. Li has outlined is reasonable and legally defensible.

Finally, it may be advisable to provide the Common Council with an outline of this process on at least an informational basis since, under the proposal, the Council is not advised of expenditures in excess of TID estimates until after the fact.

Very truly yours,



GRANT F. LANGLEY
City Attorney



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c: Richard Li
Tom Croasdaile
Michael Daun
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April 30, 1990

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Mr. James A. McCann
Comptroller
Room 404 - City Hall

Dear Mr. McCann:

Re: TID Expenditure Caps

In your March 28, 1990 communication, you requested our opinion "regarding the desirability of requiring a project plan amendment or other Common Council approval before any Tax Incremental District ("TID") expenditure above the total project plan budget may be permitted."

As you know, all that is required in a TID project plan is a "list of estimated project costs." Section 66.46(4)(f), Stats. We have in the past opined that, presuming the availability of TID funds, an increase in an estimated project plan cost does not necessarily constitute an amendment to the plan requiring formal approval by the Common Council and the Joint Review Board. (See 87 O.C.A. 190 and 89 O.C.A. 71.)

Your question focuses on the desirability of imposing a cap on the estimated project costs. The cap could either be on individual project costs or, as you suggest, on the overall project cost total. With such a cap in place, any increase beyond that ceiling would require a formal project plan amendment. Section 66.46(4)(h) and (4)(m), Stats. There may also have to be a redetermination of the tax incremental base if the amendment would permit project cost expenditures beyond the initial five year period. Section 66.46(5)(c), Stats.

The issue of imposing such a cap involves more policy, rather than legal, considerations. However, we believe that placing such an upper limit on TID expenditures would provide more clarity to the otherwise definitionally murky situation which is presented by "estimated project costs." The ultimate decision on the advisability of imposing such expenditure

Mr. James A. McCann

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April 30, 1990

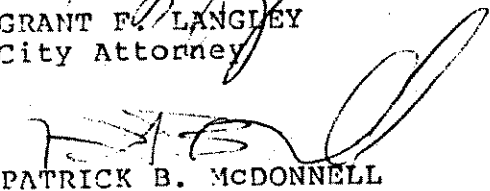
limitations must be left to the Common Council and the Joint Review Board.

With respect to existing TID project plans, the imposition of expenditure caps would, in our opinion, require formal plan amendment.

Very truly yours,



GRANT F. LANGLEY
City Attorney



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PBMCD:dms

cc: Ricardo Diaz

JOHN J. CARTER
Chief Prosecutor

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February 6, 1989

Mr. Ricardo Diaz
Commissioner
Department of City Development
809 Building

ATTENTION: THOMAS MILLER

Dear Mr. Diaz:

In your January 27, 1989 communication, you posed two questions relative to your ability to qualify certain expenditures as Tax Incremental District No. 7 ("TID-7") project costs.

You first state:

"Page 6, item B1.a.(5) of the project plan lists 'provision of adequate surface and/or in-structure parking' as a proposed improvement within the TID. Specific expected expenditures are itemized on pages 7-11 of the plan. On page 11, item (8) lists parking as a secondary improvement. Note that only \$1 is budgeted. Under these circumstances, would it be possible to spend up to \$1 million of TID funds for construction costs related to the Water and State parking structure?"

We responded to a similar inquiry in our March 18, 1987 opinion to former Commissioner Drew (copy attached). 87 O.C.A. 190. Also see 85 O.C.A. 361.

In that 1987 opinion, we concluded that the \$2.5 million estimated cost of a grant to the Redevelopment Authority of the City of Milwaukee ("RACM") to fund loan(s) to private

Mr. Ricardo Diaz

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February 6, 1989

developers [could be exceeded without changing or amending the original project plan "because the original plan, by its use of estimated costs, did not pretend to base those costs upon absolute calculations and in fact contemplated variations from the cost figures listed in the plan." (Emphasis in original)

Similarly, the amount listed in the plan for parking is also found under the heading "Detailed List of Estimated Project Costs." See P. 14, Project Plan. Therefore, an increase in the already specified estimated project cost does not, in our opinion, constitute an "additional project cost" within the meaning of sec. 66.46(5)(c), Stats.; and such an expenditure could be incurred without amending the project plan.¹ This conclusion presumes that the expenditure can be made within the initial five-year period, and that there are sufficient TID-7 funds available to fund the expenditure.]

