



## Legislation Text

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**File #:** 82371, **Version:** 1

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### **Fiscal Note**

This resolution would authorize a \$1,700,000 loan to East Washington Apts, LLC, or its assigns ("Developer") and amends the 2024 capital budget for the loan. TIF funding is also contingent upon the creation of a new TID #52 (E. Washington and Stoughton Rd.).

The Project consists of approximately 192 affordable apartment units, and approximately 139 parking stalls ("Project"). The TIF Loan would be repaid through incremental taxes generated by the Project and represents 55% of the present value of all incremental taxes anticipated from the Project over the proposed TID's 27-year life.

While it is anticipated that the incremental taxes generated by the Project will be sufficient to repay the loan within approximately 9 years, the Developer is required to guaranty a minimum payment if sufficient future tax increment is not available.

The increment guarantee is secured by a subordinated mortgage on the property. The TIF Loan also requires that Developer be prohibited from selling or transferring the Property prior to repayment of the TIF Loan. If Developer sells or transfers the Property to a tax-exempt entity, Buyer shall pay an annual payment in lieu of taxes (PILOT) in the amount of the property tax paid as of the date of sale, frozen, until 2051.

### **Title**

Authorizing the Mayor and City Clerk to execute a development agreement and authorizing a funding appropriation in the 2024 Capital Budget to fund a \$1,700,000 Tax Incremental Finance Loan to East Washington Apts, LLC, or its assigns to construct approximately 192 units of affordable housing and approximately 139 parking stalls located at 808 Melvin Court in the 3100 block of East Washington Avenue in Tax Incremental District (TID) 52. (District 12)

### **Body**

WHEREAS the City of Madison is in the process of creating a new TID #52 (East Washington and Stoughton Rd) during 2023; and

WHEREAS the intent and purpose of the Project Plan, among other things, is to eliminate blighting conditions and encourage development of a wide range of commercial and housing options and attract and retain business and employment in the City of Madison; and

WHEREAS East Washington Apts, LLC, or its assigns, ("Developer") has proposed to construct 192 affordable housing units on the Property at a total estimated development cost of approximately \$68,418,243 ("Project") located at 808 Melvin Court, formerly known as the former Capitol Auto property in the City of Madison and within the boundary of a proposed to the TID #52 (East Washington and Stoughton Rd) boundary ("Property"); and

WHEREAS City staff has conducted an analysis (See Attached Report) of the Project and has determined a gap for to be approximately \$1,700,000 such that, but for TIF assistance, the Project could not occur; and

WHEREAS, \$1,700,000 of TIF assistance to Project A represents approximately 55% of the present value of

the estimated tax incremental revenues generated by the Project, in conformance to TIF Policy that no more than 55% be made available to a project ("55% Gateway") without Board of Estimates prior authorization; and

WHEREAS, in addition to any other powers conferred by law, the City may exercise any power necessary and convenient to carry out the purpose of the TIF law, including the power to cause project plans to be prepared, to approve such plans, and to implement the provisions that effectuate the purpose of such plans; and

NOW, THEREFORE, BE IT RESOLVED that the City hereby finds and determines that the Project is consistent with the public purposes of Tax Increment Finance Law and the plans and objectives set forth in City of Madison TIF Policy, the City's loan to Developer demonstrates the potential to and encourage development of a wide range of housing options in TID #52, thereby making more likely an accomplishment of the public purpose objectives set forth in the Project Plan, the TIF Law and City TIF Policy.

BE IT FURTHER RESOLVED that funding is subject to the following conditions:

1. The Project. Developer agrees to develop on the Property all of the following:
  - a. Construction of approximately 192 units of affordable housing, which Developer agrees will be set aside for occupancy by households who income is at or below 70% of the area median income (AMI) as defined by Section 42 of the Internal Revenue Code, with an average AMI of less than or equal to 60% using the average income set aside, and consistent with the income restrictions under the Wisconsin Housing and Economic Development Authority's Low-Income Housing Tax Credit Program, and subject to the Land Use Restriction described in Section 24 of this Term Sheet.
  - b. Approximately 139 parking stalls
2. Form of Assistance. TIF assistance shall be provided in the form of a 0% loan from the City to CDA Housing, Inc. ("CDA") ("TIF Loan") and then loaned to Developer, or its assigns, in the amount of One Million Seven Hundred Thousand Dollars (\$1,700,000) to the Developer for the purposes of constructing the Project. The TIF Loan to be repaid either through increment or a guaranty payment pursuant to Section 11 herein. CDA Housing Inc. is a Michigan nonprofit corporation, and is not associated with the Community Development Authority of the City of Madison.
3. Evidence of Financing, Audit and Clawback Provision. Prior to the TIF Loan closing, Developer shall provide evidence of bank financing, grant funds and/or equity in the aggregate amount of not less than \$66,718,243.00 for Project ("Financing").

