



OFFICE OF CORPORATION COUNSEL

MARGARET C. DAUN
Corporation Counsel

Client-Driven. Community-Focused.

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
JUDD H. TABACK
Assistant Corporation Counsel

TO: Scott Manske, Chair
Capital Improvements Committee

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

FROM: Paul Kuglitsch, Deputy Corporation Counsel ^{PK}
Adam Stehly, Associate Project Manager, DAS-ED

DATE: August 27, 2020

SUBJECT: Legal Opinion on Financial Commitments for Capital Project WO65501
WMC Saarinen Building Switchgear Replacement (File No. 20-664)

For the fiscal year 2021 capital budget cycle, Milwaukee County is evaluating a request to fund the replacement of the electrical switchgear in the Saarinen Building. A question has arisen as to who is responsible for this project. Based on a reading of the 2013 Development Agreement between Milwaukee County (the “County”), the Milwaukee Art Museum, Inc. (“MAM”), and the Milwaukee County War Memorial, Inc. (“WMC”), the County’s contribution is capped at **\$200,000** versus the estimated \$600,000 replacement cost. (Ex. 1, 2013 Development Agreement, Ex. A, Line Item 9.1; Ex. 2, 2011 Precision 20/20 Full Reserve Study for Milwaukee County War Memorial Center, Page 3.2, Line Item 3.300). The balance is the responsibility of MAM and/or WMC.

In 2013, the County, MAM, and WMC entered into separate lease agreements for certain land and facilities along the lakefront. As between the County and MAM, the lease included the Kahler Addition, portions of the Saarinen Building, and the East Atrium Addition and interior gallery space. As between the County and WMC, the lease included certain portions of the Saarinen Building.

At that same time, the parties entered into a Development Agreement. (Ex. 1). This agreement recognized that portions of the leased premises required certain repairs and improvements. The County and MAM agreed to divide and undertake the work. The County contributed \$10MM, while MAM contributed \$15MM. As part of its \$10MM contribution, the County committed \$200,000 to the “Electrical Systems, System Costs per Reserve Advisor Allowance” (Ex. 1, DA, Ex. A, Line Item 9.1). This figure was derived from a Precision 20/20 Full Reserve Study for Milwaukee County War Memorial Center dated December 8, 2011. (Ex. 2). The report noted that the switchgear would eventually need repair and replacing. (Id. pp. 4.29-4.31). On page 3.2, line

3.300, the report indicates that the “Electrical System, Inspections and Partial Replacements” require an allowance of \$160,000.00. It stands to reason that the \$200,000 number contained in the Development Agreement was the \$160,000.00 referred to in the 2011 report adjusted for inflation. *Why?* Because page 4.30 of the report indicates “an allowance of \$160,000 plus inflation for periodic invasive inspections via thermoscans and replacement of limited electrical system components, including transformers, switchgear and distribution panels, every eight years beginning by 2015.” In other words, there was \$160,000.00 budgeted every eight years, adjusted for inflation to cover “replacement of limited electrical system components.” The clear expectation of this report is that upgrades would take place over a 24-year process, and the county was responsible for the first installment of \$160,000 plus inflation or \$200,000. Based on this report, read in conjunction with the 2013 Development Agreement, there can be no dispute that the County committed to contributing \$200,000 to the switchgear project – not the estimated \$600,000 for total replacement.

In 2016, the County, MAM, and WMC collectively decided to alter their relationship at the lakefront. Pursuant to adopted File No. 16-229, the County transferred portions of the Saarinen Building, and the O’Donnell Park parking structure to MAM; and transferred portions of the Saarinen Building to WMC. Together, the parties created a condominium association and divided the facilities between three (3) condominium units, each owned by one of the parties.

File No. 16-229

<https://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=2636565&GUID=88573603-2DB6-4B51-B5EF-DC2134C4F914>

Important for this opinion, as part of the transaction the leases were terminated, but the 2013 Development Agreement remained in effect. Even though portions of the facilities were transferred to MAM and WMC, the County continues to fulfill its obligations under the 2013 Development Agreement, which includes budgeting \$200,000 for the switchgear project.

If the 2013 Development Agreement does not control the allocation of funding for the switchgear, then we must rely upon the language contained in the 2017 Declaration of Condominium. (Ex. 3). Based on the Declaration, the switchgear would appropriately be catalogued as a Common Element (as defined in Section 5 thereof) due to it providing service to the entire campus. Pursuant to Section 8, each unit owner (County, MAM and WMC) each has an undivided 1/3 interest in the common elements are each responsible for a shared portion of the cost.

Article IV of the 2017 Condominium Agreement addresses the operation of the property. (Ex. 4). In short, repairs to Common Elements are treated as Common Expenses and subject to review/approval of the Condominium Board. Repairs would then be executed and overseen by the Condominium Association.

In order to move forward with the switchgear project, the County has two (2) options:

1. Adhere to the terms of the 2013 Development Agreement, which caps the County's contribution to the project at \$200,000; or
2. Follow the path outlined in the 2017 condominium agreements to assess the need of the project, determine the scope, and establish how the costs will be split among the Unit Owners at the next Meeting of the Condominium Board.
