




## OFFICE OF CORPORATION COUNSEL

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To: Supervisor Khalif Rainey  
From: Colleen Foley   
Deputy Corporation Counsel  
Re: Execution of Legislative Policies  
Date: June 29, 2015

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You asked for my analysis on the obligation of Milwaukee County's executive branch to carry out policies or directives adopted in the legislative process. In particular, you are interested in options should the administration not act on legislation.

### Background:

On January 23, 2014, the Milwaukee County Board's Judiciary, Safety and General Services Committee (Judiciary Committee) considered a Resolution sponsored by Supervisors Broderick, Johnson, and Stamper, for development of a "Minority Impact Statement (MIS) Ordinance for all Milwaukee County resolutions, contracts, and grants greater than \$300,000." The stated purpose of the Resolution: "to ensure that at-risk minority populations are carefully considered when expending taxpayer resources. . . ." The Resolution contained this *Further Resolved* provision:

**BE IT FURTHER RESOLVED, that the Director of the Office of Community Business Development Partners, working in conjunction with Corporation Counsel, shall develop a recommended ordinance and related procedures to formally implement the aforementioned minority impact statement requirement for consideration by the County Board no later than the March 2014 meeting cycle.**

The full Board took up the matter at its February 6, 2014 meeting and endorsed the resolution with the previously stated *Be It Further Resolved* clause, plus this one:

**BE IT FURTHER RESOLVED, that the minority impact statement shall explain qualitatively and quantitatively the positive and/or negative impact the legislation, grant, or contract may have on the following groups:**

- Women
- African Americans and Blacks

- **Hispanics/Latinos**
- **Asian and Pacific Islanders**
- **Native Americans and Alaskan Natives**
- **Elderly, of more than 65 years of age**
- **Disabled**

On July 17, 2014, Rick Norris, Director of Community Business Development Partners (CBDP), gave a MIS status report to the Judiciary Committee. It stated in part: “DAS is working with Corporation Counsel and other departments to develop a more robust system that creates more meaningful and greater DBE participation.”

Director Norris made eleven (11) recommendations to minimize impediments to contracting opportunities and increase participation levels, at least one requiring Board approval (see \*):

- Modification of Fiscal Note to report impact of action item on MBE, WBE, SBE community.
- Modification of Department Budget Narrative to incorporate a MIS related metric.
- Elimination of proposal and bid shopping conditions and securing of minority participation in bid submissions.
- DBE participation as reflected by qualitative and quantitative measures in RFP scoring.
- Upfront CBDP involvement in RFP/BID development stage.
- Development of an outreach program to explain RFP/BID solicitation as it relates to DBE participation and the hosting of an annual consultant/contractor meeting to identify potential projections.
- Modification of MCGO Chapter 42 to include MBE, WBE or DBE firms by acceptance of State of Wisconsin certified MBE and WBE firm list (vs CBDP practice of certifying companies as both DBE and SBE). \*
- Clarification of “good faith” language to ensure uniform procedures.
- Creation of a waiver database to transform waived contracts into future contracting opportunities.

- Increased outreach to Milwaukee County Departments by CDBP and Procurement to better explain new RFP/BID document preparation and selection process.
- B2GNow: 3 year plan for departments to require that primes submit payment information to track and monitor compliance associated with payment to certified companies.

Following Director Norris's testimony, the Judiciary Committee voted (7-0) to recommend that his report be received and placed on file (file 14-552), as referenced in the County Board's July 31, 2014 meeting agenda.

#### Analysis:

Milwaukee County Corporation Counsel Paul Bargren answered a similar question in February 2015 regarding legislative/policy directives and the executive branch. The following borrows extensively from that previous opinion.

#### Overview:

Milwaukee County policies are established through legislative action, consisting of action by the County Board and subsequent consideration by the County Executive. *See* § 59.02, Stats. ("The powers of a county as a body corporate can only be exercised by the board, or in pursuance of a resolution adopted or ordinance enacted by the board"); § 59.17(6), Stats. (executive approval, veto/override or non-action).

Once the policy of the County is established through legislative action, it is to be administered or executed by the County Executive and the administrative departments that report to the Executive. By statute: "The county executive shall be the chief executive officer of the county. The county executive shall take care that every county ordinance and state or federal law is observed, enforced and administered within his or her county if the ordinance or law is subject to enforcement by the county executive or any person supervised by the county executive. Sec. 59.17(2), Stats.