Financing shall be evidenced in the form of (i) a bank commitment letter and evidence that Developer has met all of the lender's conditions of financing such as commercial pre-leasing requirements, if any; (ii) a letter of intent from a tax credit investor; and/or (iii) a grant award letter from a nonprofit or governmental entity.

Equity investment shall be evidenced by paid invoices or other documentation of prepaid project costs paid by Developer and/or a financial statement demonstrating Developer's financial capacity to invest equity in the Project. The Developer's Equity investment may include equity from the sale of Low-Income Housing Tax Credits, a cash contribution from the tenant that will occupy the Project, the Developer's contribution of land or cash via a sponsor note, and a deferred developer's fee. In aggregate, Developer's equity investment, as established through financing documents shall not be less than the amount of the TIF Loan at closing.

After closing, the TIF Loan shall be used solely for the purpose of funding the TIF eligible portion of the total project costs as stated in the TIF Application. The total project costs estimated therein at approximately \$68,418,243.00. Upon completion of the Project defined as issuance of a certificate of occupancy for all elements of the Project, Developer shall provide the City with a cost certification of the total Project Cost and Financing ("Audit"), to the City's satisfaction, for the City's review and approval. If the City does not approve the Developer's Audit of Project Cost, the City may request additional information from the Developer and may perform its own audit of Developer's books and records related to Project Cost and Financing. In the event that the financing gap for Project (which is equal to the amount of the TIF Loan) is reduced by a decrease, as established by the Audit, in the Project Cost ("Audited Actual Cost") and/or an increase, as established by the Audit, in Financing ("Audited Actual Financing"), the following formula shall apply to determine the clawback payment due to the City ("Clawback"):

The Clawback shall be calculated as follows:

1. "Cost Savings" Project = \$68,418,243.00, minus the Audited Actual Cost; and
2. "Financing Increase" = Audited Actual Financing minus \$66,718,243.00.

If the sum of (1) Cost Savings and (2) Financing Increase is a negative number, there shall be no Clawback. If the sum is a positive number, Developer shall pay the City Fifty Percent (50%) of such positive number as a Clawback.

Developer's payment of the Clawback shall be applied as a payment to the tax increment guaranty under Sections 9 and 11 below and shall reduce the outstanding amount of the TIF Loan pursuant to Sections 9 and 11 below.

4. Tax Credit Approval. TIF assistance to the Project is contingent upon Developer receiving an award of Section 42 low-income housing tax credits ("LIHTC") from Wisconsin Housing and Economic Development Authority ("WHEDA") in 2024. Prior to closing of the TIF Loan, Developer shall provide the City with a copy of its LIHTC Online Application ("LOLA") provided to WHEDA. The City reserves the right to amend TIF Assistance to the Project in the event that the financial information provided in the LOLA demonstrates that the gap is less than presented in Developer's TIF Application.
5. Disbursement Method. At closing, the City shall disburse the TIF Loan to a title company to be held in escrow. In order to facilitate the City's review of project cost to confirm eligibility under Wisconsin TIF Law (Wis. Stats. 66.1105) and Developer's progress toward SBE bidding goals as set forth in Section 13 herein, the City and Developer shall enter into a Disbursement Agreement that authorizes no less than three (3) disbursements of TIF funds, including a final 20% of total TIF funds retained until 80% project completion confirmation by the Department of Civil Rights ("DCR") that Developer has complied with the applicable provisions of MGO 39.02 (9). TIF funds shall be disbursed upon the City's receipt and satisfactory review of a detailed draw request from Developer provided on or about no less than three (3) disbursement dates, to a title company. CDA shall have the right to lend a portion of the TIF Loan proceeds to the project in phases, secured by one or more notes and mortgages as approved by the City Attorney.
6. 2024 Capital Budget Amendment. Funding for the One Million Seven Hundred Thousand Dollar (\$1,700,000) TIF Loan is contingent upon an amendment to the City of Madison 2024 Capital Budget authorizing the expenditure of funds stated herein.
7. Intentionally omitted.
8. Intentionally omitted.
9. Method of Payment and Tax Increment Guaranty. The City's expenditure in providing the TIF Loan for the

