FN 050073

City of Milwaukee

Department of City Development

Housing Authority
Redevelopment Authority
City Plan Commission
Historic Preservation Commission
NIDC

Rocky Marcoux
Commissioner

Martha L. Brown
Deputy Commissioner

June 29, 2005

Alderman Michael D'Amato
Chair
Zoning, Neighborhoods & Development Committee
City Hall – Room 205

Dear Alderman D'Amato:

Below you will find the responses to several questions you posed regarding the proposed Pabst City Tax Incremental Financing (TIF) District scheduled for consideration by your Committee on July 5, 2005. We appreciate having the opportunity to provide input on this matter in advance of Council action.

Several of your questions refer to a "new policy" introduced by the Mayor regarding TIF borrowing for the City; you cite as evidence of the new policy a recent *Business Journal of Milwaukee* article. Please be aware that the conclusions drawn by the author of the article were his own and not offered as a new policy by the Barrett Administration. Additional general obligation borrowing for TIF is likely to be requested as part of the upcoming budget, but you will be advised of any overall policy change well before the media.

Also, you and the members of the Council should be aware that up to four active TIF districts containing $250 million in incremental property value will likely close in 2006. The closeout of these TIFs will have a favorable affect on the City's TIF capacity, while adding significant value to the property tax rolls.

Your questions, and the responses of the Department of City Development (DCD), are listed below:

1. *The latest issue of the Milwaukee Business Journal includes the introduction of the Mayor's new policy to double the amount of TIF borrowing for the City. According to the City Comptroller, the average TIF borrowing over the past 5 years has been $15 million annually. Doubling that amount still falls short of the $41 million proposed for Pabst City. What is the administration's projected TIF borrowing over the next 3 years as contemplated in the 3-year budget plan and considering the projects presently "on the table" at DCD? What are the details of this new policy? What criteria will be used by DCD in order to determine the projects are worthy of this additional City borrowing? What is the potential effect of this policy on the City's bond rating?*

While the next few years will likely see an increase in the number of TIF districts (TIFs) created, this does not necessarily translate to a long-term, sustained increase in City general obligation borrowing for these projects. In fact, many communities in metro-Milwaukee do not issue general obligation bonds for TIFs at all, preferring instead to finance them with dedicated revenue bond issues structured specifically for each project.

The Comptroller's comments assume all future districts will be financed directly by the City. As you know, DCD has encouraged the increased use of "developer financed" districts, as has been done in Chicago and Minneapolis, and has also used borrowing by the Redevelopment Authority of the City of Milwaukee (RACM), backed by the City's moral obligation. This latter approach was used for the Cathedral Place TIF and has been authorized by the Common Council for financing the Menomonee Valley TIF, as well. While the RACM financing method is certainly factored into the City's bond rating, it is not included in the City's 5% debt limitation. The Term Sheet for the Pabst City project provides for financing via the RACM method, at the recommendation of the Comptroller.

The Pabst City borrowing, even if implemented through the City, will increase City debt from 53% of the 5% statutory limit to 57% of the limit. This is well within the 65% to 75% maximum utilization apparently suggested to the Comptroller by rating agencies. The project borrowing will also be staged over 2005, 2006, and 2007, further reducing the impact on our borrowing limit.

We should note that the Comptroller participated in virtually all the negotiating sessions on the project and not once indicated that the borrowing for this development would have any negative affect on our debt capacity or bond rating.

The criteria for future Tax Incremental Finance Districts is not expected to depart from our existing criteria, and will, of course, include the need to address the "but for" test for all projects.

2. *The City generally borrows for TIF projects over 17 years. Pabst City is projected to be paid back over 25 years. What unique features of Pabst City justify deviating from the average typical payback schedule?*

When the City issues general obligation bonds for TIF, it typically includes two years of interest-only payments, and then amortizes the principal over a 15-year period. This is done in large part because the City borrowing for TIFs is included in a much larger bond issue for all City purposes and the City typically restricts the term of these issues to 15 years. The City pays back its debt relatively quickly, compared to other cities, with about 85% of the outstanding bonds being paid back in 10 years. We understand this is one of the centerpieces in maintaining the City's strong credit rating.

In the past, however, this has not meant that the City would only approve districts with an expected payback period of 17 years or less. Recently approved districts with

expected payback periods of more than 17 years include: Park East (21 year pay-back), Cathedral Place (25 years), Menomonee Valley (21 years), Stadium Business Park (27 years), and Harley-Davidson Museum (24 years, developer financed). Also, at its last meeting, the Zoning, Neighborhoods & Development Committee approved the "20th & Walnut" TIF, which has a payback of 26 years.

