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CC: Scott A. Manske, Comptroller

RE: Conflicts Created by Act 55 Related to the Scope of Board and County Executive Authority

DATE: March 3, 2017

EXECUTIVE SUMMARY

In 2015 Wis. Act 55 (“Act 55”), the state legislature expressly took away certain powers from the Milwaukee County Board of Supervisors and granted those powers to the County Executive. Under Act 55, newly revised section 59.17(2)(b)3. granted to the executive all of the powers under 59.52(6), as well as what appears to be nearly unilateral authority to “s[ell], acqui[re], or lease as landlord or tenant” any non-park county property, including both non-park real estate and personal property.

By doing so, Act 55 also created conflicts among the statutes that define the powers of the executive and board. Put simply, because the subsections of 59.52 define the board’s powers, and because many of those overlap with or are directly related to the powers detailed under subsection 59.52(6), which was delegated by the legislature to the executive, as well as the powers newly granted under the language added to section 59.17(2)(b)3. by Act 55, irreconcilable conflicts arise. For example:

- Section 59.52(6)(b) under Act 55 grants to the executive the power to “make all orders concerning county property.” How is this extremely broad language to be harmonized with other subsections of 59.52, such as 59.52(2)-(4), (14) (addressing county records)? Or 59.52(11) (insurance), 59.52(19) (donations and gifts), 59.52(23) (reference materials), and 59.52(24) (parking on county lands)?
- Section 59.52(6)(b) under Act 55 also grants to the executive the power “to commence and maintain actions.” But how can this be reconciled or harmonized with section 59.52(12),

which grants to the board the power to “[e]xamine and settle ... all claims, demands, or causes of action against the county and issue county orders therefor”?

- Section 59.52(6)(d)2. under Act 55 also appears to grant the county executive authority to issue revenue bonds under 66.0621, while section 66.0621 requires board authority for bonding irrespective of whether the land is parkland.
- When the legislature wrote in 59.17(2)(b)3. that the executive had the power to “s[ell], acqui[re], or lease as landlord or tenant” any non-park county property, did the legislature mean to place this power outside of the limit specified in 59.60(12), which mandates board review of any “contract, lease or other obligation requiring the payment of funds from the appropriations of a later fiscal year or of more than one fiscal year”?
- And very broadly, how do these changes and conflicts get harmonized and applied to service contracts – both professional and procurement-based?

These conflicts, among others, discussed in turn at greater length below, cannot be reconciled by the Office of Corporation Counsel (“OCC”) because in doing so, the OCC would be forced to decide the fundamental balance of powers between the board and the executive in Milwaukee County, which in turn would usurp the state legislature’s function. Therefore, the OCC recommends resolution of these conflicts through an opinion from the state Attorney General, a declaratory judgment action, and/or legislation.

ANALYSIS

In the wake of Act 55, the OCC received many requests from departments and/or Supervisors to determine whether contracts require County Board approval and if so, by what mechanism. The OCC responded to these inquiries largely on a one-off basis, (i.e., County Board approval is/is not required for “x” contract) and frequently worked with the Comptroller’s Office to ensure consistent application of its interpretations. In the course of its responses to specific contracting authority inquiries, the OCC also provided many general statements of interpretation regarding the Act 55 changes to Chapter 59, Wis. Stats. These interpretations continue to guide the OCC’s ongoing advice to clients.

Importantly, despite having issued innumerable formal and informal opinions regarding contracting authority since the enactment of Act 55 a little less than two years ago, this office continues to receive such inquiries on a near daily basis for three interrelated reasons.¹ First, prior to the issuance of this opinion, the OCC had not undertaken a comprehensive analysis of post-Act 55 provisions of Chapter 59, sought to expressly harmonize the changes made by Act 55 with other key Chapter 59 subsections, nor expressly considered the impacts of Act 55 on the many different types of contracts the County executes, such as procurement contracts, professional services contracts, non-professional services contracts, as well as sales, acquisitions, and leases of both real

¹ For example, in January, during the last legislative cycle, Supervisor Dimitrijevic requested an analysis of Chapter 32 of the County’s ordinances related to procurements, as well as professional services contracts, in light of Act 55. See Opinion, March 3, 2017, issued contemporaneously herewith.

and personal property.² Second, contracting authority has critical separation of powers implications. Third, key County stakeholders remain confused as to when County Board approval is required.

This opinion reviews the changes made by Act 55 to Chapter 59 (as well as the prior opinions of the OCC), sets forth some of the significant interpretation challenges posed by Act 55's revisions, highlights the critical balance of power issues raised by these interpretation challenges, and ultimately concludes that the OCC cannot offer a comprehensive interpretation of Chapter 59, as amended, because of the conflict of interest these questions raise among the County Executive and County Board. As noted above, this opinion recommends resolution of these interpretation challenges by one or all of the following options: an opinion from the Attorney General's Office, litigation, and/or legislation.

