



OFFICE OF CORPORATION COUNSEL

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MARGARET C. DAUN
Corporation Counsel

PAUL D. KUGLITSCH
ANNE B. KEARNEY
Deputy Corporation Counsel

ALAN M. POLAN
KATHRYN M. WEST
DALE R. NIKOLAY
SCOTT F. BROWN
TEDIA K. GAMIÑO
DAVID N. FARWELL
LISA M. PROCACCIO
NELSON W. PHILLIPS III
MELINDA S. LAWRENCE
KEITH L. REESE-KELLEY
Assistant Corporation Counsel

TO: Domes Task Force
Milwaukee County Board of Supervisors
Milwaukee County Executive, Chris Abele

CC: County Clerk George Christenson (c/o Janelle Jensen)

FROM: Margaret Daun, Corporation Counsel
Paul Kuglitsch, Deputy Corporation Counsel

DATE: October 1, 2019

SUBJECT: Responses to Questions Posed by the Domes Task Force (File No. 19-806)

The Milwaukee County Task Force on the Mitchell Park Conservatory Domes (“Domes Task Force”) has completed its mission. Any new expenditure authority should be directed towards the Office of Corporation Counsel (“OCC”) and the Office of the Comptroller to conduct independent legal and fiscal analyses of the Domes Task Force’s recommendations.

Background

A little over three years ago, on March 17, 2016, the Milwaukee County Board of Supervisors (“County Board”) adopted Resolution File No. 16-200. This resolution established Milwaukee County’s policy on pursuing the repair and preservation of the existing Mitchell Park Conservatory (the “Domes”). The resolution also created the Domes Task Force. The Task Force was asked to provide a written recommendation to the Committee on Parks, Energy and Environment on how accomplish the County Board’s policy directive. To date, the County has invested approximately \$1 million in the Task Force and contractors retained by the Task Force.

Although the Domes Task Force was initially asked to present its recommendations to the Parks Committee by the September 2016 cycle, it quickly became apparent that a proposal for a project of this magnitude could not be finished in such a tight time frame. The final recommendations were approved by the Task Force on August 13, 2019 and submitted to Milwaukee County. The primary consultant is ArtsMarket, Inc., a consulting firm headquartered out of Bozeman, Montana (“Consultant¹”).

¹ For simplicity’s sake, the term Consultant will refer collectively to not only ArtsMarket, but also Engberg Anderson Architects and Saiki Design, Landscape Architects.

The recommendation has essentially six (6) parts.²

1. Milwaukee County Parks and Domes Executive Summary.
2. Business Plan and Conceptual Design (“recommendations,” “proposal,” or “Plan”).
3. Final Phase III PowerPoint.
4. Domes Task Force Resolution I
5. Domes Task Force Resolution II
6. Domes Task Force Inquiries to Milwaukee County Offices.

At the request of the Milwaukee County Department of Parks, Recreation and Culture (“DPRC”), the Consultant prepared a document entitled “Assumptions Informing the Business Plan and Conceptual Design Report to Milwaukee County Mitchell Park Domes Task Force Addressing Questions from the [DPRC]” (“Assumptions”) (Exhibit A). The Consultant also prepared a powerpoint that includes a chart of the proposed structure and interrelationships of the various required entities and a summary of assumptions, which was presented to the Task Force in May/June (“May/June Powerpoint”) (Exhibit B).

The purpose of this report is to respond specifically to Item 6 above. Please be advised that the below responses and comments are not final legal conclusions. The OCC had extraordinarily limited time to review this complex proposal and believes internal and outside expert review is both required and the logical most prudent next step.

Finally, the OCC wishes to make clear that while the proposal at least twice makes reference to “discussions with Milwaukee County legal counsel,” (Plan at 57, 83³), these discussions were preliminary, high level and should not be construed in any way as an endorsement of the proposal. The OCC has not provided any final opinion regarding any of the legal questions this Plan raises, nor should this memorandum be construed as such, as stated above.

² <https://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=3834867&GUID=196C2325-03D7-41BC-96CD-8A1D18E8A059>. See items 65-66, 77-80.