The Pabst City payback period does not represent a deviation from the City's past practices. In fact, its payback period is typical of most redevelopment projects involving significantly blighted properties. Finally, the payback period for the Pabst City TIF is estimated at 22 years, not 25 years.

3. *The City, keeping in mind the "substantial development uncertainty" of the Pabst City project, asked the developer for a guarantee to reimburse the City in any year that the increment falls below the repayment schedule as outlined in the agreement. This agreement only extends to Juneau Avenue Partners and not its principals. In order to best protect the taxpayer's interest, shouldn't the agreement extend to the principals, specifically, Wispark and WE Energies? What are the consequences if Juneau Avenue Partners dissolves or sells the project before debt retirement?*

Guarantees like the one contemplated in this project are usually structured as 'non-recourse' to the stockholders of the limited liability corporation that operates as the developer. The primary lender of the estimated $137 million first mortgage loan will limit its security in the same manner. We would certainly have no objection to obtaining further guarantees, but this may make it extremely difficult to raise equity for the project.

The increment guarantee for this project will run with the land and be secured by a second mortgage on the property. Hence, any potential future owner must also assume the guarantee.

4. *Is the City's second mortgage lien a sufficient guarantee, considering it is subordinate to the $137 million first mortgage and any secured interests of the investors if the anchor tenants pull out of the project?*

By its very nature, a second mortgage is a subordinate security interest but would have a superior claim on assets and cash flow ahead of unsecured creditors and trade creditors. Also, we do not know of any security interest in favor of the equity investors, as your question states.

Above and beyond the second mortgage, the developer has also consented to the City's levying special assessments to recoup any deficiencies in payments on the guarantee. This is a separate form of security that constitutes a first lien on the project, even ahead of the first mortgage. As such, it is likely of greater value than a recourse guarantee.

5. *Has the City Attorney signed off on the special assessment guarantee provision as proposed? Is there a written opinion that you could supply to members of the Committee?*

Please see the attached opinion from City Attorney Grant Langley regarding the special assessment guarantee provision. The City Attorney wrote, *"We have opined regarding the appropriateness of using special assessments to 'backstop' tax increments in the past and concluded that it was an appropriate use of the special assessment methodology..."*

6. *DCD has made binding 10-year lease commitments from major tenants a condition of release of City funds. It is my understanding that the present proposal calls for an "out" clause for the tenant after 5 years. Please provide the exact language of this agreement to the Committee. Why should approval of these leases be at the discretion of the Commissioner of DCD rather than require Common Council approval?*

The only tenant we are aware of with such a clause is the House of Blues, and the clause is valid only if House of Blues' non-ticket revenue falls below certain thresholds. The lease has not been finalized at this time, so we do not have the exact language. The Game Works and Cinema's letters-of-intent do not contain similar provisions and these tenants can only vacate if retail occupancy declines to less than 70% - an unlikely situation, in our view.

Approval of these leases has typically been delegated to the DCD Commissioner. We do not recall a project in which the Council was required to make this approval. The Commissioner's review is intended to ensure that the business terms of the leases are consistent with the underwriting standards employed during negotiations. Any substantive difference will require legislative approval.

Please note that questions 7 and 8 are answered together below.

7. *It has been DCD policy in recent years to require that TIFs that include a developer partner up front be "developer financed" as opposed to more traditional "infrastructure" TIFs (Park East) that are fully publicly financed. This includes the TIFs created for Cathedral Place, Time/Warner (with WE Energies involvement) and the Milwaukee Hilton parking structure. Why is the Pabst City TIF not being presented as a developer financed TIF? Were there discussions to this effect with the developer and what were the specifics of those discussions? Was a deal ever considered that would traditionally finance the $18 million of TIF attributable to infrastructure, job training and RACM administration costs while requiring developer financing of the remaining $23 million that are of more direct benefit to the project?*

8. *A recent report by the Public Policy Forum's Ryan Horton says the City of Milwaukee's use of TIF is minimal compared to other midwestern cities. This has*

caused the Mayor to introduce a policy that proposes to double the use of TIF borrowing. If one examines Horton's observation closer, what we will find is that virtually all the TIFs that have developer partners in the comparison cities are "developer financed", allowing for an expanded use of this economic development tool. What are the criteria that are being used by DCD to determine which TIFs are "developer financed" and which are not? How is this implemented in the Mayor's new TIF doubling initiative? Doesn't our inability to insist on Pabst City being "developer financed" put the taxpayer at undue risk and create a bad precedent for future proposals?

