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## WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

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<b>2017 Wisconsin Act 70</b> [2017 Senate Bill 173]	<b>Various Changes Relating to Remediation of Brownfields</b>
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2017 Wisconsin Act 70 makes various changes relating to remediation of brownfields.<sup>1</sup> All of the changes in the Act relate to recommendations made by the Brownfields Study Group<sup>2</sup> in its 2015 report, *Investing in Wisconsin: Reducing Risk, Maximizing Return*.

### TAX INCREMENTAL FINANCING

**Prior law** provided a special tax incremental financing (TIF) option for environmental remediation projects undertaken by cities, villages, towns, or counties.<sup>3</sup> A tax incremental district (TID) created for purposes of environmental remediation (“ERTID”) differed from a general TID in several respects. For example, the creation of an ERTID required a detailed proposed remedial action plan approved by the Department of Natural Resources (DNR), and eligible project costs for an ERTID were limited to costs associated with certain environmental remediation activities approved by the DNR in a site investigation report.

**The Act** sunsets the special provisions governing ERTIDs as of the effective date of the Act, but the Act authorizes the creation of an ERTID under the general TIF statute, with some

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<sup>1</sup> A “brownfield” is an abandoned, idle, or underused industrial or commercial facility or site, the expansion or redevelopment of which is adversely affected by actual or perceived environmental contamination. [s. 238.13 (1) (a), Stats.]

<sup>2</sup> The Brownfields Study Group was created as a result of a study requirement in a nonstatutory provision of 1997 Wisconsin Act 27, the 1997 Biennial Budget Act.

<sup>3</sup> Generally, TIF is a tool that allows cities and villages (and, to a more limited degree, towns and certain counties) to pay for public improvements within a designated portion of the political subdivision, called a TID, using the future taxes collected on the TID’s increased property value to repay the cost of the improvements. [s. 66.1105, Stats.]

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This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature’s Web site at: <http://www.legis.wisconsin.gov>.

special conditions and requirements. Specifically, ERTIDs authorized under the Act differ from other TIDs in the following ways:

- A municipality must obtain a certified site investigation report from the DNR before creating an ERTID.
- Before designating an ERTID, a municipality must provide one of the following items to the Department of Revenue:
  - A certification that the project plan specifies that the municipality expects all project costs to be paid within 90% of the ERTID's remaining life.
  - A certification that the project plan specifies that the expenditures may be made only within the first half of the ERTID's remaining life, except that the limitation does not apply to expenditures made to address significant environmental pollution that was not identified in the original certified site investigation report.
- An ERTID is exempt from the 12% equalized value limitation, but that exemption applies to only one ERTID in a given municipality at any given time.
- The tax incremental base of the ERTID would be \$1 when the ERTID is created.
- An ERTID is prohibited from serving as a "donor TID."<sup>4</sup>

### **EXPANSION OF PROPERTY ASSESSED CLEAN ENERGY LOAN PROGRAM**

**Wisconsin law** authorizes cities, villages, towns, and counties to provide property-assessed clean energy (PACE) financing to property owners who make a loan or enter into an agreement regarding loan repayments for certain energy efficiency improvements. A city, village, town, or county may collect such a loan repayment as a special charge. Those special charges may be collected in installments or by a third party. Generally, if the loan or agreement is for an improvement that costs \$250,000 or more, the owner must obtain a written guarantee with specified assurances from the contractor or project engineer. [s. 66.0627 (8), Stats.]

**The Act** expands that financing option to include "brownfield revitalization projects," defined to mean certain actions, including site assessment, remediation, lead or asbestos abatement, demolition, and other site preparation actions, taken upon commercial or industrial premises located on a brownfield. The Act also authorizes the repayment period for financing for brownfield revitalization projects to exceed 20 years, and provides an exception for brownfields from the general requirement to obtain a written guarantee for projects that cost \$250,000 or more.

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<sup>4</sup> Under current law, unaffected by the Act, if a TID pays all project costs before it reaches the end of its maximum life span, a municipality may amend the TID's project plan to allow the TID to serve as a "donor TID." A donor TID's positive tax increments may be used to pay project costs of another TID located in the same municipality. [s. 66.1105 (6) (e) and (f), Stats.]

