DRAFTER'S NOTE LRB–4242/P2dn
FROM THE MES/JTK/RAC/JK:cmh:km
LEGISLATIVE REFERENCE BUREAU

January 28, 2000

Representative Gard:

1. Per our discussion of January 14, this draft, in proposed s. 229.823, establishes a district's jurisdiction in such a way that there is no scenario that envisions a relocated stadium. Therefore, if for any reason the current thinking shifts on this point, the district will not have jurisdiction to become involved. We do not think this necessarily impairs the open class because the draft still permits a new stadium to be sited potentially in any county having a population of 150,000 or more.

2. Under proposed ss. 77.54 (45) (c), 229.824 (13) and 229.826 (5), we have substituted references to fees or other charges for the right to purchase "admission" rather than "tickets". Though the difference is subtle, it seemed to us that the concept of a public entity deciding who may purchase tickets to a privately produced event is potentially awkward. We were more comfortable with the concept of an admissions fee.

3. There are several references in the draft to municipalities contained within a district's jurisdiction. Because under current Wisconsin law, a city or village may be located in more than one county (and over 40 of them are), we have changed these references to municipalities that are *wholly or partly* contained within a district's jurisdiction. This is just an effort to maintain an open class by dealing with every potential situation. You could, if you wish, substitute references to municipalities that are *wholly* contained within a district's jurisdiction.

4. Concerning the appropriations to DOA (your treatment of s. 20.505 (1) (ka) and (kc), stats.), we did not think this treatment was necessary because under this draft, unlike 1995 Act 56, DOA does not provide services generally to the football stadium district. However, even though 1995 Act 56 did not include this detail, we do think the draft should properly include a program revenue appropriation to the building commission to implement the amendment of s. 18.03 (5s) and proposed s. 229.829 (2). See proposed s. 20.867 (5) (g).

5. Concerning the legislative declaration, the last sentence of proposed s. 229.820 (1) asserts that the taxes that may be imposed by the district are special taxes. Although this language appeared in 1995 Act 56, the courts will presumably make this determination independently. It would be more helpful and appropriate in this context to explain why the taxes are special taxes. The rest of the declaration provides interpretive guidance, but this sentence does not.

6. For this draft, we have included an appropriation for administration of local professional football stadium taxes but have specified "$–0–" for expenditure in fiscal years 1999–00 and 2000–01. When you know the dollar amounts that you need to include in the proposal, contact us and we will either redraft the proposal or draft an amendment, whichever is appropriate.

Constitutional issues:

This draft adheres to the structure of 1995 Act 56 in most respects, and the constitutionality of several provisions of that act were upheld in *Libertarian Party v. State*, 199 Wis.2d 790 (1996). Therefore, the issues that were novel prior to enactment of 1995 Act 56 have now in many instances been reviewed and decided. There is no better authority on a point of state law than a recent holding of the Wisconsin Supreme Court that is almost directly in point. Nevertheless, the language and reasoning of that decision in some cases left unexplained logical issues and inconsistencies with the Court's prior decisions, which may indicate that there is some risk that the Court might refine its thinking if the issues are ably reargued. Every enactment of the legislature enjoys a presumption of constitutionality and any doubt must be resolved in favor of the constitutionality of a statute. *Sambs v. City of Brookfield*, 97 Wis. 2d 356 at 370 (1980). Given this situation, it may be the better part of wisdom to design this draft to fit this recent holding as closely as possible. However, because alternative choices are available, we raise these issues for your consideration:

1. Article VIII, section 10 of the Wisconsin Constitution prohibits the state from being a party to carrying on works of internal improvement. In *Libertarian Party*, because the Court found that construction of stadium facilities serves a predominately governmental purpose, it found no violation of the internal improvements clause. 199 Wis. 2d 790 at 816. In other cases, however, the Court has said this is not enough: see, for example, *State ex rel. Jones v. Froehlich*, 115 Wis. 32 (1902), where the Court requires that there be an essential governmental function and that private capital be inadequate to fund the project. 115 Wis. 32 at 41. See also *State ex rel. Martin v. Giessel*, 252 Wis. 363 at 365–374 (1948) and *Dept. of Development v. Building Comm.*, 139 Wis. 2d 1 at 9–11 (1987). In *Libertarian Party*, the Court did not distinguish these cases. Because the public purpose doctrine stands independently of the internal improvements clause [see, for example, *Rath v. Community Hospital*, 160 Wis. 2d 853 at 862 (Ct. App., 1991)], it would have been helpful for the Court to explain what, if anything, remains of the internal improvements clause under its revised interpretation. If the line of cases that precedes *Libertarian Party* retains any vigor, it may be helpful to include a legislative finding that private capital is insufficient to fund needed capital investments in professional football stadium facilities. Despite the remaining uncertainty, it should be noted that while this draft retains state involvement in at least 3 ways (see proposed ss. 229.822 (2) (a) and (4), 229.829 (2) and 229.830), it does not retain any requirement for the department of administration to provide services generally to a football stadium district (see ss. 16.82 and 16.854, stats.), so state involvement here is less extensive than under *Libertarian Party*. To resolve all uncertainty, however, state involvement would need to be completely removed.

