STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

December 20, 2011 OAG—6—11

Ms. Kimberly R. Walker
Corporation Counsel
Milwaukee County
901 North Ninth Street, Rm. 303
Milwaukee, WI 53233

Dear Ms. Walker:

QUESTIONS PRESENTED AND BRIEF ANSWERS

¶ 1. Your predecessor, then-acting Corporation Counsel Timothy R. Schoewe, requested a legal opinion concerning two questions:

1. May a Joint Review Board ("Board") created under Wis. Stat. § 66.1105(4m) approve an amendment to a Tax Incremental District ("TID") to provide for payment of already-scheduled street paving work, if the sole stated reason for the amendment is "freeing up street paving dollars in the [City of Milwaukee's ("City")] regular capital budget for use on street projects in areas more than one-half mile from a TID?"

2. May a Board approve the creation of a TID that includes street paving expenses that were already planned by the City before the creation of the TID in order to free up "street paving dollars in the City's regular capital budget for use on street projects in areas more than one-half mile from a TID?"

¶ 2. In my opinion, the answer to each of these questions is the same. The goal of freeing up city street paving dollars for a city's regular capital budget is not a valid legal basis to include expenses in the initial project plan for a TID or in an amendment to a project plan for an existing TID. However, the fact that a city has such a purpose does not, in itself, preclude the Board from approving or amending a TID. The Board must evaluate whether to approve the creation of or amendment to a TID based on whether the proposal as a whole meets the statutory criteria.

¶ 3. In conducting this analysis, the Board is required to review city council and planning commission resolutions under Wis. Stat. §§ 66.1105(4)(gm) and 66.1105(4)(h)1., to examine the city council's project-specific findings under Wis. Stat. § 66.1105(4)(gm)4., and to

consider the project-specific information provided by the city under Wis. Stat. § 66.1105(4)(i). The legal standards that the Board must apply are contained in Wis. Stat. §§ 66.1105(4m)(b)2. and 66.1105(4m)(c)1. Under those standards, the Board could conclude—but would not be required to conclude—that the costs of street paving planned before a TID is created or amended are appropriate project costs under Wis. Stat. § 66.1105(4m)(d). The Board is accorded considerable legal latitude in making these determinations.

BACKGROUND

¶ 4. We were advised that the City of Milwaukee Common Council has enacted two general resolutions concerning TIDs. The first resolution notes that tax incremental financing may be used for public works or improvements outside a TID but within one-half mile of the TID's boundaries. It further notes that the project plans for an active TID could be amended to include certain street-paving projects within the TID, or within one-half mile of the TID's boundaries, that have already been identified in the City's most current six-year street paving program. The resolution specifically notes that such amendments would "free up street paving dollars in the City's regular capital budget for use on street projects in areas more than one-half mile from a TID." The second resolution makes similar affirmations with respect to project plans for prospective TIDs, and then states:

> The Mayor and Common Council of the City of Milwaukee do ordain as follows:
>
> Part I. Section 304-95 of the [Milwaukee Code of Ordinances] is created to read:
>
> 304.95. Tax Incremental Districts-Inclusion of Street Paving Costs in Project Plan. In preparing the project plan for any new tax incremental district, the department of city development shall include in the plan, as project costs, the costs of all street paving projects anticipated to occur within the district and within one-half mile of the district's boundaries within the next 6 years, as identified by the city's most recent 6-year local street paving program. The department of city development shall consult with the department of public works in identifying all street paving projects to be included in the project plan.

¶ 5. We were advised that, based upon the first of these resolutions, the Board has been requested to approve a project plan amendment for an existing TID solely to include the costs of previously-planned street paving.