## **SCOPE OF VOLUNTARY PARTY LIABILITY EXEMPTION**

Under **Wisconsin law**, a property owner is typically responsible for the remediation of contamination, whether or not the owner caused the contamination. However, an owner may obtain an exemption from certain remediation requirements through the voluntary party liability exemption (VPLE) program, if certain criteria are satisfied. One such criterion is that the owner has received a certificate of completion from the DNR, stating that the owner has restored the environment to the extent practicable and that the harmful effects of discharges have been minimized. [s. 292.15, Stats.]

**The Act** creates a new process whereby an applicant may seek DNR approval for exemptions affecting property that has been modified by a subdivision, transfer, or other similar change. Specifically, if a property owner who has submitted an application for an exemption under the VPLE program proposes to modify a property because of a subdivision, transfer, or other change to parcels affecting the property, the Act authorizes the owner to submit a revised application or applications under the VPLE program. If the DNR approves an owner's proposed modification, then each parcel within the modified property must meet all of the program requirements under current law to be eligible for the exemption. If an owner does not submit such an application, the Act specifies that the included property remains the same.

## **EXEMPTION OF LIABILITY FOR OFF-SITE VAPORS**

As described above, **Wisconsin law** generally holds a current property owner responsible for the remediation of prior contamination. In addition to exemptions under the VPLE program described above, prior law, retained by the Act, provides limited exemptions from certain remediation requirements for contamination originating from an off-site property. Specifically, the exemptions apply to hazardous substances in groundwater if a person conducts an investigation or submits other information, that the DNR determines is adequate, to substantiate both of the following criteria:

- The discharge originated from off-site property.
- The person did not possess or control the hazardous substance on the off-site property or cause the original discharge.

The person must also agree to allow the DNR and certain other parties to access the property, and the person must agree to other conditions that the DNR determines are reasonable and necessary to ensure an adequate response to the discharge. [s. 292.13, Stats.]

**The Act** expands the scope of that exemption to apply to vapors emitted from the soil or groundwater.

## **PILOT PROGRAM FOR CERTAIN PERMITS UNDER THE CLEAN AIR ACT**

**Wisconsin law**, under authority delegated to the state under the federal Clean Air Act, requires a person to obtain an air pollution control permit prior to commencing construction,

reconstruction, replacement, or modification of a stationary source<sup>5</sup> (“construction permit”). A person also must obtain a separate permit prior to operating a new or modified source of air pollution (“operation permit”). [s. 285.60 (1), Stats.]

However, a simplified process applies to stationary sources with low actual or potential emissions. Under the simplified process, an owner or operator of a stationary source may obtain a “registration permit” in lieu of a construction permit or operating permit, or both, if the owner or operator takes certain steps, and the DNR finds that the stationary source’s actual emissions do not exceed 50% of any applicable major source threshold. [s. 285.60 (2g), Stats.]

**The Act** requires the DNR to implement a pilot program to freeze, for 10 years, state requirements imposed under registration permits for certain types of sources. Specifically, the Act provides that a participating owner or operator is not required to make changes to the air pollution controls for a stationary source due to new or modified legal requirements, except as required under the Clean Air Act, for 10 years after the DNR grants coverage under a registration permit for the stationary source. An owner or operator may participate in the pilot program only if all of the following criteria apply:

- The stationary source is a minor source<sup>6</sup> and is eligible for coverage under a registration permit.
- The stationary source is a manufacturing facility that the owner or operator is constructing.
- The stationary source is located on property on which the owner or operator has completed certain steps under the voluntary party liability exception, described above.
- The owner or operator participates in the Green Tier Program<sup>7</sup>, and the manufacturing facility is included in the program.

The Act requires the DNR to submit a report to the Governor and relevant standing committees of the Legislature regarding the pilot program within five years after implementing the program.

## **ANNEXATION OF PROPERTY TO A BUSINESS IMPROVEMENT DISTRICT OR NEIGHBORHOOD IMPROVEMENT DISTRICT**

Under **Wisconsin law**, the process to create a business improvement district (BID) or neighborhood improvement district (NID) begins with a petition to the relevant municipality

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<sup>5</sup> A “stationary source” is any facility, building, structure, or installation that directly or indirectly emits or may emit an air contaminant only from a fixed location. [s. 285.01 (41), Stats.]

<sup>6</sup> A “minor source” is a stationary source that is not a major source. A “major source” is defined by the DNR by rule.

