



May 22, 2012

VIA ELECTRONIC MAIL

Common Council of West Lafayette, Indiana
Economic Development Commission of West Lafayette, Indiana

Re: Faith West Properties, Inc. Bond Issue

Dear Common Council and EDC Members:

We have been copied on a letter dated May 21, 2002 from The Freedom of Religion Foundation. The letter in large part reiterates the same points which previously were raised in a Memorandum dated May 4, 2012, authored by Mr. Blake Meadows.

As we have pointed out before, the “opponents” of this purely conduit bond issue are fundamentally misinformed about the nature of the proposed transaction. Here are a some clarifying responses:

1. As you know, in order to be considered as tax-exempt under federal tax law, a tax-exempt bond has to be issued by a state or local governmental entity. Most tax-exempt bonds issued by state or local governmental entities are issued for their own capital projects, such as to build schools or jails or bridges or infrastructure of whatever variety. However, since 501(c)(3) nonprofits are also recognized by the federal government as serving the societal good, the federal government for decades has also allowed 501(c)(3) nonprofits to take advantage of tax-exempt bonds. This is accomplished via “conduit bonds” issued on behalf of the 501(c)(3) nonprofit by a state or local governmental entity. In these transactions, the governmental issuer is merely providing a service for its 501(c)(3) nonprofit constituent. The governmental issuer lends its name to the transaction, so that the bonds will thus be issued by a state or local governmental entity and will therefore be viewed as tax-exempt. However, in a conduit transaction the governmental issuer has no responsibility whatsoever to actually repay the bonds. That burden falls entirely and exclusively on the 501(c)(3) nonprofit borrower. There is no governmental subsidy of any kind, there is no outlay of any governmental funds or tax revenues, and there is zero risk to the governmental issuer. The governmental issuer is merely facilitating the ability of a 501(c)(3) nonprofit borrower to gain access to the private marketplace of tax-exempt lenders.

In this case, the City would be facilitating an economic development project for Faith West in a

5526 State Road 26 E
Lafayette, IN 47905
765 448-1986
765 448-2985 fax

neighborhood that clearly needs it, at zero cost and zero risk to the City. The City would not be “supporting” the Project in any tangible sense, financially or otherwise, but merely would be serving as a conduit -- as necessary under the Internal Revenue Code so that the loan by JPMorgan Chase to Faith West can be viewed as tax-exempt under federal tax law. Any other credit-worthy 501(c)(3) nonprofit, religious or otherwise, can likewise come to the City to take advantage of the availability of tax-exempt bonds. Governmental issuers nationwide routinely issue conduit bonds of this nature, at no cost and no risk to the governmental issuers, for bona fide economic development projects in their jurisdictions. Literally thousands of these economic development transactions have been done for 501(c)(3) nonprofits all around the United States, at no cost and no risk to the governmental issuers.

In short, the City of West Lafayette would not be paying one dime toward the Faith West Project, none of the City’s tax dollars would be going toward the Project, no citizen of West Lafayette would in any way be forced to support the Project, and citizens can obviously avoid both Faith West and the Project if they so desire.

2. You previously have been provided with a short memorandum which provides a brief discussion of the First Amendment issues which have been raised. The United States Supreme Court has not had occasion to address and resolve the narrow question of whether or not a conduit tax-exempt bond issue for a 501(c)(3) nonprofit entity (which happens to be a religious entity) would violate the Establishment Clause of the First Amendment. However, a number of opinions have been issued by the Supreme Court and the lower courts which address a broader question: whether or not a neutral government program, which is available to all manner of potential recipients (religious or non-religious), would violate the Establishment Clause on those occasions when the government benefit happens to be granted in favor of a religious recipient. These cases in total stand for the clear proposition that if an entirely neutral governmental program happens to occasionally benefit a religiously affiliated recipient, such a program does not violate the Establishment Clause. This result is even more firmly entrenched where the governmental program in question does not extend a direct subsidy or a direct outlay of any government funds, but merely provides some sort of indirect benefit.

The availability of conduit tax-exempt bond issues to religiously affiliated 501(c)(3) nonprofits is strongly supported by the totality of this case law. Qualified 501(c)(3) bonds are made available nationwide under the Internal Revenue Code and a myriad of state laws in all jurisdictions. These bonds are made available on an entirely neutral basis to any and all 501(c)(3) nonprofits with capital projects, religiously affiliated or otherwise. The only limitation (as a practical matter) is whether a particular 501(c)(3) is sufficiently credit-worthy to attract financial institutions or other lenders to purchase the bonds. Moreover, the governmental benefit being extended (if any) is indirect at best. There is no subsidy or outlay of governmental funds and there is no governmental obligation to repay the debt. The “indirect” aid or benefit to a borrower comes merely in the form of being able to borrow funds from private lenders at a marginally lower rate of interest. This is due to the fact that the financial institutions or other lenders who purchase the bonds will not owe income tax on the interest payments received on their tax-exempt loan.

