

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4065/P2dn
MS/JK/RC/PK/JK/PG/RM:cmh:jf

February 16, 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 ss. 229.842 (1) (c) and 229.846 (6).

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. 229.842 (1) (intro.) 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 and 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 local 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. Per our telephone discussion on February 10, we have revised the proposed draft to limit the district to incurring 2 kinds of debt on its own: revenue bonds and

short-term obligations. See proposed s. 229.844 (8). The draft also allows use of a special fund to secure debt issued by others. See proposed s. 229.850.

6. In light of the creation of ss. 24.61 (2) (a) 8. and 9., 25.17 (3) (b) 11. and 12., 66.04 (2) (a) 3r. and 3t. and 219.09 (1) (e) and (f), there is no need to draft the proposed s. 229.96 in the Quarles draft.

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. *Samb's v. City of Brookfield*, 97 Wis. 2d 356 at 370 (1980). Nevertheless, the language and reasoning of *Libertarian Party* 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. 229.842 (2)), 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 local governmental unit [see proposed s. 229.842 (1) (intro.)]. However, under proposed s. 229.842 (2), the governor or his or her designee is a member of the district board and the governor appoints three other 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. 229.846, or if a district subsidizes another governmental unit, as authorized in s. 229.844 (18). 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 district, rather than serve simply as a means of circumventing revenue raising at the level of government where a subsidy is received, 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 article XI, section 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 revenue bonds... and to enter into any agreements relating thereto” (see proposed s. 229.844 (8) (a)). The draft further contemplates that the district may become indebted to the Wisconsin Health and Educational Facilities Authority (WHEFA) to retire bonds that may be issued by WHEFA or by a city redevelopment authority to finance the district’s cultural arts facilities. See proposed s. 229.850. See also 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 proposed 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.

6. There are several issues regarding the lien provision in proposed s. 229.852. Although this provision is similar to language currently in ch. 231, stats., you may want to draft this lien provision differently in order to ensure that the language accomplishes your intent. First, it is unclear under the proposed language whether the lien has priority over a valid security interest in the accounts of the district. If you intend to give the lien this priority, you may want to generally exempt the lien from ch. 409, stats., [see s. 409.104 (3), stats. (exemption of certain other statutory liens)] and specify the prioritization you intend in a provision similar to s. 409.310, stats.

Second, to the extent that this provision is intended to establish priority for bankruptcy purposes, the provision may not accomplish your intent. Let me know if you would like me to research federal law in order to determine the priority given to a lien of this type in a bankruptcy proceeding.

Third, the proposed language may unconstitutionally impair existing contracts because the lien is "valid and binding as against all parties having claims of any kind . . . in contract." In addition, an impairment issue may exist to the extent that the lien is given priority over existing perfected security interests. In order to avoid this issue, you may want to specify that the lien is valid and binding against any claim arising under a contract entered into after the date that the pledge was made and is valid against any claims against the district other than under a contract. You may also want to give the lien priority over any security interest perfected after the date that the pledge was made.

There are also two clarifications you may want to make. First, it may be helpful to specify who has the lien (for example, the person holding the instrument that evidences the pledge). Second, under the proposed language, it appears that filing is a prerequisite to perfection. However, the language could be interpreted to treat perfection and filing as separate issues. If you intend to require filing in order to perfect the lien, please let us know and we can clarify this point.

7. Concerning proposed s. 229.844 (17), we assumed you intended to limit the district's power to enter upon private property to the geographic area in which the district has eminent domain authority (rather than anywhere in the city). In this connection, see also *Redevelopment Authority v. Uptown Arts*, 229 Wis. 2d 458 (Ct. App., 1999) in which this entry power was essentially declared unconstitutional on its face. In that case, the court read in a requirement for the property owner to be afforded the opportunity to consider the necessity of the entry, the scope of the entry and the time, place and manner of the entry. Do you wish to amend the draft to address this issue?

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

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266-6778

Marc E. Shovers
Senior Legislative Attorney
Phone: (608) 266-0129
E-mail: Marc.Shovers@legis.state.wi.us

Peter R. Grant
Managing Attorney
Phone: (608) 267-3362
E-mail: Peter.Grant@legis.state.wi.us

Rick A. Champagne
Senior Legislative Attorney
Phone: (608) 266-9930
E-mail: Rick.Champagne@legis.state.wi.us

Joseph T. Kreye
Legislative Attorney
Phone: (608) 266-2263
E-mail: Joseph.Kreye@legis.state.wi.us

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: Pam.Kahler@legis.state.wi.us

Robert J. Marchant
Legislative Attorney
Phone: (608) 261-4454
E-mail: Robert.Marchant@legis.state.wi.us