

LAW OFFICES OF
ARENZ, MOLTER,
MACY, RIFFLE & LARSON, S.C.
720 N. EAST AVENUE
P.O. BOX 1348 (53187-1348)
WAUKESHA, WISCONSIN 53186
Telephone (262) 548-1340
Facsimile (262) 548-9211

DALE W. ARENZ
DONALD S. MOLTER, JR.
JOHN P. MACY,
COURT COMMISSIONER
H. STANLEY RIFFLE,
COURT COMMISSIONER
ERIC J. LARSON

RICK D. TRINDL
JULIE A. AQUAVIA
PAUL E. ALEXY
R. VALJON ANDERSON

July 30, 2013

To: City of Pewaukee Common Council, c/o Tammy LaBorde, Administrator

From: Stan Riffle, City Attorney

Re: Questions regarding spending cap referendum requirements and the Sports Complex

As a result of discussions during the July 15, 2013, Common Council meeting on moving forward with the Sports Complex, several questions have arisen. In your memo dated "revised 7/24/13", we have been asked to provide legal answers to those questions. Before getting into the specific questions, an overview of how the provisions of the ordinance work is in order, because many of the questions stem from a misreading of the Code provisions.

The Code is written to require the Common Council to receive direction or pre-approval from electors prior to making public expenditures in in three situations:

- 1) "capital spending project" (§1.01(1)(d)2.);
- 2) new or existing building construction (§1.01(1)(d)3.); and
- 3) road work (§1.01(1)(d)4.).

With regard to each type of project, the Council is required to take specific steps before approving a project when the "total project cost" reaches a particular level. Thus, the Common Council must first identify the type of project involved, and then calculate the total project cost to determine whether it must hold a public hearing or conduct a referendum or both. It appears to me that the questions arise because everyone is reading "total project cost" as something more than a definition, which it is not. The answers to the specific questions (relating to the Sports Complex) are as follows:

Does the cost of the total project include storm water costs, infrastructure improvements, or are they excluded from the cost of the project (see 11.01[sic] (1)(3)(b))¹ when considering a referendum question? Utilities and infrastructure are proposed at \$1,239,817 for the project.

The Sports Complex, Phase I, appears to be a "capital spending project" (although no definition is provided in the Code) because it is clearly neither a new nor existing building or a road. Thus, the costs of the storm water and infrastructure improvements are considered in "total project cost". Under sub (1)(d) 2., a public hearing is required when the total project cost

¹ The proper section number is §1.01(1)(d)3)a. & b., not 11.01(1)(3).

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will exceed \$2 million. As provided in sub. (3)(a) only a contract for a building with a total project cost of more than \$5 million dollars requires a referendum. Neither the Code nor the 7/24/13 memo defines what is considered infrastructure² for this project, but typically roads, sewer and utilities are some of the items that would be considered as infrastructure. In any event, Phase I will require the public information and comment meeting with the Common Council, but will not require a referendum.

Does the cost of the total project include the land that was acquired in 2006 for \$2.6 million, which took place over seven (7) years ago? Is there a specific time frame in which land is acquired becomes part of the total project cost?

While land purchased for a public construction project is to be included in a “total project cost” pursuant to §1.01(1)(d)1., this parcel was purchased in 2006 before sub (1)(d)1., existed and therefore would not have to be included in the “total project cost” of the Sports Complex.

The Code does not specify any time frame in which land acquired for a project becomes a part of the total project cost. Beginning in 2007, with the adoption of the current language, any project in which the land will need to be acquired must include acquisition costs in determining whether a referendum will be required. The difficulty is in the definition of “project.” For example, if the City was going to build a new fire station on land that it already owns, the cost of the original purchase would not have to be included in the “total project cost”, but if the City would need to acquire the land to build the station, and the common council wanted to commit funds for the land acquisition and the new building at the same time, then the cost should be included in order to determine whether a referendum is required. The “project” would be land acquisition and building the fire station. Alternatively, if a common council authorized expenditure of, say, One Million Dollars for the purchase of land for *potential future* building of a fire station, but did not commit expenditure of funds for the fire station itself, the probable effect would be that the “project” was the purchase of the land only, and would not require a referendum. This is the case because there would be no assurance that a future common council would ever commit funds for a fire station. This analysis applies for each category of “project” listed in §1.01(1) (d).

Is the project cumulative for expenses – when Phase II comes up it is treated separately or is it added to Phase I and then cumulatively a determination is made regarding a referendum? Or is there a time period that does not make this cumulative?