We would, in fact, prefer to initially fund the TIF as a "developer-financed" project while retaining the option to pre-pay the developer funded portion when the project is completed and TIF revenue is established. While this may initially require the City to pay a higher rate of interest on the TIF funded project costs, it succeeds in shifting more of the project risk to the developer and away from the City. In this particular situation, project costs would have to be financed with a $39 million subordinated, 'conventional' loan that would be repaid only from future tax increments.

The developer has not expressed a willingness to pursue this arrangement and does not believe such a loan could be easily obtained given the number and variety of uses and tenants in the project, and the possibility that separate portions may be sold and refinanced over time. At the same time, we understand the Comptroller believes a City general obligation bond issue is the most efficient way to finance the project.

In our experience, this "developer funded" approach has worked best when the developer is a large corporate entity (Marcus Corporation, Aldrich Chemical, Time Warner, Harley-Davidson) with the ability to internally finance this component of the project and not depend on outside funding from commercial lenders.

9. *It has been argued by established locally owned businesses in and around downtown that the subsidized Pabst City proposal creates unfair competition and will succeed only at their expense. Studies by both the developer and C.H. Johnson agree that at least 50% of sales at Pabst City will be "substitute" spending, that is, entertainment dollars that would otherwise be spent at existing local businesses that will instead be spent at Pabst City. An exercise performed by the Comptroller at my request using this data contemplated whether or not the Pabst City TIF could pay itself back if it were only funded through the new dollars it would bring to the area--the "making the pie bigger" argument forwarded by the Mayor and the developer. The Comptrollers analysis concluded that " with this reduced property tax increment as a result of counting only retail sales new to the area, the TID would not be able to successfully retire the $47 million debt obligation within the 30-year maximum legal time limit." Doesn't this, in fact, confirm the position of local business owners that success comes at their expense? What is the administrations response to this constituency?*

The Comptroller estimated that retail development at Pabst accounts for 50% of the expected tax increment, and since C.H. Johnson estimated that 50% of these sales would be "substitute spending," an analysis could be made to determine if a 25% reduction in overall tax increment revenue (50% times 50%) would still produce a TIF that paid itself off. The Comptroller concluded that a TIF with this artificially reduced revenue could not pay itself off in 30 years.

This analysis was conducted with the assistance of DCD's consultant, S.B. Friedman Co. Friedman advises that while the TIF, when subjected to this artificial reduction in revenue, cannot pay itself off in 30 years, it can pay itself off in 31 years. As we have noted, the TIF, without the revenue reduction, does pay itself off in 22 years.

We also believe that if this same analysis had been conducted for the Schlitz Park TIF, or those created for the Tannery, Midtown/Capitol Court, Grand Avenue, the renovation of the former Marshall Fields building, or numerous other office and retail redevelopment projects assisted by the City, similar market apprehensions (mostly about location) and "retail substitution" issues would have been raised. Reducing those projects' expected incremental revenue estimates by a healthy 25% would have likely produced a conclusion that those projects were also very risky and potentially infeasible.

We are convinced, for example, that a market study for Schlitz Park would have cautioned against the likelihood of revitalizing that long vacant brewery complex of some two million square feet. The Schlitz site is detached from downtown, and at the time the redevelopment project was initiated, it was adjacent to a struggling Martin Luther King Drive area and a deteriorated Brewers Hill neighborhood. Schlitz Park is now the second largest office complex in the metropolitan area, and the revitalization it stimulated for King Drive and in Brewers Hill is well documented.

Similarly, the Tannery Complex at S. 7th & Virginia Streets was perceived as being in a high-crime area and unlikely to attract office tenants to an old factory in the decaying Menomonee Valley. This area is now the 12th largest office complex in the metro area, and tenants include AIG American General's regional insurance center, Compuware, Verizon Wireless, and the *Business Journal of Milwaukee.*

The Midtown development, which replaced Capitol Court, certainly confronted similar challenges. Developing a retail complex on the same site as a failed regional shopping center entailed a great deal of risk, for both the City and the developer. We estimate that close to 100% of the retail sales at Midtown are "substitution sales" – possibly much of it coming from adjacent suburbs. The positive outcome, however, is apparent and this too is stimulating a revitalization of an entire neighborhood.