I. Rules of Statutory Interpretation

Courts will construe statutes to determine the legislature's intent. *State ex rel. Kalal v. Circuit Court for Dane Co.*, 2004 WI 58, ¶ 38, 271 Wis. 2d 633, 681 N.W.2d 110. To do so, the courts first look to the plain language of the statute. *Id.*, ¶ 37. Where the plain language cannot resolve a question of interpretation, or where statutes appear to conflict, courts next turn to the context of several statutes and any expression of legislative purpose in the statute. *Id.*, ¶ 49. Furthermore, courts must seek to harmonize statutes and avoid absurd results. *State v. Gould*, 56 Wis. 2d 808, 812, 202 N.W.2d 903 (1973). Additionally, courts presume that legislatures enact new statutes with full knowledge and awareness of prior-existing statutes. *See Storm v. Legion Ins. Co.*, 2003 WI 120, ¶ 29, 265 Wis. 2d 169, 665 N.W.2d 353. And statutes of specific application trump statutes of general application, *Ahrens-Cadillac Oldsmobile, Inc. v. Belongia*, 151 Wis. 2d 763, 766, 445 N.W.2d 744 (Ct. App. 1989). *See also* P. Bargren Op., May 16, 2016, Exhibit A (attached as Ex. 10).

II. Act 55

A. Background

Before beginning the analysis of the changes made by Act 55 (and its predecessor, 2013 Wis. Act 14 ("Act 14")) to the balance of power in Milwaukee County, it is important to note the overarching statutory structure that defines, limits, and in some instances, specifies in detail the powers of the county's legislative and executive branches of government. Subchapter IV of Chapter 59, section 59.17, specifies the county executive's powers, duties, and authorities. It states that the 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

² Black's Law Dictionary, 7th ed. (1999) at 1233, defines personal property as, "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." In short, personal property is anything that can be owned or used that is not real estate, including both tangible and intangible things. *See* Wis. Stat. §§ 990.01(27); 70.03; 70.04; *In re Estate of Larson*, 196 Wis. 2d 231, 235, 538 N.W.2d 802, 803 (Ct. App. 1995) ("bank deposits, checks, annuities and trust agreements are all ... intangible personal property. . . . This conclusion is consistent with the law defining tangible and intangible personal property in other areas of the law, as in construing intangible personal property to include cash."); *Acharya v. Carroll*, 152 Wis. 2d 330, 335-36, 448 N.W.2d 275, 278 (Ct. App. 1989).

administered” and further specifies a litany of additional powers, some with limitations, others not, some shared with the board, others not, as discussed in more detail below. Wis. Stat. § 59.17(2). For example, the county executive appoints and supervises department heads, establishes departments, signs contracts, introduces proposed ordinances and resolutions for consideration by the board, hires and supervises the staff of his office, and exercises a veto right over legislation. *See* Wis. Stat. §§ 59.17(2)(b) 2.-7.; 59.17(6).

Subchapter V of Chapter 59, sections 59.51 and 59.52, define the county board’s powers, duties, and authorities. Subsection (1) of section 59.51 states that the board “shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive.” This subsection further states that “these powers shall be broadly and liberally construed and limited only by express language.” Section 59.52 then provides an exhaustive listing of powers and duties, some limited and others not, as discussed further below. These span everything from record retention to insurance to establishment of a civil service system and beyond.

B. Act 14

Two years before the enactment of Act 55, in 2013, the state legislature effected a significant shift in the balance of powers between the executive and the board in Milwaukee County. *See* Act 14. While portions of Act 14 are currently under litigation regarding exactly to what degree and in what precise manner the legislature shifted that balance, *see Lipscomb v. Abele*, Milwaukee County Circuit Court Case No. 2016-CV-2888, Act 14 *generally* decreased the board’s powers and increased the executive’s powers. For example, the executive’s power to control county departments and their day-to-day operations increased, *see* Act 14, § 10 (59.17(2)(b)1.), § 11 (59.17(2)(b)2.), § 33 (59.794(3)(a)) (attached as Ex. 1). *But see Lipscomb v. Abele, supra* (debating extent of changes particularly regarding control over compensation).³ Moreover, Act 14 decreased board member salaries and benefits, as well as their term of office. *See* Ex. 1, §§ 3-7, 9, 23. Notably, the state legislature applied these changes only to Milwaukee County, and no other Wisconsin County. *See* n.5, p. 5, *infra*.