Using the above rationale, the “total project” costs apply to each Phase separately. Here, Phase I consists of earthwork/erosion control; utilities & infrastructure; and basic parking lot and Phase I landscaping (per presentation on City website). As noted above this is a capital

² **Infrastructure:** 1. the underlying foundation or basic framework (as of a system or organization) 2. The permanent installations required for military purposes. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1983), 621.

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spending project. Because the total project costs are estimated to exceed Two Million Dollars, the project cannot go forward until a public hearing is held.

By breaking the park development into phases, each phase would most likely be a “project”. The Code clearly refers to each type of project/triggering action in the singular, not plural: “...any capital spending project...” (no “s” in original); “...*a* contract for construction of any *individual* new or existing building...”; and “...*a* contract for the construction of any road work...”. Thus, each phase of the park would involve separate contracting for the work associated with each phase.

For example, if Phase II is going to be an indoor water park/swimming pool which requires stormwater facilities, fire hydrants, a pedestrian pathway and other utilities to service the park, together with tables, chairs, weight machines and sauna, then the City would proceed under the provisions associated with a new building. If the Phase II construction of this new building would exceed \$5 million alone, (excluding the cost of the stormwater, fire hydrants, pathways or other utilities per §1.01(1)(d)3.b., but including the building itself, the tables and chairs, weight machines and the sauna equipment (“furnishings”) the project could only go forward if approved by referendum.

If a fire station were built on the sports complex land, would it be considered separately or as part of the project?

It would be a separate project - see the answers above associated with a new building.

Can the funds that remain in the Park Dedication Fund be utilized for the Sports Complex development? Current balance as of 12/31/12 - \$147,724. The last information that the City had was that it can be used to pay off debt or to purchase/build park buildings and improvements.

Yes. See our analysis done in 2006 regarding the applicable Code provisions (attached).

Does the Common Council confirm that a portion of the construction project (previously estimated as 18% by Ald. Kiser in 2006) will be utilized from the Tourism fund for the construction of the complex?

It is unclear what this question is asking. Is the question whether the City may use these funds or what procedure or steps it must take to utilize tourism taxes?

As for using the hotel tax, we have previously addressed this question in our March 12, 2012, memo to Ms. LaBorde regarding use for the Sports Commons (attached). In short, the City may use 30% of the tourism tax it collects on anything it wants. The remaining 70% must be used by statute for “tourism promotion and development”. We previously opined what was necessary to use some or all of the 70% towards the Sports Commons, and it required the

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ability to show that the development will attract tourism. Please note that the standard to use the 70% is very high. A copy of that memo is attached.

I know of no statutorily required procedure that must be undertaken to utilize the hotel tax dollars.

Should you have questions about the above information or about the project in general please let me know.

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PARK DEDICATION FUND MEMO

May 30, 2006

To: HSR

From: JAA

RE: City of Pewaukee - Question about using Park Dedication fees

You had forwarded me an email from the City Administrator who asked if you had made a determination as to whether the City could use Park dedication fees “for asbestos abatement and other items”. I was given no other information.

The City’s Code provides for park dedication fees in §18.0709. If a proposed subdivision encompasses in whole or part a proposed school site, playground, park or other public open-space land as found on a comprehensive plan or map, the proposed public lands must be reserved by the developer in the plat. If the proposed public land is for park or parkland, the subdivider also has to pay the parkland and improvement fee set forth in §18.0709(b). §18.0709(a).

If the proposed subdivision does not encompass all or part of public lands, then the developer must pay the park and parkland acquisition and development fee “...to serve future inhabitants of proposed land division...” §18.0709(b)

According to subsection (b) the funds are to be used “...for the purposes set forth herein within a designated neighborhood or other designated area...and said special funds shall be used exclusively for acquisition and/or development within each specially designated area of the Town.”

Because the funds are available for development of parklands, I would assume asbestos abatement would qualify for use of the funds, if abatement is necessary to prepare/develop the land to be used as a park. I don’t

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know what the “other items” the City would like to use the funds for that Tammy refers to in her e-mail, so I can’t comment on those. The only question I have is whether money acquired related to one subdivision can be used in another part of town. My question arises because the language in the section varies from keeping the money tied to the specific development to more general language “other designated area”. It’s probable that “other designated area” and “specially designated area” language used in the ordinance is referring to the proposed public lands. My conclusion is that because of the additional more inclusive language, it would probably be all right to spend money collected from one subdivision or area in another as long as it was for park and parkland acquisition and development. That opinion is supported by *Jordan v. Menomonee Falls*, 28 Wis.2d 608, 137 N.W. 2d 442 (1965).