Given the regional focus of the project, any "substitute spending" captured by Pabst City is just as likely to come from Milwaukee's suburbs as from other downtown locations.

With Glendale and Brookfield using TIFs to strengthen commercial projects, the real concern is having funds flow out of the city to suburban communities, along with the accompanying loss of employment and overall redevelopment momentum for the city and the surrounding neighborhood.

Notwithstanding the aforementioned development experiences, DCD acknowledges the Comptroller's conclusion.

10. *The deal as presently structured anticipates that the TIF would assist in an expected rate of return for the developer that peaks at 23.1%, the highest ever in any City deal. The S.B. Friedman report concludes that these "appear to be at the aggressive (insert high) end of the spectrum, particularly in terms of early year cash flows." How can we justify to the taxpayers of the City of Milwaukee a rate of return that is the highest the City has ever offered in any TIF arrangement? Don't these numbers indicate that the project is just too risky to be publicly financed? With such an emphasis on the aggressive payback to the developers in the first 10 years, should it not cause concern regarding a long-term commitment to the project and its viability over the 30 years necessary for successful retirement of the debt?*

90% of the equity for the project is coming from third party outside investors. Outside investor return for the Brewery component of the project is 20.3% only for the last 5 years of the project, years 6-10. The overall return from years 1-10 is 13.5%. Juneau Avenue Partners is putting up 10% of the equity and achieving a 23% return. The blended, effective rate of return to the developer and outside investor is more in the neighborhood of 15% - well within the City's experience with other projects. None of the returns are guaranteed.

Friedman's comment on this, which you abbreviated in your question, goes on to indicate that "...although the returns for the Building 29 Office component appear to be at the aggressive end of the spectrum, particularly in terms of early-year cash flows, the overall returns indicated by the developer fall within ranges that have been observed in the market."

We appreciate the opportunity to provide responses to your inquiries on this issue and would be pleased to answer any additional questions you may have. We will attend the meeting of the Zoning, Neighborhoods & Development Committee on July 5th to provide information as needed.

Sincerely,

Rocky Marcoux
Commissioner

Enclosure

C: Common Council Members, Mayor Tom Barrett, Pat Curley-Chief of Staff, Kimberly Montgomery-Mayor's Staff Assistant, Grant Langley-City Attorney, W. Martin Morics-City Comptroller

CITY OF MILWAUKEE

Form CA-43

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
PATRICK B. McDONNELL
LINDA ULISS BURKE
Deputy City Attorneys

OFFICE OF CITY ATTORNEY
800 CITY HALL
200 EAST WELLS STREET
MILWAUKEE, WISCONSIN 53202-3551
TELEPHONE (414) 286-2601
TDD 286-2025
FAX (414) 286-8550

THOMAS O. GARTNER
BRUCE D. SCHRIMPF
ROXANE L. CRAWFORD
SUSAN D. BICKERT
HAZEL MOSLEY
STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOUREN
JOHN J. HEINEN
MICHAEL G. TOBIN
DAVID J. STANOSZ
SUSAN E. LAPPEN
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
KURT A. BEHLING
GREGG C. HAGOPIAN
ELLEN H. TANGEN
MELANIE R. SWANK
JAY A. UNORA
DONALD L. SCHRIEFER
EDWARD M. EHRLICH
LEONARD A. TOKUS
VINCENT J. BOBOT
MIRIAM R. HORWITZ
MARYNELL REGAN
G. O'SULLIVAN-CROWLEY
DAWN M. BOLAND
KATHRYN M. ZALEWSKI
MEGAN T. CRUMP
ELOISA DE LEÓN
ADAM STEPHENS

Assistant City Attorneys

June 27, 2005

Mr. Joel Brennan
Assistant Secretary
Redevelopment Authority
of the City of Milwaukee
809 Building

Re: Use of Special Assessments to Backstop Tax Increments

Dear Mr. Brennan:

In your June 27, 2005 communication, you requested our opinion on whether special assessments, levied under Subchapter IV of Chapter 66, Stats., can be used to "backstop" sec. 66.1105, Stats., increments so as to assure that the increments will be adequate to pay, in a timely fashion, all tax incremental project costs.

We have opined regarding the appropriateness of using special assessments to "backstop" tax increments in the past and concluded that it was an appropriate use of the special assessment methodology. See attached December 3, 1986 and January 28, 1987 opinions.