Critical to the instant analysis, Act 14 granted the executive concurrent authority with the board over contracts to acquire, lease, rent, or sell county property, both real and personal. *See* Ex. 1, § 2 (59.06(2)), § 11 (59.17(2)(b)3.), § 15 (59.52(6)(a)). *See also* P. Bargren Op. Oct. 16, 2013 at 1 (attached as Ex. 2). Specifically, Act 14 stated that in Milwaukee County, the executive would now have the power to:

[e]xercise the authority under s. 59.52(6)(a) that would otherwise be exercised by a county board. With regard to the sale or lease of property, the county executive’s action must be consistent with established county board policy and must be approved by the county board to take effect. The county board may only approve or reject the contract as negotiated by the county executive.

³ Act 14 also shifted power to the executive regarding child and spousal support programs, Ex. 1, § 17 (59.53(5)(a)); work centers, § 20 (59.53(20)); relief programs, § 21 (59.53(21)); and harbor facilities, § 27 (59.70(8m)).

See Ex. 1, § 11 (59.17(2)(b)3). Subsection 59.52(6)(a) enumerated these co-extensive powers under Act 14 to include the power to “take and hold land ... and acquire, lease or rent property, real and personal, for public uses or purposes of any nature... .” Ex. 1, § 15. Importantly, however, Act 14 also limited the board’s role in the consideration of a property transaction to an up or down vote on the contract, without amendment. See Ex. 2, P. Bargren Op. Oct. 16, 2013 at 1.

Act 14 also created section 59.52(31), applicable only to Milwaukee County, which established the exclusive jurisdiction of the board’s finance committee over all contracts, whether property-related or not, and set forth different board contract review processes depending upon the dollar threshold involved. Ex. 1, § 16.

C. Act 55

Act 55 continued the legislature’s shifting of certain powers from the board to the executive in Milwaukee County. See generally Act 55 (attached as Ex. 3).⁴ See also P. Bargren Op., July 8, 2015 at p. 2 (attached as Ex. 4) (“[Act 55] would complete a transition that began with Act 14 two years ago.”) Relevant here, Act 55 made the following changes (insertions noted by underscore and deletions by ~~strike through~~) to the subsections of Wisconsin statute section 59.17 as noted below (emphasis in ***bolded italics*** added).

(2) The duties and powers of the county executive shall be, without limitation because of enumeration, to:

(b) In any county with a population of 750,000⁵ or more:

3. ***Exercise the authority under 59.52(6)(a) that would otherwise be exercised by the county board***, except that the county board may continue to exercise the authority under s. 59.52(6) with regard to land zoned as park... . With regard to the sale ~~or~~ acquisition, or lease as landlord or tenant of property, other than certain park land as described in this subdivision, the county executive’s action ~~must need not~~ be consistent with established county board policy and ~~must be approved by~~ ***may take effect without submission to or approval by the county board to take effect.*** ~~The county board may only approve or reject the contract as negotiated by the county executive. ... Before the county executive’s sale of county land may take effect, [the county executive and either the comptroller or an individual selected by the executive committee under s. 59.794(1)(d) must certify in writing that they] believe the sale is in the best interests of the county.~~

Ex. 3, §§ 1907m, 1907n.

⁴ 2013 Wis. Act 203, enacted in April of 2014, further tilted the balance of power by creating the Milwaukee County Mental Health Board to control mental health services in the county and in doing so, removed the County Board’s authority over mental health services.

⁵ At the time of enactment, Milwaukee County was – and remains – the only Wisconsin County with a population of 750,000 or more. This fact was well known to the legislature and the governor at that time and thus, it is not a matter of reasonable debate that the changes were intended only to impact Milwaukee County.

In addition, Act 55 also amended section 59.52(31) and created subsection (e), which states that section 59.52(31) (described above) shall not apply to any transaction covered by section 59.17(2)(b)3. See Ex. 3, § 1914h.

Critically, the powers enumerated under section 59.52(6), now vested in the County Executive with respect to non-parkland, are vast. It states (emphasis in ***bolded italics*** added):

(6) PROPERTY. Except as provided in s. 59.17(2)(b)3., the board may:

(a) How acquired; purposes. ***Take and hold land*** acquired under ch. 75 and ***acquire, lease or rent property, real and personal, for public uses or purposes of any nature***, including without limitation acquisitions for county buildings, airports, parks, recreation, highways, dam sites in parks, parkways and playgrounds, flowages, sewage and waste disposal for county institutions, lime pits for operation under s. 59.70 (24), equipment for clearing and draining land and controlling weeds for operation under s. 59.70 (18), ambulances, acquisition and transfer of real property to the state for new collegiate institutions or research facilities, and ***for transfer to the state for state parks*** and for the uses and purposes specified in s. 23.09 (2) (d).

