DRAFTER'S NOTE LRB–4065/P1dn
FROM THE MS/JK/RC/PK/JK/PG:cmh:ch
LEGISLATIVE REFERENCE BUREAU

February 11, 2000

Paul Ziegler:

1. This proposal establishes a district's jurisdiction as the city limits of the sponsoring city. This just seemed to us to be the simplest and most natural choice to make. However, under the draft, the eminent domain authority of the district may be specifically limited geographically by the common council. See proposed s. .

2. Per our discussion, we have not included any special provisions concerning telephonic meetings of the district board [your proposed s. 229.86 (11)]. The attorney general has concluded that, with limited exceptions, governmental bodies may conduct telephonic meetings provided that certain measures are taken to ensure that the public and news media are able to monitor the meetings effectively. See 69 O.A.G. 143 (1980) and *Badke v. Village of Greendale*, 143 Wis. 2d 553 (1993). As we understand it, you are able to live within the guidelines applicable to other governmental bodies on this point.

3. This draft does not amend s. 893.80, stats., relating to notice of claims and limitation of liability, because s. 893.80, stats., applies to any "political corporation" and proposed s. provides that the cultural arts district is a "body corporate and politic". The analysis also speaks to this point.

4. We have not included the language contained in s. 229.89 (2) of the Quarles draft, which seems to be based on s. 66.412. We did not include the language for a number of reasons. First, the language is archaic, convoluted and contains phrases that are incompatible with proper drafting, such as "Notwithstanding any requirement of law to the contrary . . ." Second, the language appears to accomplish no purpose. If any of the entities listed may transfer property to a cultural arts district under their "instruments", they don't need redundant authority to do so. Under created s. 229.844 (14), the district may already "Solicit and accept gifts, loans, grants of land or other property and other aid, and agree to conditions with respect to such gifts, loans, grants or other aid.", so no additional authority is needed. If there *is* some sort of intent in s. 229.89 (2) of the Quarles draft that you would like to accomplish, that is not already allowable or contained in the draft, please let us know what your intent is and we can draft something to ensure that it is achieved.

5. In various places, the Quarles draft states that the district may "issue debt" (see, for example, s. 229.87 (8) of the Quarles draft) and in other places it uses the term "bonds" (see for example s. 229.90 (1) of the Quarles draft, which states that the district

may be dissolved if its "bonds" are paid off.) The phrase "issue debt" is not used in the statutes. We have decided that it would be best for the draft to state that the district may "issue bonds, notes and incur debt." Is this OK? Also see the "****NOTE" following s. 229.844 (8) of the bill.

Constitutional issues:

This draft adheres to the structure of 1995 Act 56 in several respects, and the constitutionality of relevant 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. 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). 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. 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. Despite the remaining uncertainty, it should be noted that while this draft retains some state involvement (see proposed s.), it does not include any requirement for the department of administration to provide services generally to a cultural arts district (see ss. 16.82 and 16.854, stats.), nor any state involvement in the issuance of bonds by a cultural arts district (see s. 229.74, 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.]. However, under proposed s. , the governor appoints three members of the district board. 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.

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 sponsoring city subsidizes a district, as authorized in proposed s. . 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, 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 cultural arts facilities are public utilities. Under *Payne v. Racine*, 217 Wis. 550 at 555 (1935), the term "public utilities", as used in article XI, section 3 (5), "... must be considered to include all plants or activities which the legislature can reasonably classify as public utilities in the ordinary meaning of the term." *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. From this decision, we can conclude that the courts will probably construe this term very liberally. Under art. XI, sec. 3 (5), the indebtedness must be secured "solely by the property or income of such public utility [cultural arts facilities]". The draft permits a cultural arts district to "...issue debt [in the constitutional sense] and to enter into any agreements relating thereto" (see proposed s.). The draft further contemplates that the district may become indebted to the Wisconsin health and educational facilities authority to retire bonds that may be issued by WHEFA to finance the district's cultural arts facilities (see s. 231.09, stats. and the treatment of ss. 231.01 (4m) and (5w), 231.05 (1), 231.08 (5) and 231.23, stats.). Provided that the courts agree that the cultural arts facilities are a public utility and the income of the facilities is sufficient to retire the district's debts, this should not be a problem.

5. Under s. 229.848 (1) a district's property, upon dissolution of the district, could be transferred to an entity that is "organized and operated exclusively for religious . . . purposes. . . " See section 501 (c) (3) of the Internal Revenue Code. This could be challenged as a violation of the Establishment Clause of the First Amendment to the

U.S. Constitution and of the Preference clause of Article I, section 18, of the Wisconsin Constitution.

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

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