3. Since the Supreme Court has never ruled in a case directly on point, many bond lawyers have drawn a conservation line of demarcation in this area. The prevailing “best practice” is that tax-exempt bonds should not be utilized for capital projects (or components of those projects) which constitute spaces where direct worship activities will be conducted. Most bond counsel, for example, would be reluctant to opine in a deal where bond proceeds would be utilized to directly finance a church sanctuary, worship center, or chapel space.

Note that there is a completely separate concept under the federal tax regulations, which similarly prohibits tax-exempt bond proceeds from being utilized on project spaces where so-called “private use” activities are being conducted. This means, in large part, that bond proceeds should not be used to pay for portions of a project where for-profit merchants might be leasing space, or where the nonprofit borrower might be conducting ancillary business activities which are unrelated to its nonprofit mission.

Given these concepts, it is extremely well established -- and it is a common practice in many (if not most) bond transactions -- for troublesome components of a project to be “carved out” and funded from other sources aside from bond proceeds. Here, Faith West will be carving out the entire first floor of the Project, to be paid for from its own resources. It will use bond proceeds only on the top three floors of the four story building. The top three floors are entirely the dormitory/apartment style housing portion of the Project. The ground floor is comprised of all other spaces, including any arguable “worship” spaces, as well as all spaces where certain for-profit merchants might indeed be setting up shop.

The idea of an allocation of this nature in a bond financing is absolutely commonplace. The applicable IRS tax regulations actually allow a borrower to go back as late as 18 months after a project is completed, in order to reallocate dollars (if need be) and to make an appropriate paper trail showing that bond proceeds were not expended on problematic portions of a project. Faith West will be making an express covenant in the bond documents, and in the related tax and arbitrage certificates, to not spend bond proceeds on any portion of the first floor. This is more than adequate protection. However, Faith West is going a step further by making express arrangements with its contractor to literally segregate its bills into separate invoices for the first floor and separate invoices for the upper three floors.

4. Under Indiana Code 36-7-11.9 and 12, there is indeed language that bonds issued should be of benefit to the City in terms of economic development. There is no minimum threshold for measuring this type of benefit. As a general proposition, it is often true that the bigger the project, the bigger the boost to the local community in terms of economic development. Here, no rational argument can be made that the proposed Faith West Project will not have a positive economic development benefit. The Project will generate at least \$11,460,00 in immediate spending on the labor and materials necessary to construct the Project. It will create an estimated 100 construction job for a period of approximately one full year. Thereafter, the Project will create at least 18 permanent new jobs, and it will become a sorely needed economic development magnet in a relatively depressed area of the City. The fact that certain citizens may have a philosophical objection to Faith West, or may opt not to patronize the new facility, does not change the fact that the Project will have a very significant economic development benefit.

5. The property tax argument raised by the opponents is entirely misplaced. Whether or not Faith West pays property taxes, or makes payments in lieu of taxes, is a totally unrelated question which will be dealt with separately, whether the Project is financed with tax-exempt bonds, a conventional taxable bank loan, gifts, or any other technique. There is no proper basis for somehow holding the tax-exempt bond deal hostage pending resolution of an entirely unrelated question.

6. The employment discrimination argument is likewise misplaced. As you know, the City’s Human Relations Commission Ordinance specifically provides that religious institutions may hire based on religion, where religion is a bona fide occupational qualification for employment. This simply codifies common sense. For positions of a certain nature, Faith West or any other religious institution is obviously allowed to employ individuals who not only are qualified in terms of education and experience, but who also share a belief in the core mission of the institution. One would not expect a synagogue to be required

under the law to employ a well-qualified and experienced Catholic to run its programming, and the same principal applies to Faith West and all other religious organizations. Furthermore, opponents of the bond issue are clearly just “anticipating” that Faith West may discriminate in hiring in the future, for positions where religion may not be a bona fide occupational qualification. Faith West fully understands its obligations under the law, it has every intention of complying, and it has no track record whatsoever of prior employment discrimination. If any individual were to perceive in the future that Faith West had in fact violated the Human Relations Commission Ordinance, a well-established process is in place for voicing those complaints.