(b) Control; actions. Make ***all orders concerning county property*** and ***commence and maintain actions*** to protect the interests of the county.

(c) Transfers. Direct the clerk to ***lease, sell or convey or contract to sell or convey any county property***, not donated and required to be held for a special purpose, on terms that the board approves. In addition, any county property may be leased, rented or transferred to the United States, the state, any other county within the state or any municipality or school district within the county. Oil, gas and mineral rights may be reserved and leased or transferred separately.

(d) Construction, maintenance and financing of county-owned buildings and ***public works projects***.
1. ***Construct, purchase, acquire, lease, develop, improve, extend, equip, operate and maintain all county buildings, structures and facilities hereinafter in this subsection referred to as "projects"***, including without limitation because of enumeration swimming pools, stadiums, golf courses, tennis courts, parks, playgrounds, bathing beaches, bathhouses and other recreational facilities, exhibition halls, convention facilities, convention complexes, including indoor recreational facilities, dams in county lands, garbage incinerators, courthouses, jails, schools, hospitals and facilities for medical education use in conjunction with such hospitals, homes for the aged or indigent, regional projects, sewage disposal plants and systems, ***and including all property, real and personal, pertinent or necessary for such purposes***.

2. ***Finance such projects, including necessary sites, by the issuance of revenue bonds*** under s. 66.0621... .

3. ***Operate or lease such projects in their entirety or in part, and impose fees or charges for the use of or admission to such projects***. Such projects may include space designed for leasing to others if such space is incidental to the purposes thereof.

(e) Leases to department of natural resources. ***Lease lands owned by the county to the department of natural resources*** for game management purposes. ...

Finally, Act 55 did not amend section 59.60(12), which addresses multi-year contracts. It states, in its last sentence, that “[t]he board shall make or approve by resolution each contract, lease or other obligation requiring the payment of funds from the appropriations of a later fiscal year or of more than one fiscal year.”

D. Prior Opinions and Preliminary Interpretations

As noted above, the OCC has issued a multitude of opinions considering the ramifications of both Act 14 and Act 55. Although nearly all of these opinions focused on the consideration of a particular contract, the variance among them as to general interpretations of the relevant statutes following Act 55 is small, with one notable exception discussed in the next section. These consistent interpretations, coupled with the plain language of the statutes, can be synthesized into a handful of key preliminary interpretations.

1. Act 55 took all of the powers listed in section 59.52(6) from the county board and gave them to the county executive except as to parkland and except as noted in points 4, 5, and 6 below.
 - “[Act 55] delegate[s] to the Executive all of the power that a county board normally exercises under 59.52(6)...” Ex. 4, p. 2.
 - “By adopting § 59.17(2)(b)3, the Legislature gave the Milwaukee County Executive specific authority over all of the § 59.52(6) functions as to non-park Milwaukee County property. This was a clear delegation of power by the Legislature to the Executive.” P. Bargren Op. Oct. 7, 2015, p. 1 (attached as Ex. 6).
 - “The entire point of § 59.17(2)(b)3 was to allow the Executive to take action to ‘operate and maintain’ (and lease and sell) **without** board approval. The legislature’s intent to give that authority solely to the Executive needs to be seen as trumping the existing board/executive procedure.” *Id.*, p. 2.
 - “Act 55 . . . gives the County Executive sole authority over county land that is not zoned as a park, removing such authority from the County Board. Wis. Stat. 59.17(2)(b)3. This gives the Executive sole authority to lease space – such as vendor space – at [General Mitchell International Airport] without County Board approval.” P. Bargren Op., Nov. 11, 2015, p. 1 (attached as Ex. 7). *See also* P. Bargren Op., Dec. 23, 2015 (attached as Ex. 8).
2. These powers apply not just to non-park real estate, but **all** county property, including personal property.⁶
 - “[Act 55] delegate[s] to the Executive all of the power that a County Board normally exercises under § 59.52(6), Stats., concerning county real estate and personal property.” Ex. 4, p. 2.
 - “By adopting § 59.17(2)(b)3, the Legislature gave the Milwaukee County Executive specific authority over all of the § 59.52(6) functions as to non-park Milwaukee County property.” Ex. 7, p. 2.

⁶ Although Act 55 raised many questions and conflicts, as this opinion explores, the delegation of power by the legislature from the board to the county executive over non-park property, inclusive of both non-park real estate and **personal** property, cannot be reasonably disputed. Most importantly, the precise “personal property” or the generic “property” is used throughout section 59.52(6), when elsewhere in subsection (6) and Chapter 59, the precise “land” is used. Based on the principles of statutory construction, discussed above in Section I, *see supra* p. 3, the plain meaning must be given to these terms and thus, the county executive’s authority under Act 55 indisputably applies to both non-park real estate **and** personal property, as detailed further below. *See also* n.8, p. 11, *infra*.