#### Ordinance vs Resolution

In certain settings, a resolution may "denote something less solemn or formal than, or not arising to the dignity of, an ordinance." *Cross v. Soderbeck*, 94 Wis. 2d 331, 338, 288 N.W.2d 779, 782 (1980), citing 5 McQuillin § 15.02. McQuillan also states that "a common distinction between a resolution and an ordinance is that only the latter need be signed by, or passed over the veto of, the [executive]." *Id.* However, in Wisconsin, a Milwaukee County resolution, including the budget, is subject to the full veto and override process and so is on equal footing with an ordinance with respect to the requirement that the Executive must administer it. *See, e.g.*, 80 Op. Atty Gen. 49 (1991).

### Policy versus Administration:

Policy has been defined as “a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body.” *Webster's New Collegiate Dictionary* 890 (1977). “Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them, or appoint the agents charged with the duty of such enforcement.” *See* 2A McQuillin, *Municipal Corporations* § 10.06 at 311 (3d ed. 1996). “The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence.” *Id.*

The county board’s function is primarily policy making and legislative, while the county executive functions as an administrator and manager. *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996). A county executive is charged with “[c]oordinat[ing] and direct[ing] all administrative and management functions of the county government not otherwise vested by law in other elected officers.” § 59.17(2)(a), Stats. In Milwaukee County, the Executive is specifically designated to “administer, supervise, and direct all county departments.” 59.17(2)(b)1, Stats.

What does it mean to “administer” the county government? The standard treatise on the operation of local government has a succinct answer. Administrative and executive functions are designed to **carry out and effectuate the provisions of the laws**. 2A McQuillin *Municipal Corporations* § 10.44 (3d ed.) (emphasis added).

Where the performance of a County official’s duties requires at least some level of discretion, the official is not necessarily required to execute a Board policy the official feels is illegal or invalid. *See State ex rel. Roelvink v. Zeidler*, 268 Wis. 34, 41 (1954) (where the Milwaukee mayor felt the Common Council had acted illegally in ordering him to sign a particular deed, he was not required to do so). (There has been no suggestion of illegality about the MIS resolution.) With no legal basis to challenge the Board action, the administration should proceed to execute the “provisions of the laws” of the County as set out in the Board resolutions.

### Act 14:

That said, Act 14 must be kept in mind. It placed substantial limits on certain aspects of the Board’s authority. Specifically, Wis. Stat. 59.794(3) states:

#### 3) Limitations on board authority.

59.794(3)(a) Notwithstanding the provisions of s. 59.51, the board may not exercise day-to-day control of any county department or subunit of a department. Such control may be exercised only by the county executive as described in s. 59.17.

59.794(3)(b) A board may require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions. Except as provided in

par. (d), for the purpose of inquiry, or to refer a specific constituent concern, **the board and its members may deal with county departments and subunits of departments solely through the county executive, and no supervisor may give instructions or orders to any subordinate of the county executive that would conflict with this section.** (emphasis added)

These provisions further limit the Board's ability to direct day-to-day or administrative matters, perhaps including expeditious enforcement of MIS initiatives.

#### Remedies:

Where the Board or a supervisor feel the Board's policies are not being properly executed by the administration, the only direct remedy is a court action for mandamus. "Mandamus is an 'extraordinary writ' that may be employed to compel public officers to perform a duty that they are legally obligated to perform." *In re Doe*, 2009 WI 46, ¶ 10, 317 Wis. 2d 364, 372, 766 N.W.2d 542, 546. To pursue a mandamus action, one or more supervisors or other interested parties would file an action in Circuit Court, naming the Executive or an administrator as defendant, and ask the Court to order that the policies described in the Board resolution be carried out as stated. Outside counsel would be required.

Informal remedies include:

- asking administrators to attend committee meetings to "to provide information and answer questions" about the issue, *see* § 59.794(3)(b), Stats.;
- requiring written progress reports (*see* MCO 1.25(3) ("County officers, department heads or boards or commissions shall from time to time report to the county executive and county board the steps that have been taken in carrying out any directive"); Attorney General Opinion OAG-06-13 (August 14, 2013) ("[a] county board lawfully may require county department heads to submit periodic reports as to steps taken in carrying out any directive");
- imposing budget restrictions or similar controls as a way to compel compliance;
- Negotiations or discussions with administrators to achieve the desired results.

#### Conclusion:

The executive branch is required to implement legislative actions, including for Resolutions in Milwaukee County. Nonetheless, Act 14 limits the Board's authority to exercise day-day control over a County department. An action for mandamus would likely be required to determine the line between policymaking and administration and to require the Executive to take administrative actions, if he is not doing so. Informal remedies are available as noted.

