



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

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March 28, 2018

Carrie Riepl, City Clerk
City of Eau Claire
203 S. Farwell Street
Eau Claire, Wisconsin 54702-5148

Re: NOTICE OF CLAIM & INJURY
Eau Claire Tax Increment District No. 11

Dear Ms. Riepl:

The Wisconsin Institute for Law & Liberty is a public policy legal center that seeks to advance the rule of law and the public interest in open and transparent government. WILL represents Voters with Facts and a number of Eau Claire taxpayers, all as set forth below. Our clients have serious concerns regarding the manner in which the City Council, the Plan Commission, and the Joint Review Board have failed to comply with the Wisconsin statutes that authorize tax incremental financing. In particular, they have exceeded their authority in connection with their actions in enacting and implementing Eau Claire Tax Increment District No. 11.

This Notice of Claim & Injury follows up on two previous notices sent to the City on September 17, 2015, and November 10, 2015, which are attached and incorporated by reference.

The Joint Review Board and the “but for” test.

The purpose of a TID is to create a dedicated revenue stream – the incremental tax revenue associated with the increasing value of properties in the district – that can be used to finance development projects within the district. The framework for the creation of a TID assumes that the incremental revenue results from the development projects in question, and would not have been realized in the absence of the government financed improvements envisioned by the TID Project Plan. For the purpose of allocating tax levies, the law requires that incremental taxable values in the TID be removed from the tax base, thereby increasing the tax rates that would otherwise be borne by taxpayers. This affects both taxpayers in the municipality and in overlapping tax jurisdictions. If rates are not increased, then the enacting municipality will be deprived of tax revenue that could otherwise be used for general purposes. Likewise, if county and school district rates are not raised, the TID will also deprive those taxing jurisdictions from their share of the incremental tax revenue associated with the TID.

For that reason, the Wisconsin statutes that authorize the creation of a TID require the creation of a Joint Review Board that must review and approve the creation of any TID districts within their jurisdiction. The Joint Review Board must include a taxpayer representative as well as representatives of each of the taxing entities that will be affected by the creation of the TID. Wis. Stat. §66.1105(4m). The Joint Review Board must consider and approve any municipal resolution creating or amending a TID district. Wis. Stat. §66.1105(4)(gs).

The statutes require the Joint Review Board to review the public record, planning documents, and the resolution passed by the local legislative body, and to hold one or more hearings on the TID proposal. And the statutes specifically provide that “[t]he board may not approve the resolution [creating the TID] under this subdivision 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.” Wis. Stat. §66.1105(4m)(b)1 and 2. In other words, the JRB must find that the incremental tax revenue set aside as a result of the TID would never have been realized if the TID had never been created.

This “but for” test is intended to check the power of municipalities and to assure that there is broad agreement within all of the affected communities that public funds are in fact being spent for projects that are appropriate for funding tax incremental financing. Before the Joint Review Board approves the creation of a TID, it is required to carefully review the record to determine whether the “but for” test has been satisfied. An unsupported and conclusory assertion that the test has been met does not suffice. The Board must give some explanation of the facts it has considered, and the reasons it has reached the judgment that is required. It has not done so in the case of TID 11.

In addition, the judgment of the Joint Review Board must be true. In other words, it must be, at the very least, reasonable to conclude that the incremental tax revenue would not have been realized “but for” the TID.

The project that anchors TID 11, the Lismore Hotel, would have been developed even without TID 11. This is not conjecture, but rather is demonstrably true, as the Lismore Hotel was not only planned well before TID 11 was created, a substantial portion of the project was completed before TID 11 was created. The incremental value being created by the Lismore Hotel and captured by TID 11 occurred independently of TID 11. By rights, the hotel should be part of the ordinary tax base and the tax revenues it generates should be going to the funding of ordinary city expenses.

Furthermore, other projects likewise would have occurred even without TID 11. Maintenance on the city-owned parking structure is an ordinary governmental expense that would have had to occur at some point anyway. \$3.5 million is going to additional funding for the Confluence Community Art Center, a project that was already well underway years before TID 11 was created.