3. According to subsection (e) of section 59.52(31), its required board and committee review processes ***do not*** apply to any of the executive's powers under section 59.52(6), regardless of contract value.
4. Because section 59.60(12) (requiring board approval of multi-year contracts) was not amended in any way by Act 55, it arguably applies to all of the executive's powers under 59.52(6), ***except*** sales, leases, or acquisitions of property under the plain language of the statute. The reason section 59.60(12) does not apply to property sales, leases, or acquisitions is because later-enacted section 59.17(2)(b)3. expressly states that those functions can be executed by the county executive, except as to parkland, "without submission to or approval by the county board" and without complying with "established county board policy." Although in conflict, section 59.17(2)(b)3. was a later-enacted statute, with a more specific reallocation of power by the legislature from the board to the executive. To give meaning to the legislature's intent, section 59.17(2)(b)3. must trump section 59.60(12). *But see infra* p. 10, Section III.2. Therefore, under this interpretation, the executive must seek county board approval for any multi-year contract except multi-year or single-year contracts for property sales, leases, or acquisitions, which the executive controls (subject to points 5 and 6 below). Note also that this provision of section 59.17(2)(b)3. concerns a sale of "property" – meaning either real estate or personal property. Since elsewhere in 59.17(2)(b)3. the legislature differentiated between land and other property, to give full meaning to the words of the statute and the intent of the legislature, this provision must be interpreted as applying to both real estate and personal property.⁷ *But see infra* p. 10, Section III.1.
5. The executive's "sale of county land" requires written certification that the sale is in the best interest of the county by either the comptroller or a representative from the executive council (as well as the executive himself) under 59.17(2)(b)3. Note that by its terms, this provision in section 59.17(2)(b)3. applies only to "***sales***" of "***land***" and does not apply to leases or acquisitions or to property other than land.
6. The executive's authority and power is necessarily subject to funding made available by the board through the budget process, bonding, or otherwise.
 - Ex. 4, p. 2.
 - "Even where the Executive is exercising authority under § 59.17(2)(b)3 over non-parkland without Board consideration, the Executive still must have budget

⁷ As to whether a contract is considered to be encumbering future fiscal years and/or a multi-year contract and potentially under the purview of section 59.60(12), the OCC looks beyond any labels or other stylings of a contract to assess the likely and intended term of the contract. Thus, a contract that automatically renews would be considered a multi-year contract. If a contract only has an option to renew (whether it requires the consent of both parties or mere notice by one party), so long as the initial term and the renewal term was each a year or less, it would not be considered a multi-year contract. After a contract is in effect, an option to renew may or may not itself be considered a multi-year contract, depending on the length of the option term. The OCC strongly advises against drafting contracts with terms that provide for "automatic" renewals contingent upon sufficient appropriations because this complicates contract administration as it may become unclear whether dollars appropriated to the relevant department were intended to cover a particular contract or were for other purposes. Finally, an otherwise multi-year contract is not somehow arguably "transformed" into a single-year contract for purposes of section 59.60(12) simply because an option to terminate the contract exists. Exceptions to these guidelines may be considered on an ad hoc basis.

authorization if spending is required. For example, the Executive would need funding through an appropriate departmental budget before he could issue a contract to operate or maintain a non-parks facility. That funding would be part of the Board's annual budget review and approval process." Ex. 10, pp. 2-3.

III. The Interpretation Challenges Posed by Act 55 Cannot be Resolved by the OCC

Prior Corporation Counsel Bargren noted key canons of statutory construction in an earlier opinion considering the interpretation of Act 55 issued on May 16, 2016. *See* Ex. 10, p. 5. In it, he stated:

The express grants of authority to the Executive in Act 55 and § 59.17(2)(b)3 supersede the more general grants of authority to the Board in certain areas for the following reasons.

First, the express and specific delegation of authority by the Legislature in Act 55 came after provisions like § 59.58 regarding airports were already on the books. The Legislature expressly granted the [executive] broad authority to exercise all powers listed in § 59.52(6). If the Legislature had meant to exclude use of that authority over GMIA or other county property, it would have so specified, just as it excluded the Executive's authority to control land that is zoned as a park.

Second, historically and in practice, the powers set out in § 59.52(6) have been exercised by the County Board in connection with and in addition to any enabling legislation. . . . [t]he County is authorized to [fulfill a particular function or service by a particular enabling statute], but the County's many specific options to exercise control over the operation, use and disposition [and other relevant powers related thereto] of [a particular function or service] are set out in § 59.52(6). In Milwaukee County, that authority is now delegated to the Executive by Act 55 and § 59.17(2)(b)3.