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TOURISM PROMOTION AND DEVELOPMENT MEMO

March 12, 2012

To: Tammy LaBorde, Administrator

From: Stan Riffle, Attorney

Re: Use of Hotel Tax proceeds to construct improvements at the Sports Commons

Alderman Bierce has asked for an opinion on what the hotel tax collections can be used for, specifically what percentage of the cost of the Sports Commons can be paid by the hotel tax; and if some portion is eligible for this use, whether the City must reserve a portion of the Sports Commons facilities for tourism related events, and whether such reservations would be anytime or during weekends. *Bierce e-mail to Tammy LaBorde dated 2/9/12.*

As we know, up to 30% of hotel taxes collected can be used for anything the City would like. §66.0615(1m)(d)1., Stats. Thus, that amount can be used for development of facilities or paying any debt for purchasing the Commons. At least 70% of the hotel tax must be used for “tourism promotion and development”. §66.0615(1m)(d), Stats. “Tourism” means travel for recreational, business or educational purposes. §66.0615(1)e), Stats. “Tourism promotion and development” is defined, in pertinent part, as follows:

...any of the following that are **significantly** used by transient³ tourists and **reasonably** likely to generate paid overnight stays:

³ Transient is defined at §77.52(2)(a)1., Stats., §66.0615(g), Stats. Transient is defined to mean any person residing for a continuous period of less than a month in a hotel, motel or other furnished accommodations available to the public. §77.52(2)(a)1., Stats.

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1. Marketing projects, including advertising media buys, creation and distribution of printed or electronic promotional tourist materials, or efforts to recruit conventions, sporting events, or motorcoach groups;

2. Transient tourist informational services; and

3. Tangible municipal development, including a convention center.

§66.0615(1)(fm), Stats.

Development of the Sports Commons is certainly a tangible municipal development. The question the Common Council needs to answer in deciding whether hotel taxes can be used to develop/purchase the Commons is whether the facilities developed there will be significantly used by transient (those who will stay overnight) visitors and reasonably generate overnight stays.

That answer will depend on what is planned to be constructed and developed. A brief review of the 2007 Master Plan shows 4 ball diamonds, 6 soccer fields, 5 under-8 soccer fields and 1 football field. The City needs to be able to answer the question of whether the complex, as planned, is large enough to attract tournaments and competition that will be multi-day, multi-team events attracting participants that will stay overnight. I have no additional information as to plans with the Waukesha & Pewaukee Convention bureau relating to tournaments and events that will be brought in (as mentioned in the 2007 newspaper article sent with Ald. Bierce's memo). I assume the Parks and Recreation Department will have more in depth information regarding the tournaments and users that have expressed interest or that they have contacted regarding use of the facilities and their needs.

In order to confirm and justify the use of hotel taxes, I would highly recommend that the City conduct a study to obtain information about potential uses, number of events and the need for hotel rooms for participants. I know that the hotels in the City are not only active in promoting the City, but also in watching how hotel tax money is spent. While the City only needs to reasonably believe the use of the money will bring in transient tourists, there must be a *significant* number of tourists attracted by virtue of sports complex events. In order to determine what is significant, the City may wish to determine the number of hotel rooms that exist in the City, which you have started by asking the hotels directly.

I know the City is looking for more concrete examples of what the fund can be spent on such as \$x dollars on creating baseball diamonds. Unfortunately, there are no solid guidelines as that is not how the statute was designed. There is only one case which discusses this statute, but it interpreted a prior version of the statute which did not contain the overnight stay requirement. In that case, one day festivals and police overtime for such things were appropriately covered by the hotel tax. The City cannot rely solely on that case for guidance because of the requirement in the statute now requires the use of the money to generate overnight stays.

You should also be aware that a bill has been introduced that will make some changes to the hotel tax. Senate Bill 438, introduced on 2/7/12, copy enclosed. Of the proposed changes that will be of consequence to the question at issue here, is that, any amount of revenue not retained by the municipality (70%) must be

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forwarded to the tourism entity or commission, although the person collecting the tax (the hotel, motel, bed & breakfast etc.) may retain 3%. The new bill also proposes that the governing body must certify the amounts collected and spent to the Department of Revenue.