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DATE: December 1, 2022

TO: Board of Supervisors
County Executive Crowley
Guy Smith, Parks Executive Director
Interested Stakeholders

FROM: Margaret C. Daun, Corporation Counsel
Scott F. Brown, Deputy Corporation Counsel

SUBJECT: File No. 22-1190 – Supplemental Guidance re Domes Historic Designation

At its September 22, 2022, meeting of the Milwaukee County Board of Supervisors, the Board adopted File No. 22-980. This resolution requested “the Department of Parks, Recreation, and Culture (DPRC) to collaborate with the Office of Strategy, Budget, and Performance, and of the Office of Corporation Counsel to nominate the Mitchell Park Domes [“Domes”] for the National and State Registers of Historic Places.”

On October 31, 2022, the Office of Corporation Counsel (“OCC”) provided a legal opinion regarding possible direct and indirect impacts if the Mitchell Park Domes (“the Domes”) are listed on the National and/or State Registers of Historic Places.

In that opinion (and in oral testimony), the OCC stated that federal oversight does not result merely from listing on the federal register of historic places alone, but rather only upon receipt of federal funding or permits. *See also infra* n.4. We also advised that under state law, once listed on the state register, the County would be required to submit any plans regarding the Domes to the State Historic Preservation Officer (“SHPO”) and engage in negotiation over any plans to materially alter the Domes (i.e., including partial or complete demolition). We summarized these realities thusly: “If the Domes were to be listed on State and/or National Register of Historic Places, any alteration of the Domes would be subject to review ... by state and federal government. *See Wis. Stats* § 44.39(1); 36 C.F.R. § 800.3(a).” And we concluded, “The OCC strongly advises against any step that invites the state or federal government into the decision-making process regarding County cultural assets at this time, especially given the lack of any agreed upon plan (or agreed upon characteristics of a workable plan) for the Domes.”

Subsequently, the County Executive vetoed file No. 22-980, in reliance upon the OCC's guidance. The County Executive echoed concerns voiced by the OCC in fall of 2019 and in our October 2022 guidance that no workable plan with realistic cost or revenue projections for Domes restoration has yet been identified. The County Executive specified the characteristics of a workable plan including:

- The plan must be fiscally sound, and Milwaukee County should not necessarily be first payor or payor of last resort.
- The plan must include full exploration of funding mechanisms, including solidification of a business plan, identification and commitment of private or philanthropic dollars, and, if necessary, identification of a potential private entity partner(s) and corporate structure.
- Any financial projections (costs and revenues) included in the plan must be based on historical data and be verifiable and realistic, not speculative or aspirational.
- The plan must also include all forward looking operational, administrative, compliance, and debt financing costs.
- The plan should not include any largely speculative development assumptions related to tax credit structures or private donations or other investment.

On November 10, the County Board declined to override the County Executive's veto.

Ahead of further consideration of historic designation and other Domes plans on December 6, 2022, and beyond, the OCC received input from staff for the City of Milwaukee's Historic Preservation Commission and legal staff for the National Trust for Historic Preservation. The OCC writes today to provide further clarifications and guidance based on the helpful expert feedback from these organizations. We are thankful for their cooperation and feedback and hope to continue to call upon their experience and expertise as Domes discussions proceed.

The OCC stands behind the letter and spirit of its October 31 opinion and provides additional clarity in this supplemental guidance about the process which applies to plans for registered historic landmarks. This guidance should be read and applied by decision-makers in conjunction with the OCC's October 31 guidance and oral testimony.¹ See also [An Introduction to Section 106 | Advisory Council on Historic Preservation \(achp.gov\)](https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106), available at <https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106> (December 1, 2022).

¹ Attached hereto in its entirety for the convenience of the reader. To the extent that anything in this opinion could be read to contradict the OCC's October 31 opinion or prior oral testimony, this guidance shall apply.

Executive Summary

If the Domes were listed on the state register of historic places, then:

1. the County must submit its plans for the Domes to the SHPO for review and feedback; and
2. the County must negotiate with the SHPO regarding any plan that constitutes a material alternation to the Domes, such as any partial or complete demolition, but negotiation can conclude without agreement.²

If the Domes were listed on the federal register of historic places and the County accepted funding or required federal permits, then:

1. the County must submit its plans for the Domes to the federal government for review and feedback;
2. the County must negotiate with the federal government regarding any plan that constitutes an undertaking regarding the Domes, such as any partial or complete demolition, but negotiation can conclude without agreement;³ and
3. funding would not be available if the Domes are to be razed in part or whole.⁴

So, even if the SHPO or federal government objected to any partial or complete demolition, *neither the state nor federal government could forcibly halt such demolition*, but they could materially impact, influence, and participate in County deliberations, wading into what is an already fraught debate.

In summary then, if at this time the County wishes to continue to be the exclusive venue for debates regarding the future of the Domes to the exclusion of the state or federal government, historical registration is not advisable.

If, however, the County wishes to involve state and/or federal experts on historic preservation into the County's debate now regarding the Domes, then registration is advisable.

Of course, nothing prevents the County from pursuing state or federal historic designation in the future, even if the County declines to do so now.

² As noted in the OCC's October 31 opinion (p.2) and during oral testimony, both state statutes and implementing regulations are silent as to the particulars of this negotiation process and say nothing regarding what occurs if the negotiations fail to reach a cooperative agreement. Based upon discussions with the experts noted herein, based on their experience, the SHPO possess no powers to halt any plans even if there is no agreement.

³ Unlike the state process, federal regulations detail with great specificity the back-and-forth negotiation process that is required. *See id.* But just like the state process, negotiations can conclude without agreement and the federal government cannot halt demolition. The caveat is that if even partial demolition is part of the Domes plan, no federal funding will be provided.

⁴ Under 36 C.F.R. § 800.4(c), if the structure is found to be eligible for historic designation (not listed), no federal funds would be available for complete or partial demolition.

Notwithstanding the foregoing, the OCC's unequivocal advice since 2019 to County decision makers has been that legal risks, regulatory risks, administrative/operational risks, and mixed legal/fiscal risks related to Domes restoration or preservation can be properly managed only if the County first develops a workable plan for the Domes based on realistic and meaningful financial projections and regulatory/operational analyses.

It further remains the OCC's advice that such a plan should be substantially identified and agreed upon before the County applies for any federal or state historical designation, either of which unequivocally would require the State Historic Preservation Officer to formally weigh in on County decisions about the Domes, as explained further below.

Analysis

If the Domes are listed on the National Register of Historic Places, the federal government can neither mandate nor prohibit any particular Domes plan. Once federal funding or permits are received, significant back-and-forth with non-County governmental actors regarding any Domes plan would be required. 36 C.F.R. §§ 60-61; 26 CFR § 800, *et seq.*

In addition, if listed on the National Register, section 106 of the National Historic Preservation Act of 1996 and related regulations are administered by the State of Wisconsin, via the State Historic Preservation Officer ("SHPO").

Regardless, we have been advised that as a practical matter, it is not possible to be listed on the National Register of Historic Places without also being listed on the State Register of Historic Places. *See* Wis. Stat. §§ 44.31(11); 44.36(4)(c).

Once listed on the State Register of Historic Places, any material alteration to the Domes must be submitted to the SHPO and would be subject to review by, comment from, and negotiation with the SHPO. *See* Wis. Stats § 44.39(1); 36 C.F.R. § 800.3(a).

The OCC is duty bound to ensure that all decision-makers are aware that listing the Domes triggers an appreciable level of oversight from the state and/or federal government. Given the significant interest from many stakeholders surrounding this important decision-making process, the OCC cannot allow the permit the misapprehension of "zero consequences" to historic designation to persist during consideration of File No. 22-980 or related files. It remains our advice that while our potential partners at the state and/or federal government are well meaning and would proceed in good faith, it is premature to invite additional parties into an already challenging process until a comprehensive plan is in place.

The OCC also wishes to share the practical experiences and expert guidance provided by the professionals at the City's Historic Preservation Commission and the National Trust for Historic Preservation, which is summarized below.

A. Staff to the City of Milwaukee’s Historic Preservation Commission⁵

Federal historic registration generally means registration under the National Historic Preservation Act (54 U.S.C. § 300101, *et seq.*) [“NHPA”] and its implementing regulations (36 CFR §§60-61; 36 CFR §800). The federal government has no review process for buildings listed on the National Register of Historic Places unless the federal government is invited directly into the project through funding or permits. In such scenarios, a mandatory review process is created if a project or funding will affect an historic property. It is a “stop, look, and listen” law; there are no powers to require any specific action or to stop a project. All non-federal owners are treated identically under federal preservation law; there are no additional requirements on other levels of government.

It is certainly conceivable that the County could apply for and receive federal financial assistance for the Domes. It is unlikely that federal funding could be obtained for any proposal other than preservation. Preservation in the specific language of the National Historic Preservation Act does not mean “no change.” Preservation requires that a place be kept active, vibrant and in use. Some change in operations, funding, and maintenance would undoubtedly be required under a grant and substantial written guidance is available to help achieve these goals in a sensitive manner. A grant for a demolition option does *not* exist, leaving such a choice entirely in the discretion of the Board.

Federal involvement is time-limited to the undertaking at hand and does not carry forward to future undertakings or future uses or expenditures at the property. It is true that some grant funds have multi-year requirements. These are always fully disclosed in the application materials and any subsequent agreement documents if such a grant were accepted.⁶

⁵ The OCC extends our many heartfelt thanks to Mr. Tim Askin, Senior Planner for the City of Milwaukee’s Historic Preservation Commission.