Third, although [a statute] says "the **board** may ... operate and maintain [x, y, z]," any board action to do so is necessarily subject to approval or veto by the Executive. The entire point of § 59.17(2)(b)3 was to allow the Executive to take action to "operate and maintain" (and lease and sell) [among other authorities and actions] **without** board approval. The legislature's intent to give that authority solely to the Executive needs to be seen as trumping the existing board/executive procedure.

Finally, I note that the legislature [sic] delegation of authority to [sic] Executive in this regard is consistent with § 59.51(1), Stats., which states as relevant here:

The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive . . .

The enactment of § 59.17(2)(b)3 is such an enactment of the legislature.

In short, consistent with the longstanding principles of statutory construction noted in Section I, *supra*, prior Corporation Counsel Bargren took the view that the legislature's unequivocal re-delegation of authority from the board and to the executive in section 59.17(2)(b)3. must trump other, earlier statutes that appear to delegate powers to the board in conflict with any of the powers enumerated in section 59.52(6) and now delegated to the executive under section 59.17(2)(b)3.

However, applying that approach (as well as the preliminary interpretations noted in Section II.D., *supra*) uniformly and consistently among even a small subset of the key subsections of the statutes at issue leads to absurd results and makes harmonizing the statutes nearly impossible, thereby violating other principles of statutory construction noted previously. We describe a number of the interpretation challenges below:

1. Sections 59.17(2)(b)3. and 59.52(6) use the terms land, personal property, and property. Is it correct to interpret each use as deliberate (i.e., use of “property” means both real and personal property? And the use of “land,” excludes personal property?). As noted in Section II.D.4.-5., *supra*, this key question of interpretation has important implications. For example, one clause of section 59.17(2)(b)3. states that “[w]ith regard to the sale, acquisition, or lease ... of *property*, other than certain park *land*...” – should the reference to “land” be imputed to the earlier use of the word “property” such that it is interpreted as “real property”? Or, does it mean what it says – namely that property includes both real property and personal property as to the county executive’s power to buy, sell, or lease? Regardless and as noted above in Section II.D.4., *supra*, when the legislature wrote in 59.17(2)(b)3. that the executive had the power to “s[ell], acqui[re], or lease as landlord or tenant” any non-park county “property,” did the legislature mean to place this power outside of the limit specified in 59.60(12), which mandates board review of any “contract, lease or other obligation requiring the payment of funds from the appropriations of a later fiscal year or more than one fiscal year”? See also n.9, p. 12, *infra*.

2. As discussed above, in enacting section 59.17(2)(b)3., the legislature took away the board’s powers under 59.52(6) and gave them to the executive. But powers enumerated in subsections of section 59.52(6) appear to conflict with other grants of authority or power to the board under other subsections of 59.52. In short, subsection (6) covers nearly every conceivable power related to property. See Ex. 10, p. 2 (“comprehensive list of powers”); see also P. Bargren Op., Jul. 17, 2015, pp. 1-2 (“bundle of rights” ... “full panoply of rights”) (attached as Ex. 5). Of particular note, section 59.52(6)(b) includes the incredibly broad power to “[m]ake all orders concerning county property.” This would include non-park personal and real property. How is this reconciled with many of the other subsections of section 59.52? For instance:

- a. Section 59.52(2)-(4), (14) addressing records of the county. Records are property. So does the board control records, or the executive, or both?
- b. Section 59.52(11) addresses insurance for county property – but again, it is about property. Is that covered by 59.52(6)(b)?
- c. Section 59.52(19) specifies that the board may accept donations, gifts, or grants for a public purpose – again, these things are all property and thus subject to section 59.52(6).
- d. And the same question applies to sections 59.52(23) and (24).

3. Equally important, section 59.52(9) provides that the board may appoint a purchasing agent. But purchasing functions (at least of non-park property) would be arguably covered by section 59.52(6). So, who controls purchasing? For example, in Milwaukee County, there is no purchasing agent. Instead, the County uses a Procurement Director, appointed by the Director of the Department of Administrative Services. So, what does this mean for the County’s procurement process under Chapter 32 of the County’s ordinances? Even if it was the legislature’s intent to

place the procurement processes within the executive's discretion, was it also the legislature's intent that such contracts would not be covered by sections 59.60(12) (regarding appropriations from future years) and/or 59.52(31) (regarding contracts at certain dollar thresholds)?

