

Milwaukee County Government Post-Acts 14 & 55

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1. County is an arm of the state
2. Separation of powers, but not really ...
3. State asserts authority to reallocate powers – Acts 14, 55
4. Board budget
5. Legal Guidance
6. Food for thought



County is an Arm of the State



- Counties created by the state (Chapter 59 of Wisconsin Statutes)
 - Wis. Stat. § 59.02 creates the County Board
 - Wis. Stat. § 59.17 creates the County Executive
- Wis. Stat. § 59, Subchapter IV, sets forth the powers and duties of all county elected officials, as well as certain unelected positions
- Chapter 59 has many unique rules for “populous counties” (hint: only Milwaukee County)



“[A] county Board 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.” *Town of Vernon v. Waukesha Cty.*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981); OAG-01-17.

So, “home rule authority” does not really apply to counties ... but maybe it does??

“[Chapter 59] shall be broadly and liberally construed and limited only by express language.” Wis. Stat. § 59.51(2)



Implications

- County may only pass laws and run programs where the state has very clearly stated that the County has authority
- Often, the ability to run programs or legislate does NOT include the ability to enforce/penalize
- County can never sue the state (lacks standing)
- State may allocate power among legislative and executive branches any way it chooses and could eliminate the board or executive altogether



Separation of Powers



“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

- James Madison, Federalist No. 47



- Powers of government are separated or divided among different branches of government that serve different functions
- Branches, accordingly, are experts in their specific functions ...
 - Policymaking
 - Execution
 - Clarification, interpretation, and elucidation of the law
- Objective: to ensure that no one branch can act unilaterally with little to no accountability, encourage efficiency, limit corruption, and guard rights



- Policy: “a high-level overall plan embracing the general goals and acceptable procedures esp. 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.” 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.*



- “[T]he 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 ... ” Wis. Stat. § 59.17(2).
- 72 Wis. Op. Att’y Gen. 161 1983 WL 180895, at *3 (1983) (CEX has power to “coordinate and direct...all administrative and management functions of the county government not otherwise vested by law” and “supervise personnel on a day-to-day basis.”)
- “The powers of a county as a body corporate can only be exercised by the board, or in pursuance of a resolution or ordinance enacted by the board.” Wis. Stat. § 59.17(6).
- See also *Schuetz v. Van De Hey*, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996)



BUT ...

Separation of powers is **NOT** constitutionally required for local county government in Wisconsin.

And, the state chose to reallocate fundamental powers away from the County Board and to the County Executive in Acts 14, 55.



Impacts of 2013 Wis. Act 14 & 2015 Wis. Act 55



Disclaimers ...

THIS PRESENTATION = 10,000 FOOT VIEW

(ALMOST) EVERYTHING HAS AN EXCEPTION, NUANCE

PLEASE REFER TO SPECIFIC PRIOR OPINIONS



	County Executive	County Board
Buildings	- virtually unlimited	- buildings on parkland? (<u>but</u> not likely)
Land transactions	- unlimited except parkland	- controls parkland
Contracts	- unlimited except <u>ks</u> that relate to parkland (\$\$ thresholds) or are multiyear	- multiyear contracts - if related to parkland, based on \$ value of k, different types of review
Negotiate and/or redline contracts	- exclusive	- none (cannot edit contracts up for approval, must vote up/down)
Operations	- exclusive as to day-to-day management - may create departments and subunits	- may only set policy - can mandate reporting - may require attendance of dept head at mtg
Vendor Selection	- exclusive	- no authority (other than broad policy)
Contract Compliance	- exclusive	- may mandate reporting - controls budget
Budget	- as to departmental spending within budget, exclusive	- power of the purse - certain fund transfers
Emergency Powers	- to declare an emergency - nearly unlimited	- may end an emergency declaration - may review emergency measures on a policy level

- In Milwaukee County specifically, the executive has exclusive authority to “administer, supervise, and direct all county departments.” Wis. Stat. § 59.17(2)(b) I
- Wis. Stat. § 59.794(3)(b): “the board and its members may deal with county 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.
- Board’s “compensation-fixing power” cannot directly or indirectly establish the duties of an employee and/or direct how an employee must fulfill those duties. See *Lipscomb v. Abele*, 2018 WI App. 58, ¶ 4. Only the Executive may determine the duties of employees and how they must fulfill them. *Id.*



	County Executive	County Board
Employees	<ul style="list-style-type: none">- extensive except for specific areas- for example, sets all work rules- a few positions require confirmation- controls all aspects of employer negotiation with unions- administers benefit programs and can establish details of benefits- administers pension- all hiring decisions- all individual compensation decisions- all firing and discipline decisions, subject to civil service laws	<ul style="list-style-type: none">- new positions- job categories- pay ranges for categories- CBA approvals, but cannot negotiate or alter terms- may set broad policies re benefits- establishes pension and its rules

Clarity? Nah ...