⁶ The federal government may also become involved if there is need for a federal permit in alterations at the Domes. Typical triggers for federal permits are the immediate presence and potential for impact to navigable waterways or wetlands, impacts to endangered species, installation of federally licensed telecommunications equipment, and emissions. None of these scenarios are created by a demolition of the Domes. There is no power in this law to stop the County from doing as it wishes in a permitting scenario. If a permit is required, the regulations create and require a public consultation process led by the involved federal agency. Only the process is required. Consultation can be terminated without agreement (36 CFR § 800.7). In any given federal involvement, the most that the federal government could do is withdraw funding. The Advisory Council for Historic Preservation would also not participate

Milwaukee County already owns many properties listed on the State and National Registers. There are many prominent examples: the County Courthouse, Lake Park, the former County School of Agriculture, the former Home for Dependent Children (including the Parks Headquarters building), and the Old Coast Guard Station near McKinley Marina. All have been listed on both historic registers. Review of alterations to the Courthouse and Lake Park have generally caused no great consternation to the Board or County Administration. Demolition of four of the five major buildings at the School of Agriculture was not prevented by any state or federal review. Demolition of the majority of the Home for Dependent Children Buildings were not prevented by state or federal review. Complete demolition of the Coast Guard Station was not prevented by state or federal review.

The City of Milwaukee is subject to the same state preservation statutes as Milwaukee County. Both are classed generally as “political subdivisions” of the state. Milwaukee City Hall has a higher federal designation than is being proposed for the Domes. Alterations at City Hall occur from time to time as funds allow and operational needs require. City Hall alterations have generally proceeded without the objection of the state historic preservation officer and have not triggered federal involvement.

State involvement does exist. State statute section 66.1111 provides that the County “notify the state historic preservation officer of any proposed action which it determines...would affect any historic property.” The effects of that regulation are clear and up to the discretion of the SHPO under Wis. Stat § 44.42(2): “If the officer determines that the proposed action which is the subject of that notice will have an adverse effect on the property which would be subject to that action, the officer may require negotiations with the political subdivision or school board proposing such action in an attempt to reduce such effects. If the negotiations result in an agreement as to the means of reducing such effects, that agreement shall be incorporated into the proposed action of the political subdivision).” There is no obligation to reach agreement since the statute does not clearly forbid negotiations without effect (i.e., no agreement). There is no power to stop any proposed action by the County. Only negotiation is required. There are no further

in any grant scenario, their role is limited to processes that are strictly regulatory and they have explicit criteria for involvement that are difficult to meet (36 CFR § 800, Appendix A).

implementing regulations. And there are no penalties under law for moving forward with an unchanged original proposal.

B. Legal Staff to the National Trust for Historic Preservation⁷

The NHPA (and most state companion laws) prescribes a consultation process and are not adjudicative. That process requires a consultation process prior to the undertaking of an action that has the potential to cause adverse effects to a designated historic resource. The goal of the consultation process is for expert preservationists and members of the public to advise the governmental entity undertaking the action to assist them in avoiding, minimizing, or mitigating adverse effects.

Buildings listed on the NRHP and on state historic registers are demolished daily across the country. The majority of Section 106 consultations that the National Trust Law Division engages in concern situations where adverse effects, including the demolition of historically designated buildings, are inescapable. In those situations, the consultation process aims to minimize or mitigate those effects.

For example, in the case of a hypothetical demolition that the owner of a historic property is committed to, and where avoidance is not possible, minimization measures could include partial retention of the historic structure, and mitigation commonly includes documenting the building in accordance with the standards of the Historic American Buildings Survey (“HABS”).

When substantial disagreements arise during NHPA consultations, the President's Advisory Council on Historic Preservation ("ACHP") is statutorily empowered to intervene as mediator, but the strongest action available to the ACHP is merely to terminate consultation, not to deny any aspect of a proposed undertaking.

Therefore, it is fair to say that an owner of a property that has been designated on either the NRHP or a state historic register does not sacrifice any of their property rights, nor does any government entity have the authority to deny any action proposed by the owner of a historically designated property, including partial or complete demolition.

⁷ The OCC extends our sincere appreciation to Attorney Christopher Cody of the National Trust for Historic Preservation.

To put it in layman's terms, under federal law, the County must complete a consultation process with the state HPO ("SHPO") before any Domes plan can be implemented. Importantly, as stated above, the whole point of that consultation process is to avoid, minimize, or mitigate potential adverse effects to historic properties that would occur from partial or complete demolition.

The NHPA and Section 106 are only triggered if federal funds or a federal permit are associated with a proposed undertaking. The ACHP only becomes involved in instances where adverse effects to historic resources are unavoidable, and there is significant disagreement between participants in the Section 106 consultation process.

To provide some context, the majority of Section 106 reviews are completed within 30 days or less. Obviously, any undertaking involving a historic site as tremendously important as the Mitchell Park Domes would be complex. Notably, the Section 106 process requires the postponement of a government action that has the potential to cause adverse effects to historic properties. That postponement accommodates the government's negotiation with SHPO and permits the public to weigh in to explore whether those effects can be avoided (preservation), minimized (save some of the structure), or mitigated (if the structure is to be razed in part or whole, documentation of the structure is recorded with the National Archives according to HABS standards).

The impacts of this process, timing, possible delays, etc. on any Domes plan is unknowable at this time, as there is no plan.

Separately, the NHPA applies not only to properties listed on the NRHP, but also to properties that are potentially eligible for such designation.

One other important note is that SHPOs administer both the NHPA Section 106 process within their state and any state review processes. SHPOs are somewhat unique in this regard, having both state and federal statutory responsibilities. For this reason, Wisconsin's SHPO is the best resource for definitive answers about how they review projects both under the NHPA and WI state law.

This is an extremely nuanced field of law, with lots of confusing “gray” areas, and it is very difficult to understand without substantial experience with these consultation processes.

Again, the OCC wishes to thank staff to both the City’s HPC and the NTHP for their assistance and expertise in preparing this follow-up guidance.



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DATE: October 31, 2022

TO: Guy Smith, Parks Executive Director
James Tarantino, Director of Recreation and Business Services

FROM: Margaret C. Daun, Corporation Counsel
Scott F. Brown, Deputy Corporation Counsel

SUBJECT: File No. 22-980

At the September 22, 2022, meeting of the Milwaukee County Board of Supervisors, passed File No. 22-980. This resolution requested “the Department of Parks, Recreation, and Culture (DPRC) to collaborate with the Office of Strategy, Budget, and Performance, and of the Office of Corporation Counsel to nominate the Mitchell Park Domes for the National and State Registers of Historic Places.”

The Office of Corporation Counsel (“OCC”) provides this opinion in advance of any nomination regarding possible direct and indirect impacts if the Mitchell Park Domes (“the Domes”) are listed on the National and State Registers of Historic Places.

Executive Summary

If the Domes are listed on either the State or National Registers of Historic Places, Milwaukee County (“the County”) would potentially face significant bureaucratic obstacles in crafting a strategic approach to the challenges facing the Domes. Specifically, while the National Registry of Historic Places could create the opportunity for potential federal aid, such aid will be tied to significant oversight by and reporting obligations to the federal and state government. Thus, the OCC respectfully recommends that a plan be developed (or at least characteristics of a workable plan identified and agreed upon) before the County applies for or accepts any historical designation at any level of government.

Analysis

If the Domes were to be listed on State and/or National Register of Historic Places, any alteration of the Domes would be subject to review (and effectively, approval) by state and federal government. *See Wis. Stats § 44.39(1); 36 C.F.R. § 800.3(a).* For obvious reasons that need no

explanation, the OCC strongly advises against any step that invites the state or federal government into the decision-making process regarding County cultural assets at this time, especially given the lack of any agreed upon plan (or agreed upon characteristics of a workable plan) for the Domes.

A. State Registration

Once registered, any plan regarding the Domes would require formal notice to the State Historic Preservation Officer (“SHPO”). Wis. Stat. § 44.42(1). Any such plan must not cause any “adverse effect¹” on the property. *See* Wis. Stat. § 44.42(2). If the SHPO determines that the proposed action would have an adverse effect on the property, the County will negotiate with the SHPO to reduce such effects. Wis. Stat. § 44.42(2). The SHPO must then submit a written report on the status of the negotiations and submit the same to the governor as well as the chief clerk of each house of the state legislature. *Id.* Critically, the statute does not explain what occurs if the negotiations reach an impasse.

This indisputably equates to a substantial, if not total loss of local control over the Domes. By the plain language of the state, any “alteration” of the Domes must be negotiated with the SHPO and would not be up to the County alone to determine. And the statute also mandates a process that invites both the governor’s office and the state legislature into County decision-making.

B. National Registration²

If the Domes were to be listed on the National Register of Historic Places, the County would be eligible to be considered for federal “grants-in-aid” for the purpose of historic preservation. 36 CFR § 60.2(b). However, once the County accepts the aid, any proposed projects at the Domes would nearly certainly be deemed an “undertaking,” as defined in 36 C.F.R. § 800.16(y).³ If the

¹ Adverse effects include:

- (a) Physical destruction, damage or alteration of any part of a property which would adversely affect the historic significance of that property.
- (b) Isolation of a property from or alteration of the character of the property's setting when that character contributes to the property's qualification as a listed property.
- (c) Introduction of visual, audible or atmospheric elements that are out of character with a property or alter its setting.
- (d) Neglect of a property resulting in its deterioration or destruction.

Wis. Stat. § 44.31(1).

² “A nomination to the state register of historic places does not constitute a nomination to the national register of historic places.” Wis. Stat. § 44.36(4)(c). But “nominations to the national register of historic places” must be approved by the Wisconsin historic preservation review board. Wis. Stat. § 44.31(11).

³ An “[u]ndertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency;

project is determined to be an “undertaking,” the next step of the inquiry is whether the project “is a type of activity that has the potential to cause effects on historic properties.” 36 C.F.R. § 800.3(a). If so, a review under Section 106 of the National Historic Preservation Act of 1996 is required. This is a lengthy review process in which the Advisory Council of Historic Preservation, interested parties, and the public must weigh in before any project could be undertaken. Indisputably, this equates to a substantial intrusion of the federal government into County control over the Domes.