Similarly, what does Act 55 mean for RFP processes and professional service contracts? Is the key whether these contracts somehow relate to property (in which case, the executive controls)? Arguably, most contracts could be viewed as relating to non-park property in some way – whether that is real estate or personal property. Take as examples: a services contract to provide physicians and nurses at the County Jail – is the property the jail? Or a contract to hire an outside law firm to assist DAS on a non-parkland deal – much more clearly related to property. Or what about a contract with an actuary to assist the comptroller's office – are the pension assets or county tax revenues the relevant non-park property? And what does this mean for Chapter 56 of the County's ordinances? Even if it was the legislature's intent to place professional services contracts and RFP processes within the executive's discretion, was it also the legislature's intent to also place such contracts outside the reach of sections 59.60(12) and/or 59.52(31)?

Or, are all *services* contracts – both professional and general – still subject to section 59.52(31), even if they are directly related to non-park real estate or personal property, while procurement contracts or RFPs for actual *property* – whether real or personal – are now outside of the reach of both sections 59.60(12) and 59.52(31) – rendering the distinctions between Chapters 32 and 56 of the County's ordinances irrelevant? Or, must some case-by-case analysis be undertaken to determine if a given services contract is sufficiently related to non-park property to fall under the rubric of section 59.17(2)(b)3. and outside of the county board's oversight authorities under sections 59.52(31) and 59.60(12)?⁸

⁸ A prior OCC opinion provides attenuated support for this approach. In an opinion dated January 26, 2016, prior Deputy Corporation Counsel Mark Grady exclusively focused on section 59.52(6)(d)1., and did not consider any other subsection of 59.52(6), nor any of the actual language of section 59.17(2)(b)3. See M. Grady Op., Jan. 26, 2016, pp. 1-4 (attached as Ex. 9). Deputy Grady thereby provided a too narrowly drawn opinion as to the executive's powers under Act 55, concluding – despite no statutory language in Chapter 59 to this effect – that for a contract to fall under the executive's authority per section 59.17(2)(b)3., the contract must be “required in order to render a building, structure, or facility capable of functioning as a building, structure or facility, as opposed to those things required to operate the programs contained within the facility.” See Ex. 9, pp. 1, 4. Aside from being an untenable concept, requiring legal opinions as to nearly each and every contract, it can be concluded that the opinion is inaccurate for three additional reasons. First, the gravamen of the analysis attempts to answer the question of what it means to “operate” a “facility” – a concept which appears only in section 59.52(6)(d)1. Second and related, the plain language of nearly every other subsection of 59.52(6) includes powers much broader than the operation of buildings and facilities, and expressly incorporates powers related to non-park personal property throughout subsection (6) (Deputy Grady, however, states that 59.17(2)(b)3. conferred only “general real estate authority,” see Ex. 9, p. 4; n.6, p.7, *supra*). Third, the opinion has led to “absurd” results (i.e., county board approval is not required for leasing of space at the airport or the zoo, but it is required to permit mold-o-ramas or stroller rentals at the zoo; it is not required for concession operations at the airport, but it is required for concession operations at the zoo). See Ex. 9, p. 4; Ex. 8, p. 1 (seeming to place emphasis on the fact that the concessions agreement was styled as a lease. However, similar to the analysis of whether a contract is multi-year, see n.7, *supra*, a determination of whether board approval is required should not hinge on whether the agreement is styled as a lease of café space or a services agreement to provide food concessions). Notwithstanding the foregoing, at this time, when a services contract is under consideration, it is appropriate to undertake a review of whether that services contract is sufficiently related to non-park county property – either personal property or real estate – to bring it under the aegis of the executive's powers under sections 59.17(2)(b)3. and 59.52(6). See Opinion, March 3, 2017, issued contemporaneously herewith.

And what about appeals of procurement or other contracting decisions – does Milwaukee County Ordinance section 110 apply or Chapter 68, Wis. Stats.? And who ultimately controls these processes – the executive or the board? And if the underlying contract is outside of the county board’s authority, then why would Milwaukee County Ordinance section 110 apply?

Critically, the Legislature considered – and rejected – two additional amendments to Act 55 that would have definitively resolved all of the questions posed in this item 3 (but would not resolve the persistent conflict between sections 59.60(12) and 59.17(2)(b)3., *see* point 2, *supra*). Specifically, the first rejected change would have created a new section 59.17(2)(d) that expressly granted the county executive sole authority over procurements, all forms of contracting, RFPs, as well as all administrative reviews of contract awards. *See* Senate Substitute Amendment 1 (SSA1) to Senate Bill 21 (attached as Ex. 11) (available at http://docs.legis.wisconsin.gov/2015/related/amendments/sb21/ssa1_sb21.pdf), as amended by Senate Amendment 2 (SA2) to SSA1 (attached as Ex. 12) (available at: http://docs.legis.wisconsin.gov/2015/related/amendments/sb21/sa2_ssa1_sb21). *See* Ex. 11, p. 585 at ll. 1-16. In addition, the second rejected amendment would have deleted subsections (b) and (c), and made significant changes to subsection (d) of section 59.52(31), which would have left no question that there were no applicable dollar thresholds that would trigger board or committee review of certain contracts. *See* Ex. 11, pp. 589-590, ll. 20-2.

