



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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I—02—09

Ms. Kristen L. Fish
Past President
Wisconsin Economic Development Association
c/o Clover Industries
Post Office Box 1606
Wausau, WI 54402-1606

Dear Ms. Fish:

This letter is in response to your letter of August 22, 2008, in which you request clarification and guidance on when a local economic development corporation—*i.e.*, a privately organized non-profit corporation created for the purpose of promoting local economic growth and development in the community where it operates—must be considered a “quasi-governmental corporation” that is subject to Wisconsin’s open meetings and public records laws. Although the Wisconsin Supreme Court recently addressed that very issue in *State v. Beaver Dam Development Corp.*, 2008 WI 90, ___ Wis. 2d ___, 752 N.W.2d 295, your letter expresses concern that that decision provides insufficient guidance for private sector individuals who need to determine when such organizations must make the substantial efforts needed to comply with open government requirements. Without more precise guidance, you suggest, such individuals and organizations are left subject to uncertainty and fear of potential liability.

In the *Beaver Dam* decision, the Court examined the history of Wisconsin’s open government statutes and concluded that, when the Legislature replaced the term “quasi-municipal corporation” with the term “quasi-governmental corporation,” it intended to expand the reach of those statutes by making them applicable to private corporations that are not *per se* public or governmental, but that closely resemble a governmental corporation. *Id.*, ¶¶ 33-36. Accordingly, the Court held that a quasi-governmental corporation does not have to be *created* by the government, but is a corporation that significantly “resembles a governmental corporation in function, effect, or status.” *Id.*, ¶ 9. The Court further held that each case must be decided on its own particular facts, under the totality of the circumstances and set forth a non-exhaustive list of factors to be examined in determining whether a particular entity sufficiently resembles a governmental corporation to be deemed quasi-governmental, while emphasizing that no single factor is outcome determinative. *Id.*, ¶¶ 7-8.

The factors set out by the Court in *Beaver Dam* fall into five basic categories:

- (1) the extent to which the private entity is supported by public funds;
- (2) whether the private entity serves a public function and, if so, whether it also has other, private functions;
- (3) whether the private entity appears in its public presentations to be a governmental entity;
- (4) the extent to which the private entity is subject to governmental control; and
- (5) the degree of access that government bodies have to the private entity's records.

Id., ¶ 62. The Court emphasized that these factors are not exclusive and that other courts have identified as many as fourteen factors pertinent to determining whether private entities are subject to open government laws. *Id.*, ¶ 63 n.14. The Court likewise emphasized that no single factor, standing alone, is sufficient to determine whether a corporation is quasi-governmental. *Id.*, ¶ 79.

In applying the above factors to the facts of the case before it, the Court found numerous attributes that supported the conclusion that the Beaver Dam Area Development Corporation (“BDADC”) was a quasi-governmental corporation:

- BDADC’s revenues were derived exclusively from public tax dollars (or interest thereon). This was considered by the Court to be a “primary consideration” and a “significant factor” supporting the conclusion that BDADC was a quasi-governmental corporation. *Id.*, ¶¶ 10, 64.
- BDADC also received public support in that the city provided it with clerical services and all of its office supplies. *Id.*, ¶¶ 10, 64.
- BDADC’s exclusive function was the public function of promoting economic development and business retention in and around the City of Beaver Dam. *Id.*, ¶¶ 11, 69. The city was BDADC’s sole client and BDADC did not have ongoing business relationships with other clients. *Id.*, ¶¶ 11, 23.
- The conclusion that BDADC’s economic development functions were public ones was reinforced by the fact that, prior to the creation of BDADC, those functions had been performed by the city itself through its own economic development office. When BDADC was created, the city office was discontinued and its

former director became the corporation's executive vice president and sole paid employee and served as such for eight years. *Id.*, ¶¶ 11, 18, 69.