The special assessments discussed in the above-referenced opinions were generated through business improvement districts created under sec. 66.608, Stats., (now sec. 66.1109, Stats.). However, except as discussed below, we see no conceptual difference between special assessments generated though business improvement districts versus special assessments generated under the general provisions of Subchapter VII of Chapter 66, Stats. The one cautionary note that we provided with respect to costs recovered as special assessments was in response to the following question in the December 3, 1986 opinion:

> "Your final question was:
>
> '3. Section 66.46(2)(f) states in part that [TID] "Project Costs" mean public improvement costs within the district . . . diminished by any income, special assessments, or other revenues . . . received or reasonably expected to be received by the City in connection with the implementation of the plan. What effect does this provision have on the general concept outlined above?'
>
> "The effect would be that any special assessment recovered through the BID for an improvement, which also qualified as a TID project cost, would reduce the amount of TID project costs which could be recoverable. In effect, there could be no double recovery of such project costs."

The validity of special assessments levied pursuant to a properly adopted business improvement district is virtually impossible to challenge. That is not necessarily the same for special assessments imposed under the general provisions of Subchapter VII of Chapter 66. Section 66.0703(12), Stats. Therefore, the party against whom the assessments may potentially be levied should waive, presumably in a development agreement with either the City and/or the Redevelopment Authority, any right to contest the validity or amount of such assessments. We would suggest the following type of waiver provision be inserted into such a development agreement:

> "In consideration of the benefit derived from such expenditures by the City/Authority, the developer hereby consents to the imposition of such special assessments and hereby waives, pursuant to sec. 66.0703(7)(b), Stats., and any other applicable provision, any and all requirements of the Wisconsin Statutes which must be met prior to the imposition of such special assessments including, but not limited to, the notice and hearing requirements of sec. 66.0703, Stats., the notice requirements of sec. 66.0715(3), Stats., and the appeal possibility under sec. 66.0703(12), Stats., and agree that the Authority, or the City on behalf of the Authority, may proceed immediately to levy such special assessments."

Finally, we understand that an issue has also arisen with respect to the application of uniformity in taxation requirements of Article VIII, § 1, Wisconsin Constitution, to such "backstop" special assessments. In our November 2, 1992 opinion (copy attached), we opined that a contractual commitment by the developer to a minimum assessment amount would have offended the constitutional uniformity requirements. However, we pointed out in that opinion:

> "We have worked with your department in the past to fashion a fail-safe device, through the instrumentality of a business improvement district created under sec. 66.608, Stats., which would insure that in cases where revenues from a tax incremental district are insufficient, revenues could then be generated through special assessments exacted through a business improvement district. For an example of this device, we suggest that you review the tax incremental district and business improvement district which were created for the Historic Third Ward area."

The reason why such special assessments would not offend the constitutional uniformity requirement is because the Wisconsin Supreme Court has consistently held that a special assessment is not governed by the uniformity requirements of Article VIII, § 1. (See *Plymouth v. Elsner*, 28 Wis. 2d 102 at 108 (1965).

Very truly yours,

GRANT F. LANGLEY
City Attorney

PATRICK B. McDONNELL
Deputy City Attorney

PBM:dms

Enc.

c: Ald. Michael D'Amato
Thomas O. Gartner

1033-2005-1781:94501

CITY OF MILWAUKEE

Form CA-43

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
Deputy City Attorney

THOMAS E. HAYES
PATRICK B. McDONNELL
Special Deputy City Attorneys

JOHN J. CARTER
Chief Prosecutor

WILLIAM J. LUKACEVICH
NICHOLAS M. SIGEL
JOSEPH N. MISANY
CHARLES R. THESS
JOSEPH H. McGUIN
REYNOLD SCOTT RITTER
BEVERLY A. TEMPLE
GREGG J. GUNTS
THOMAS O. GARDNER
LINDA ULISS BURKE
MILTON EMMERSON
BRUCE D. SCHRIMPF
ROXANE L. CRAWFORD
THOMAS C. GOELDNER
SUSAN D. BICKERT
HAZEL MOSLEY
VINCENT D. MOSCHELLA
HARRY A. STEIN
SCOTT G. THOMAS
STUART S. MUKAMAL
NANCY E. MALONEY
THOMAS J. BEAMISH
PATRICK J. LUBENOW
LYNNETTE M. PARKER
Assistant City Attorneys

OFFICE OF CITY ATTORNEY

800 CITY HALL
MILWAUKEE, WISCONSIN 53202-3551
(414) 278-2601

December 3, 1986

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

Dear Mr. Drew:

