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TIF Law Gets Make-Over

Tax incremental financing ("TIF") got a make-over in February. Act 126 largely enhances municipalities' authority under the TIF program, which has not seen changes this significant since it was established in 1975. Governor Doyle signed the Act February 20, 2004. It takes effect June 1, 2004, although some provisions apply only to TIF districts ("TIDs") created after October 1, 2004.

The TIF program provides a mechanism for cities and villages to finance development and redevelopment projects in limited areas they designate within their jurisdictions. Generally, a municipality makes improvements in the designated area, and earmarks any subsequent increase in the property tax revenues from the area as an income stream to pay off the costs of the improvements. However, this simple summary glosses over numerous restrictions that encumber municipal authority under the TIF program.

Act 126 takes a significant step toward making the TIF program more useful and less onerous for municipalities. Although the changes made are too numerous to list here, the following are some of the highlights:

More property may be included in TIDs. Under current law, a municipality may not create a new TID if 7% or more of the total equalized value of property in the municipality is in a TID, and the equalized value of the proposed TID plus the value increment of all existing TIDs exceeds 5% of the municipality's total equalized value. Act 126 raises the limit to 12% of total equalized value, measured as the equalized value of the proposed TID, plus the value increment of all existing TIDs.

TID boundaries can be amended more often, and in more ways. Current law allows TID boundaries to be amended

once, and only during the TID's first seven years of existence. Act 126 allows TID boundaries to be amended up to four times. The amendments may be adopted at any time during the life of a TID. Additionally, for the first time, a TID's boundaries may be amended to subtract territory from the district, provided that the subtraction does not remove contiguity from the district.

TIDs may be used for more purposes.

Current law restricts the use of TIF funds for projects involving blighted property, rehabilitation or conservation areas, and industrial sites. There is also a similar environmental remediation TIF program. Act 126 adds a new project category termed "mixed-use development."

A mixed-use development is a development that contains a combination of industrial, commercial, and residential uses and in which the newly platted residential portion consists of no more than 35%, by area, of the real property within the district. At least 50% of the property in a mixed-use development TID must be land suitable for mixed-use development. Current law applies a similar restriction to the other categories of TIDs.

TIDs can last longer. Act 126 extends the maximum life of "blighted area" and "rehabilitation or conservation" TIDs from 23 years to 27 years. The maximum life of "industrial site" districts is reduced from 23 years to 20 years. However, Act 126 allows a municipality to ask the joint review board in the 18th year of an industrial site TID to extend the life of the district by five years. If the municipality submits an audit showing that the district cannot pay off its costs within the original 20 year life span of the district, then the joint review board must approve the request for the five-year extension. Act 126 applies this same arrangement (20-year life span, 5-year extension) to "mixed-use development" TIDs.

TIF Law Gets Make-Over

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Expenditures can last longer. Currently, all expenditures for project costs in a TID generally must be completed within seven to ten years after the district is created. Act 126 extends this period, allowing expenditures to continue until five years before the district's mandatory termination date. This provision applies to new and existing TIDs. Consequently, municipalities may wish to revisit existing TIDs to determine whether additional expenditures to improve the area would be justified.

Different criteria apply to sharing surplus funds. One of the few areas in which Act 126 retracts municipal authority relates to the sharing of surplus revenues between TIDs created before October 1, 1995. Current law allows a municipality to transfer surplus revenues between such TIDs if the "donor" district has more revenues than necessary to pay costs that are due in the current year. Act 126 raises this standard. It allows revenues to be transferred between districts created before October 1, 1995 only where the "donor" district has more revenue than necessary to pay for all project costs that have been incurred under the project plan.

However, Act 126 also creates a new mechanism for sharing surplus revenues that applies to certain TIDs regardless of their date of creation. To make the transfer, the donor and recipient TIDs each have to meet certain criteria. The donor TID must have the same overlapping tax jurisdictions as the recipient TID, and must have first satisfied all current year debt service and project cost obligations. The recipient TID must be a "blighted area" or an "area in need of rehabilitation" TID, and must use the donated funds to create, provide or rehabilitate low-cost housing or to remediate environmental contamination. Joint review board approval is required prior to any transfer. Note that a municipality may not extend the life of a donor TID under the five-year extension provision described above.