You then state:

"Item (9) on page 11 lists property acquisition also as a secondary improvement. As you know, the Water and State site has already been acquired. Would it be possible to reimburse the City for its acquisition costs using TID funds?"

¹The project plan itself provides for this sort of flexibility. Specifically, in the note found on the bottom of Page 7 of the project plan, the following is stated:

"NOTE: The kind, number, location, and estimated cost of public works and improvements necessitated by this proposed project, as identified above, are based on preliminary plans and concepts only. These may be modified as to kind, number, location, and cost at any time during project execution based on more definitive plans and engineering studies without amendment of this Plan."

Mr. Ricardo Diaz

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February 6, 1989

The permissible expenditures which qualify as a tax incremental district "project costs" include:

"c. Real property assembly costs, meaning any deficit incurred resulting from the sale or lease as lessor by the city of real or personal property within a tax incremental district for consideration which is less than its cost to the city."

Sec. 66.46(2)(f)l.c., Stats.

The definition of "real property assembly costs" contemplates that the City already would have purchased property within the district, and then sold it for less than the purchase price and relocation costs. It is that sale deficit which qualifies as an allowable project cost.

Therefore, had the City itself purchased the property and then sold it at a loss, that loss would have qualified as a "project cost." The loss obviously could not have been calculated until after the City had expended its own funds to purchase the property.

However, it is our understanding that the City did not directly purchase land within TID-7; rather, acting pursuant to sec. 66.431(13), Stats., the City provided funds to RACM through a cooperation agreement. RACM then purchased the property. In fact it appears that all TID-7 project costs, including the parking structure expenditures discussed above, were intended to be incurred by RACM and not the City.²

²In sec. II.C. on Page 5 of the Project Plan, the following is specified:

"The objectives and implementation of this Project Plan can only be accomplished by the exercise of powers granted to the Redevelopment Authority of the City of Milwaukee (RACM)."

Mr. Ricardo Diaz

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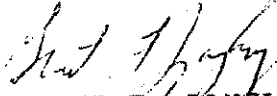
February 6, 1989

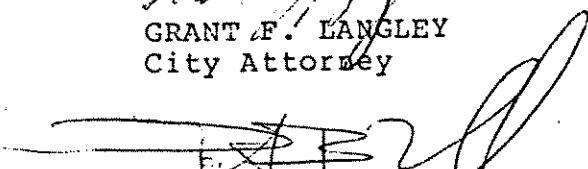
The City's contributions to RACM under the terms of the TID-7 project plan qualify as a "project cost" under sec. 66.46(2)(f)l.h., Stats., which provides:

"h. The amount of any contributions made under s. 66.431(13) in connection with the implementation of the project plan.

Since the above statutory provision speaks in terms of "contributions made," we interpret that phrase as meaning that the City cannot claim the RACM contribution as a TID project cost until after the contribution has been made. Therefore, not only could the City claim its contributions to RACM, for either the parking structure or land purchase, as TID project costs after the City had incurred the cost of those contributions; but it is only after the contribution had been made, that the City would be in a position to claim the expenditure as a qualified TID project cost.

Very truly yours,


GRANT F. LANGLEY
City Attorney


PATRICK B. McDONNELL
Special Deputy City Attorney

PBMCD:cfg

Enclosure

CC: Mr. James A. McCann

CC: Mr. W. Martin Morics



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March 25, 1985

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Assistant City Attorneys

Mr. William Ryan Drew
Commissioner
Department of City Development
809 N. Broadway

Attention: Mr. Daniel McCarthy

Re: Your File Reference DCD:WRD:DM:jg

Dear Mr. Drew:

In your March 15, 1985 communication, you indicated that one of the proposed methods of financing the project costs for Tax Incremental District No. 5 ("TID 5"), namely, a federal grant of \$6 million, did not appear likely to materialize, thereby occasioning a revision in the proposed methods of financing TID 5 project costs.