In your November 12, 1986 communication, you asked our opinion on a number of questions regarding the joint use of a Tax Incremental District ("TID") and a Business Improvement District ("BID"). The BID would be used to backstop any cost which could not be recovered through TID revenues. Your first question was:

> "1. The concept as described above would necessarily mean a long term commitment by property owners in the BID while at the same time there would be considerable uncertainty about the extent of their financial obligations. Such obligations could be zero if increments cover costs or they could be substantial if increments didn't materialize. The BID statute says that a BID plan must include a description of the '...special assessment method applicable to a BID.' (s. 66.608(1)(f) 1.) Does this mean that only the assessment formula and procedures must be described or must actual assessments be determined?"

The subsection of sec. 66.608 which you quote in your question is only one of the elements of the "operating plan" which is to be annually considered by the BID Board. Section 66.608(1)(f) and (3)(b), Stats. Two other elements which the plan must also include are:

"2. The kind, number and location of all proposed expenditures within the business improvement district.

"3. A description of the methods of financing all estimated expenditures and the time when related costs will be incurred."

Therefore, a BID plan must include not only the method of special assessment but also all proposed expenditures and a description of the method of funding those expenditures, together with a time when the related cost will be incurred. Joining all of those plan elements together, leads us to the conclusion that both the method of assessment and the actual, (or estimated, if costs have not yet been incurred) assessments should be included in the BID operating plan.

Such an approach is consistent with the procedures required for the imposition of special assessments. One of the initial statutory steps in the special assessment process is the preparation of the report required under sec. 66.60(2) and (3), Stats., and sec. 5-42(2)(c), MCO. The report must include:

"(b) An estimate of the entire cost of the proposed work or improvement.

"(c) An estimate, as to each parcel of property affected, of:

"1. The assessment of benefits to be levied."

Once prepared, the report then forms the basis for the Council hearing on the proposed assessment district. Section 66.60(7) and sec. 5-42(4), MCO.

Therefore, in order to use the special assessment method in the first place, the statutory procedures under sec. 66.60 must be followed, and those procedures include determining

the actual or estimated assessments on all benefitted properties within the proposed assessment district.

Your second question was:

"2. It is anticipated that the BID boundaries would encompass an area larger than the TID. Would there be any problems in levying assessments against properties outside the TID to pay for improvements therein? (Assessment formulas could be structured so that TID property owners were assessed more heavily than property owners outside the TID boundaries.)"

In order to answer your question, the initial point that must be made is that the creation of a TID and the creation of a BID are essentially independent (although as our answer to your third question will show, there is some interdependence) transactions; and each must qualify under applicable statutory criteria. Section 66.608 and sec. 66.60 or sec. 66.46, Stats.

Therefore, if property is to be included within a BID and specially assessed for improvements within that district, the property so assessed must qualify for special assessment under the criteria of both sec. 66.60 and sec. 66.608, Stats. If the property so qualifies under those statutory sections, then the fact that the actual improvement, for which the special assessment is made, is located within a TID that does not encompass the entire BID, is, in our opinion, of no significance.

Your final question was:

"3. Section 66.46(2)(f) states in part that [TID]'Project Costs' mean public improvement costs within the district'...diminished by any income, special assessments, or other revenues...received or reasonably expected to be received by the City in connection with the implementation of the

plan.' What effect does this provision have on the general concept outlined above?"

The effect would be that any special assessment recovered through the BID for an improvement, which also qualified as a TID project cost, would reduce the amount of TID project costs which could be recoverable. In effect, there could be no double recovery of such project costs.

Very truly yours,

GRANT F. LANGLEY
City Attorney

PATRICK B. McDONNELL
Special Deputy City Attorney

PBMcD:pml

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
Deputy City Attorney

THOMAS E. HAYES
PATRICK B. McDONNELL
Special Deputy City Attorneys

JOHN J. CARTER
Chief Prosecutor

CITY OF MILWAUKEE

Form CA-43

WILLIAM J. LUKACEVICH
NICHOLAS M. SIGEL
JOSEPH N. MISANY
CHARLES R. THEIS
JOSEPH H. McGINN
REYNOLD SCOTT RITTER
BEVERLY A. TEMPLE
GREGG J. GUNTA
THOMAS O. GARTNER
LINDA ULISS BURKE
MILTON EMMERSON
BRUCE D. SCHRIMPF
ROXANE L. CRAWFORD
THOMAS C. GOELDNER
SUSAN D. BICKERT
HAZEL MOSLEY
VINCENT D. MOSCHELLA
HARRY A. STEIN
SCOTT G. THOMAS
STUART S. MUKAMAL
NANCY E. MALONEY
THOMAS J. BEAMISH
PATRICK J. LUBENOW
LYNNETTE M. PARKER
Assistant City Attorneys