Project shall be repaid by Developer through tax increments generated by the Project and/or cash payments by Developer and guaranty payments. A schedule of the projected increment used to calculate the TIF Loan amount shall be attached to the Agreement (“Increment Schedule”).

10. Sale to Tax Exempt Entity - PILOT Payment. Developer shall be prohibited from selling or transferring the Property prior to the Developer’s repayment of the TIF Loan without the prior written consent of the City (except for transfers made pursuant to foreclosure of senior loan on the Project). If Developer sells or transfers the Property to a tax-exempt entity (“Buyer”), whereupon such ownership renders the Property as property tax-exempt, Buyer shall pay the City an annual payment in lieu of taxes (PILOT) in the amount of property tax last levied as of the date of sale to Buyer, frozen, through 2051. The City of Madison shall share said PILOT in proportion with the overlying taxing jurisdictions. Buyer shall execute a PILOT Agreement and a mortgage in favor of the City in the amount of the PILOT payments (“Buyer’s Mortgage”) at the time of Buyer’s acquisition of the Property. The Buyer’s Mortgage and PILOT Agreement shall be released and terminated by the City upon the closure of TID 52. This obligation will be secured by a land use restriction terminable upon closure of TID 52.
11. Security and Corporate Guaranty. The TIF Loan shall be evidenced by notes executed by CDA, or its assigns, to the City of Madison in the amount of One Million Seven Hundred Thousand Dollars (\$1,700,000) bearing zero percent (0%) interest (together the “Note”) CDA shall loan the proceeds to Developer and Developer shall execute a note to evidence the loan from CDA to it (the “Second Note”) and also a subordinate mortgage in favor CDA. CDA will assign its interest in the Second Note and Mortgage to the City of Madison securing payment of the TIF Loan (the “Mortgage”). Developer shall deliver to the City the fully executed Second Note, endorsed to the City, to be held by the City in the event of default. The City agrees, if necessary, to execute a subordination of mortgage in a form approved by the City Attorney and acceptable to CDA Developer and Developer’s lender(s) and said subordinated Mortgage shall be in the second mortgage position. Developer and its assigns shall cause to be provided a corporate guaranty of Bear Development, LLC of the TIF Loan to the Project.
12. Satisfaction. The TIF Mortgage and Agreement shall be satisfied and the Note and Guaranty cancelled via a recordable release upon full payment of the TIF Loan.
13. Affirmative Action MGO 39.02 (9). Developer and its contractors/subcontractors shall comply with all applicable provisions of the Madison General Ordinance (MGO) 39.02 (9), concerning contract compliance requirements. Prior to commencing construction, Developer shall contact the City’s Affirmative Action Division to assure that Developer is in compliance with the aforementioned requirements. Developer shall assist and actively cooperate with the Affirmative Action Division in obtaining the compliance of contractors and subcontractors with such applicable provisions of the Madison General Ordinance. Developer shall allow maximum feasible opportunity to small business enterprises to compete for any contracts entered into pursuant to the contract. The Developer understands that it is obligated to meet the goal set by the Department of Civil Rights, or show best efforts to meet the goal based on documented evidence of efforts.

Furthermore, in order to ensure compliance with the above provisions, Developer and its contractor agree to the following:

- a. The general contractor provides a schedule of values as soon as reasonably possible following the execution of this Term Sheet.
- b. A meeting shall take place before loan closing to set affirmative action goals for the Project. Additional meetings may be scheduled at the request of DCR and must be held within 10 days of the request.
- c. At 80% completion, the goal is either met, signed contracts establish that the goal will be met, or

documented good faith efforts are shown as to why the goal is not met.

For the purposes of this paragraph, “completion” shall mean expenditure of total project costs as described in the TIF Application.