ANALYSIS

¶ 6. The Board's functions are set out in Wis. Stat. § 66.1105(4m). The Board reviews three kinds of proposals: "Any city that seeks to create a tax incremental district, amend a project plan, or incur project costs as described in sub. (2)(f)1.n. for an area that is outside of a

district's boundaries, shall convene a . . . joint review board . . . to review the proposal." Wis. Stat. § 66.1105(4m)(a). When considering a proposal, the Board "shall review the public record, planning documents and the resolution passed by the local legislative body or planning commission under sub. (4)(gm) [project plan] or (h)1. [project plan amendment]." Wis. Stat. § 66.1105(4m)(b)1.

¶ 7. Before a city council submits a proposal to the Board to approve the creation or amendment of a TID, the city council must enact a resolution with provisions and findings specific to the proposal that is before the Board. Wis. Stat. § 66.1105(4)(gm)(h). All proposed "project costs" must be included in the project plan. Wis. Stat. § 66.1105(4)(f). "Project costs" are the city's costs in implementing the project plan; the city council's resolution must include findings that the costs "relate directly to eliminating blight, directly serve to rehabilitate or conserve the area or directly serve to promote industrial development, consistent with the purpose for which the tax incremental district is created[.]" Wis. Stat. § 66.1105(4)(gm)4.bm. The city council is also required to furnish the Board with project-specific information stating "[t]he reasons why the project costs . . . may not or should not be paid by the owners of property that benefits by improvements within the tax incremental district." Wis. Stat. § 66.1105(4)(i)3.

¶ 8. If the city council resolution submitted to the Board states only that street paving costs have been included in the project plan or plan amendment in order to free up street paving dollars in the city's regular capital budget for use on street projects in areas more than a one-half mile radius from a TID, then the resolution is legally insufficient under Wis. Stat. § 66.1105(4)(gm)4. Assuming that the city council's resolution is not so limited, however, the Board must apply the appropriate statutory criteria.

¶ 9. Initially, the Board must consider whether to approve the city council resolution that creates the TID or the amendment to the project plan. Wis. Stat. §§ 66.1105(4)(gm); 66.1105(4)(h); 66.1105(4m)(b)2. The Board's approval must "contain[] a positive assertion that, in its judgment, the development described in the documents the board has reviewed . . . would not occur without the creation of a tax incremental district." Wis. Stat. § 66.1105(4m)(b)2.

¶ 10. The "positive assertion" concerning the "development" mandated by Wis. Stat. § 66.1105(4m)(b)2. is also required in connection with any amendment. Wis. Stat. §§ 66.1105(4)(h)1.; 66.1105(4m)(b)2. The "development" referred to in Wis. Stat. § 66.1105(4m)(b)2. and (c)1.a. is the "project plan," which is defined in Wis. Stat. § 66.1105(2)(g) as the "properly approved plan for the development or redevelopment of a tax incremental district, including all properly approved amendments thereto."

¶ 11. The "development" is described in the project plan for the district as a whole. *See* Wis. Stat. § 66.1105(2)(g); *see also State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶ 29, 252 Wis. 2d 628, 643 N.W.2d 796 (interpreting prior law). The Board's judgment that the

development would not otherwise occur applies to the development in the entire TID, without reference to individual categories of project costs.

¶ 12. The Board must also apply the criteria contained in Wis. Stat. § 66.1105(4m)(c)1.a.-c. Each of the required findings examines the TID taken as a whole. The first criterion is "[w]hether the development expected in the tax incremental district would occur without the use of tax incremental financing." Wis. Stat. § 66.1105(4m)(c)1.a. Because this provision examines the "development," the analysis turns on the TID or amendment as a whole, not just one feature or the amendment in isolation. Wis. Stat. § 66.1105(2)(g); *see also Olson*, 252 Wis. 2d 628, ¶ 29 (interpreting prior law).[1]

¶ 13. The second criterion in Wis. Stat. § 66.1105(4m)(c)1.b. is "[w]hether the economic benefits of the tax incremental district, as measured by increased employment, business and personal income and property value, are insufficient to compensate for the cost of the improvements." Although Wis. Stat. § 66.1105(4m)(c)1.b. has not been judicially construed, its focus is again on the TID taken as a whole. The phrase "the cost of the improvements" in Wis. Stat. § 66.1105(4m)(c)1.b. refers to the proposed cost of the improvements for the entire TID, and not to the proposed cost of particular improvements. Where a TID or amendment thereto includes numerous already-planned, ordinary expenses, the Board may find that the total costs of the project outweigh the economic benefits of the TID.