³ The reference to “the team’s pro bono legal counsel” (Plan at 83) appears to refer or imply that the Consultant retained or entered into an engagement with outside legal counsel at no cost. In the Consultant’s Responses, at page 1, they state that “we have ourselves included independent legal/real estate counsel from the Milwaukee office of Husch Blackwell on our team to review our premises and assumptions at every step.” The OCC spoke directly with this attorney. The attorney made it very clear that the Consultant is not a client of either he or his firm, and that he provided no definitive legal advice or opinion regarding the legality or feasibility of the proposal, nor did he vet, analyze in meaningful detail, nor formally opine upon any of the Consultant’s premises or assumptions.

Preliminary Thoughts and Questions in Response to Domes Task Force Inquiries

The Domes Task Force asked the OCC, the Comptroller Office, and the Economic and Community Development Director eight (8) questions. The questions and initial responses are as follows:

1. *Does Milwaukee County have the ability to create a new nonprofit corporation for management and intake of donations as foreseen in this plan? If the county does not have this power, are we reliant on a third party to create such a body?*

It depends. While the OCC is not aware of the County itself creating a nonprofit corporation in the past, the County Board has previously authorized the creation of such an entity. For example, the County Board authorized the creation of Milwaukee Public Museum, Inc. (File No. 91-775), a nonprofit corporation created to operate the public museum. The County Board also authorized a contract between Milwaukee County and Milwaukee Transport Services, Inc. (File No. 79-1196), a nonprofit corporation created to operate the transit system. Notably, the authority for creating, contracting with, and appropriating money for these nonprofit entities is derived from an express grant of authority under state law.

- Public Museum.

Wis. Stat. § 59.56(2) Public museums.

- (a) The board may appropriate money for the establishment, expansion, operation and maintenance of public museums in the county, including, but not limited to, any public museum owned by a city.
- (b) The board may acquire, establish, expand, own, operate and maintain a public museum in the county and appropriate money for such purposes, except that a public museum owned by a county under this subsection may seek tax-exempt status as an entity described under section 501 (c) (3) of the internal revenue code.
- (c) Notwithstanding pars. (a) and (b), in counties having a population of 750,000 or more the board may contribute funds toward the operation of a public museum owned by a 1st class city in such county, as partial reimbursement for museum services rendered to persons residing outside such city and in a manner similar to the annual appropriation of funds by the board under s. 43.57 toward the operation of the central library in such city.

See also, Hart v. Ament, 176 Wis. 2d 694, 500 N.W.2d 312 (1993) (holding Milwaukee County had authority to transfer management of the public museum to a nonprofit corporation).

- Transit System.

Wis. Stat. § 59.59(3) Public transit in counties. A board may:

- (a) Purchase and lease buses to private transit companies that operate within and outside the county.
- (c) Make grants and provide subsidies to private transit companies that operate bus lines principally within the county to stabilize, preserve or enhance levels of transit service to the public.
- (g) Upon the acquisition of a transportation system:
 - 1. Operate and maintain it or lease it to an operator or contract for its use by an operator.
 - 2. Contract for superintendence of the system with an organization which has personnel with the experience and skill necessary.

Moreover, it is well established that a county “has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power.” *State ex rel. Teunas v. Kenosha Cty.*, 142 Wis. 2d 498, 504, 418 N.W.2d 833, 835 (1988). In a recent opinion, the Attorney General advised Shawano County Corporation Counsel that its board did not have the authority to appropriate money to a nonprofit corporation whose “sole mission is to operate a food pantry in the county for the benefit of the county’s citizens *because state law did not allow for such an appropriation.*” No. OAG-01-17, 2017 WL 3901691 (Wis. A.G. Sept. 1, 2017). (emphasis added). Therefore, Milwaukee County can only authorize and appropriate money to a nonprofit corporation if state law authorizes it.