C. Potential Characteristics of a Workable Domes Plan

One potential next step, in lieu of proceeding with a premature application for historic designation, would be for policymakers, stakeholders, and administration to agree upon the essential characteristics of a feasible and workable plan for Mitchell Park and the Domes, that meets the needs of the community surrounding Mitchell Park and succeeds to the County’s mission to become the healthiest county in Wisconsin by achieving racial equity. Helpfully, two substantive analyses of the plan put forward by the consultant hired by the Domes Task Force provide some initial guideposts.

1. OCC Analysis

In the late fall of 2019, the OCC issued a memorandum that outlined numerous serious and significant legal, regulatory, operational, and fiscal concerns regarding the business plan (“Plan”) submitted by ArtsMarket, Inc., as the consultant selected by the Domes Task Force. We reached numerous critical conclusions that bear repeating here:

- The Plan itself and its key financial estimates and assumptions were “aspirational guesstimates.”
- “[U]nlike other public-private partnerships . . . , the County must be the first to fund and the funder of last resort” under ArtsMarket’s Plan.
- Significant additional ancillary costs for entity management, outside legal expertise, tax compliance, etc. would be required – also presumptively paid for by the County.
- The timetable proposed by ArtsMarket was unfeasible.
- “[C]ertain details were simply filled in to reach a predetermined result.”
- “It is the opinion of the OCC that the true costs to the County (both capital and ongoing operational costs) are very likely to be higher than what is stated in this Plan.”

*See Exhibit 1 at 9.*⁴

those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16(y)

⁴ Following our memorandum, the former Chair of the Task Force filed papers to create the “Mitchell Park and Domes Conservancy,” which was the hypothesized entity put forward by the consultant to potentially partner with private sector entities to utilize various tax credit structures proposed under the Plan. This

2. Baker Tilly / Husch Blackwell Analysis

Later, during the pandemic, the County engaged additional experts, Baker Tilly and Husch Blackwell, to assess the fiscal, regulatory, and legal feasibility of the Plan. Their conclusions and recommendations submitted on May 4, 2022, mirror the OCC's and also bear repeating here:

- The funding sources hypothesized by ArtsMarket in the Plan are “highly unlikely” to support the Task Force’s vision for the Domes, specifically:
 - it is “highly unlikely” that all of tax credits and other capital sources suggested by ArtsMarket would be available; and
 - it is “highly unlikely” that the tax credits and other capital sources that are available would be available in the amounts suggested by ArtsMarket.
- The County must have “a realistic budget for the essential work that needs to be done to restore the Domes (as well as the cost of ongoing maintenance).”
- “[T]he revenue assumptions in the Plan are unsupported by factual analysis.”
- The County needs a “realistic projection of revenues from a fully restored facility based on historical data.” Realistic revenue projections are needed not just to identify a workable plan for the “future of the Domes, but [] also [] to understand what kind of debt service and operating costs the Domes will be able to confidently support upon restoration.”
- If the County is unable to finance the entirety of the restoration, there must be properly formed entity with appropriate leadership and funding that can see the project to its completion.

See Exhibit 3 at 10-11.

3. Possible Questions/Characteristics to Consider

Taking these analyses together, as well as many of the policy prescriptions from the County Board over the past years, the OCC respectfully suggests consideration of the following questions/characteristics to establish a feasible plan for Mitchell Park and the Domes:

- As we stated in the fall of 2019, it is important to identify the “highest and best use of increasingly scarce County budget dollars. The opportunity costs for County dollars cannot be ignored.” This suggests a candid look at whether the Mitchell Park community is best served by a new investment in the Domes, or whether the community would benefit from new investment in other programming, playgrounds, bandshells/concert venue, buildings, etc. (i.e., youth center, community center, senior care, entertainment venue, educational programming, small business support, other public private partnership to deliver services and support, etc.).

forced the OCC to clarify that neither the former chair nor the Task Force could act on behalf of the County since its mandate had been completed. See Exhibit 2.

- Are the flora assets preserved in the Domes best served by the Domes structure or would some other County or external facility better fulfill the agricultural and plant preservation purposes of the Domes, while still preserving low-cost access for County residents?
- What can the County maximally contribute to Mitchell Park development, regardless of plan, within the structure of the County's overall approach to racial equity?
- What is a reasonable estimate of potential private sector fundraising, with or without the Domes?
- What would a new task force accomplish that the first did not? What are the specific deliverables? What is the framework that the task force must operate within? Consider:
 - County cannot be first payor and payor of last resort.
 - Racial equity framework for strategic planning.
 - Engagement of the Mitchell Park community in selecting among *meaningful* community-supporting investment alternatives for Mitchell Park (i.e., multiple options that include various degrees of options regarding the Domes, but also alternate investment ideas for Mitchell Park without preservation of the Domes at Mitchell Park).
 - Minimum dollars of private commitments (contingent upon County investment per usual approach).
 - Maximum County contribution.
 - What should be the specific criteria for the use of any tax credit structure?
 - Require operating, administrative, and debt financing cost estimates.
 - Require realistic revenue estimates.
 - Specify specific format and content of a business plan, in consultation with Budget Office, Parks Department, and Comptroller.

EXHIBIT 1



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TO: Domes Task Force
Milwaukee County Board of Supervisors
Milwaukee County Executive, Chris Abele

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

DATE: September 25, 2019

SUBJECT: File No. 19-736: Recommendation of the Domes Task Force

The Milwaukee County Task Force on the Mitchell Park Conservatory Domes (“Domes Task Force”) has completed its mission. Any new expenditure authority should be directed towards the Office of Corporation Counsel (“OCC”) and the Office of the Comptroller to conduct independent legal and fiscal analyses of the Domes Task Force’s recommendations.

Background

A little over three years ago, on March 17, 2016, the Milwaukee County Board of Supervisors (“County Board”) adopted Resolution File No. 16-200. This resolution established Milwaukee County’s policy on pursuing the repair and preservation of the existing Mitchell Park Conservatory (the “Domes”). The resolution also created the Domes Task Force. The Task Force was asked to provide a written recommendation to the Committee on Parks, Energy and Environment on how accomplish the County Board’s policy directive. To date, the County has invested approximately \$1 million in the Task Force and contractors retained by the Task Force.

Although the Domes Task Force was initially asked to present its recommendations to the Parks Committee by the September 2016 cycle, it quickly became apparent that a proposal for a project of this magnitude could not be finished in such a tight time frame. The final recommendations were approved by the Task Force on August 13, 2019 and submitted to Milwaukee County. The primary consultant is ArtsMarket, Inc., a consulting firm headquartered out of Bozeman, Montana (“Consultant¹”).

¹ For simplicity’s sake, the term Consultant will refer collectively to not only ArtsMarket, but also Engberg Anderson Architects and Saiki Design, Landscape Architects.

Theodore Lipscomb, Sr., Chair
Domes Task Force
Milwaukee County Board of Supervisors
Milwaukee County Executive
September 17, 2019
Page 2 of 10

The recommendation has essentially six (6) parts.²

1. Milwaukee County Parks and Domes Executive Summary.
2. Business Plan and Conceptual Design (“recommendations,” “proposal,” or “Plan”).
3. Final Phase III PowerPoint.
4. Domes Task Force Resolution I
5. Domes Task Force Resolution II
6. Domes Task Force Inquiries to Milwaukee County Offices.

At the request of the Milwaukee County Department of Parks, Recreation and Culture (“DPRC”), the Consultant prepared a document entitled “Assumptions Informing the Business Plan and Conceptual Design Report to Milwaukee County Mitchell Park Domes Task Force Addressing Questions from the [DPRC]” (“Assumptions”) (Exhibit A). The Consultant also prepared a powerpoint that includes a chart of the proposed structure and interrelationships of the various required entities and a summary of assumptions, which was presented to the Task Force in May/June (“May/June Powerpoint”) (Exhibit B). While the September 18, 2019 agenda of the Committee of the Whole does not contain all six parts or the newly submitted assumptions, the agenda does contain a report prepared by DPRC, the original authorizing resolution (File No. 16-200), a 2018 opinion from the OCC responding to a request for clarification regarding the County Board’s policy on repairing and rehabilitating the Domes, and the Plan.³

The purpose of this report is to respond specifically to Item 6 above, and to provide the Committee of the Whole with some general comments on the Plan. Please be advised that the below responses and comments are not final legal conclusions. The OCC had extraordinarily limited time to review this complex proposal and believes internal and outside expert review is both required and the logical most prudent next step.

Finally, the OCC wishes to make clear that while the proposal at least twice makes reference to “discussions with Milwaukee County legal counsel,” (Plan at 57, 83⁴), these discussions were

² <https://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=3834867&GUID=196C2325-03D7-41BC-96CD-8A1D18E8A059>. See items 65-66, 77-80.

³ It appears that the Business Plan and Conceptual Design submitted under this file is slightly different from the plan submitted to the Domes Task Force on August 9, 2019. *Id.* item 66. The August 9 plan contains a narrative from Engberg Anderson Architects; a narrative by Saiki Design, Landscape Architects, which prefaces the Site Master Plan Development Estimate; a Recommended Pre-Capital Redevelopment Budget; and responses by ArtsMarket, Inc. to questions posed by County staff dated August 7, 2019 (“Responses”). These are omitted from the Plan submitted under this file that is publicly available, but they are available under related files of the Domes Task Force on Legistar.

⁴ The reference to “the team’s pro bono legal counsel” (Plan at 83) appears to refer or imply that the Consultant retained or entered into an engagement with outside legal counsel at no cost. In the Consultant’s Responses, at page 1, they state that “we have ourselves included independent legal/real estate counsel from the Milwaukee office of Husch Blackwell on our team to review our premises and assumptions at every step.” The OCC spoke directly with

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preliminary, high level and should not be construed in any way as an endorsement of the proposal. The OCC has not provided any final opinion regarding any of the legal questions this Plan raises, nor should this memorandum be construed as such, as stated above.