¶ 14. The third item the Board must consider is "[w]hether the benefits of the proposal outweigh the anticipated tax increments to be paid by the owners of property in the overlying taxing districts." Wis. Stat. § 66.1105(4m)(c)1.c. This criterion is specific to the proposal before the Board. For a proposal creating a TID, the Board determines whether the benefits of the proposal to create the TID outweigh the anticipated tax increments to be paid by the owners of property in the overlying taxing districts, again without reference to any specific category of project costs. For a proposal amending a TID, the Board determines whether the benefits of the amendment outweigh the anticipated tax increments.

¶ 15. If the Board finds that the proposal to create or amend a TID meets the standard in Wis. Stat. § 66.1105(4m)(b)2. and the three criteria set forth in Wis. Stat. § 66.1105(4m)(c)1., it may approve the proposal even if the inclusion of certain expenses was intended to free up dollars the City had already planned to spend apart from any TID.

¶ 16. The questions discussed above raise another issue that should be addressed. Project costs and liabilities that are outside of a TID, but within a half-mile radius of its

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[1]This requirement existed before the Board was required to make a similar positive finding under Wis. Stat. § 66.1105(4m)(b)2. *See* Wis. Stat. § 66.1105(4m) (2001-02); Comment, "*A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose In Wisconsin's Tax Increment Financing Law*," 89 Marq. L. Rev. 407, 423 (2005).

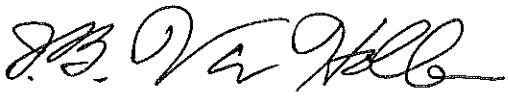
boundaries, are subject to an additional layer of review. Wis. Stat. § 66.1105(4m)(d) states: "Before a city may make or incur an expenditure for project costs, as described in sub. (2)(f)1.n., for an area that is outside of a district's boundaries, the joint review board must approve the proposed expenditure." Review under that subsection is not triggered until after a project plan has been approved. I conclude that the principal function of the Board's review under Wis. Stat. § 66.1105(4m)(d) is to determine if the money to be spent in the area outside the TID's boundaries will, in fact, be spent in accordance with the approved plan and any approved amendments. When acting under that provision, the Board should not independently analyze individual expenditures to determine if each expenditure itself satisfies the specific criteria for initial plan approval under Wis. Stat. § 66.1105(4m)(c)1.

¶ 17. The Board possesses considerable legal latitude in making its determinations. The Board's determinations are reviewable by *certiorari*. *See Olson*, 252 Wis. 2d 628, ¶ 8. A court will therefore review only whether the board "(1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) acted in a way that was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) might reasonably make the order or determination in question, based on the evidence." *Olson*, 252 Wis. 2d 628, ¶ 8.

CONCLUSION

¶ 18. To summarize, the Board reviews all relevant information provided by the city council and the city planning commission. The principal criteria that the Board applies to proposed street paving costs is approval under Wis. Stat. § 66.1105(4m)(b)2. and the three-part legal standard contained in Wis. Stat. § 66.1105(4m)(c)1. The Board could conclude that the costs of street paving that had already been planned before a TID is created or before a project plan for an existing TID is amended are appropriate for inclusion as proposed project costs. The Board could also approve actual street paving expenditures incurred outside of a TID and within a one-half mile radius of the TID's boundaries, if the expenditures are in accordance with the approved project plan.

Sincerely,



J.B. VAN HOLLEN
Attorney General

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