
MEMORANDUM

TO: Poudre River Public Library District

FROM: Seter & Vander Wall, P.C., Kim J. Seter, Esq., Elizabeth A. Dauer, Esq., and Cameron J. Richards, Esq.

DATE: March 6, 2019

RE: Legal Status Report for March 11, 2019, Trustees' Meeting

Fort Collins Urban Renewal Authority Project Discussions and Negotiations

Task: Work with the Executive Director and the Board to review and evaluate the Library District's participation in the planned Drake Road and College Avenue redevelopment.

Status: The City of Fort Collins Urban Renewal Authority ("URA") is proposing to fund a redevelopment project utilizing Tax Increment Financing. The URA and developer, Brinkman Brothers, will present their proposal, explain the project, and request the District pledge the tax increment to the project. The District has concerns about the budget impacts of pledged tax increment revenue, particularly regarding the impact on the District's ability to operate and serve a growing population.

The URA has provided some information concerning the project, including estimated program costs, estimated tax increment revenues, fiscal impact modeling, and a draft intergovernmental agreement. Documents provided by the URA assume the District agrees to a contribution of 66% of its incremental revenue, or \$17,886 annually. We are reviewing the draft intergovernmental agreement.

The District and URA have 120 days from the date of notification to negotiate the allocation of property tax revenue. See, C.R.S. 31-25-107(9.5)(c). If an agreement is not reached, the URA and District must mediate. It is unclear if the Board has been formally notified, as the project was known and the Executive Director has met with the URA. Assuming notification has not occurred previously, the March 11, 2019 presentation would be notification, and unless a different time frame is agreed to, negotiations should be completed by July 9, 2019.

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Following the presentation, the Board will be able to question the URA and the developer regarding the project. Issues the Trustees should explore are:

- A. Impacts on population growth due to residential development (i.e. library users); and,
- B. Impacts on population growth due to increase in jobs (i.e. library users); and,
- C. Whether developer is interested or willing to provide space or land for library services of various kinds (including cash assistance); and,
- D. Any other issues that implicate the need for more materials, facilities and services.

The March meeting agenda includes an executive session pursuant to C.R.S. 24-6-402(b) and (e) to discuss the proposal, receive the advice of counsel and develop positions related to the negotiations with the URA.

Action: If desired, we should discuss in executive session. Suggested Motion:

I move the board adjourn in executive session to discuss negotiating positions concerning the sharing of revenues and to direct negotiators pursuant to C.R.S. 24-6-402(b) and (e).

TIF/URA Question re Propriety of Tax “Sharing”

Task: A question was asked at a public meeting regarding “the propriety and legality of redirecting funds approved by voters for specified purposes away from the purpose voters approved and into a different function.” A Trustee asked us to “evaluate whether the recent litigation and legislation would indicate that we could not share our general mill levy revenue for non-library purposes.”

Status: First, the District is not (through the URA committee or otherwise) determining how much of its general mill levy revenue to “share” with the URA. The law provides that all of the incremental revenue attributable to increased valuation of the Urban Renewal Project goes to the URA. The recent changes in the statute allow the District to argue that the URA should return some of the incremental revenue because the District will incur additional expense as a result of the Project.

These questions were addressed by the Colorado Supreme Court in 1980

in a case called *The Denver Urban Renewal Authority v. Charles D. Byrne et al.* As the Denver City Auditor, Mr. Byrne refused to execute an agreement allocating TIF funds to the URA because the increment would otherwise be part of Denver's general fund and used for Denver's purposes. In ordering Mr. Byrne to execute the agreements and upholding the agreement between the URA and Denver, the Court considered whether the tax increment financing model created a financial obligation on the City or otherwise directed the use of the City's general funds.

The Court determined the funds generated by the tax increment and remitted to the URA to pay for the project bonds were not tax revenues of the City, nor were they revenues appropriated from the City, and that such tax increment schemes were consistent with the Colorado Constitution. Under the URA agreement the City would continue to receive the revenues it was entitled to on the property if the URA project never went forward and these were the only revenues the City had an interest in receiving. Finally, the Court noted the City was not required to approve of the project submitted by the URA and therefore consented to the allocation of tax increment revenues. The Courts reasoning is based on furthering the public interest, both local and statewide, of addressing and fighting blight.