With respect to the creation of “a new nonprofit corporation for management and intake of donations,” it appears that the recommendation calls for the creation of the Mitchell Park & Domes Conservancy, Inc. (the “Conservancy”), a nonprofit corporation that will take the lead in “rais[ing] capital and operat[ing] funds, manag[ing] operations and oversee[ing] supporting entities, and ensur[ing] fiscal sustainability.” (Plan at 72). What is not clear or explained in detail in the proposal is how the nonprofit will be funded, what its governance structure should (or must be), will it be staffed by County employees or by newly-created positions at the Conservancy, who will pay for those staff costs, who will oversee – as a fiduciary – Conservancy operations/staff, how potential liability would be addressed, etc.

Questions:

- Is Milwaukee County responsible for appropriating startup money to the Conservancy?
- Is that legally permissible?
- Assuming Milwaukee County can appropriate money to support the Conservancy, is it ready, willing and able to? The projected staff cost in 2021 is \$500,000. (Plan at 80).
- If Milwaukee County cannot appropriate money to support the Conservancy, who or what entity will provide the financial support?
- Who will serve on the Conservancy board of trustees/directors, presuming there is one?

- The plan calls for a “transition leadership committee” to identify a minimum of 15 individuals to as many as 30 to serve on the board. (Plan at 71). What is the basis for these recommended numbers?
 - Is the transition committee to then become the Conservancy board?
 - Who is going to serve on the “transition leadership committee”? On the Conservancy board? What qualifications?
 - Has anyone been identified or shown interest in sitting on the transition committee or board?
 - Who is going to establish and pay for the other corporate entities required in the recommendation, including both limited liability corporations, a C-corporation, and an operating association? (Plan at 74-77, May/June Powerpoint).
 - How are conflicts or disputes among the other corporate entities to be resolved?
 - What about conflicts of interest among the entities and the Conservancy? And employees thereof if they are cross-staffing?
 - Does each corporate entity have a separate board and staff to avoid conflicts? At what cost?
 - Even if it is legal for the County to create (and fund) a nonprofit entity, is it legal for that entity to effectively be the holding company of for-profit subsidiaries (Assumptions at 8)?
2. *Is Milwaukee County eligible to apply for the tax credits delineated in the proposal?*
- a. *Presuming an affirmative answer to the prior question, does the County face any limitations on the credits it may receive because it is a governmental unit?*

No. Milwaukee County is not “taxpayer” and, therefore, cannot by itself apply for either Historic Tax Credits or New Market Tax Credits. The County would need to partner with a property developer or investor taxpayer, who would apply for the tax credits to offset taxable income.

Questions:

- Has the Domes Task Force identified any potential property developer or equity investor interested in the project? The recommendation mentions Grandview Management, Inc. (“Zilli”) as a potential investor. (Plan at 81). However, in other correspondence, ArtMarket, Inc. mentions that Zilli is likely not interested. *See also* Question 6.
- County staff reached out to MATC, UW-Extension, MMSD, Teens Grow Greens, and Medical College of Wisconsin. For a variety of different reasons, while these entities expressed interest in partnering with the County, none has firmly committed any grant dollars to this project, nor even speculated about any possible commitment levels significant enough to fund this project. Total grant moneys are estimated in the Plan to be approximately \$19 million, comprised of \$750,000 in year 2020, \$1 million in 2021-2023,

\$1.5 million in 2024, \$1.75 million in 2025, \$1.8 million in 2026, \$1.9 million in 2027, \$2 million in 2028-29, \$2.25 in 2030-31. (Plan at 79). If none of these potential partners firmly commits any money up front or in the medium term, how does this project get off the ground? If grant moneys fall short of projections over time, then what?

- Does the County have to effectively expend real dollars up front without knowing whether all the assumptions and structures will come to fruition as expected? Does this effectively put the County in the position of potentially spending millions without knowing if the project will succeed, ultimately forcing the County to fund first and fund to the finish – i.e., as the funder of last resort – or face potentially writing off as a loss whatever its up-front and ongoing investments are? The aspirational and excellent intentions of all stakeholders, the Task Force, and the Consultant must be measured against failure risks that appear likely to land virtually exclusively on the County.
 - Are there any structures that have been successful for other public projects of comparable complexity and time-sensitivities (i.e., completed successfully under a timetable similar to that which is proposed here and with the entity complexity, layered tax credit structure complexity similar to that which is proposed here, and a time-phased approach for construction/rehabilitation)?
3. *Has the State of Wisconsin forbid or restricted the County from mandating wage or benefits from the jobs that would be created through this plan?*

