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MEMORANDUM

TO: Interested Parties

FROM: Mike Wittenwyler / Jodi Jensen
Godfrey & Kahn, S.C.

DATE: March 4, 2014

SUBJECT: Senate Bill 338: Assembly Amendment 3

Senate Bill 338 grants Wisconsin towns that meet population and equalized value thresholds the authority to establish Tax Incremental Financing Districts ("TIDs"). With the adoption of Assembly Amendment 3 on February 20, 2014, the bill now also provides that Wisconsin's property tax emption for biogas or synthetic gas energy systems does not apply to property already in existence on January 1, 2014 and located in a TID that was in effect on that same date.

The effect of the amended bill is to eliminate the property tax exemption established by Wis. Stat. § 70.111(18) for GreenWhey Energy, Inc. of Turtle Lake. GreenWhey is a waste-to-energy company that converts food processing wastewater into biogas, producing energy, fertilizer, heat and clean water. By targeting a specific Wisconsin property owner with this amendment, Senate Bill 338 is considered special legislation prohibited under the Wisconsin Constitution.

ASSEMBLY AMENDMENT 3

The provision making GreenWhey Energy ineligible for a property tax exemption granted to every other biogas or synthetic gas energy system in Wisconsin was originally introduced as Assembly Bill 709. Its language was slightly revised by Assembly Amendment 3 to Senate Bill 338, but its meaning and effect did not change. Assembly Amendment 3 provides:

> Until the tax incremental district terminates, the exemption under this subsection [70.111 (18)] for biogas or synthetic gas energy systems does not apply to property in existence on January 1, 2014, and located in a tax incremental financing district in effect on January 1, 2014.

UNIFORMITY CLAUSE ANALYSIS

The Joint Survey Committee on Tax Exemptions reviewed AB 709 and examined whether it conforms to the Uniformity Clause of the Wisconsin Constitution (Article VIII, Section1). The committee's February 18, 2014 report explained the Uniformity Clause as follows:

> [It] requires that for the direct taxation of property, there can be but one constitutional class. All property within that class must be taxed on the basis of equality so far as

> practicable and all property taxed must bear its burden equally on an ad valorem basis. All property not included in that class must be absolutely exempt from property taxation. The Legislature may classify between property that is to be taxed and that which is to be wholly exempt and the test of such classification is reasonableness.

The report does not opine definitively on whether AB 709 (now Assembly Amendment 3) violates the Uniformity Clause. Instead, it presents the argument on why a court "could find a reasonable explanation" for the tax treatment but also making clear that it "appears possible, and perhaps likely" that a court would find that the provisions in Assembly Amendment 3 violate the Uniformity Clause. Accordingly, a Uniformity Clause challenge would not be a frivolous and likely could be successful.

SPECIAL LEGISLATION

The Joint Survey Committee on Tax Exemptions did not examine whether AB 709, and thus Assembly Amendment 3, violates Article IV, Section 31 of the Wisconsin Constitution which prohibits special legislation if it leads to differential treatment in the assessment or collection of taxes.

In the event that Senate Bill 338 was amended to specifically target GreenWhey Energy and subject it to different tax treatment than other biogas or synthetic gas energy systems in Wisconsin, the legislation would be special legislation aimed at a specific taxpayer. Article IV, Sec. 31 of the Wisconsin Constitution prohibits special legislation if it leads to differential treatment in the assessment or collection of taxes. This prohibition against special legislation has guaranteed fundamental even-handed tax laws in Wisconsin since 1892.

Only five years after this requirement was added to the state constitution, the Wisconsin Supreme Court concluded that this prohibition applied broadly to "the entire subject and method of taxation," and "the whole statutory method of imposing taxes upon property," because the language of this provision "is not used in any restricted or technical sense." *Chicago & N.W.R. Co. v Forest Co.*, 95 Wis. 80 (1897). This decision, rendered by a court interpreting this requirement in the same decade in which it was enacted, concluded simply that "[t]he object of section 31 of article 4 of the constitution was to restrict and lessen the evils of special legislation." *Id*.

Nearly a century later, the Wisconsin Supreme Court revisited this provision in a lawsuit brought by Milwaukee suburbs challenging a new state law that would have empowered the Milwaukee Metropolitan Sewerage District to increase its assessments against these municipalities for its capital costs. While the law itself did not specifically identify municipalities such as Brookfield, Mequon, or Germantown, the Wisconsin Supreme Court applied what it called "a sophisticated multirule test to determine whether legislation which is general on its face is impermissibly local or private because the generality is simply a surface sham." *City of Brookfield, et. al. v. Milw. Metro. Sewerage Dist.*, 144 Wis.2d 896, 914 (1988). This "test" includes whether the classification employed by the legislature is "based on substantial distinctions which make one class really different from another," whether any such different characteristics justify different legislative treatment, and whether others "could join" the class. *Id*. at 907-08. As the court explained, "if there is not something substantially distinct about them that

requires" a different "method of assessing charges," then a law treating two taxed parties differently "is in reality local or private legislation," not general legislation. *Id*. at 916.

In the *City of Brookfield* decision, the Wisconsin Supreme Court concluded that the legislature couldn't get around its special tax treatment of a limited class of municipalities simply by trying to package the bill as a general, neutral law. The supposed generality was a "surface sham." *See id.* at 914.

In its amendment of Senate Bill 338, the Wisconsin Legislature has made no findings that a biogas or synthetic gas energy system in existence on January 1, 2014 and located in a TID that was in effect at that time ought to be treated differently than any other biogas or synthetic gas energy system located elsewhere in Wisconsin. In addition, the amendment does not allow other landowners to join the class since it applies to only to property in a TID as of January 1, 2014.

The Wisconsin Constitution requires that the Wisconsin Legislature have some general policy reason for its tax-related enactments instead of crafting seemingly neutral language that is designed to target a specific taxpayer. There are no neutral policy justifications for the limitation in Assembly Amendment 3, which allows every other company providing the same waste-to-energy services as GreenWhey Energy to remain unaffected. Similar to the assessment in the *City of Brookfield* case, Assembly Amendment 3's surface generality regarding ineligibly for a property tax exemption is a "surface sham."

CONCLUSION

In sum, by targeting a specific Wisconsin property owner with this amendment, Senate Bill 338:

- is considered special legislation prohibited under the Wisconsin Constitution; and,
- likely could violate the Uniformity Clause.

Accordingly, if Senate Bill 338 is enacted, the State Legislature will have passed an unconstitutional law that will be subject to legal challenge.

Please let us know if you have further questions or need any additional information on either of these problems with Senate Bill 338.

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