- BDADC appeared governmental to the public in that its office was located in the city municipal building and it was listed on the city's internet website with a city web address. *Id.*, ¶¶ 10, 73.
- BDADC was subject to a degree of governmental control in that the mayor and another city official served as *ex officio* members of BDADC's board of directors. *Id.*, ¶¶ 11, 16, 75-76. The city also retained a reversionary interest in BDADC's assets, in the event of corporate liquidation. *Id.*, ¶¶ 11, 67.
- The city had mandatory access to BDADC's private records, in that BDADC was obligated to open its accounting books for city inspection and to submit its annual management plan to the city. *Id.*, ¶¶ 11, 77-78.

It is true, as your letter indicates, that there is inherent uncertainty in applying the kind of legal standard set forth in the *Beaver Dam* decision. In fact, in arguing the *Beaver Dam* case before the Supreme Court, the Wisconsin Department of Justice ("DOJ") expressly acknowledged that such a case-specific, totality-of-the-circumstances standard with a multitude of factors is cumbersome and does not yield the most predictable results. In order to reduce the uncertainty of the totality-of-the-circumstances approach, however, DOJ asked the Court to supply a simplified standard that would examine the extent to which a private entity resembles a governmental corporation in function, effect, and status, with particular emphasis on: (1) the degree of governmental control of the private entity; (2) the extent to which the private entity performs governmental functions; and (3) the nature and scope of public funding for the private entity. While the Court basically endorsed the type of standard advocated by DOJ, the Court declined either to reduce the proliferation of relevant factors to be considered or to indicate the comparative weight that a judge or jury should give to any particular factor under any given circumstances.

Nonetheless, we believe that a close examination of the *Beaver Dam* decision in light of the basic policy of Wisconsin's open government laws can provide additional meaningful guidance for local economic development corporations.

First, the Court itself advised that, if a private entity does not want to be subject to open government requirements, then it should change the way it operates so that it does not too closely resemble a governmental corporation and it took pains to provide express guidance to entities that wish to be considered private and not quasi-governmental. *Id.*, ¶¶ 7, 89-90. More specifically, the Court noted that such an entity could reduce the likelihood of being deemed quasi-governmental by: (1) not receiving all of its revenue from public funds and the interest thereon; (2) not giving the municipality a reversionary interest in corporate assets if the

corporation dissolves; (3) not housing corporate offices in municipal facilities; (4) not combining the corporation's website with the municipality's website; (5) not giving the municipality mandatory access to corporate records and management plans; (6) not having municipal officials serve *ex officio* on the corporate board of directors; and (7) having other, private clients in addition to the municipality. *Id.*, ¶ 90. While this list does not provide absolute certainty or shed light on the relative importance of the different factors, it does provide a menu of practical steps that the organizers of a local economic development corporation can take to lessen the probability that their organization will be required to comply with the open meetings and public records laws.

In addition, the Court emphasized that, even if an economic development corporation is subject to the open government laws, it still may be entitled to protect some economically important information from public scrutiny by closing certain meetings or withholding certain records from public disclosure. *Id.*, ¶ 80. For example, those corporate board meetings which, if open to the public, would harm the competitive or bargaining interests of the municipality in question may be closed under section 19.85(1)(e) of the Wisconsin Statutes. *Id.*, ¶ 81. In addition, the Court indicated that meetings between private developers and the *administrative staff* of an economic development corporation would not be subject to the open meetings law. *Id.* The Court also emphasized that some corporate records may be exempt from public disclosure either under the public records balancing test or under specific exemptions in the public records statutes, such as the exemption for trade secrets. *Id.*, ¶¶ 82-87. While this part of the Court's discussion does not assist in clarifying the *definition* of a quasi-governmental corporation, it does provide some concrete guidance as to ways in which economic development corporations can shield some sensitive information from public scrutiny.