Including annexed land in TID is more difficult. Act 126 bars a municipality from including in a TID land annexed after January 1, 2004, unless one of the following applies:

(continued in next column)

Court Overturns Municipality's Determination of Need for Annexation

In *Town of Campbell v. City of La Crosse*, 02-2541 (Ct. App., November 13, 2003), the Court of Appeals examined the Town of Campbell's challenge to four different annexations of the City of La Crosse. The Court found that three of the annexations met the rule of reason, but that a fourth annexation did not meet the need component of the rule of reason. The Court invalidated this fourth annexation.

Annexations must meet the rule of reason. The rule of reason has three components: (1) exclusions and irregularities in boundary lines must not be the result of arbitrariness; (2) there must be some present or demonstrable future need for the annexation; and (3) there must be no other factors that constitute an abuse of discretion on the part of the municipality. In analyzing whether an annexation meets the rule of reason, the annexation ordinance enjoys a presumption of validity, and the challenger has the burden of showing that the annexation violates the rule of reason.

With respect to the need component of the rule of reason, the Court acknowledged that need can be either the need of the petitioner or the need of the municipality for annexation. Based upon facts produced at trial, the Court agreed that petitioners for three of the annexations had an urgent need for potable water, which the Town could not supply. The Court held that this was sufficient to meet

- Three years have elapsed since the land was annexed;
- The municipality enters into an agreement with the town from which the property is annexed (the agreement may be, but is not required to be, a cooperative plan boundary agreement under sec. 66.0307, Stats.); or
- The municipality pledges to pay the town, in each of the next five years, an amount equal to the property taxes levied by the town on the land at the time of the annexation.

In total, Act 126's make-over of the TIF program renders it a much more attractive instrument for municipal development and redevelopment projects. For a copy of Act 126, visit www.legis.state.wi.us.

— Matt Weber

the need component of the rule of reason for these three annexations.

Regarding the fourth annexation, the Court found that there was not a need for the annexation. With regard to the petitioner's need, the Court found that facts produced at trial showed that the petitioner had no reasonable present or future demonstrable need for water. The Court found that there was no demonstrable future need for water because the petitioner's wells were still providing good quality water and there was no specific plan to hook the petitioner up to City water.

The Court held that when no need is shown by the property owners for annexation, the annexing municipality must have a reasonable present or demonstrable future need for a substantial portion of the annexed territory. Here, the trial court had found that 11% of the annexed property was able to be developed. The Court then determined that whatever the precise definition of "substantial portion" is, 11% is not a substantial portion. Therefore, the Court concluded that the City could not demonstrate a reasonable need for this fourth annexation.

This case—which will be published—is disturbing for a number of reasons. First, the Court of Appeals rejected the City's legislative determination that the "need" component had been met, even though there was no showing of abuse of discretion or arbitrary decision making by the City. Second, the Court of Appeals rejected a petitioner's preferred need for the annexation, and did so based upon events which occurred years later. Essentially, the Court of Appeals engaged in Monday morning quarterbacking—determining that petitioner's beliefs and action in seeking annexation were not reasonable, knowing how things would actually work out. Third, the Court of Appeals set a numerical standard on how much developable land must be included in an annexation petition (submitted by landowners) before the City can claim a reasonable need for that land.

This case will be only the second reported case in which a court overturned a direct annexation by a non-municipal petitioner on the basis of need.

— Larrie J. Kobza

Groundwater Quantity Legislation in the Works

A subcommittee assembled by State Senator Neal Kedzie and State Representative DuWayne Johnsrud have been working on groundwater quantity legislation. Members of the subcommittee representing a variety of interests have been meeting this year to discuss what proposed groundwater legislation may look like. The subcommittee includes representatives from the Wisconsin Department of Natural Resources, Wisconsin Legislative Council, municipal interests represented by Lawrie Kobza and the Municipal Environmental Group, agricultural interests, Wisconsin Water Well Association, McCain Foods, Wisconsin Builders Association, Wisconsin Manufacturers and Commerce, Wisconsin River Alliance, UW Stevens Point, Trout Unlimited, and Wisconsin's Groundwater Guardian program.