Yes. Pursuant to Wis. Stat. § 104.001(2), Milwaukee County cannot enact or administer an ordinance that establishes a minimum wage. In addition, pursuant to Wis. Stat. § 66.0134(2), Milwaukee County cannot “enact a statute or ordinance; adopt a policy or regulation; or impose a contract, zoning, permitting, or licensing requirement, or any other condition including a condition of any regulatory approval; that would require any person to accept any provision that is a mandatory or nonmandatory subject of collective bargaining under state or federal labor laws.” Therefore, the County cannot mandate wages or benefits for jobs created under the Plan.

4. *Assist the Comptroller’s office in the review of various tax credit programs and offer an opinion on feasibility.*

The OCC, the Comptroller’s Office, and the Director of Economic and Community Development have not had sufficient time to review this request.

5. *Offer an opinion on required legal contracts to move the project forward, and how they will coordinate with or be managed through the Office of Corporation Counsel.*

The OCC, the Comptroller's Office, and the Director of Economic and Community Development have not had sufficient time to review this request. In addition, the complexity of this project, i.e. the organizational structure, the tax structure, and capital stack, virtually certainly requires development, accounting, and legal expertise in addition to that of County staff.

6. *If the Domes proposal moves forward as outlined, will there be impacts related to the existing Zilli arrangement and contract?*

Yes. There is currently a 10-year Catering and Facility Management Services Agreement between Milwaukee County and Zilli for catering services at the Domes and Annex. The Agreement has two five-year extensions with an expected termination date of 2039. The recommendation is for the Conservancy to develop a partnership with a private firm to operate a catering and event space, among other private partners. These partnerships are necessary to take advantage of the proposed tax credits and other federal incentives, and the Plan assumes Zilli will be the catering/event partner. However, if Zilli is that private partner, the existing Agreement would need substantial revision, which, based on past experience, would be a highly time-consuming endeavor. If Zilli was not that partner, then Milwaukee County would have to work with Zilli to find a solution on how the Plan, if adopted, would impact the existing arrangement. The County does face possible litigation risk should the Plan be implemented.

7. *Address the structure of the taxable portions of the project, for example a Conservancy subsidiary.*

See response to Item 5 above.

8. *Assuming tax-exempt bonds will not be eligible for the County portion of the project, what type of funding could be used and how would cost be impacted?*

See response to Item 5 above.

General Comments

The OCC is keenly aware of the significant time, effort, and energy invested by the Task Force, the Consultant, County Board, and County Executive to date, the financial commitment that the County has made to help fund the work of the Task Force, as well as the significant landmark, prestige, educational, and recreational value of the Domes to the Milwaukee County community.

As the Plan repeatedly noted and is abundantly evident, this is a very complex structure, with significant legal and financial complexity, that proposes execution under an extraordinarily aggressive timetable. It appears that everything must come together "just right" for this Plan to

be a success. A Plan that has very little to zero margin for error, insufficient contingency,⁴ or delay and no ability to flex to meet changing circumstances (or to change course if assumptions or projections do not come to fruition) appears, in the OCC's opinion, to create enormous legal and economic risk for the County and its taxpayers.

Furthermore, the Assumptions appear to state that there are very few independently verifiable quantitative bases for the assumptions, or revenue⁵ and expense projections contained in the Plan.⁶ The Plan, including its forecasted revenues and operating expenses, as well as its organizational and funding structures (see above questions) are well-researched and duly-informed by the Consultant's experience and expertise, but appear to be nonetheless aspirational guesstimates. Probing whether these projections, funding sources, and funding estimates are realistic is an essential next step in the opinion of the OCC.

It also appears that unlike other public-private partnerships in the County's experience, the County must be the first to fund and the funder of last resort, under a timetable that is extraordinarily

⁴ Typical contingency funding for any real estate project is 10%, with higher contingency amounts for unique and challenging projects in the range of 15-20%. The total contingency for the capital budget here appears to be \$4 million (Plan at 55). This represents a 6% contingency.