Second, and more importantly, guidance can be drawn from consideration of the legislative policy of the open meetings and public records laws and of the way that policy has been construed by the courts. In announcing this policy, the Legislature has recognized that effective democratic government depends on citizens having as much information as possible about the affairs of their government and that the public, therefore, should be given full access to such information, except in situations where such access would be incompatible with the conduct of government business. *See* secs. 19.31 and 19.81(1), Wis. Stats. Moreover, the Supreme Court has held that the governmental business to which this policy applies is not limited to formal or final decision making, but rather comprises all stages of the decision making process, including preliminary decisions, discussion, or simply information gathering. *St. ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 572, 494 N.W.2d 408 (1993). Accordingly, the Court has emphasized that an entity that is authorized to deliberate and interact with other parties and to make recommendations relative to matters of municipal business is subject to the open meetings law, even if the entity lacks the authority to bind the municipality to any final decisions. *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

When this policy reasoning is applied to local economic development corporations, it leads to the conclusion that—out of the multitude of factors discussed by the Court in the *Beaver Dam* decision—the public function factor must be of particular importance. This is why the Court, while acknowledging that the economic development process sometimes requires flexibility and confidentiality, nonetheless insisted that those legitimate goals cannot be achieved by allowing a governmental body to shield *governmental functions* associated with the development process from public scrutiny through a contract under which a private entity would perform those public functions. See *Beaver Dam*, 2008 WI 90, ¶ 4. Similarly, consistent with prior Wisconsin case law on the nature of government business under the open meetings law, the *Beaver Dam* Court emphasized that the fact that the city had to give final approval to contracts negotiated by BDADC did not detract from the corporation’s quasi-governmental status because an entity may serve a *public function* even if it merely makes recommendations subject to final government approval. *Id.*, ¶ 72.

Therefore, when a private entity contracts to perform certain services for a governmental body, a key consideration in determining whether the private entity thereby becomes quasi-governmental is whether those services play an integral part in any stage—including the purely deliberative stage—of the decision-making processes of the governmental body. See *News and Sun-Sentinel Co. v. Schwab, Twitty, & Hanser Arch. Group*, 596 So.2d 1029, 1032, (Fla. 1992) (cited by *Beaver Dam*, 2008 WI 90, ¶¶ 57-58).

For example, in *Beaver Dam*, the cooperation agreement between BDADC and the city allowed BDADC to negotiate with private developers regarding financial incentives for businesses as well as infrastructure and government approval issues, with final approval and execution of any resulting agreements belonging to the city government. *Beaver Dam*, 2008 WI 90, ¶¶ 22-24. The Court emphasized that those negotiations concerned governmental functions such as the provision of utilities and fire protection and the making of improvements to development sites. *Id.*, ¶ 70. The Court thus concluded that BDADC was a quasi-governmental corporation for open meetings and public record purposes in large part because, when acting under the cooperation agreement, BDADC played an integral part in the negotiation and discussion stages of the city’s own decision-making processes regarding proposed economic development projects.

It thus appears that the probability that an economic development corporation will be deemed quasi-governmental may largely depend on the extent to which its purposes and activities are connected to the traditional public functions of a governmental body. For example, to the extent that an economic development corporation is authorized to negotiate and prepare recommendations for a municipality about the use of municipal fiscal powers—such as direct public financing, the issuance of tax-exempt municipal bonds, or arranging tax incentives, public loans, or government-backed loan guarantees—to support an economic development plan, that corporation is more likely to be deemed quasi-governmental. The same is true to the extent that the economic development corporation participates in such governmental activities as planning

the use of a municipality's eminent domain power to condemn lands for a development project, creating a relocation plan for displaced occupants of such lands, or arranging infrastructure projects, legislative assistance, or the issuance of regulatory permits to support a development plan.

Conversely, activities that are less directly connected to the traditional public functions of a governmental body may be less likely to result in an economic development corporation being deemed quasi-governmental. This could include such activities as: searching for and identifying businesses and private developers that may want to relocate or expand in the municipality; marketing the municipality to such businesses and developers as an attractive location for economic development; providing expert guidance to a municipal government regarding the economic development process; pricing and appraising development opportunities; comparing developer responses to plan proposals; or preparing technical analysis of the terms and conditions of potential business deals for presentation to municipal officials. It is at least arguable that, in performing these kinds of activities, a local economic development corporation would only be contracting with the municipality for the sale of professional services that the municipality would use in performing its own governmental operations, but would not itself be relieving the municipality of the performance of a portion of its public functions. *See id.*, ¶¶ 57-58, 66 (distinguishing between the sale of professional services by a private firm to a governmental body and the performance of a public function by a private firm on behalf of a governmental body) (citing *News and Sun-Sentinel Co.*, 596 So.2d at 1031-33).