Preliminary Thoughts and Questions in Response to Domes Task Force Inquiries

The Domes Task Force asked the OCC, the Comptroller Office, and the Economic and Community Development Director eight (8) questions. The questions and initial responses are as follows:

1. *Does Milwaukee County have the ability to create a new nonprofit corporation for management and intake of donations as foreseen in this plan? If the county does not have this power, are we reliant on a third party to create such a body?*

It depends. While the OCC is not aware of the County itself creating a nonprofit corporation in the past, the County Board has previously authorized the creation of such an entity. For example, the County Board authorized the creation of Milwaukee Public Museum, Inc. (File No. 91-775), a nonprofit corporation created to operate the public museum. The County Board also authorized a contract between Milwaukee County and Milwaukee Transport Services, Inc. (File No. 79-1196), a nonprofit corporation created to operate the transit system. Notably, the authority for creating, contracting with, and appropriating money for these nonprofit entities is derived from an express grant of authority under state law.

- Public Museum.

Wis. Stat. § 59.56(2) Public museums.

- (a) The board may appropriate money for the establishment, expansion, operation and maintenance of public museums in the county, including, but not limited to, any public museum owned by a city.
- (b) The board may acquire, establish, expand, own, operate and maintain a public museum in the county and appropriate money for such purposes, except that a public museum owned by a county under this subsection may seek tax-exempt status as an entity described under section 501 (c) (3) of the internal revenue code.
- (c) Notwithstanding pars. (a) and (b), in counties having a population of 750,000 or more the board may contribute funds toward the operation of a public museum owned by a 1st class city in such county, as partial reimbursement for museum services rendered to persons

this attorney. The attorney made it very clear that the Consultant is not a client of either he or his firm, and that he provided no definitive legal advice or opinion regarding the legality or feasibility of the proposal, nor did he vet, analyze in meaningful detail, nor formally opine upon any of the Consultant's premises or assumptions.

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residing outside such city and in a manner similar to the annual appropriation of funds by the board under s. 43.57 toward the operation of the central library in such city.

See also, Hart v. Ament, 176 Wis. 2d 694, 500 N.W.2d 312 (1993) (holding Milwaukee County had authority to transfer management of the public museum to a nonprofit corporation).

- Transit System.

Wis. Stat. § 59.59(3) Public transit in counties. A board may:

- (a) Purchase and lease buses to private transit companies that operate within and outside the county.
- (c) Make grants and provide subsidies to private transit companies that operate bus lines principally within the county to stabilize, preserve or enhance levels of transit service to the public.
- (g) Upon the acquisition of a transportation system:
 1. Operate and maintain it or lease it to an operator or contract for its use by an operator.
 2. Contract for superintendence of the system with an organization which has personnel with the experience and skill necessary.

Moreover, it is well established that a county “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.” *State ex rel. Teunas v. Kenosha Cty.*, 142 Wis. 2d 498, 504, 418 N.W.2d 833, 835 (1988). In a recent opinion, the Attorney General advised Shawano County Corporation Counsel that its board did not have the authority to appropriate money to a nonprofit corporation whose “sole mission is to operate a food pantry in the county for the benefit of the county’s citizens *because state law did not allow for such an appropriation.*” No. OAG-01-17, 2017 WL 3901691 (Wis. A.G. Sept. 1, 2017). (emphasis added). Therefore, Milwaukee County can only authorize and appropriate money to a nonprofit corporation if state law authorizes it.

With respect to the creation of “a new nonprofit corporation for management and intake of donations,” it appears that the recommendation calls for the creation of the Mitchell Park & Domes Conservancy, Inc. (the “Conservancy”), a nonprofit corporation that will take the lead in “rais[ing] capital and operat[ing] funds, manag[ing] operations and oversee[ing] supporting entities, and ensur[ing] fiscal sustainability.” (Plan at 72). What is not clear or explained in detail in the proposal is how the nonprofit will be funded, what its governance structure should (or must be), will it be staffed by County employees or by newly-created positions at the Conservancy, who will pay for those staff costs, who will oversee – as a fiduciary – Conservancy operations/staff, how potential liability would be addressed, etc.

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Questions:

- Is Milwaukee County responsible for appropriating startup money to the Conservancy?
 - Is that legally permissible?
 - Assuming Milwaukee County can appropriate money to support the Conservancy, is it ready, willing and able to? The projected staff cost in 2021 is \$500,000. (Plan at 80).
 - If Milwaukee County cannot appropriate money to support the Conservancy, who or what entity will provide the financial support?
 - Who will serve on the Conservancy board of trustees/directors, presuming there is one?
 - The plan calls for a “transition leadership committee” to identify a minimum of 15 individuals to as many as 30 to serve on the board. (Plan at 71). What is the basis for these recommended numbers?
 - Is the transition committee to then become the Conservancy board?
 - Who is going to serve on the “transition leadership committee”? On the Conservancy board? What qualifications?
 - Has anyone been identified or shown interest in sitting on the transition committee or board?
 - Who is going to establish and pay for the other corporate entities required in the recommendation, including both limited liability corporations, a C-corporation, and an operating association? (Plan at 74-77, May/June Powerpoint).
 - How are conflicts or disputes among the other corporate entities to be resolved?
 - What about conflicts of interest among the entities and the Conservancy? And employees thereof if they are cross-staffing?
 - Does each corporate entity have a separate board and staff to avoid conflicts? At what cost?
 - Even if it is legal for the County to create (and fund) a nonprofit entity, is it legal for that entity to effectively be the holding company of for-profit subsidiaries (Assumptions at 8)?
2. *Is Milwaukee County eligible to apply for the tax credits delineated in the proposal?*
- a. *Presuming an affirmative answer to the prior question, does the County face any limitations on the credits it may receive because it is a governmental unit?*

No. Milwaukee County is not “taxpayer” and, therefore, cannot by itself apply for either Historic Tax Credits or New Market Tax Credits. The County would need to partner with a property developer or investor taxpayer, who would apply for the tax credits to offset taxable income.

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Questions:

- Has the Domes Task Force identified any potential property developer or equity investor interested in the project? The recommendation mentions Grandview Management, Inc. (“Zilli”) as a potential investor. (Plan at 81). However, in other correspondence, ArtMarket, Inc. mentions that Zilli is likely not interested. *See also* Question 6.
 - County staff reached out to MATC, UW-Extension, MMSD, Teens Grow Greens, and Medical College of Wisconsin. For a variety of different reasons, while these entities expressed interest in partnering with the County, none has firmly committed any grant dollars to this project, nor even speculated about any possible commitment levels significant enough to fund this project. Total grant moneys are estimated in the Plan to be approximately \$19 million, comprised of \$750,000 in year 2020, \$1 million in 2021-2023, \$1.5 million in 2024, \$1.75 million in 2025, \$1.8 million in 2026, \$1.9 million in 2027, \$2 million in 2028-29, \$2.25 in 2030-31. (Plan at 79). If none of these potential partners firmly commits any money up front or in the medium term, how does this project get off the ground? If grant moneys fall short of projections over time, then what?
 - Does the County have to effectively expend real dollars up front without knowing whether all the assumptions and structures will come to fruition as expected? Does this effectively put the County in the position of potentially spending millions without knowing if the project will succeed, ultimately forcing the County to fund first and fund to the finish – i.e., as the funder of last resort – or face potentially writing off as a loss whatever its up-front and ongoing investments are? The aspirational and excellent intentions of all stakeholders, the Task Force, and the Consultant must be measured against failure risks that appear likely to land virtually exclusively on the County.
 - Are there any structures that have been successful for other public projects of comparable complexity and time-sensitivities (i.e., completed successfully under a timetable similar to that which is proposed here and with the entity complexity, layered tax credit structure complexity similar to that which is proposed here, and a time-phased approach for construction/rehabilitation)?
3. *Has the State of Wisconsin forbid or restricted the County from mandating wage or benefits from the jobs that would be created through this plan?*

Yes. Pursuant to Wis. Stat. § 104.001(2), Milwaukee County cannot enact or administer an ordinance that establishes a minimum wage. In addition, pursuant to Wis. Stat. § 66.0134(2), Milwaukee County cannot “enact a statute or ordinance; adopt a policy or regulation; or impose a contract, zoning, permitting, or licensing requirement, or any other condition including a condition of any regulatory approval; that would require any person to accept any provision that is a

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mandatory or nonmandatory subject of collective bargaining under state or federal labor laws.” Therefore, the County cannot mandate wages or benefits for jobs created under the Plan.

4. *Assist the Comptroller’s office in the review of various tax credit programs and offer an opinion on feasibility.*

The OCC, the Comptroller’s Office, and the Director of Economic and Community Development have not had sufficient time to review this request.

5. *Offer an opinion on required legal contracts to move the project forward, and how they will coordinate with or be managed through the Office of Corporation Counsel.*

The OCC, the Comptroller’s Office, and the Director of Economic and Community Development have not had sufficient time to review this request. In addition, the complexity of this project, i.e. the organizational structure, the tax structure, and capital stack, virtually certainly requires development, accounting, and legal expertise in addition to that of County staff.

6. *If the Domes proposal moves forward as outlined, will there be impacts related to the existing Zilli arrangement and contract?*

Yes. There is currently a 10-year Catering and Facility Management Services Agreement between Milwaukee County and Zilli for catering services at the Domes and Annex. The Agreement has two five-year extensions with an expected termination date of 2039. The recommendation is for the Conservancy to develop a partnership with a private firm to operate a catering and event space, among other private partners. These partnerships are necessary to take advantage of the proposed tax credits and other federal incentives, and the Plan assumes Zilli will be the catering/event partner. However, if Zilli is that private partner, the existing Agreement would need substantial revision, which, based on past experience, would be a highly time-consuming endeavor. If Zilli was not that partner, then Milwaukee County would have to work with Zilli to find a solution on how the Plan, if adopted, would impact the existing arrangement. The County does face possible litigation risk should the Plan be implemented.