14. Accessibility (MGO 39.05). Developer shall submit a written assurance of compliance with Madison General Ordinance 39.05.
15. Equal Opportunity. Developer shall comply with all applicable local, state and federal provisions concerning Equal Opportunity.
16. Ban the Box. Developer shall comply with Madison General Ordinance 39.08 related to job applicant arrest and conviction records.
17. Material Changes. At the time of Closing, if any material adverse changes to the size, use or ownership of the Project or Property stated in the TIF Application, including any changes to the number or rent of the affordable units, have been made, this TIF Loan commitment shall be subject to reconsideration by the City. Following Closing, any material change made without consent of the City shall subject the TIF Loan to immediate repayment. Notwithstanding the foregoing, the City acknowledges that the Developer may, with the prior approval of the City, which approval may not be unreasonably withheld, reconfigure the size and use of the Project to address current market conditions (for example, the number and configuration of parking stalls may be increased or decreased, and certain space designated for office use may be converted to retail use).
18. Project Completion. Developer shall guarantee that the construction of the Project will be completed by September 30, 2026, | Project completion shall be evidenced by the issuance of a certificate of occupancy. Failure to complete the Project by said date will require payment under the increment guaranty in Sections 9 and 11.
19. Property Insurance. Prior to funding, evidence shall be provided that a property insurance policy of the proper type and amount of coverage to protect the City’s participation has been obtained. The policy shall name the City of Madison as an additional insured.
20. Title Insurance. Within thirty (30) days of the date of the Loan Agreement, Developer shall provide a commitment for a title insurance policy of the proper type and amount of coverage to the City. The City shall receive a lender’s policy in a form to be approved by the City Attorney, which will require, among other things, an updated survey of the Property. Developer shall be responsible for all lending costs and fees.
21. Environmental Assessment. Developer shall provide the City an environmental assessment of the Property which is acceptable to staff. Developer providing said environmental assessment does not modify the Developer’s indemnification obligations described in Section 22.
22. Indemnification.
  - a. Developer shall be liable to and hereby agrees to indemnify, save harmless and defend the City, its officers, officials, agents and employees against all loss or expense (including liability costs and reasonable attorney’s fees) arising from any and all claims, demands, liabilities and causes of action of whatever kind or nature related to the Property, to the extent occasioned in whole or in part by any act or omission of Developer or its officers, members agents, contractors, subcontractors, invitees or employees, which may now or hereafter be made against them, whether caused by or contributed to by the negligent acts of the City, its agents or employees.

- b. Developer shall enter into an environmental indemnification agreement with the City, which will include the following:
- i. Representations and warranties from Developer regarding Developer's knowledge of the presence of pollutants on the property, history of pollutants on the property, and any existing or possible legal proceedings or actions related to pollutants on the Property.
  - ii. Agreement by Developer to indemnify and save the City harmless from all causes of action, suits, claims, demand, judgments and liabilities arising from pollutants on the Property, failure to perform abatement, removal, etc., or other liabilities otherwise arising from environmental laws with respect to the Property.
  - iii. Agreement by Developer to timely comply with all applicable environmental laws.
- c. The indemnification provisions described in this Section will survive termination of the Loan Agreement and shall be in addition to any other rights and remedies of the City.

23. Period of Affordability. This Project will have a 30-year affordability period evidenced by a Land Use Restriction Agreement recorded in the first position, behind only a Land Use Restriction for Low-Income Housing Tax Credits with WHEDA, and if a permanent first mortgage lender is providing financing, then after such lender's permanent first mortgage and related security documents. The Land Use Restriction Agreement will remain in effect even if the Promissory Notes are satisfied before the end of the Period of Affordability.

24. Automatic Expiration. The Loan Agreement shall be null and void if either of the following occurs: (1) Developer does not commence construction on the Project, as evidenced by issuance of permits for footings and foundations, by July 1, 2024; or (2) Developer does not close on the TIF Loan by July 1, 2025. Upon expiration, the Guaranty shall be of no further force and effect.

BE IT STILL FURTHER RESOLVED that the TIF Loan to the Developer is hereby approved and that the Mayor and City Clerk are hereby authorized to execute a development agreement and other documents as may be necessary to effectuate the transaction, all of which are subject to the approval of the City Attorney.

BE IT FINALLY RESOLVED that a funding appropriation be made in the 2024 Capital Budget to authorize \$1,700,000 of funding to the Project.