The financing revision would increase the dollar amount of the general obligation bonds which would be sold. The debt service on those bonds would be a "financing cost" recoverable as a "project cost" pursuant to sec. 66.46(2)(f)1.b, Stats. Therefore, unless cost savings are realized in other areas of the TID 5 project costs, the net effect of the alteration in the method of financing would be an increase in the project costs, specifically, an increase in the "financing cost" element of those project costs.

The TID project plan which must be adopted pursuant to sec. 66.46(4), Stats., contains a number of elements which are required to be included within it. Among those required elements are: "... a detailed list of estimated project costs ..." and "... a description of the methods of financing all estimated project costs ..." Section 66.46(2)(f), Stats. (Emphasis added)

In the project plan which was adopted for TID 5, the detailed list of project costs was characterized as a "Detailed List of Estimated Project Costs" (emphasis added) (pp. 13-15 of

TID 5 project plan). These enumerated project costs specifically included Financing Costs.

The method of financing the TID 5 project costs was also denominated as an "Estimated Method of Financing Project Costs" (emphasis added) (p. 16 of TID 5 project plan).

Therefore, both the project costs themselves, including the financing costs, and the method of financing those costs were characterized in the TID 5 plan as "estimates." As noted above, it is perfectly allowable to include only estimated project costs in a TID project plan. Section 66.46(4)(f).

The Wisconsin Supreme Court has defined the term "estimate" as a "mere [approximation]," noting that the term "precludes accuracy." Shipman v. State, 43 Wis. 381, 389 (1877). The Iowa Supreme Court reached a similar conclusion stating that:

An estimate is equivalent of "more or less" and does not pretend to be based on absolute calculations. Use of the word precludes accuracy. ...

Denniston and Partridge Co. v. Mingus, 179 N.W.2d 748 at 752 (1970).

Because the TID 5 project plan recognized, and properly so, that the project costs, which included the cost of financing, and the methods of financing those costs, were only "estimates," the possibility of alterations in either or both of those plan areas was contemplated by the project plan as originally adopted. The plan, by its very terms, i.e., by the use of the word "estimated," precluded accuracy in the categories of project costs and methods of financing.

Therefore, it is our opinion that the alterations in those elements of the project plan, which sec. 66.46(4)(f) permits to be cast in terms of "estimates" and which were in fact characterized as "estimated" in the TID 5 project plan, do not constitute amendments to the project plan. We do note that if the City wished to incur additional project costs after the initial five-year period specified in sec. 66.46(6)(am)1, that

Mr. William Ryan Drew

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March 25, 1985

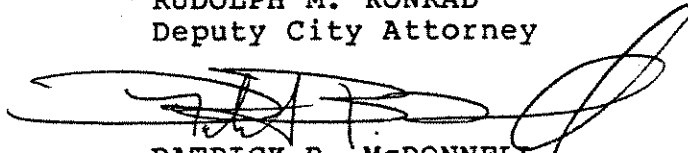
the tax incremental base of the district may very well have to be redetermined pursuant to sec. 66.46(5)(c), Stats. Further, any such extension of the time period for incurring project costs would, in our opinion, constitute an amendment to the project plan requiring full compliance with sec. 66.46(4)(h), Stats.

While we have concluded that alterations of estimated project costs and methods of financing those costs do not constitute an amendment to a TID project plan, we would suggest that members of the City Plan Commission, the Common Council and the Joint Board of Review be apprised, on an informational basis, of the financing modifications for TID 5.

Very truly yours,



RUDOLPH M. KONRAD
Deputy City Attorney



PATRICK B. McDONNELL
Assistant City Attorney

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