7. Yet another argument has been made that the Faith West bond issue should not be approved, since the City might not be inclined to issue tax-exempt bonds in the future for the capital projects of other 501(c)(3) nonprofit entities, which happen to have other religious beliefs or no religious beliefs. Bear in mind that literally thousands of tax-exempt bond issues have been done all over the United States for conduit 501(c)(3) borrowers affiliated with all sorts of faiths and religions, or with no religion at all. There is no reason to “assume” that the City of West Lafayette would somehow deviate from this well established practice in a discriminatory manner.

For your information, you previously have been provided with a listing of selected transactions over the past few years in which Ice Miller has been involved, which all feature the issuance of conduit tax-exempt 501(c)(3) bonds for religiously affiliated institutions of all stripes. The list contains several dozen such transactions. This list reflects the experience of only one mid-sized law firm in central Indiana, and thus represents just a tiny fraction of all such deals which have done nationwide for a myriad of religiously affiliated 501(c)(3) borrowers, from all sorts of faith traditions and all sorts of denominations.

As alluded to above, a compelling argument can be made under the Free Exercise Clause of the First Amendment that if an indirect government benefit (like the ability to borrow tax-exempt) is made available on an entirely neutral basis to all manner of 501(c)(3) nonprofits, then a conduit issuer should not be allowed to discriminate against particular applicants who have a religious affiliation or a certain type of religious affiliation. Simply put, if a governmental benefit has been made broadly available to an entire universe of potential beneficiaries, the government cannot be allowed to discriminate by denying that benefit to particular applicants on the grounds that they are religious or that they practice a certain form of religion. From this perspective, the City might actually be committing a First Amendment violation if it denies its tax-exempt bond program to Faith West. It is equally concerning for the opponents of the Project to somehow “assume” that the City will intentionally discriminate in the future against other eligible 501(c)(3) nonprofits, who happen to exercise other forms of religious belief.

8. The argument has been made that the citizens of West Lafayette would be compelled by proxy to support and erect a place of worship. As noted, the bond financed spaces will not be a place of worship. More importantly, no citizen of West Lafayette would be compelled to support Faith West or its Project, and no citizen of West Lafayette would be compelled to somehow erect the Project. Not a dime of City or taxpayer money will ever be spent on the Project. Citizens would be free to support Faith West and the Project, or not to do so, as they see fit.

9. The argument has been made that treasury funds will be drawn for Faith West’s benefit. As noted several times, that assertion is factually inaccurate and betrays a fundamental misunderstanding of the mechanics of the proposed conduit transaction.

10. As a final observation, it goes without saying that no organization which might come before the City for a conduit 501(c)(3) tax-exempt bond issue is going to be supported by all members of the local community. The point which needs to be emphasized, however, is that the Faith West Project has an undeniable economic development benefit, and it clearly fits all the criteria under the City's conduit tax-exempt bond program. There is no basis whatsoever for denying the Faith West application, aside from capitulating to the viewpoint of those in the community who view Faith West's philosophy with scorn. Anybody who is not personally supportive of Faith West for whatever reason, whether grounded in fact or misperception or even just a hostility toward all things religious, is absolutely free to steer clear of Faith West and the Project. Opponents of the Project are not being asked to contribute one penny toward the Project, either directly or indirectly through the use of their tax dollars.

With apologies for being blunt, there is no valid basis for voting "No" with regard to a Project like this one, which provides a clear economic development boost in a struggling neighborhood, at no cost to the City and no risk to the City – aside from simply discriminatory animus toward a particular borrower.

As noted, economic development projects like this one are available to all manner of 501(c)(3) nonprofit borrowers with all manner of religious and non-religious affiliations. These types of projects are being done by the scores all over the country by governmental conduit issuers. Other governmental issuers are doing deals for projects strikingly similar to this one for Jewish congregations, Episcopalians, Muslims, non-religious entities with a particular world view -- such as Planned Parenthood -- and even for 501(c)(3) borrowers affiliated with the gay/lesbian and transgender community. Other issuers who are serving as conduits are focusing solely on economic development, and are not discriminating against particular borrowers based on their particular form of religion or their particular philosophical underpinnings. For the City to do otherwise in this case would quite possibly flip this entire situation on its head, by constituting overt discrimination under the law on the sole basis of religious belief. The City should be very cautious about starting down the path of picking and choosing which economic development projects it approves, based solely on an affinity (or lack thereof) for the religious beliefs of a particular borrower. This would be a very slippery slope which the City may want to avoid.

Thanks very much for your reasoned consideration of the Faith West application.

FAITH WEST PROPERTIES, INC.

Stephen Viars

cc: Mayor John R. Dennis
Clerk-Treasurer Judith C. Rhodes