7. *Address the structure of the taxable portions of the project, for example a Conservancy subsidiary.*

See response to Item 5 above.

8. *Assuming tax-exempt bonds will not be eligible for the County portion of the project, what type of funding could be used and how would cost be impacted?*

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See response to Item 5 above.

General Comments

The OCC is keenly aware of the significant time, effort, and energy invested by the Task Force, the Consultant, County Board, and County Executive to date, the financial commitment that the County has made to help fund the work of the Task Force, as well as the significant landmark, prestige, educational, and recreational value of the Domes to the Milwaukee County community.

As the Plan repeatedly noted and is abundantly evident, this is a very complex structure, with significant legal and financial complexity, that proposes execution under an extraordinarily aggressive timetable. It appears that everything must come together “just right” for this Plan to be a success. A Plan that has very little to zero margin for error, insufficient contingency,⁵ or delay and no ability to flex to meet changing circumstances (or to change course if assumptions or projections do not come to fruition) appears, in the OCC’s opinion, to create enormous legal and economic risk for the County and its taxpayers.

Furthermore, the Assumptions appear to state that there are very few independently verifiable quantitative bases for the assumptions, or revenue⁶ and expense projections contained in the Plan.⁷

⁵ Typical contingency funding for any real estate project is 10%, with higher contingency amounts for unique and challenging projects in the range of 15-20%. The total contingency for the capital budget here appears to be \$4 million (Plan at 55). This represents a 6% contingency.

⁶ Past admissions revenues during normal operational years have averaged around approximately \$900,000 per year. The Plan assumes the admissions revenue will be \$2.0 million by 2024 (with general grounds construction, and one of each of the three Domes closed for each of the first three years). This represents a doubling of admissions during a period of less than full operation.

⁷ For example, closely reading the Assumptions at page 8 raises numerous questions:

“[The pro forma’s] revenues are based on the programming, partnership, and other assumptions stated in the Plan at pages 26-54. These assumptions were established to meet the requirements of the capital financing from HTC, NMTC, PACE, and OZ. Its expenses are based on the estimated required staffing by the Conservancy. (Pages 72-74) It does not include the operating budgets of the subsidiaries.” This may be circular; it appears to say that the pro forma was essentially backed into based upon the total moneys projected from the capital stack. What if the tax credits and opportunity zone do not generate as much as expected? What if the operating revenues do not match projections? What if expenses exceed estimates? What if the staffing needs are greater than guesstimated? What if the rehabilitation takes longer than estimated to complete?

Page 8 appears to answer some of these questions by placing the downside risk squarely on the County’s/Conservancy’s shoulders, when it states, “It is the Conservancy’s responsibility to meet the revenue goals and thus pay down the capital financing. It is the Conservancy’s role to create, maintain, and grow the subsidiary entities required by the capital stack. It is the Conservancy’s role to work with the newly created developer entity ... to develop the property.” In the August 9 Responses at page 3, the Consultant echoes this sentiment, stating “It will be up to the County to make this happen or potentially lose revenue.”

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The Plan, including its forecasted revenues and operating expenses, as well as its organizational and funding structures (see above questions) are well-researched and duly-informed by the Consultant's experience and expertise, but appear to be nonetheless aspirational guesstimates. Probing whether these projections, funding sources, and funding estimates are realistic is an essential next step in the opinion of the OCC.

It also appears that unlike other public-private partnerships in the County's experience, the County must be the first to fund and the funder of last resort, under a timetable that is extraordinarily aggressive, where parties outside of the County's control will have a determinative impact on the ultimate success of the project, including but not limited to third-party developers, third-party partners, granting entities, the fundraising capability of the affinity friends group, and the Internal Revenue Service.

Moreover, it is a certainty that significant outside legal counsel expenses will be incurred, excluding initial diligence into the legality of the proposed structures, the creation of the required entities, ongoing careful monitoring of loan repayment deadlines, regulatory compliance, governance and oversight. Should anything go awry – like the IRS rejecting one of the tax credits or auditing the structure or a legal dispute among subsidiaries – legal fees could increase even more so, and potentially put the County into a state of prolonged operational uncertainty.

The OCC has reviewed the proposed timetable (Plan at 89) and it is our opinion that the deadlines related to the creation of the requisite legal entities is not feasible.

In summary, the goal of the Plan is unclear to the OCC. Was this Plan designed to identify a fiscally-sustainable, likely to succeed, operationalizable, detailed business plan to market to potential private sector partners and granting entities? If so, it is the opinion of the OCC that this does not fulfill this mandate. If, however, the Plan was intended to instead be a vision of a possible hypothesized path forward that may or may not succeed, and will require significant vetting, further analysis and development of the business plan, then this Plan does fulfill that objective.

But there exist strong indications that certain details were simply filled in to reach a predetermined result – i.e., to make the demolition costs greater than the County's contribution under this Plan and a lower-than-typical capital budget contingency. It is the opinion of the OCC that the true costs to the County (both capital and ongoing operational costs) are very likely to be higher than what is stated in this Plan.

Notably, the revenues are characterized as “hypothesized” twice on page 8 of the Assumptions.

In other correspondence, the Consultant has stated that “more detailed costs cannot be projected until the County's other reports are completed It should be the responsibility of the County and/or Conservancy to do the next round of detailed operating budgets – as per our recommendations.” (Email from Consultant to County staff on August 31, 2019.)

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Policymakers, stakeholders, and the public will ultimately determine the highest and best use of increasingly scarce County budget dollars. The opportunity costs for County dollars cannot be ignored. Acute public interest in rehabilitating the Domes, separated or viewed in isolation from the scarcity of public dollars, other County public programming funding needs, and the significant legal risks inherent within the Plan, presents an incomplete picture. In summary, the OCC believes that a serious vetting of the legal and fiscal feasibility of the Plan is required, as well as the development of a more realistic timetable and pro forma based on past experience, aided by objective, independent outside expert assistance as required and directed by the OCC and Comptroller's Office.

EXHIBIT 2



OFFICE OF CORPORATION COUNSEL

Client-Driven. Community-Focused.

MARGARET C. DAUN
Corporation Counsel

PAUL D. KUGLITSCH
ANNE B. KEARNEY
Deputy Corporation Counsel

ALAN M. POLAN
KATHRYN M. WEST
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SCOTT F. BROWN
TEDIA K. GAMIÑO
DAVID N. FARWELL
LISA M. PROCACCIO
NELSON W. PHILLIPS III
MELINDA S. LAWRENCE
Assistant Corporation Counsel

Milwaukee County Task Force on the Mitchell Park Conservatory Domes
“Conservancy” Members
Attorneys Gregory Burce and James Hall, Jr.

VIA EMAIL

December 4, 2019

Task Force Members, Attorneys Burce and Hall, Jr., and “conservancy” members,

We write related to the Articles of Incorporation for the “Mitchell Parks Domes & Conservancy, Inc.,” filed by the former chairman of the Task Force as incorporator, on or around November 25, 2019, setting forth Attorney Burce and Attorney Hall, Jr. as the drafter and registered agent, respectively (Exhibit A). In addition, the Office of Corporation Counsel (OCC) understands that a purported “conservancy” group¹ met approximately one to two weeks ago.

As made clear in the OCC’s report, attached to File 19-806 (Exhibit B), “the [Domes Task Force] completed its mission.” The OCC prepared that report in response to a specific set of questions submitted by the Task Force contemporaneously with the final Task Force recommendations and dated August 13, 2019, see File 19-802.

Therefore, by no later than October 19, 2019, the date the above-noted OCC opinion was publicly available via posting to Legistar,² the Task Force, its members, and any vendors or outside counsel providing services to, for, or in conjunction with the Task Force or its work in the past or at the direction of any task force member, **no longer possessed any authority** to continue any work, take any actions, engage any consultants or service providers, with respect to the Domes on behalf of the County or the Task Force. To be clear, this means that:

- No task force member was authorized to file any incorporation paperwork with the Wisconsin Department of Financial Institutions on November 25 on behalf of the County or Task Force **and the entity should be dissolved immediately**;

¹ As explained more fully herein, this also is befuddling in that it is the County, and only the County, that can and should determine membership of the so-called “conservancy” as specified in the Consultant’s plan. See *infra* pp. 2-3. If any member of the “conservancy” group that was convened recently did not receive this communication, the OCC requests that this communication be immediately forwarded to them.

² Arguably, the cut-off should be earlier, specifically, September 25, 2019, when the opinion was circulated to the Chair of the Task Force and the Consultant.

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- No so-called “conservancy” entity, as contemplated in the Consultant’s plan, exists and any purported membership or members are invalid, as are any actions of such are likewise invalid; and
- No vendor (including outside counsel) should expect payment for any services provided after October 19, 2019 (if not earlier, *see supra* n.2) from the County or the Task Force.

In short, all parties should cease and desist from engaging in any activities on behalf of the County or the Task Force (or the “conservancy”) related to the Domes until further notice. Again, to be clear, no individual, vendor, consultant, attorney, Task Force or “conservancy” member has any authority to take any action or do any work related to the Domes. Nor does any such party have any agency – real or apparent – to do so, given the public notice that the Task Force’s purposes had concluded, as spelled out in the OCC opinion.