OFFICE OF CITY ATTORNEY

800 CITY HALL
MILWAUKEE, WISCONSIN 53202-3551
(414) 278-2601

January 28, 1987

Mr. William Ryan Drew, Commissioner
Department of City Development
809 Building

Attn: Tom Miller

Historic Third Ward Tax Incremental District (TID)

Dear Mr. Drew:

In your January 21, 1987 communication, you requested our opinion on several questions related to the proposed "Historic Third Ward Tax Incremental District (TID)."

The initial part of your first inquiry was:

1. Under what circumstances can improvements located outside the TID be funded by the district? The specific case involves a proposal to vacate North Broadway between Menomonee and Erie and to create a small park. Preliminary boundaries of the TID would only include a portion of the proposed park (see attached map). The boundaries are shown this way so as not to overlap any portion of TID 3. The conceptual plan for the park is illustrated by Map #3 in the recently completed Third Ward Plan (see paper clipped page.)

Project costs recoverable through a TID are defined to include:

That portion of costs related to the construction or alteration of sewerage treatment plants, water treatment plants or other environmental protection devices, storm or sanitary sewer lines, water lines, or amenities on streets outside the district if the construction, alteration, rebuilding or expansion is necessitated by the project plan

> for a district, and if at the time the construction, alteration, rebuilding or expansion begins there are improvements of the kinds named in this subdivision on the land outside the district in respect to which the costs are to be incurred. Sec. 66.46(2)(f)1.k., Stats.

In order for the costs attributable to that portion of the proposed park to be constructed outside of the TID to qualify for recovery through the TID, those costs would have to fall within the above statutory definition. The most obvious type of costs which might qualify would be the cost of " . . . amenities on streets . . ." in and around the proposed park; but those costs would qualify only " . . . if the construction . . . is necessitated by the project plan for a district and if at the time the construction . . . begins there are improvements of the kinds named . . . [i.e. amenities on streets] on the land outside the district in respect to which the costs are to be incurred." In other words, the new amenities would have to replace existing amenities on the land outside of the district rather than improving that land in a fashion in which it had not previously been improved.

The second part of your initial question was:

> If it would be inappropriate to undertake improvements outside the boundary of the TID, would there be any problems in drawing the new TID boundaries to overlap a small portion of TID #3.

It is permissible to overlap the boundaries of TID's. When such an overlap occurs, the provisions of sec. 66.46(10), Stats., apply. That provision states:

> **10** Overlapping Tax Incremental Districts. (a) Subject to any agreement with bondholders, a tax incremental district may be created, the boundaries of which overlap one or more existing districts, except that districts created as of the same date may not have overlapping boundaries.

(b) If the boundaries of 2 or more tax incremental districts overlap, in determining how positive tax increments generated by that area which is within 2 or more districts are allocated among such districts, but for no other purpose, the aggregate value of the taxable property in such area as equalized by the department of revenue in any year as to each earlier created district is deemed to be that portion of the tax incremental base of the district next created which is attributable to such overlapped area.

Your second question was:

2. There are no major investments anticipated in the Third Ward although a number of small projects are planned. Thus it is possible that at least in the early years tax increments will not be sufficient to cover costs. So that the City would not be at risk, we are exploring the idea of creating a Business Improvement District to cover any shortfalls. If assessments against property owners will be needed in the early years of a TID, would it be possible to reflect the BID contributions as loans in the project plan and then pay back the loans in the later years of the TID when district revenues allow?

Essentially what you are asking is whether the repayments of a loan, presumably between the Business Improvement District (BID) as lender, and the City, as borrower, would qualify as recoverable TID project costs.

Financing costs, as defined by sec. 66.46(2)(f)1b, Stats., which are incurred to fund other TID costs, are themselves recoverable TID project costs. However, the financing methods which may be used, and hence the financing costs which may be recovered, to fund the payment of TID project costs are specified in sec. 66.46(9), Stats., and do not, in our opinion, include financing through the vehicle of a loan funded by Business Improvement District revenues.

Moreover, special assessments are one of the primary funding sources for Business Improvement Districts, sec.

