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Date: August 25, 2015

To: Comptroller Scott Manske

cc: County Executive Abele  
County Board Chair Lipscomb  
County Board Supervisors  
Human Resources Director Mitchell  
Performance, Strategy & Budget Director Kreklow  
Other Interested Parties

From: Paul Bargren *PB*  
Corporation Counsel

Re: Execution of legislative policies authorized in File 15-526

You had asked for my analysis on the obligation of the County's executive branch to carry out the measures included in File 15-526. In that File, the County Board transferred \$1.5 million from the Debt Service Reserve to implement Transit Signal Priority, authorized \$5 million for parks infrastructure projects that are not eligible for bonding, and authorized a 1.5% cost of living pay increase for most employees.

In my opinion, the County Executive and the administration are required to execute and administer the Milwaukee County policies that have been directed and authorized by the legislative action contained in this file.

### Background

The resolution in File 15-526

- “authorizes” the budget office to transfer \$1.5 million from the Debt Service Reserve “to implement Transit Signal Priority along the Wisconsin Avenue corridor” pending a report from the Director of Transportation (lines 145-157);
- “authorizes” spending “\$5 million for park infrastructure projects that are **not** eligible for general obligation bond financing” and requests the Parks Director to “submit ... a list of \$4 million in high priority park infrastructure projects” while allocating the remaining \$1 million directly to Parks for major maintenance; states DAS is “authorized” to make fund

transfers accordingly and states the transfers “shall be used to decrease the amount of sales tax that is required to fund the Capital Improvements Budget (lines 161-194); and

- “authorizes” a 1.5% COLA for non-BHD, non-union, non-elected, general employees, retroactive to June 21, 2015, and “authorizes Budget transfer \$969,097 from contingencies to pay for the raise (lines 198-206).

The resolution was adopted by the County Board on a vote of 14-4 on July 15. It was vetoed by the Executive, and the veto was overridden on July 30 on a vote of 14-4. It appears the administration has not taken steps to carry out these measures.

### **Analysis**

The resolution in File 15-526 expresses the legislative will of the County Board, sometimes using the word “authorizes,” sometimes stating “shall.” In context, both words accomplish the same thing, as discussed further below. Once the legislation is enacted, the administration is to execute it.

The County Board “may not exercise day-to-day control of any county department or subunit of a county department.” Wis. Stat. § 59.794(3). However, File 15-526 does not impose day-to-day control. Setting a 1.5% raise, designating \$5 million for Parks improvements and calling for Transit improvements recommended by the Public Policy Forum are policy decisions (although the Transit matter is a closer call, given the specified location). Implementing the raise, preparing the list of Parks projects and reporting on the details of the Transit project are the day-to-day implementation of the policies that are appropriately left with the administration.

By statute, the policies of Milwaukee County 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”). *See also* § 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<sup>1</sup> 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. The Wisconsin Court of Appeals has described it this way:

The county board’s function is primarily policy making and legislative, while the county executive functions as an

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<sup>1</sup> In this context, “ordinance” includes the adopted budget and any other Board resolution subject to signature or veto by the Executive. The budget itself “become[s] law.” *See* Wis. Constitution § 23a and § 59.17(6), Stats. In some 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. However, 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.* 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.

administrator and manager. *See, e.g.*, 80 Op. Atty Gen. 49 (1991). Policy has been defined as “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, 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.*

*Schuette v. Van De Hey*, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996). These definitions are consistent with the policy vs. day-to-day distinctions found in the statutes governing Milwaukee County operations.

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.

But 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).

However, there has not been any suggestion of illegality raised about File 15-526. 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.

### “Authorizes”

In the context of the resolution in File 15-526, the word “authorizes” carries as much weight as the word “shall.”

Under rules for construing legislative actions, “authorized” can have one of two meanings:

In 59 C.J. 1087, § 637, it is said: ‘Such expressions as ‘authorized and empowered,’ and ‘shall have power,’ are to be construed as mandatory or permissive in accordance with the legislative intent manifested in the particular act.’