The reasons for this are plain. First and foremost, the County has yet to determine what course it wishes to take related to the Domes. No one can decide that but the County. And no party should attempt to “force the hand” of the County or its taxpayers by acting unilaterally. Likewise, no party should interact with potential private sector partners on behalf of the County, the Task Force, or the “conservancy.”³

Second, the aforementioned OCC opinion summarized significant legal questions and risks, particularly related to the structure of the various legal entities required under the Consultant’s proposal. Most relevant here is whether the County (or any individual) can legally create a new nonprofit corporation for management and intake of donations as foreseen in the Consultant’s plan. Put bluntly, even if the purported “Mitchell Parks Domes & Conservancy, Inc.” may have complied with DFI’s filing formalities, the selected entity may not be legally appropriate for the purpose for which it is intended. *This concern was explicitly discussed on pages 3-5 of the OCC opinion in response to a specific question posed by the Task Force on August 13.*

It appears that regardless of the serious legal risks and concerns outlined by OCC in its opinion, an individual member of the Task Force, with the assistance of legal counsel that neither conferred with nor was retained by the OCC (and therefore cannot and will not be paid by the County), believed it appropriate to proceed without any explicit authorization by the County to create an

³ Of course, this directive does not impugn or attempt to direct how any private individual, acting clearly and unequivocally in their private capacity, engages with other third-parties regarding the Domes. That said, the OCC cautions Task Force members, “conservancy” members, vendors to the Task Force and others, if they have any interactions with other parties related to the Domes, to explicitly disclose that they are acting without any grant of authority from the County or the Task Force, purely in the private, personal capacity, and to use caution to avoid the use of entity names, logos, images or the like that could reasonably lead a person to infer affiliation with the County, including but not limited to such entity names as described in the Consultant’s plan. Beyond these technicalities, the County wishes to engage all stakeholders in a transparent, cooperative, and productive process that leads to the best outcome possible for County residents related to the Domes. The County therefore encourages interested parties to contact the Parks Department (Guy Smith) or the OCC with questions, comments, concerns, or regarding any proposed course of action.

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entity that may not be able to legally fulfill the purposes for which it is intended under the Consultant's business plan (or may simply not be the best entity or best structural approach), convened a meeting of this purported "conservancy," and utilized the exact naming convention for the umbrella entity specified by the Consultant in its plan.

Third, a project of the magnitude and complexity as contemplated here must be embarked upon, and the course of the project decided, by the responsible entity – here, the County. And furthermore, this must be done with full cooperation and transparency among stakeholders and the public, and with appropriate oversight by the County. The creation of the "conservancy" corporation and the convening of the that group, without the knowledge, consent, or any grant of authority by the County, are counterproductive to these aims.

To summarize, the Task Force's work (including the work of each of its members) and the Consultant's work are completed. They no longer possess any authority to act on behalf of the County or Task Force or any members thereof. Put simply, we are at a stage in the process where the proverbial "ball" is solely in the County's court. Only the County can determine what next steps are appropriate. Of course, when the County determines what those next steps are, the County will engage with stakeholders and partners to move forward with its Domes plan – whatever that may be.

To best enable deliberative, thoughtful, and meaningful stewardship of taxpayer dollars, it is essential that all parties external to the County (including Task Force members) immediately stand down from any and all activities related to the Domes and/or the Task Force and/or purported "conservancy." *See also supra* n.3. Failure to do so could result in personal liability for which the County has no obligation to indemnify.

If you have engaged in material work or actions that may be addressed by this letter, please provide a written accounting of those activities to Paul Kuglitsch as soon as practicable at Paul.kuglitsch@milwaukeecountywi.gov. Communication of such activities does not presume or imply any right or entitlement to payment or indemnification from the County.

Notwithstanding the foregoing, the OCC is keenly aware of the significant time, effort, and energy invested by the Task Force, the Consultant, County Board, and County Executive to date, the financial commitment that the County has made to help fund the work of the Task Force, as well as the significant landmark, prestige, educational, and recreational value of the Domes to the Milwaukee County community. We applaud and appreciate all stakeholder efforts and energy. The next steps must be coordinated and directed by the County.

Mr. Kuglitsch will reach out to stakeholders before the end of the year to set up a discussion to work through coordination issues, as well as these questions of proper responsibilities and authorities.

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In the interim, please send any and all questions to Deputy Corporation Counsel Paul D. Kuglitsch at the above-noted email address.

Thank you,



MARGARET C. DAUN
CORPORATION COUNSEL



PAUL D. KUGLITSCH
DEPUTY CORPORATION COUNSEL

cc: ArtsMarket, Inc.⁴
Chairman of the Milwaukee County Board of Supervisors, Theodore Lipscomb, Sr.
Chairman of the Committee on Parks & Recreation, Jason Haas
Chief of Staff to the County Board, Kelly Bablitch
County Executive Chris Abele
Chief of Staff to the County Executive, Raisa Koltun
Director of Parks, Guy Smith
County Comptroller Scott Manske

⁴ For simplicity's sake, the term "Consultant" will refer collectively to not only ArtsMarket, but also Engberg Anderson Architects and Saiki Design, Landscape Architects.

**Wisconsin Department of Financial Institutions**

Strengthening Wisconsin's Financial Future

Corporations Bureau

EXHIBIT A

Form 102-Nonstock Corporation Articles of Incorporation

Name of Corporation

Name of Corporation: MITCHELL PARK AND DOMES
CONSERVANCY, INC.

Principal Office

Mailing Address: 759 N MILWAUKEE STREET, SUITE 410
City: MILWAUKEE
State: WI
Zip Code: 53202

Registered Agent

Registered Agent Individual: JAMES H. HALL, JR
Name of Entity:
Street Address: 759 N MILWAUKEE STREET, SUITE 410
City: MILWAUKEE
State: WI
Zip Code: 53202

Select Statement

Select one statement: The corporation will NOT have members
Is this corporation authorized to make distributions under the statute?: Yes
This document was drafted by: GREGORY C BURCE

Incorporator

Name: WILLIAM H. LYNCH
Street Address: 3410 NORTH LAKE DRIVE
City: MILWAUKEE
State: WI
Zip Code: 53202

Incorporator Signature

I understand that checking this box constitutes a legal signature: Yes
Incorporator Signature: WILLIAM H.LYNCH

Optional Articles

The purpose(s) for which the corporation is incorporated: PURPOSE: The Corporation is engaged and shall be operated exclusively for charitable and educational purposes; to engage in activities relating to the

for the purposes mentioned herein, and to invest in, receive, hold, use and dispose of all property, real or personal, as may be necessary or desirable to carry into effect the aforementioned purposes. Notwithstanding any other provisions of these Articles of Incorporation, the corporation shall not carry on any activities not permitted to be carried on (A) by a corporation exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), or the corresponding provision of any future federal tax code or (B) by a corporation, contributions to which are deductible under Sections 170(c)(2), 2055(a)(2) and 2522(a)(2) of the Code, or corresponding provisions of any future federal tax code. DISSOLUTION: Upon the dissolution of the Corporation, all of the remaining assets of the Corporation shall be distributed only for one or more exempt purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or the corresponding section of any future United States internal revenue law, or shall be distributed to the federal government, or to a state or local government, exclusively for a public purpose. Any such assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said court shall determine, which are organized and operated exclusively for such purposes.

Delayed Effective date:

Directors

Optional Contact Information

Name: GREGORY C BURCE
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Endorsement

Received Date: 11/25/2019

EXHIBIT 3

Memorandum

Milwaukee County, Wisconsin – Domes Business Plan Analysis

Date **May 4, 2022**

To: Milwaukee County Department of Administrative Services

From: Rebecca Mitich, Managing Partner, Husch Blackwell LLP
 Jolena Presti, Managing Director, Baker Tilly US, LLP

Introduction

In October of 2019, the Domes Task Force (“Task Force”) submitted a Business Plan and Conceptual Design (“Plan”) to Milwaukee County, which outlined the Task Force’s recommendation for the renovation of the Milwaukee County Horticultural Conservatory (the “Domes”) and a larger placemaking effort surrounding Mitchell Park (“Park”). At that time, the financial situation of Milwaukee County was not conducive to using cash on hand or solely issuing debt to renovate the Domes. This being the case, the Task Force developed a plan that targeted outside sources of capital, created new revenue sources and expanded the scope of development from restoration of the Domes to the Park beyond in an effort to appeal to a wider audience (such development is referred to herein as the “Domes Redevelopment Project”).

The capital sources for the proposed Domes Redevelopment Project include New Markets Tax Credits, Historic Tax Credits, PACE financing, Opportunity Zones capital, private donations and County financing (collectively “Capital Sources”). The Capital Sources and their associated requirements create a complex capital stack and legal structure. The County has engaged the authors of this memorandum to review the proposed capital stack and organizational structure to determine the viability of the Task Force’s proposal with respect to these components. Because the Capital Sources and legal structure are intertwined, Baker Tilly and Husch Blackwell worked closely to combine their respective professional evaluation into one memorandum. This memorandum will review each of the Capital Sources both on an individual basis and in combination with the other sources, discuss repayment methods for each, and examine the legal and organizational structure proposed in the Plan.

The summary of the preliminary findings is that while certain Capital Sources likely could be used in the Domes Redevelopment Project, it is highly unlikely (a) that all of the Capital Sources would be available to the Domes Redevelopment Project, and (b) that the Capital Sources that may be available would be available in the amounts required to execute the Domes Redevelopment Project as a whole.

The Plan

The Plan proposes doing much more than simply renovating the Domes. It proposes turning the Park into a destination and creates a model that includes more revenue generating activities in hopes that the Park will become self-sustaining. The Domes Redevelopment Project includes rehabilitating the Domes and creating the ‘Mitchell Park Learning, Wellness and Horticulture Campus’, which would house workspace for classrooms, learning labs, outdoor areas for summer camps, research space, a wellness clinic and more.