The first three meetings of the subcommittee involved education on the issues surrounding groundwater management, and discussion of various drafts of proposed legislation. At the February 13, 2004 meeting, the group discussed a Legislative Council Memorandum which could be used to draft a bill. This Memorandum was based in large part on an outline previously provided by the Department of Natural Resources (DNR).

High Capacity Wells

Much of the proposal focuses on high capacity wells. If a new high capacity well is proposed to be installed in a "Groundwater Protection Area" or near a "spring", the proposed well must meet certain additional criteria. A Groundwater Protection Area is any area within 1,200 feet of an outstanding resource water, an exceptional resource water, or a trout stream as designated by DNR under current regulations. A "spring" is an area of concentrated groundwater discharge occurring at or near land surface with flows of a minimum of one cubic foot per second during a low flow condition. "Low flow condition" means a flow that is exceeded 80% of the time.

Greater environmental review will be required for these wells, and a high capacity well proposed to be located in a Groundwater Protection Area or near a spring may not cause significant

environmental impact with one potential exception. The proposal would give DNR discretion to approve a high capacity well that is a public utility water supply if the environmental impact of the well is balanced by public benefit related to health and safety. At least in the near term, DNR would be left to define the term "significant environmental impact" and establish the factors relevant to any balancing.

These new requirements would first apply to any new high capacity well for which an approval request has not been submitted to the DNR by the effective date of the legislation.

Greater environmental review is also required for a proposed high capacity well outside of a Groundwater Protection Area that has water loss that exceeds 95% of the amount withdrawn. Such a well may also not cause significant environmental impact. This provision is designed to deal with bottled water plants.

Existing wells could become subject to these new requirements if a well owner requests a change in its existing approval for a well. DNR could also modify or rescind an approval if the well is not in conformance with conditions applicable to the existing approval of the well.

The owner of an existing high capacity well must provide DNR with accurate well location data and submit an annual pumping report to DNR. High capacity wells would be required to pay a one time \$1,000 fee.

The proposal would require all well owners to report the location of a new well to DNR. Wells that are not high capacity wells would be required to pay DNR a one-time \$175 fee.

Regional Drawdown Areas

Under the proposal, DNR would designate two "Groundwater Management Areas" by rule. These areas would encompass the areas in Brown County and Waukesha County where the groundwater potentiometric surface has been reduced 150 feet from the level at which it would be if no groundwater had been pumped. The "Groundwater Management Area" to be designated is to include the entire area of each city, village, and town which has part of its jurisdiction within the 150 foot drawdown area.

Each city, village, town and county in a Groundwater Management Area is required to participate in the development of a local response to the conditions in the Groundwater Management Area. The process for developing a local response is to be broadly inclusive, with participation by local units of government, businesses, farms, farmers, individuals, and any other person affected by conditions in the Groundwater Management Area. DNR is to assist political subdivisions by providing advice, incentives, and funding for research and for planning costs. Although the proposal contains no information about any incentives or funding.

It is envisioned that the local response will consist of a written report which will be used by local governments and submitted to DNR. Local responses may include responses based on existing local authority; nonregulatory responses such as education or cooperative efforts; and recommendations for regulatory responses by DNR or another state agency.

Continued Work

A 24-person groundwater quantity committee (like the subcommittee here) would continue to work and would make a report to the Legislature within two years. The committee is to recommend legislation to address issues regarding groundwater quantity that are not addressed in the bill. The committee is also to recommend final administrative rules to implement the legislation. If the committee does not issue a report as directed, the DNR is required to promulgate rules to address groundwater quantity issues under its existing statutory authority.

Status of Proposal

As of the writing of this Article, the status of the proposal is still uncertain. While the interest in the bill is high, and while Senator Kedzie, Rep. Johnsrud, DNR and the Governor, would like to see legislation passed this session, some subcommittee members are uncomfortable with some of the provisions included in the Memorandum. If this discomfort can be resolved, a groundwater quantity bill may move quickly through the Legislature. The Legislature's general session ends on March 11, 2004.

—Lawrie J. Kobza

MUNICIPAL LAW NEWSLETTER

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