*Longino v. Hanley*, 184 Ga. 328, 330, 191 S.E. 101, 102 (1937).<sup>2</sup>

The question then becomes what the legislative body intended, or, as the Wisconsin Supreme Court once put it, “the mischief sought to be remedied” by the legislation:

We are mindful of the instruction that a court should consider the “mischief sought to be remedied” by a statute when interpreting the statute. *See Heyde Companies, Inc. v. Dove Healthcare, LLC*, 2002 WI 131, ¶ 15 n. 3, 258 Wis.2d 28, 654 N.W.2d 830.

*Teschendorf v. State Farm Ins. Companies*, 2006 WI 89, ¶ 56, 293 Wis. 2d 123, 153, 717 N.W.2d 258, 272.

There can be no doubt that the County Board’s intention here was to address items that had been omitted earlier from the budget and to restore them now that surplus funds were available. Given that intent, “authorized” must be given its mandatory meaning.

Black’s Law Dictionary, 4th ed., p. 169, indicates that “authorize” means more than consistent with the general scheme. Among its definitions: “To empower; to give a right or authority to act . . . **It has a mandatory effect or meaning, implying a direction to act. Authorized is sometimes construed as equivalent to directed.**”

*State v. Devitt*, 82 Wis.2d 262, 270, 262 N.W.2d 73, 77 (1978) (emphasis added). *See also Schumacher v. Howard Sav. Inst.*, 128 N.J. Eq. 56, 61, 15 A.2d 107, 110 (Ch. 1940) decree aff’d, 131 N.J. Eq. 211, 23 A.2d 581 (1942) (“To authorize is to empower, to give a right to act, to clothe with authority. 6 C.J. 865. It has been held to be obligatory. *Hutton v. Hutton*, 41 N.J.Eq. 267, 3 A. 882. The word has different meanings dependent upon the connection and circumstances of its use”).

In sum, “Words of a permissive character may be given a mandatory significance in order to effect the legislative intent where the clear intent of the statute, as shown by the context demands such a construction.” 82 C.J.S. Statutes § 491.

Standard dictionary definitions are consistent. The first definition in the Merriam-Webster dictionary of the transitive verb “authorize” is “to establish by or as if by authority: sanction <a custom *authorized* by time>”, and the first example given is “The city council *authorized* the sale of the land.” <http://www.merriam-webster.com/dictionary/authorizes>

## Salaries

In particular, the Board action authorizing the 1.5% salary increase is consistent with Wis. Stat. § 59.60(10). Notably, § 59.60(10) itself uses the word “authorizing”:

No ordinance or resolution **authorizing** the creation of new or additional positions or increasing salaries shall become effective in any fiscal year until an appropriation of funds for such purpose is made or the ordinance or resolution contains a provision for the transfer of funds if required. (emphasis added)

<sup>2</sup> Note however, that “shall” has only one meaning – it must be done – and it appears even those portions of File 15-526 using “shall” have not been acted upon.

Given the use of “authorizing” in § 59.60, the legislative intent of a resolution using language that tracks the language of the statute is clear, and “authorizing” must be given its mandatory meaning in that context.

### **Request for Reports**

The Board has the statutory authority to request reports from administration officials, such as the listing of capital projects requested from Parks and the signal report requested from Transit. The statutes provide:

A board may require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions.

Wis. Stat. § 59.794(3)(b).

This has been interpreted by the attorney general to include requiring reports from department heads. Op. Atty. Gen. OAG-06-13, Aug. 14, 2013 ¶ 12, construing MCO 1.25(3) (“A county board lawfully may require county department heads to submit periodic reports as to steps taken in carrying out any directive both to the county board and to the county executive. The requirement is consistent with Wis. Stat. sec. 59.794(3)(b), which provides [quoting as above]”). The reports requested in File 15-526 are within the Board’s statutory authority and should be provided.