The Plan proposes a total funding need of \$66 million for the Domes Redevelopment Project, though we note that there are various components of the Domes Redevelopment Project that are not included in this initial figure (page 55 of The Plan.) The funding sources used to fill the \$66 million gap include Historic Tax Credits (HTC), New Markets Tax Credits (NMTC), Opportunity Zone (OZ) capital, Property Assessed Clean Energy (PACE) financing, a private sector capital campaign, and County bond financing. The breakdown of the funding amount for each portion of the stack can be seen below in figure 1.

Figure 1. Capital Stack proposed in 2019 Business Plan	
Historical Tax Credits	\$7,000,000
New Market Tax Credits	\$15,000,000
Opportunity Zone Investment	\$12,000,000
PACE Loan	\$5,000,000
Private Sector Capital Campaign	\$13,500,000
County – Bond Financing	\$13,500,000
Total	\$66,000,000

The chart above shows the breakdown of the Capital Stack as shown in the Plan.

In support of the Domes Redevelopment Project and the proposed capital stack, the Plan proposes the creation of various legal entities with various responsibilities. Additional discussion of these entities is provided in a June 13, 2019 Task Force power point titled “Task 1 Summary Recommendations and Update from May 7 Presentation” (the “PowerPoint”) and the document entitled “Assumptions Informing the Business Plan and Conceptual Design Report to Milwaukee County Mitchell Park Domes Task Force Addressing Questions from the DPRC” (“Summary of Assumptions”). The proposed entities and their roles are summarized as follows:

- **Mitchell Park and Domes Conservancy** (“Conservancy”). The proposed Conservancy is a fund development, fiscal management and operational entity whose board has 15 to 30 members made up of County Supervisors, equity investors, representatives from partner organizations and service providers, and members elected by the Conservancy. According to the Summary of Assumptions, it is a 501(c)(3) “responsible for managing County assets and services and for working together with the County in operations.” The specific duties proposed for the Conservancy are set out on page 72 of the Plan. Additionally, the Conservancy will support the Friends of the Domes (“Friends”), accepting gifts of \$250 and above, while smaller gifts go to Friends.
- **Mitchell Park Partners LLP** (“MPP”). MPP is proposed to manage programming and educational partnerships within the Park. The Plan contemplates that MPP will make payments to the Conservancy in exchange for the provisions of “utilities, maintenance,

marketing and service population synergies” that the Conservancy will provide to MPP. MPP is also positioned as “less capital intensive or risk intensive than [the Conservancy]”. It will “maintain long-term shared equity investment partnerships to further the Park’s missions and that of its mission-aligned partners, in areas of conservation, health, education and community economic development.”

- **Domes Services Corporation** (“DSC”). DSC is proposed to manage the enterprise elements of the Park and Domes (Plan, pg. 7). It provides “exhibit design and fabrication, events and food services sub-leases and operations, retail, floral design and other services”. It is also positioned as an “entrepreneurial start up revenue center for the Park” (Plan, pg. 72).
- **Historic Domes LLC** (“Historic Domes”). Historic Domes is identified in the Summary of Assumptions as the proposed developer of the Domes Redevelopment Project. The Summary of Assumptions assumes that there will be an agreement between Historic Domes and the County pursuant to which Historic Domes is responsible for the redevelopment of the Domes and Park/buildings.

Other than references in the Summary of Assumptions to the need for “agreements” between the County and these entities and, in some cases, between and among the entities themselves, there is little detail in the Plan and the supporting documents relating to the assets and liabilities of each of these entities or the flow of funds between these entities and from these entities to the County. As it relates to the Capital Sources, it is unclear which entity the Plan conceives as being primarily liable for the debt portions of those Capital Sources; which entity, in the case of Opportunity Zone capital, would serve as the Qualified Opportunity Zone Business; or which entity, in the case of Historic Rehabilitation Tax Credits, would incur Qualified Rehabilitation Expenses.

Capital Stack Analysis

Historic Rehabilitation Tax Credits (HTC)

Overview: HTC are intended to help the funding of rehabilitation or re-use projects on structures listed on the National Register of Historic Places or certified as contributing to a registered historic district. The total benefit of the tax credits is generally equal to 20% of qualified rehabilitation expenditures (“QREs”) for federal credits and 20% of QREs for state credits up to \$3,500,000, totaling a maximum of 40% of qualified rehabilitation expenditures. QREs are broadly defined but do not include expenditures relating to additions onto or expansions of historic structures. Other requirements for receiving the credits are (i) that the project meet the “substantial rehabilitation test”, which means that the QREs made in either a two- or five-year period exceed the adjusted basis of the historic structure, (ii) that the historic structure was placed in service prior to rehabilitation, and (iii) that depreciation is allowable with respect to the historic structure. All rehabilitation must be done to the Secretary of the U.S. Department of the Interior’s standards, and the building must be used for income purposes after rehabilitation.

HTCs are generally not granted to tax exempt entities or governments. Exceptions to this rule are provided if the tax-exempt entity is using the historic structure in a manner that makes it subject to the unrelated income rules of Internal Revenue Code Section 511, or if the historic structure is leased to a tax-exempt entity provided that the property is not deemed “tax-exempt

use property”. Additionally, a tax-exempt entity could lease the property to a for-profit entity that incurs the QREs to the property and then (under certain conditions) takes the tax credits.

Plan Proposal: The Plan proposes \$7 million worth of the total funding come from HTCs, which are to be received in year 1 of the Domes Rehabilitation Project. Although the graph on pages 64 and 65 show the funding coming in during year one, there is a statement on pages 67 and 68 of the Plan about HTCs not being released until the building is in service. As stated in the Plan, this would require bridge financing for the construction/rehabilitation phase. It’s assumed the credits are received upon building opening and then capitalized.

To receive the HTCs, the Domes would have to be added to the National Register of Historic Places. A draft application is included as an exhibit to the Plan. HTCs would then be used to help fund the repair of the Domes themselves, the total cost of which is estimated at \$30 million.

Preliminary Findings: The use of HTCs as laid out in the Plan is possible, but there are several structuring hurdles that could cause issues.

- **Placement on National Register.** We feel it is reasonable to anticipate that the Domes would qualify for listing on the National Register of Historic Places.
- **Planned Amount.** If the total cost of rehabilitating the Domes is projected to be \$30,000,000 it is likely that a significant portion of this will be QREs, though without a breakdown of that \$30,000,000 we cannot be certain of the exact proportion. For the sake of this Memorandum, we will assume that 90% of the total expenditures are qualified rehabilitation expenditures. This would mean that the project could generate \$5,400,000 in federal HTCs and another \$3,500,000 in state HTCs (20% of \$27,000,000, subject to the state cap) for a total possible credit of \$8,900,000. Because a likely structure would involve an investor purchase of the HTCs (discussed in more detail below), the total benefit to the project will be reduced to reflect investor pricing. If we estimate investor pricing at \$0.800¹ per credit, we obtain a total benefit to the project of \$7,120,000. This being the case, \$7,000,000 appears to be a reasonable estimate of the HTC benefit to the project.
- **Organizational Structure.** The Plan is silent as to the party incurring the QREs and the party taking the tax credits. In addition to the general unavailability of HTCs to tax-exempt entities, neither the County nor the Conservancy, which is planned as a 501(c)(3), would be able to use the HTCs because they have no tax liability to offset. This being the case, it is likely that a new, for-profit entity (“FPE”) would need to be created to bring in a federal HTC investor. The federal HTC investor would typically be a 99% member of this new FPE with the 1% member being related to the County or Conservancy. There are various means by which the state HTC investor could come into the project but they would generally also become a member of the FPE or a member of a member of the FPE. The FPE would likely need to have a long-term lease for the Domes (not less than 39 years after completion of the rehabilitation), enabling it to incur the QREs and claim the HTCs. While there are different ways to structure entities so that the project can benefit from HTCs, it is far more complicated than simply applying for placement on the National Register and then monetizing the tax credits.

¹ This credit price was taken from a recent HTC/NMTC transaction. Credit pricing fluctuates based on the project, the strength of the sponsor and market forces, and could be higher or lower than the amount referenced here.

- **Timing.** The Plan anticipates that the HTC's will be taken the year the project is placed in service. In actuality, HTC's are taken over five years, beginning on the date the Project is placed in service. The impact of this extension on a project that is monetizing the HTC's is lower investor pricing. Regardless, the project will require a bridge loan to monetize the tax credit investor equity at the commencement of the rehabilitation. This loan would be repaid from investor equity as it comes into the project (typically in tranches through the course of reconstruction).

New Markets Tax Credits (NMTC)

Overview: New Markets Tax Credits are federal income tax credits used to encourage private investment in low-income communities. A community development entity (CDE) must apply through a competitive process for an NMTC allocation from the Community Development Financial Institutions Fund, a division of the U.S. Treasury Department. A project seeking NMTCs needs to bring together at least one CDE with an NMTC allocation from which it can receive a sub-allocation, one NMTC investor and generally one debt provider to leverage the NMTC investor's equity and take advantage of the full amount of the NMTC sub-allocation. Just as obtaining an allocation is highly competitive for CDEs, attracting a sub-allocation, investor and debt provider can be extremely challenging for a project. CDEs and investors typically look for projects in "severely distressed" census tracts rather than just low-income census tracts. Additionally, both CDEs and investors are often looking for projects that result in job creation or new services to the community.

Projects that successfully obtain an NMTC sub-allocation and investor and are able to line up either a leverage debt provider or otherwise raise a source of leverage funds receive, in essence, two loans that are generally at below market interest rates and are interest only for the first seven years. The first loan represents the leveraged debt and the second loan represents the tax credit equity. The total amount of the loans is generally just under the total amount of the sub-allocation the project receives. At the end of seven years, generally speaking, the loan representing the tax credit equity is forgiven and the loan representing the leveraged debt is refinanced.