TID 11 does not and cannot meet the “but for” test required by the Wisconsin statutes. Accordingly, any expenditures of taxpayer funds under the project plan are unlawful.

Illegally Increasing Taxes

In creating the TIF law, the Legislature intended to allow a city to capture the increased taxes generated from increases in property value within a district and place that money in a dedicated fund for specific projects within the district. The Legislature did not intend the city to be able to use the existence of a TID to also raise the ordinary levy to fund ordinary governmental expenses. Yet that is exactly what the city of Eau Claire has done in its 2018 budget.

In calculating the property tax levy, the City used the new construction of the Lismore Hotel to increase its valuation factor under Wis. Stat. §66.0602(1)(d), allowing it to increase its levy by a proportional amount under §66.0602(2). The City is therefore using the TID increment relating to the hotel development to generate incremental tax revenue for TIF spending and to increase the amount of ordinary tax revenue that it can collect for ordinary governmental spending. Pursuant to §66.0602(1)(d), the City should be subtracting the incremental revenues it is receiving from its allowable levy to avoid increasing taxes on other property owners.

Harm to Taxpayers

In November, 2017, the City Council approved a budget that captured increased property values from the Lismore Hotel and allocated that value to the TID 11 increment rather than to the rest of the City's ordinary tax base. That allocation is illegal. By capturing the Lismore Hotel's value in the TID, the City has shifted the burden of funding all non-TIF City expenditures onto other taxpayers. The inclusion of the increased property values from the Lismore Hotel into a TID increment therefore harms all taxpayers.

Furthermore, the TID 11 Project Plan calls for the expenditure of the bulk of project costs - \$4.5 million of a total of \$5.6 million – in 2018. Contrary to the Project Plan, the City's 2018 adopted budget calls for just over \$2 million in TID 11, which the City's Capital Budget breaks down into \$1 million for the parking ramp, \$750k for the library plaza, and \$975k for the "Downtown Riverwalk." All of those expenditures are illegal as the TID itself is not valid. The riverwalk expenditure is also illegal for a separate reason – it is not listed in the Project Plan, which permits spending only on the plaza, the parking ramp, and the community arts center. The illegal expenditure of tax money causes harm to all taxpayers by either making tax money unavailable for other, legitimate, expenditures or by necessitating increased taxes.

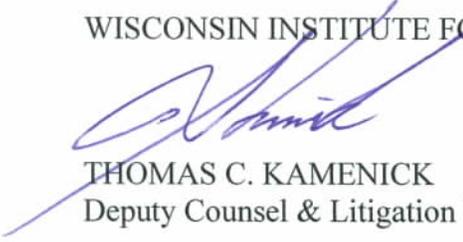
Conclusion

For the reasons set forth above, the City's actions are not in compliance with Wisconsin law. Our clients have suffered, and will continue to suffer, an injury. Our clients do not seek monetary damages. The relief they seek is: (a) an acknowledgment by the City of Eau Claire and the JRB that their conduct did not comply with the Wisconsin Statutes governing the creation of TIF districts, and are therefore unlawful, void, and of no force and effect; and (b) the cessation of any and all actions by the City to implement TID 11.

Voters with Facts is an Eau Claire organization and its members are Eau Claire City and Eau Claire County taxpayers. Our individual clients are Eau Claire City and County taxpayers as well. Our clients do not assert these claims lightly, and we trust that you will give them due consideration and a prompt decision on the merits.

Very truly yours,

WISCONSIN INSTITUTE FOR LAW & LIBERTY



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September 17, 2015

Stephen C. Nick, City Attorney
City of Eau Claire
203 S. Farwell St.
Eau Claire, WI 54701

via email: stephen.nick@eauclairewi.gov

Re: Proposed Eau Claire Tax Increment Finance District No. 11

Dear Steve:

As you know, we represent Voters With Facts. We are writing to call your attention to a serious legal problem with the proposed creation of Eau Claire Tax Increment Finance District No. 11 ("TIF #11"). We do not believe that the proposed TIF complies with the requirements that must be met in order to create a valid tax increment district under Wisconsin law.