As applied to the question presented by the Board, the District would not be considered to have "redirected" funds away from library purposes as the increment revenues generated are not funds the District can direct. While the analysis in *Byrne* is specific to the agreement in place between the Denver URA and the City of Denver, the general principals remain applicable.

Action: No action necessary at this time.

Intergovernmental Agreement Re: TIF Financing

Task: Tax Increment Financing is an economic development tool usually utilized to fund Urban Renewal Authorities. TIF financing affects the library because:

- A. The assessable value of a TIF area is determined and then fixed.
- B. The revenue derived from the library mill levy on any growth in assessable value for a period of 25 years thereafter is called the Tax Increment.
- C. The Tax Increment is diverted from the library to an Urban

Renewal Authority to be used to finance public infrastructure or provide other incentives to development.

Historically, affected taxing entities had no say in the imposition of TIF. Recent laws have given taxing entities a voice in whether or not their incremental tax revenue should go entirely to the URA. It is still the presumption that new development drives the increase in the Tax Increment and should be given to the URA. However, taxing entities now have a forum to argue otherwise.

Larimer County considered forming a TIF financing committee by intergovernmental agreement to assist the County and taxing entities in developing information to fairly distribute the opportunity cost of TIF.

Status: We reviewed and commented on the drafts of the proposed IGA and provided those comments to staff for consideration. As of October 3, 2018, no subsequent draft or final IGA has been submitted for review or approval.

At the September meeting, Trustee Wise reported that he has joined the URA board as a commissioner. Discussion at the URA had focused on what timeframe was appropriate for an impacted taxing entity to review projects, financial impact models, and possible mitigation steps including negotiating a reduced increment from the URA. Trustee Wise was seeking input from other Trustees, staff and legal counsel. Suggestion of a policy for reviewing a TIF was considered.

Legal Counsel and Director Slivken were originally working on a policy that would permit 60 days to review any proposal concerning TIF financing before a Board vote was necessary. This time period would allow for 2 Board of Trustees meetings before a decision is rendered. However, the policy needed to sync with the IGA, which may impact the time available. Under the draft agreement a Public Review Committee is formed to analyze a project using an approved Financial Impact Model. Additionally, Colorado Law provides a default period of 120 days for an impacted taxing entity to negotiate an agreement concerning what increment goes to the URA. C.R.S. § 31-25-107(9.5).

At the November meeting, Trustee Wise informed the Board that the County did not receive substantial buy-in from various stakeholders to warrant advancing the proposed IGA. Accordingly, the County Attorney is not submitting the IGA for adoption by either Larimer County or any other taxing entity in Larimer County. However, the stated intent of the parties will be to use the draft IGA as “principles” to guide TIF use in Larimer County. How this will be actually implemented is unknown.

Update: As discussed above, while the IGA appears to be a moot issue, Trustee Wise has circulated proposed policy language to other special districts in the URA area. Hopefully continued conversation amongst stakeholders will result in a consistent process for the consideration of URA projects and the negotiation of tax increment finance schemes in a manner that makes sense for all stakeholders.

Action: No action at this time.

Review of Bylaws

Task: Review the District's bylaws for any changes or updates that are necessary or inconsistent with changing law.

Status: The review of bylaws was requested as part of the ongoing review of policies. We will work with the committee of Ms. Quijano, Mr. Frey and Ms. Schultz to make appropriate and necessary revisions.

A mark-up copy will be provided to the Committee for review and comment prior to presentment to the Board.

Pursuant to the bylaws, any proposed amendment must be presented to the entire Board at least 15 days before a vote.

Action: None at this time.

Options for Funding Future Facilities Development

Task: Summarize financing options the District can consider to fund future facilities development.