The same line of reasoning may also provide guidance to economic development corporations in applying the *public funding* factor to their own circumstances. The Court in *Beaver Dam* indicated that public funding is a key factor that ranks first among the considerations that bring a private entity within the coverage of open government laws. *Id.*, ¶ 62. While noting that public funding, standing alone, is not dispositive, the Court cited numerous decisions from other states in which public funding had supported the conclusion that a private corporation resembled a governmental corporation closely enough to make it subject to state open government laws. *Id.*, ¶ 62 n.13. Although the Court emphasized that BDADC derived virtually 100% of its revenues from public tax dollars (or interest thereon), however, it provided little or no guidance as to how much public funding below the 100% level a private entity could receive without thereby becoming quasi-governmental.

It would be difficult to speculate as to how the Court might answer that funding-level question in a future case. The public function analysis discussed above, however, considered together with the public policy of the open government laws, may provide guidance regarding the *form*, if not the *amount*, of public funding that a private entity may receive without relinquishing its private character. As already noted, the *Beaver Dam* Court distinguished between the use of public funds as compensation for the purchase of professional services from a private corporation (which is less likely to render the private entity quasi-governmental) and the use of public funds to support the provision of a public service by a private corporation (which is

more likely to render the private entity quasi-governmental). *See id.*, ¶¶ 57-58, 66. It follows that a local economic development corporation may be able to reduce the likelihood of being deemed quasi-governmental by structuring any receipt of public funds as an arm's length contractual transaction in which the public funds are bargained-for consideration exchanged for professional services rendered by the private entity. Conversely, a local economic development corporation would appear to be more likely to be deemed quasi-governmental if it is directly supported by governmental taxation, by public capital or credit, or by subsidized use of municipal property and equipment.

For all of the above reasons, it appears that, in construing the majority decision of the Court in *Beaver Dam*, one need not go so far as to suggest that, henceforth, the only way that a private economic development corporation could “avoid conducting business in the fishbowl of the open meetings and public records statutes” would be by “severing its cooperative relationship with its municipal beneficiary and paying for all its economic development initiatives with private money.” *Id.*, ¶ 104 (Prosser, J., dissenting). Rather, as discussed above, it may be possible for such a corporation to maintain a cooperative relationship with a municipality and to receive public funds, provided that it structures that relationship as a contractual sale of professional services to the municipality, rather than as the use of a public revenue stream to fund the corporation in performing some portion of the municipality's governmental services.

Although the *Beaver Dam* decision thus can be read as providing some meaningful guidance on when a local economic development corporation must be considered a quasi-governmental corporation subject to Wisconsin's open meetings and public records laws, it is also essential to emphasize that there is bound to be a significant degree of uncertainty in applying the kind of case-by-case, totality-of-the-circumstances standard set forth in that decision. The views expressed in this letter, therefore, should be seen only as suggestions of possible arguments that could arise in future cases and that are not clearly foreclosed by what the Court has said on this subject so far. It is impossible to go further in speculating about the potential application of the *Beaver Dam* decision in the absence of some particular facts to which it might be applied.

Finally, in conclusion, it should also be noted that the inherent uncertainty of the Court's case-by-case approach increases the risk of future litigation. Furthermore, because the totality-of-circumstances in a case is not very amenable to early resolution by courts, this kind of standard also makes litigation more costly to all parties. In addition, because it is difficult to predict the comparative weight that a judge or jury might give to any particular factor, the risk of an adverse outcome increases for all parties. All of these risks and expenses can be minimized,

Ms. Kristen L. Fish
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however, if one consistently keeps in mind the purposes of the open meetings and public records laws and the desirability of transparency in the conduct of governmental functions.

Sincerely,



J.B. Van Hollen
Attorney General

JBVH:TCB:rk

c: Jerry Wehrle
Mayor of Lancaster
President, League of Wisconsin Municipalities

Leland T. Rymer
Oconto County Board Chair
President, Wisconsin Counties Association

Timothy M. Hanna
Mayor of Appleton
President, Wisconsin Alliance of Cities

James E. Hough
Hamilton Consulting Group, LLC