

OFFICE OF THE CITY ATTORNEY

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Memorandum

To: City Council

From: Jenessa Stromberger, Assistant City Attorney

Date: February 5, 2025

Re: Proposed Resolution in Support of Business Improvement Districts (“BIDs”)

Councilmembers Brewster and Felton have proposed a resolution that expresses support of BIDs and encourages City staff to respond or work with BID board members in a certain way. This memo highlights the legal concerns with the resolution related to BIDs, addresses the improper direction of staff, and briefly discusses that while some BID members understand that compliance with government requirements such as open meetings and public records law and meeting financial procurement requirements is non-negotiable and serve to promote the statutory requirement of governmental transparency, other members actively seek to avoid transparency requirements. Non-compliance leads to a litany of issues that will be explained in greater detail below and may be further encouraged by the passing of this resolution.

Proposed Resolution

Operating Plans

Operating plans are a statutory legal requirement for a BID to exist. Operating plans are approved at a BID's creation but are also subject to periodic updates that must be reviewed and approved by City Council. Per state statute, operating plans must include how the BID “promotes the orderly development of the municipality, including its relationship to any municipal master plan.”¹ The BID is to review the operating plan annually; changes are subject to City Council review and approval.² In this way, BID goals must support the City's policy direction or the City Council will redirect BID work through the operating plan approval. The operating plan also must include a legal opinion that the statutory requirements of the operating plan have been met. The current operating plans of at least three of the BIDs are deficient due to their age and need extensive updating. Staff has drafted a template that BIDs may use to insert their boundary-specific needs and be confident that what staff provides meets legal standards and will result in provision of the required legal opinion.

BID Policy Handbook

As the resolution states, clarity is important. Ongoing education and communication to all the BID members helps ensure the continued working relationship with these important City committees and contributes to the efficient efforts of all individuals involved. As such, the City has an existing

¹ Wis. Stat. §66.1109(1)(f)4.

² Wis. Stat. §66.1109(3)(b).

Public Officials Handbook that is distributed to all BID board members following their appointment by City Council. Over the past year, BIDs have also been provided with memos clarifying their questions over their belonging to the City and the policies to which they are subject. These memos are attached here and incorporated by reference.

BID Board Composition

Per Wis. Stat. § 66.1109(3)(a), the City is responsible for the appointment of BID members and the length of any such appointment. A majority of BID members must own or lease property within the BID boundaries, but it is not a requirement of membership and an attempt to do so is not only contradictory to statute but an attempt to bind future City Council action. The individuals presented for appointment are reviewed and recommended by the Council's Advisory Committee on Appointments per City Ordinance 2.04.050.A. and reviewed and confirmed by City Council per Wis. Stat. § 66.1109(3)(a). It may be that future City Councils choose to appoint only BID members who are "a property or business owner, occupier, or representative within BID boundaries" but there is no policy to change and for Council to act in such a manner as to bind future Advisory Committees and Councils is impermissible.

BID Rights

As the proposed resolution accurately states, "BIDs are a branch of the City of Eau Claire, governed by State of Wisconsin Statutes, City of Eau Claire policies, and BID operating plans and bylaws".

- As a "branch" of the City, BIDs are represented by the City Attorney's Office with respect to all legal matters. Branches of the City do not have the ability to hire their own legal counsel because they are not an entity unto themselves that can lawfully have its own representation.
- The City undergoes an extensive audit on an annual basis, which includes the BIDs as component units of the City. Any contract entered into by a BID (if granted the ability to contract), is held to the same audit standards as the City. With respect to subcontractors, the contractor must ensure the subcontractors meet the same procurement, suspension, and debarment standards as the contractors themselves.
- Agenda items must be lawful and within the scope of a BID's lawful exercise of authority. Items falling outside of these constraints must be removed as a matter of course.
- The resolution also accurately references the BID's necessary compliance with Wisconsin Open Meetings Law. Work on BID business must always be undertaken in compliance with those laws, often requiring a public notice. Failure to comply with Open Meetings Law may result in personal liability for the participating individuals as well as liability for the City as an organization.

Direction to Staff

The Resolution as drafted speaks directly to City staff, encouraging them to take certain actions. Not only are many of these actions improper at best or unlawful at worst, as described above, but it is also improper and unlawful for the City Council to direct or attempt to supervise staff. Eau Claire operates in a City Manager form of government, in which the city manager is responsible for all executive function of the city.³ Staff direction and supervision rests solely with the city manager. The City's Public Officials Handbook also discusses the manager's responsibility of supervising

³ Wis. Stat. § 64.11(1), City of Eau Claire Code of Ordinances 2.04.013

staff and the separation of Council's role.⁴ In addition, the city manager, city attorney, and treasurer are statutory officers of the city who the proposed resolution attempts to direct.⁵ These individuals have a statutory obligation to follow the law and lawful policies of the city and cannot be directed by City Council to execute their duties in any certain manner. Council may create policies and amend ordinances so long as they are lawful, and staff will enact, follow and enforce those lawful actions.

BID Member Legal Compliance

Over the past year, the City Attorney's Office has met with each BID board and discussed open meetings and public records law requirements. The Finance Department has also met with BID board members and discussed procurement requirements. Most BID board members have applied this information and made good faith efforts to comply with not only those requirements, but also City agenda publication timelines, public notices, and others. However, there are some BID board members who seek to "get out from underneath the city purchasing policy and legal," as stated in an email on February 5th, 2025, from a South Barstow BID Board Member. This type of conduct does not meet the standards of the City's Public Officials Handbook and has significant consequences, both legal and policy related, if acted upon.

City Council has a non-delegable fiduciary responsibility to the City's taxpayers and citizens. The City cannot delegate legal and fiscal responsibility or compliance with Open Meetings Law or other good government and fiscal audit practices to the BIDs or any board or branch of the City. To the extent the resolution does so it is unenforceable. Encouraging or permitting avoidance of state law or directing City staff to do so, even if that is not the intent of the resolution, is a potential violation of the City's Public Official Handbook and misconduct. It is advised and encouraged that City Council not take such action. Should such action be taken by Council the City and its taxpayers will be legally responsible for the fiscal, procurement, or legal claims and liabilities. While in some instances individual elected or appointed public officials may also be responsible for their actions, the responsibility for fiscal, audit, contract, employment, and like matters remains with the City.

What may appear just "red tape" hassle that can be avoided through expediciencies of the moment are in fact laws and policies that ensure lawful and transparent use of public funds, making of public policy, and that ultimately lead to greater legitimacy and faith in our local government. If evaded or ignored it can lead to the loss of public confidence, personal and city liability, and the weakening of our collective ability to do the type of great joint public and private projects that have transformed our downtown into one that, as the resolution describes "has gone through a renaissance" and resulting in "a vibrant downtown and bustling local economy."

Electronically signed by

Jenessa Stromberger
Assistant City Attorney

⁴ City of Eau Claire Public Officials Handbook, Section 4.

⁵ Wis. Stat. § 62.09(1), (9), (12).