On the one hand, it can be argued that in rejecting these changes, the legislature intended to preserve for the board some of these powers and oversight privileges. On the other hand, it could also be argued that the legislature thought these provisions were surplusage given the broad authorities granted in sections 59.17(2)(b)3. and 59.52(6).

These interpretation challenges are by no means exhaustive.⁹

⁹ Section 59.60(12) requiring board review of multi-year contracts conflicts with section 59.17(2)(b)3., which specifies that there shall be no board review for property sales, acquisitions, and leases. *See supra*, at 8, § D.4. Leases, by definition, are typically of a term greater than one year. And certainly, sale and purchase transactions – particularly real estate deals – often do have multi-year deal structures. Former Corporation Counsel Bargren also seemed to encounter difficulty reconciling this issue. In his May 16, 2016 opinion, he stated, “[c]ontract funding required over more than [one] budget year is also subject to Board approval, even for non-parks land,” citing Wis. Stat. § 59.60(12). Ex. 10, p. 3. And in the very next paragraph, he wrote this: “Act 55 does not provide for consideration of [non-park land] sales by [a county] Committee or the Board.” *See id.* While a sale obviously does not involve expenditures over more than one year, tellingly, Corporation Counsel Bargren did not address the fact that not only does Act 55 appear to take non-park land *sales* out of the County Board’s purview, as stated above, it also appears to do this as to “*acquisition[s], or lease[s], as landlord or tenant.*” Wis. Stat. § 59.17(2)(b)3 (emphasis added).

Subsection 59.52(6)(b) also includes the power to “commence and maintain actions to protect the interests of the county.” It does not limit those interests expressly to property interests. But should that limitation be read into the statute? And does “maintain” include the power to settle any action? Or only those actions where the county is the plaintiff? Can this section be reconciled with section 59.52(12), if 59.52(12) is interpreted as granting the board only the powers to resolve and settle claims against the county (i.e., county as defendant)? What about a scenario where the county is both a plaintiff and a defendant in an action (i.e., third-party actions)? Would this encourage the executive to “rush” to court and press a declaratory judgment action so he could “commence and maintain” the action? And this provision also would conflict with Milwaukee County Ordinance section 1.11(c)(4)2.(b), which states that the Judiciary Committee must approve the commencement of any action (excepting emergency injunctive relief when brought by the executive) where the amount claimed exceeds or the rights sought to be declared have a potential fiscal effect in excess of ten thousand dollars. [Footnote continued on next page.]

The above discussion and analysis leads to three conclusions. First, Acts 14 and 55 created material and irreconcilable conflicts among important state statutes which delineate identical or substantially similar powers, authorities, and duties among the Milwaukee County Board of Supervisors and the County Executive. Prior to these enactments, it did not matter that statutes overlapped and addressed the same or similar powers, since they all delegated the particular authority at issue to the board. Now, however, these conflicts have reached a critical and increasingly unmanageable juncture.

Second and related, previous attempts to interpret the statutes have led to (a) a variety of unintended consequences for county contracting practices (e.g., board review of non-essential and ancillary contracts like the mold-o-rama contract at the zoo, inconsistencies among similar contracts, artificial styling of contracts as “leases,” and/or use of unilateral renewal options, among other impacts); (b) an undesirable level of uncertainty amongst county departments and policymakers; (c) continuing disagreements between the branches of government about contracting authority; and (d) near daily ad hoc inquiries to the OCC.

Third and finally, because of these irreconcilable contradictions among key statutory provisions and the critical powers implicated by the interpretation of Act 55, resolution of this fundamental balance of power must be determined by an external entity.

IV. Recommendations

Given all of the foregoing, the OCC therefore respectfully recommends that, either separately or jointly, the County Board and County Executive attempt to achieve clarification of the issues highlighted in this opinion by one or all of the following methods: (a) an opinion from the state Attorney General; (b) legislative change; or (c) a declaratory judgment action.

* * *

Section 59.52(6)(d)2. appears to grant the county executive authority to issue revenue bonds under section 66.0621. However, section 66.0621 appears to require board authority for bonding regardless of the nature of the underlying land (i.e., non-park vs. park). So which governs?

Section 59.17(2)(b)3., as well as 59.52(6), also appear to conflict with section 27.05(3)-(4), which specifies that the Parks Director can acquire land for parks purposes, but only with board approval. Which governs?

Under section 59.52(6)(e), the executive appears to be able to lease land to the DNR, but his powers apply only to non-parkland, so this seems to be a nullity or at best, a non-sequitur.