



OFFICE OF CORPORATION COUNSEL




INTER-OFFICE COMMUNICATION

MARGARET C. DAUN
Corporation Counsel

COLLEEN A. FOLEY
PAUL D. KUGLITSCH
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ
MOLLY J. ZILLIG
ALAN M. POLAN
DEWEY B. MARTIN
JAMES M. CARROLL
KATHRYN M. WEST
JULIE P. WILSON
CHRISTINE L. HANSEN
CARRIE THEIS
Assistant Corporation Counsel

TO: Chris Abele, County Executive
Theodore Lipscomb, Sr., Board Chairman
Jason Haas, Chairman, Parks, Energy, and Environment Cmte.
Milwaukee County Board of Supervisors
Scott B. Manske, County Comptroller Manske
Teig Whaley-Smith, Director, Department of Administrative Services
James Tarantino, Director, Department of Economic Development

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

DATE: May 16, 2017

RE: Redevelopment of The Rock

At the Parks, Energy, and Environment Committee on May 16, 2017, Comptroller Manske outlined three questions, in which the Committee echoed its interest, directed to the Office of Corporation Counsel (“OCC”). This memorandum provides a written response to each issue raised by the Comptroller that can be addressed by the OCC.

Issue 1: The Comptroller correctly identified that the OCC has retained outside expert environmental counsel to assist with the negotiation of environmental liability and related terms for the land sale and redevelopment agreement. The OCC has caucused with outside counsel, who has reviewed the term sheet, as well as many of the environmental concerns and issues raised in writing and in person by community members. Ultimately, outside counsel will review analyses prepared by The Sigma Group. It is the opinion of OCC, as guided by outside counsel, that environmental risks and liabilities can be addressed in a commercially reasonable manner in the relevant transactional documents. Should either outside counsel or the OCC determine that the deal documents do not appropriately address environmental liabilities and risks, the Board and the Department of Economic Development will be advised accordingly.

Issue 2: The Comptroller also inquired what the County’s responsibilities would be related to the decommissioned trunk road if this transaction did not move forward. As understood by the OCC, the decommissioning will not occur unless the land sale and redevelopment proceed.

Issue 3: Lastly, the Comptroller inquired whether the establishment and funding of a trust, as part of the overall sale and redevelopment plan of The Rock site, requires County Board approval. Importantly, the trust would be funded, per the Term Sheet (version 6, page 3), through contributions by the County calculated and based upon the property taxes collected from the

redeveloped site. Specifically, the Comptroller inquired whether this fact, under Wis. Stat. § 59.60(12), now required the County Board to approve terms related to the trust fund.

In short, no, County Board approval is not required as to the creation or funding of the trusts. This is a unique type of non-park land sale, wherein, because of the blighted nature of this parcel, the County is agreeing to make certain payments directly related to and intended to fund environmental risk mediation by the buyer over many years.¹ Therefore, the creation of the trust is material to and not separable from the underlying land sale: it is an essential term of the sale.²

Problematically, Act 55, as explained in detail in the two memoranda issued by this office on March 3, 2017 on this topic, did not adequately address the conflict that arises among sections 59.60(12) and 59.17(2)(b)3, which expressly states that the County Executive may sell or purchase County non-park real estate “without submission to or approval by the county board.”

Here, the legislative history of Act 55 (and Act 14) make clear that the one power the Legislature indisputably intended to give, unfettered, to the County Executive was this power to sell, purchase, or lease non-park real estate. It is the view of the OCC that it would be directly contrary to the plain language of section 59.17(2)(b)3 and legislative intent to impute the limitations of section 59.60(12) onto the powers granted the Executive in 59.17(2)(b)3, when nothing in the record exists to support such a limitation.

Furthermore, section 59.17(2)(b)3 came after and is arguably more specific than 59.60(12) and under long-standing canons of statutory construction, it is proper to infer that the Legislature was aware of 59.60(12) and elected to place 59.17(2)(b)3 outside of its scope when it granted the Executive these broad powers *without restriction* in Act 55.

Importantly, recall that Act 55 also granted the Executive the unilateral power to acquire and lease property. Many land acquisitions have multi-year payment mechanisms and leases, by their definition, involve multi-year financial commitments. Again, had the Legislature intended to limit the Executive’s power based on this multi-year concept, it would have expressly made the powers granted in 59.17(2)(b)3 subject to 59.60(12). It did not do so.

The Comptroller has also inquired as to how this interpretation can be harmonized with his statutory duty, as Comptroller, to “countersign all contracts with the county if he or she determines that the county has, or will have, the necessary funds to pay the liability that the county may incur under the contract. No contract is valid until so countersigned.” Wis. Stat. § 59.255(2)(e).

¹ Absent the transaction, the County would be obligated to continue to pay for environmental risk mitigation in a sum likely to exceed the financial commitment to fund the trust.

² This transaction has numerous parts, and as understood by the OCC, if any one piece of the transaction does not go forward, the sale and redevelopment cannot move forward.

Here again, the unique nature of the transaction is critical. This is not a multi-year contract for the purchase of widgets without a known funding source – which would indisputably require County Board approval to be legally executable by the Comptroller. Nor is it a land transaction unilaterally obligating the County to millions in payments without any apparent or even nascent funding source – also a deal which the Comptroller could not legally execute. To the contrary: here, the trust will be funded through a share of the property taxes collected from the redeveloped Rock property – the funding source is known and identifiable and certain.³ Therefore, it is our opinion that the Comptroller may properly confirm, by his signature, that the County will have the funds necessary to satisfy the agreement(s) required to complete this property sale and redevelopment agreement.

Ultimately, as this office made clear in March, clarification from the Legislature is required as Act 55 created numerous explicit and implicit conflicts within Chapter 59 of the state statutes. This is yet another example of such a conflict.

Notwithstanding the foregoing, the Office of Corporation Counsel advises that the Department of Economic Development/Department of Administration may, in its discretion, elect to submit the term sheet in its entirety, the terms specific to the creation of the trust fund, and/or the final deal documents to the County Board for its approval, *even though the Department is not legally required to do so*. The OCC makes clear that doing so would not legally compel submission of future transactions, even if substantially similar to The Rock transaction under consideration presently.

The Office of Corporation Counsel also makes clear that highly structured transactions, similar to the instant transaction, which require Board approval as to some elements of the deal, but not others, are discouraged.

³ The OCC will draft and review the terms of the trust to carefully define the proportional share the County would be obligated to contribute to the trust and potentially seek to limit contributions if the property tax collected fall below certain anticipated levels.