66.608(1)(f)1 and (4), Stats.; and we presume that special assessments would be the primary funding source for the Business Improvement District financed loan. However, sec. 66.46(2)(f)1 provides that recoverable TID project costs are to be " . . . diminished by any income, special assessments, or other revenues. . . ." Hence, if TID project costs were initially paid for out of a special assessment received through a BID, those special assessments would, in our opinion, reduce the recoverable TID project costs. In effect, the costs could not be recovered first through the BID and then through the TID. (See our December 3, 1986 opinion to you regarding the same point at page 4.)

Very truly yours,

GRANT F. LANGLEY
City Attorney

PATRICK B. McDONNELL
Special Deputy City Attorney

PBMcD:bd
Enc.

Form CA-43

CITY OF MILWAUKEE

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
Deputy City Attorney

THOMAS E. HAYES
PATRICK B. McDONNELL
CHARLES R. THEIS
Special Deputy City Attorneys

JOSEPH H. McGINN
BEVERLY A. TEMPLE
THOMAS O. GARTNER
LINDA ULISS BURKE
BRUCE D. SCHRIMPF
ROXANE L. CRAWFORD
THOMAS C. GOELDNER
SUSAN D. BICKERT
HAZEL MOSLEY
HARRY A. STEIN
SCOTT G. THOMAS
STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA HOUREN
JOHN J. HEINEN
MICHAEL G. TOBIN
M. JOSEPH DONALD
DAVID J. STANOSZ
MARY M. KUHNMUENCH
KATHRYN M. WEST
SUSAN E. LAPPEN
DAVID R. HALBROOKS
MILTON GARY EMMERSON
JAN A. SMOKOWICZ
KIM M. KUCIK
MONICA RIMAI
PATRICIA A. FRICKER
HEIDI A. WICK
Assistant City Attorneys

OFFICE OF CITY ATTORNEY

800 CITY HALL
200 EAST WELLS STREET
MILWAUKEE, WISCONSIN 53202-3551
TELEPHONE (414) 278-2601
FAX (414) 226-8550

November 2, 1992

Ms. Kirsten A. Nyrop
Commissioner
Department of City Development
809 Building

Dear Ms. Nyrop:

In your October 12, 1992 communication, you asked whether the City could, as a part of a tax incremental process, contract with a developer or business with regard to their minimum assessment for the project that they are proposing in connection with the TID plan. You go on to indicate that you would like us to respond to whether a development agreement could contain a provision restricting the developer's ability to appeal their assessment below a certain agreed upon value which would be the value necessary to make the TID feasible.

Inherent in your questions is the proposition that property within a tax incremental district could be assessed at other than its fair market value. It is our opinion that such a proposition offends the uniformity of taxation requirements of art. VIII, § 1 of the Wisconsin Constitution and also offends the valuation requirements of sec. 70.32, Stats.

In explaining the constitutional requirements of uniformity imposed by art. VIII, § 1, our Supreme Court has held that in order for a tax to pass constitutional muster, it must meet the following standards:

> "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."

State ex rel. Fort Howard Paper v. Lake District Board, 82 Wis. 2d 491 at 506 (1978).

The constitutional uniformity requirement has also been translated into the requirement appearing in sec. 70.32 that "requires assessors to assess real estate at its fair market value." Flood v. Lomira Board of Review, 149 Wis. 2d 220 at 226 (Ct. App. 1989). The Supreme Court affirmed that Court of Appeals decision in Flood v. Lomira Board of Review, 153 Wis. 2d 428 at 431 (1990) stating further that "we also hold that sec. 70.32(1) proscribes assessing real property in excess of market value."

Therefore, based upon the above, we would be of the opinion that any agreement which would potentially result in property being assessed at other than its fair market value would violate the constitutional uniformity requirements of art. VIII, § 1, Wis. Constitution. However, that does not mean that there are not devices available to the City to make up a deficiency in revenue produced by positive tax increments in tax incremental districts.

We have worked with your department in the past to fashion a fail-safe device, through the instrumentality of a business improvement district created under sec. 66.608, Stats., which would insure that in cases where revenues from a tax incremental district are insufficient, revenues could then be generated through special assessments exacted through a business improvement district. For an example of this device, we suggest that you review the tax incremental district and business improvement district which were created for the Historic Third Ward area.

Very truly yours,

GRANT F. LANGLEY
City Attorney

PATRICK B. McDONNELL
Special Deputy City Attorney

PBMcD:dms

cc: Julie Penman