<sup>7</sup> Green Tier is a voluntary program intended to encourage participants to commit to environmental management practices that result in a performance that exceeds the current regulatory requirements. [s. 299.83, Stats.]

by a property owner in the proposed district.<sup>8</sup> (For a BID, the property owner must own commercial property.) A proposed BID or NID must develop an operating plan, which must be approved by the municipal planning commission, receive a public hearing, and be approved by the municipality. An operating plan provides for the development, redevelopment, maintenance, operation, and promotion of a BID or NID. With certain limitations, a municipality may impose special assessments on real property located within a BID or NID to implement the operating plan. In a BID, only commercial property is subject to such special assessments. [ss. 66.1109 and 66.1110, Stats.]

Although the statutory definition of a BID refers to the “original or amended boundaries” of a BID, prior law did not directly address the procedure for amending the boundaries of a BID. Current law also appears not to address whether boundaries of a NID may be modified.

**The Act** authorizes municipalities to annex property to a BID or NID, following a procedure similar to the procedure for the creation of a BID or NID under current law. In addition, the Act authorizes a municipality to convert a BID into a NID if a residential property owner petitions a municipality for the conversion.

### **ASSIGNMENT OF TAX DEEDS**

Wisconsin law authorizes a county to assign the county’s right to take judgment in a tax foreclosure action involving a brownfield, if certain conditions are satisfied. Among other requirements, such assignments require an environmental assessment and an agreement with the DNR regarding the clean-up of any hazardous substances. [s. 75.106 (2), Stats.] **Prior law** did not authorize the assignment of tax deeds.

**The Act** authorizes a county to assign its right to take a tax deed prior to the execution of the tax deed, for a brownfield subject to the same requirements that apply to the assignment of rights in tax foreclosure actions for brownfields under current law.

### **TREATMENT OF LOANS MADE BY THE BOARD OF COMMISSIONERS OF PUBLIC LANDS**

Wisconsin law authorizes the Board of Commissioners of Public Lands (BCPL) to make general obligation and revenue obligation loans to certain public entities. For towns, villages, and cities, BCPL loans generally may be made for any purpose for which a town, village, or city may borrow money or issue municipal bonds or notes – i.e., generally for any public purpose. Loan applications generally must be signed by a majority of the members of the relevant governing body. [ss. 24.61 (3) (a) 2. and 24.66 (2), Stats.]

General obligation loans to municipalities may be made for terms not exceeding 20 years and are secured by borrowers’ general ability to repay the loans. General obligation loans must bear and draw an annual interest rate of at least 2%. [ss. 24.60 (1w) and 24.63 (1) and (3), Stats.]

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<sup>8</sup> A BID is an area consisting of contiguous parcels, and it includes any parcels that are contiguous to the district but that were tax-exempt when the district boundaries were determined. A NID is an area consisting of nearby but not necessarily contiguous parcels, at least some of which are used for residential purposes and are subject to general property taxes.

The loan amount cannot exceed 5% of the valuation of the taxable property within the municipality. [s. 24.63 (1), Stats.]

Revenue obligation loans for cities, villages, and towns may be made for terms not exceeding 30 years and are secured by revenues from the financed projects. Like general obligation loans, revenue obligation loans must bear and draw an annual interest rate of at least 2%. [ss. 24.60 (2m) and 24.63 (2s) and (3), Stats.]

The Wisconsin Constitution generally provides that: “no county, city, town, village, school district, sewerage district, or other municipal corporation may become indebted in an amount that exceeds an allowable percentage of the taxable property located therein equalized for state purposes as provided by the Legislature.” It further specifies that, with limited exceptions relating to school financing, that allowable percentage is 5%.<sup>9</sup> [Wis. Const., art. XI, s. 3, cl. 2.]

**The Act** specifies that a state trust fund loan from BCPL to a city, village, or town made for the purpose of funding a project related to brownfields may not be included in arriving at the statutory debt limitation, described above, applicable to general obligation loans, or the constitutional debt limitation under Wis. Const. art. XI, s. 3, if all of the following criteria apply:

- The term of the loan is not more than 15 years.
- The loan is not in default.
- The DNR verifies to BCPL that the site on which the project will occur is a brownfield, or if the project encompasses more than one site, verifies that no less than 50% of the project area is a brownfield.

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<sup>9</sup> A political subdivision must, before incurring any indebtedness or at the time of doing so, “provide for the collection of a direct annual tax sufficient to pay the interest on the debt as it falls due, and also to pay and discharge the principal [of the debt] within 20 years from the time the debt was contracted.” [Wis. Const., art. XI, s. 3, cl. 3.] Certain types of public utility financing are exempt from that constitutional debt limitation.