First, a substantial part of the "value added" used to calculate the TIF #11 increment relates to a project that is already under way and will likely be completed within a few days of the creation of the tax increment district. That project is the redeveloped Lismore Hotel which is scheduled to open and host an event on October 3, 2015. This "development" can hardly be associated with and should not be included in the tax increment for a district that will not even be created until a few days before the development is completed. It is difficult to see how the Joint Review Board could possibly conclude that the Lismore Hotel development would not have occurred "but for" the creation of TIF #11.

Moreover, in our view, Wisconsin law does not permit gaming the system so that the increased taxes resulting from the essentially completed Lismore redevelopment is included in the TIF #11 tax increment. Indeed, the timing here suggests that TIF #11 is being created *now* simply to capture those increased taxes. None of the proposed expenditures associated with the project plan are even scheduled to occur before 2017.

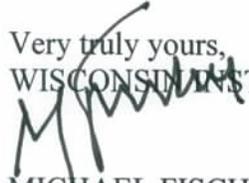
Second, to the extent there is any "project plan" for TIF #11 it is clearly deficient. The "project" consists mostly of modest improvements to a City owned parking ramp that could and probably should be funded by the City in the normal course of its business. Indeed, these expenditures are already proposed in the City's capital budget. Normal maintenance of an existing structure is hardly a project that can or should be properly considered for TIF financing. Apart from developer incentives, that leaves the City with a single justification – some landscaping work that will not occur for several years and that is not even within the district.

Third, the bulk of expenditures under the project plan involve \$3.5 million in developer incentives for the construction of a Community Arts facility. This project is already under way and these incentives have already been funded under project plans for other TIF districts. The need to include what can only be duplicative funding in the TIF #11 project plan is, to say the least, less than entirely clear. At the same time, however, it is entirely clear that the Joint Review Board could not possibly believe that the Community Arts project would not occur in the absence of TIF #11.

For these and other reasons, Voters With Facts believes that the creation of TIF #11 would violate Wisconsin law and would harm City of Eau Claire taxpayers.

We understand that the City Council is to consider TIF #11 next week and that the Joint Review Board will consider it promptly thereafter. We would appreciate your calling these matters to their attention in advance of their consideration. Thank you.

Very truly yours,
WISCONSIN INSTITUTE FOR LAW & LIBERTY


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November 10, 2015

Stephen C. Nick, City Attorney
City of Eau Claire
203 S. Farwell St.
Eau Claire, WI 54701

via email: stephen.nick@eauclairewi.gov

Re: Confluence Project Development Agreement

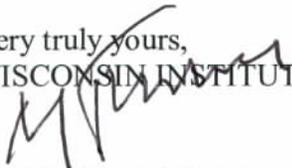
Dear Mr. Nick:

We are writing to you on behalf of our client, Voters With Facts. Last Friday the City released the development agreement for the Confluence Project Community Arts Center to the public. That agreement is incomplete in certain important respects. Nevertheless, we understand the City Council is to consider, and perhaps approve, the agreement at its meeting on November 10, 2015.

The agreement provides that funds designated by the City as costs under the project plan for Eau Claire TIF District No. 10 are to be used to reimburse the project developer for various costs associated with the construction of the Community Arts Center. The statutes that govern the creation and operation of tax increment districts in Wisconsin do not permit the City to use project plan funds in this way. In particular, Wis. Stat. section 66.1105(2)(f)(2) states that **none** of the following may be included as project costs for any tax incremental district: “the costs of **constructing** or expanding administrative buildings, police and fire buildings, libraries, **community and recreational buildings**, and school buildings” (emphasis added). Plainly, the Community Arts Center is a community building and the use of TIF funds to reimburse the developer for construction costs is prohibited. Thus, the development agreement appears to violate the applicable statutes and should not be approved.

We would appreciate your calling our concern to the attention of the City Council in advance of its meeting. Thank you.

Very truly yours,
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