- Wis. Stat. § 59.17(2)(b)(3)'s explicit grant of virtually unlimited power to the Executive to sell, acquire, and lease all nonpark property, with its general reassignment of the powers previously held by the Board under Wis. Stat. § 59.52(6) to the Executive, without more detail
- Wis. Stat. § 59.52(6)(b): executive may “commence and maintain [legal] actions” But § 59.52(12) says the board may “examine and settle all claims, demands, or causes of action against the county”
- Wis. Stat. §59.52(6)(d)2 grants authority to the executive to issue revenue bonds under § 66.0621, but that section requires county board authority for bonding ... ?



But some clarity in some (surprising) places ... one example

- Wis. Stat. § 111.70(1)(p): “With respect to municipal employees who are employed by a county with a population of 750,000 or more, the county executive is responsible for the municipal employer functions under this subchapter.” – which is all about collective bargaining.

UPSHOT: County Board does not have any role in bargaining process except to up/down vote the CBA



County Board Expenditure Authority



Limits on Board Budget

- Wis. Stat. § 59.60(7): board's budget, including salaries and all operating costs, cannot be more than 0.4 percent of county tax levy
- Does NOT include benefits or County clerk budget

	2023	2024	Variance
Property Tax	312,922,151	288,922,151	(24,000,000)
County Board	1,251,689	1,155,689	(96,000)
County Board %	0.4%	0.4%	

- Offset in 2024 by moving 5 LA positions from Board to another Board-supporting department



OCC Interpretations (and one case)



- May 23, 2022: non-emergency powers related to COVID-19 (see File No. 22-419)
- September 22, 2021: Formal written opinion regarding the emergency powers (see File No. 20-290);
- March 13, 2020: emergency powers related to COVID-19 (see File No. 20-290)
- Feb. 14, 2018: appointment/confirmation (see File Nos. 18-57, 18-75)
- Nov. 1, 2017: CEX's obligation to implement legislative enactments (see File No. 17-563)
- June 8, 2017: difference between multiyear contracts and option contracts (see File No. 17-385)
- March 3, 2017: conflicts among state statutes created by Acts 14 and 55 (see File Nos. 17-274, 17-69); and
- March 3, 2017: contracting authority (see File No. 17-275)

Lipscomb v. Abele, 384 Wis. 2d 1, 2018 WI App 58 (Ct. App. 2018)
No. 16-CV-2888 (trial court decision, Apr. 24, 2017)



Food for thought ...



Got a great idea?

1. Talk to the subject matter expert department and legislative research staff first. What do they know? What is the history? What has been tried before? Do I know everything I need to? What are the different stakeholders interests and why?
2. If there is a conflict over what to do, is compromise possible (without reverting to arguments over who has the power)?
3. Ask OCC!



Some conflicts are unavoidable. So, is something policy or management?

- Whether to act in the first instance? (Board)
- What to do and how to do it? Means, manner, mode? (CEX)
- Big picture (Board) or in the weeds (CEX)?
- Sliding scale ...
 - Specificity of the policy / directive
 - Expertise necessary to provide the directive in the first place
 - Technical knowledge required to implement to reach policy goal
- Would the Board be substituting its judgment for subject matter experts?

LABELS DO NOT MATTER



BOTTOM LINE ...

- Appeals to authority generally occur when negotiations fail
- Conflicts re authority = expensive, time consuming, hinders progress, makes compromise impossible, rarely clearly resolves the issue
- If unclear, courts likely to err on side of CEX, all else being equal
- Where a court attempts to 'split the baby,' will likely add to confusion
- OCC tries to avoid speculating about division of power at County



Questions?

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