⁵ Past admissions revenues during normal operational years have averaged around approximately \$900,000 per year. The Plan assumes the admissions revenue will be \$2.0 million by 2024 (with general grounds construction, and one of each of the three Domes closed for each of the first three years). This represents a doubling of admissions during a period of less than full operation.

⁶ For example, closely reading the Assumptions at page 8 raises numerous questions:

"[The pro forma's] revenues are based on the programming, partnership, and other assumptions stated in the Plan at pages 26-54. These assumptions were established to meet the requirements of the capital financing from HTC, NMTC, PACE, and OZ. Its expenses are based on the estimated required staffing by the Conservancy. (Pages 72-74) It does not include the operating budgets of the subsidiaries." This may be circular; it appears to say that the pro forma was essentially backed into based upon the total moneys projected from the capital stack. What if the tax credits and opportunity zone do not generate as much as expected? What if the operating revenues do not match projections? What if expenses exceed estimates? What if the staffing needs are greater than guesstimated? What if the rehabilitation takes longer than estimated to complete?

Page 8 appears to answer some of these questions by placing the downside risk squarely on the County's/Conservancy's shoulders, when it states, "It is the Conservancy's responsibility to meet the revenue goals and thus pay down the capital financing. It is the Conservancy's role to create, maintain, and grow the subsidiary entities required by the capital stack. It is the Conservancy's role to work with the newly created developer entity ... to develop the property." In the August 9 Responses at page 3, the Consultant echoes this sentiment, stating "It will be up to the County to make this happen or potentially lose revenue."

Notably, the revenues are characterized as "hypothesized" twice on page 8 of the Assumptions.

In other correspondence, the Consultant has stated that "more detailed costs cannot be projected until the County's other reports are completed It should be the responsibility of the County and/or Conservancy to do the next round of detailed operating budgets – as per our recommendations." (Email from Consultant to County staff on August 31, 2019.)

aggressive, where parties outside of the County's control will have a determinative impact on the ultimate success of the project, including but not limited to third-party developers, third-party partners, granting entities, the fundraising capability of the affinity friends group, and the Internal Revenue Service.

Moreover, it is a certainty that significant outside legal counsel expenses will be incurred, excluding initial diligence into the legality of the proposed structures, the creation of the required entities, ongoing careful monitoring of loan repayment deadlines, regulatory compliance, governance and oversight. Should anything go awry – like the IRS rejecting one of the tax credits or auditing the structure or a legal dispute among subsidiaries – legal fees could increase even more so, and potentially put the County into a state of prolonged operational uncertainty.

The OCC has reviewed the proposed timetable (Plan at 89) and it is our opinion that the deadlines related to the creation of the requisite legal entities is not feasible.

In summary, the goal of the Plan is unclear to the OCC. Was this Plan designed to identify a fiscally-sustainable, likely to succeed, operationalizable, detailed business plan to market to potential private sector partners and grating entities? If so, it is the opinion of the OCC that this does not fulfill this mandate. If, however, the Plan was intended to instead be a vision of a possible hypothesized path forward that may or may not succeed, and will require significant vetting, further analysis and development of the business plan, then this Plan does fulfill that objective.

But there exist strong indications that certain details were simply filled in to reach a predetermined result – i.e., to make the demolition costs greater than the County's contribution under this Plan and a lower-than-typical capital budget contingency. It is the opinion of the OCC that the true costs to the County (both capital and ongoing operational costs) are very likely to be higher than what is stated in this Plan.

Policymakers, stakeholders, and the public will ultimately determine the highest and best use of increasingly scarce County budget dollars. The opportunity costs for County dollars cannot be ignored. Acute public interest in rehabilitating the Domes, separated or viewed in isolation from the scarcity of public dollars, other County public programming funding needs, and the significant legal risks inherent within the Plan, presents an incomplete picture. In summary, the OCC believes that a serious vetting of the legal and fiscal feasibility of the Plan is required, as well as the development of a more realistic timetable and pro forma based on past experience, aided by objective, independent outside expert assistance as required and directed by the OCC and Comptroller's Office.