2. Also related to the issue of state involvement is the line of cases that holds that tax revenue must be spent at the level of government at which the tax is raised. See *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d. 391 at 421 (1973) and 77 Marquette Law Review, 466–67 (1994). If the district is not viewed as a unit of local government, this principle would be offended. The draft states that the district is a unit of local government [see proposed s. 229.822 (1)]. However, under proposed s. 229.822 (2) (a) and (4), the governor appoints two members of the district board and designates the chairperson. Unfortunately, the Court in *Libertarian Party* did not determine what exactly constitutes a unit of local government, thereby leaving for another day the issue of whether a unit of government, like this one, with mixed state and local control is pure enough to pass the test. The fact that under this draft, unlike *Libertarian Party*, a local referendum is required to approve a sales tax and use tax levy may help to tilt the balance in favor of viewing this district as local.

3. Also related to the issue of expenditure at the level of taxation is the question of whether this principle would be offended if a municipality or county subsidizes a district, as authorized in proposed s. 229.826. Here again, this issue was not discussed in *Libertarian Party*. It can probably be said, however, that if any subsidy would serve a legitimate, independent public purpose of the municipality or county, rather than serve simply as a means of circumventing revenue raising at the district level, the proposed language, as applied, would not offend the "spend at the level of taxation" principle.

4. Article XI, section 3 (2), of the Wisconsin Constitution imposes a debt limitation on "municipal corporation[s]". Article XI, section 3 (3) further requires that any such indebtedness be repaid within 20 years by levying a direct, annual [property] tax. However, Article XI, section 3 (5) provides that the debt limitation does not apply to indebtedness created for the purpose of "purchasing, acquiring, leasing, constructing, extending, adding to, improving, conducting, controlling, operating or managing a public utility of a ...special district...[if]...secured solely by the property or income of such public utility...". Taking advantage of this exception, the draft, like 1995 Act 56, provides in its treatment of s. 66.067, stats., that football stadium facilities are public utilities. *Libertarian Party* in effect holds that the legislature's classification of baseball stadium facilities as "public utilities" is a permissible interpretation of the term. 199 Wis. 2d 790 at 820. In that case, the Court held that the indebtedness of a baseball district is not public debt governed by the limitation, although the Court notes that the indebtedness is not secured solely by the "property or income of such public utility [stadium facilities]", as provided in Article XI, section 3 (5), but also by "the proceeds of the bonds issued by the District, and by sales and use taxes imposed by the District." 19 Wis. 2d 790 at 819. Although the Court in *Libertarian Party* cites *City of Hartford v. Kirley*, 172 Wis. 2d. 191 at 207 (1992), for the proposition that the District's bonded indebtedness has the same characteristics as special assessment bonds, in that bond revenue is placed in a special fund for debt retirement, *Hartford* seems to suggest that the special fund revenue must be from the project being funded. 172 Wis. 191 at 208–209 and 212. In *Libertarian Party*, therefore, the Court seems to overrule *Hartford* (and preceding cases cited therein) without expressly saying so. It would have been helpful had the Court made this clear so that no future questions would be raised. To

eliminate all potential questions regarding this issue, the draft would have to provide that the district's bonded indebtedness is secured only by the property or income of the stadium facilities. This may be an unacceptable policy choice, however.

If you have any further questions regarding the above issues, please let us know.

As a reminder, this draft is preliminary because certain figures are not included in this version. We know that you will be making some revisions to this draft. The revisions should include insertion of the proper figures (with the exception of the appropriation mentioned in point 6 above, if you wish to defer that). If the revisions are not extensive, we would hope to produce a final draft within a relatively short timeframe.

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