Status: The District has three options to pay for the construction of new libraries or the improvement of existing branches: (1) Cash out of reserve/budgeted funds; (2) General obligation bonds; and (3) Lease/purchase financing with or without certificates of participation. Each is summarized below. We recommend use of certificates of participation as a simple and cost-effective approach.

Cash on Hand: Availability of this "pay as you go" option depends on the scale of the project, the District's financial position, and budget considerations for not only the next year, but in years to come. It is often best to utilize cash on hand to provide current services.

General Obligation Bonds: The most common form of government

financing. Bonds are secured by the full faith credit and taxing power of the government issuer. Bonds offer low interest rates and are attractive to investors due to their double tax-exempt status. However, the issuance of debt through general obligation bonds requires an election as does the corresponding increase in taxes pursuant to Art. X, §20 of the *Colorado Constitution* (“**TABOR**”).

Lease/Purchase with or without Certificates of Participation (“COP”): Libraries are in a unique position to take advantage of sale/lease back financing. From a legal perspective, this method involves selling or leasing a property that is owned by the District. The funds received are used to buy new or improve old facilities. The property sold/leased by the District is leased back to the District which pays rent consisting of principal and interest to the investor[s]. The lease back to the District contains an option to purchase the property at the end of the lease for a nominal fee, often \$1.00. Lease/purchase financing does not constitute long-term debt obligations of the issuing authority, and is therefore exempt from state and local laws that require voter approval under TABOR.

We recommend lease/purchase financing as the best option. However, we are ready to assist on any method the District may ultimately pursue.

Action: No action is required at this time. This item is being retained as placeholder for future considerations.

Important Case Updates

Pornography Is Not Education v. EBSCO Industries, Inc., and Colorado Library Consortium

On October 10, 2018, Plaintiff Pornography Is Not Education (“PINE”), filed suit against EBSCO and Colorado Library Consortium (“CLiC”) alleging EBSCO and CLiC knowingly provide and make available sexually explicit and obscene materials through the EBSCO databases. Seter & Vander Wall represented CLiC in this suit.

On December 4, 2018, we filed a Motion to Dismiss CLiC on grounds that CLiC is an entity protected from liability for tort claims under the Colorado Governmental Immunity Act. On January 22, 2019, PINE amended its complaint recast the claims to avoid the Colorado Governmental Immunity Act. On February 1, 2019, we informed PINE that the Motion to Dismiss would be refiled on the amended complaint.

On February 15, 2019, the parties stipulated to the dismissal of all claims against CLiC. On February 25, 2019, PINE dismissed its claims against EBSCO with prejudice, effectively ending the lawsuit.

Important Legislative Update

HB 19-1048 regarding library district trustee elections was introduced on January 7, 2019. The bill is ambiguous in its current form, but we interpret the bill to accomplish the following:

- A. Creates different classes of library districts:
 - 1. Those with appointed trustees who determine the length and limitation on number terms in their bylaws. -108(3)(a)
 - 2. Those with elected trustees with 4-year terms and term limits as determined by the forming government(s). -108(3)(a)
- B. C.R.S. § 24-90-108.5 purports to apply only to elected library district boards.
 - 1. After the date the bill goes into effect, all new library district formations will require an election to determine whether the trustees will be appointed or elected.
 - 2. The establishing entities of existing library districts may require an election to determine whether future trustees should be appointed or elected.
 - 3. If the voters determine that trustee should be elected at the initial election, section (2)(a) requires a separate election of the trustees at the next regular county wide election in odd numbered years.
 - 4. Subsection (4)(a) is a recall provision. A petition with 50 signatures filed more than 90 days before a trustee's term expires removes the trustee and forces an election for a new trustee at the next County election.
- C. Miscellaneous requirements.
 - 1. Requires all Trustees to take an oath or affirmation within thirty days of appointment or election.
 - 2. Requires thirty-day written notice to the establishing entities prior to any amendment of the District bylaws.

Update: We testified against HB 19-1048 in committee. It did not receive sufficient votes to move out of committee. This item will be removed from future reports.