

WAPA LEGAL UPDATE

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Developer-Funded Tax Incremental+ Financing. Promoting Development Without Breaking the Bank.

Tax incremental financing (“TIF”) is the most powerful economic development tool that Wisconsin municipalities have now. While the amount of financing a municipality is willing to provide varies on a case-by-case basis, it often ranges from 10% and 20% of a project’s total construction cost.

Traditionally, municipalities have used TIF to provide financial assistance to developers at the beginning of a development project. The adage: “Build it and they will come,” is the game plan. The municipality recovers those costs in later years from the increased property tax revenues generated by the project. However, a number of municipalities in Wisconsin have used developer-funded TIF to reduce the financial risks associated with TIF. Essentially, the developer pays for the TIF project costs, including any infrastructure needed for the project upfront and the municipality repays the developer from the increased property tax revenues generated by the project. This is often referred to as the “pay as you go” TIF financing model.

Although the TIF mechanism can sometimes be quite complex, the “pay as you go” model is very straightforward. There are two basic approaches to developer-funded TIF. One is for the developer to borrow the funds from a bank for the project costs which can include land acquisition, infrastructure improvements, relocation benefits and environmental remediation costs. The other approach for the municipality’s to borrow money from the developer for these project costs. When the municipality pursues this second option, the monies borrowed do not constitute general obligation debt to be held by the public but instead is limited obligation debt to the developer. Under either approach a developer bond is issued and the municipality repays the developer out of the tax increment that is generated within the district. If there is no additional tax increment in a particular year, the municipality does not owe the developer anything for that year.

There are many advantages of the developer funded TIF mechanism for the municipality. The most important one is that the financial risk that the project will not generate sufficient increment is transferred from the municipality to the developer. With the “pay as you go” model, the instances of a municipality fronting money for a project that turns out to be a “white elephant” are over. In addition, the other main advantage for the municipality is that it does not use any of its constitutional debt capacity.

Although less obvious, there are also advantages for the developer. The primary advantage is that because developer bonds allow the municipality to pay more project

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costs without burdening the municipality's budget, it allows the municipality to increase the amount of project costs that can be spent on the developer's project. In other words, this financing mechanism would allow the municipality to open its wallet a little wider. A second advantage for the developer is that it frees the municipality from its otherwise strict underwriting standards. Third, if the developer pays for the project costs as opposed to lending those monies to the municipality, the cost of construction can be about 25% less because formal bidding requirements do not have to be followed. Finally, the developer bond creates an asset that can be pledged as collateral to a bank or other financial institution that provides money to fund the developer's project.

Because of the mutual advantages of using a developer-funded TIF financing model, more municipalities in Wisconsin are using this approach. The flexibility that this approach affords is making the use of TIF even more attractive to promote economic development.

Are Records of a Misconduct Investigation of a Public Employee Open to the Public?

Summary

On October 12, 2006 the Court of Appeals for District IV decided that the records relating to the investigation of a complaint against a DNR conservation warden are open to the public. In *Lakeland Times v. Wisconsin Department of Natural Resources*, the Court concluded that when individuals become public employees, especially in a law enforcement capacity, they should expect closer public scrutiny which includes possible release of disciplinary records. This decision which is likely to be reviewed by the Wisconsin Supreme Court appears to be in conflict with the Supreme Court decision in *Hempel v. City of Baraboo*, which I summarized for WAPA last year. The conflicting decisions reflect the difficulty a court has in balancing the legal and policy questions of whether the public interest favoring disclosure is outweighed by the interest in non-disclosure of public employee disciplinary or personnel records.

Analysis

A DNR conservation warden requested a license plate check from a City of Minocqua police dispatcher. His request came to the attention of a local newspaper which had obtained a copy of the transcript of the warden's call to the dispatcher. The newspaper then ran a series of articles questioning the legality of the warden's license plate check. The articles noted that this request was made six minutes after his nephew had attempted to obtain the same information from the dispatcher about the same car in conjunction with the nephew's subsequent arrest for allegedly planting drugs in that same car.

The DNR conducted an investigation as to whether the warden's request constituted misconduct in violation of DNR work rules. As a result, an interdepartmental disciplinary memo was prepared by the warden's supervisor which was the basis of a disciplinary letter sent to the warden. The newspaper filed an open records request for "all public documents related to" the license plate check request. In response, the DNR

only released portions of the investigation and the disciplinary letter which resulted in the filing of a mandamus action in Dane County. The Circuit Court ruled that neither the exception in Wisconsin's open records law as contained in Wis. Stat. § 19.36(10)(d) nor the public policy reasons asserted by the DNR justified the DNR's failure to comply with the newspaper's open records request. The Circuit Court reaffirmed its decision after the DNR requested reconsideration in light of the Wisconsin Supreme Court decision in *Hempel*.

On appeal, Judge Higginbotham, who ironically authored the *Hempel* decision at the Court of Appeals level as well as this decision – considered whether the statutory exception to disclosure referred to above, applies to this situation or not. The Court ruled that the statutory exception does not serve as a blanket exclusion of the warden's misconduct investigation and disciplinary letter. Further, the Court stated that the subsection did not expressly except disciplinary records from public access. The Court reaffirmed previous case law which holds that the public interest in disciplinary actions taken against public officials, especially those employed in a law enforcement capacity is quite substantial.

Another part of the lengthy Court decision which is quite relevant is the distinction between an **ongoing** misconduct investigation as opposed to an investigation that has been concluded. Once a misconduct investigation has concluded, the Court stated that those records may be disclosed to the public subject to the common law balancing test which is contained in Section 19.36(10)(b).

As to this balancing test, the Court determined that even if there is no statutory exception to public disclosure the strong presumption favoring openness can still be rebutted if there is an even stronger showing that the public interest supports nondisclosure. The Court recognized the compelling public interest in allowing management to engage in frank discussion of inappropriate job related actions and to protect the reputation of those employees. The Court agreed with the argument that the prospect of having disciplinary records released generally to the public, ultimately discourages competent, conscientious, well-motivated persons from seeking or continuing in public employment.

However, after considering the above policy arguments, the Court came down on the side of disclosure. A key fact that was persuasive to this Court in resolving the public policy considerations was that the records involved an investigation into possible criminal misconduct of the warden and/or his nephew. In conclusion, the Court ruled that law enforcement officers relinquish certain privacy rights by virtue of the amount of trust society places in them. To deny public access under these particular facts would be contrary to the public interest and only in an exceptional case may access be denied. The bottom-line is that this Court felt that this is not such an exceptional case.