Proposed Use: The Plan proposes \$15 million from NMTC which will be used to support the workforce development and new quality jobs created by the enterprises listed in the Plan. Per pg. 78 of the Plan, the NMTC would be deployed as a seven-year loan on roughly \$11 million, with the final payment of \$6.7 million in the seventh year. The Plan assumes that the remaining balance of the NMTC loan is refinanced at the end of seven years. The Plan contemplates that \$3,150,000 of the NMTCs would be used for working capital expenses to address moving plants and ramping up new partnership and enterprise subsidiaries (Plan, pg. 59).

Preliminary Findings: The use of NMTCs for the Domes Redevelopment Project is possible; however, there are significant challenges to accessing this incentive and the Plan does not correctly characterize the use and repayment of the NMTC proceeds.

- **Qualifying Census Tracts.** The Domes and the Park are located in a census tract characterized as "severely distressed". This is a threshold qualification matter for NMTC financing.
- **Securing a Sub-Allocation.** Unlike HTC's that are available to the project so long as the project meets the technical requirements of the tax credits, NMTCs are highly competitive. While the Plan seems to contemplate that the NMTCs will be secured before the

partnerships and revenue generating activities are in place, CDEs, NMTC investors and leveraged debt providers will want to see that the revenue sources required to pay debt service on the NMTC loans and to position the project for refinancing after the end of the seven-year interest-only period are known and committed. Generally, this would mean subleases with service providers, contracts with restaurant operators, management companies, etc. are in place. It is also important to note that even a fully structured Domes Redevelopment Project will compete with other worthy projects for an NMTC sub-allocation. The Plan promises 300 new jobs by the time the Domes Redevelopment Project is complete, but these jobs may be low wage service-type jobs. NMTC investors are looking for projects that will retain or create jobs with a living wage and benefits, with a high school degree or equivalent requirement that would provide opportunities to provide a significant impact in underserved communities. The Domes Redevelopment Project is unlikely to obtain an NMTC sub-allocation in any amount until it is fully-structured and its partnerships and revenue sources are committed. Even with that in place, however, the Domes Redevelopment Project will still have to compete with other impact projects, meaning that there is no guaranty that an NMTC sub-allocation will be secured.

- **Repayment Terms.** As noted in the Plan, the NMTC loans are interest only for the first seven years. Unlike the Plan, however, interest is paid on the full amount of the NMTC loans during that period (likely to be just under \$15,000,000 for a \$15,000,000 allocation not on only \$11,000,000 of the total). This increases the projected carrying cost of the NMTC loans.
- **Working Capital Expenses.** The Plan states that approximately \$3,000,000 of the NMTC financing will be used for working capital. While it is correct that NMTC financing can be used for working capital expenses in the qualified census tract, any such funds would generally be required to be expended with twelve months of the NMTC closing. It is highly unlikely that the Domes Redevelopment Project would be able to absorb that much working capital in such a short amount of time when the majority of the operations will not have begun. It is far more likely that NMTC financing would be used on construction expenses, either for the Domes renovation or the new and expanded portions of the Domes Redevelopment Project.
- **Organizational Structure.** The Plan does not discuss what entity would be the borrower under the NMTC loans or what entity would guaranty the loans. The borrowing entity would have to have an interest in the subject property—either outright ownership of the Domes and the affected areas of the Park or a leasehold interest. It is also highly likely that the NMTC loans would need to be secured by a mortgage on that ownership or leasehold interest. Unlike HTCs, 501(c)(3)s commonly obtain NMTC financing, which means that the Conservancy could potentially serve as the borrower so long as it held an interest in the property. This, however, raises structuring issues with HTCs.

Opportunity Zone Investment (OZ)

Overview: Opportunity Zone Investment is a way for investors to defer capital gains taxes through 2026 by investing them into a Qualified Opportunity Fund (“QOF”) that then invests in qualifying projects or businesses in designated communities called Opportunity Zones (such projects or business are known as Qualified Opportunity Zone Businesses (“QOZBs”)). In addition to tax deferral, Investors who hold their investments in a QOF for ten years or more (assuming the

QOF correctly maintains its investment in QOZBs), upon exit from the QOF will realize any appreciation on that investment tax-free. This incentivizes investors to find the best return on their investment in addition to simply deferring capital gains.

Proposed Use: The Plan includes \$12 million of OZ investment in the capital stack. This is to be achieved by the newly created Conservancy launching a QOF as soon as possible. The Plan assumes that all \$12 million would be received within the first year. The Plan references the repayment of OZ investments at the end of ten years (Plan, p. 78). The repayment revenues are to come from net operation income generated by the enterprise activities.

Preliminary Findings: While the Domes Redevelopment Project could qualify for Opportunity Zone Investment, the OZ scenario proposed in the Plan is unlikely to be successful.

- **Qualifying Census Tracts.** The Domes and the Park are located in a census tract that has been designated as an Opportunity Zone. This is a threshold qualification matter for Opportunity Zone Investments.
- **Timing.** The Plan called for the full \$12,000,000 of OZ investment to be made prior to December 31, 2021. Had investments been made prior to that date, investors would qualify for what is generally a 10% forgiveness of the amount of capital gains taxes they would have paid had they not invested those gains in the QOF. This incentive to invest in QOFs is no longer available to investors, thus reducing the benefits of OZ investments to only deferral through 2026 and tax-free appreciation after a ten-year hold. The loss of the partial forgiveness component will likely decrease the interest of Opportunity Zone investors in the Domes Redevelopment Project.
- **Investor Appetite.** OZ Investors are generally looking for projects that are going to provide for double digit returns on their investments. A typical QOF might promise an annual preferred return of 6% with an IRR at the end of the ten-year hold period of 12% to 18%. The critical factor for OZ investors is generally the ability of the investment to appreciate over time. This is even more critical when, as discussed above, the partial tax forgiveness element of the OZ program is no longer available. When looking at the Domes Redevelopment Project through the lens of an OZ investor, it is difficult to see where that appreciation or growth will occur. Is it reasonable to think that a restaurant or other for-profit business at the Domes or the Park will increase in value sufficiently to achieve the returns from competitive OZ investments? If the real estate portion of the Domes Redevelopment Project could be structured such that a QOF could own an interest in the entity that owns or leases the real estate, is it reasonable to believe that the real estate would increase in value? Without further information, the answer to these questions is likely no. This means that for investors who want to see their investment grow in value over time, the Domes Redevelopment Project is unlikely to be a good investment. If this is the case, the Domes Redevelopment Project will have a very difficult time raising OZ capital in any amount.

It is also important to note that Opportunity Zones investors only benefit from the program if they are investing capital gains. While it is certainly possible that investors could sell stocks or some other asset for the purpose of investing into the QOF, a more typical OZ investor would be a taxpayer who finds himself or herself with gains and seeks to invest those gains to benefit from the program. This means that the universe of available dollars

to be invested in a QOF is generally more limited than those available for non-OZ investments. Additionally, investors have less control over the timing of those investments because the realization of capital gains is tied to disposition of an asset, which may not occur when or how desired for the purposes of the project. These factors cast further doubt on the availability of OZ investments in the amounts (or even close to the amounts) proposed in the Plan.

- **The Exit.** One of the most important questions any OZ investor will ask of a project is how the investor will exit out of the project at or after the end of ten years. An exit would typically be accomplished either through a buy-out of the investor or through the sale of the asset and a liquidation. In the case of the Domes Redevelopment Project, it is highly unlikely that the Domes or the portion of the Park included in the Domes Redevelopment Project would be sold. If the OZ investment is in an operating business at the property, the business could be sold, but the long-term plan for the Domes Redevelopment Project is likely that the partners will stay in place. The Plan suggests that the investors will be repaid, which appears to contemplate a buy-out from the business that is the recipient of the OZ investment. While this is certainly possible, ensuring an exit after ten years for any OZ investor would be a significant burden on the Domes Redevelopment Project.
- **Organizational Structure.** Opportunity Zone investments require that the investor invest in a QOF that then invests in a QOZB. The Plan provides no specifics around who would organize and manage the QOF or what entity (or entities) would be the QOZB. A QOF is simply a partnership or corporation that is organized to serve as a Qualified Opportunity Fund. The County could organize a QOF and solicit private funds for investment, though it should be noted that soliciting investments in a QOF is subject to securities laws and requires disclosures and the filing of exemptions from registration (if available). Additionally, a QOF that is holding \$12,000,000 in private investment must manage those investments—a role that is unaccounted for in the Plan. The QOZB could be (i) a real estate entity that leases and improves the Domes or other areas of the Park included in the Domes Redevelopment Plan, and then sub-leases those areas out to operating companies; (ii) an operating entity such as a restaurant or event venue that leases an area in the Domes or the Park, improves the area and operates its business from that area, or (iii) an operating entity that leases an already improved area and operates its business from that area. There are various requirements of a QOZB as well as prohibited acts with which any QOZB would need to comply. These organizational structures could be put into place to create an opportunity for OZ investors in the Domes Redevelopment Project but at much expense and with an added regulatory and administrative burden.

PACE Loan

Overview: A property assessed clean energy (PACE) Loan is a mechanism for financing energy efficiency or clean energy improvements on property. The loans are sourced from the open lending market and secured through a voluntary PACE special charge, which acts as a lien on the subject property enforceable through the tax foreclosure process. PACE loans are tied to the property and not the owner; thus, if property is sold, the PACE special charge would remain on the property to be paid by future owners. Terms for PACE loans can be 20 years or more, tracking

to the useful life of the equipment purchased with the financing. Property owned by local, state or federal government is generally not eligible for PACE financing in Wisconsin.

Proposed Use: The Plan proposed receiving a \$5 million PACE loan. The Plan states proceeds would be used for renovation activities such as reglazing, installing energy efficient heating/cooling systems, and lighting systems.

Preliminary Findings: Public ownership of the Domes and Park make PACE financing an unlikely option.

- **Organizational Structure.** The Plan does not state which entity would secure the PACE financing. While the Wisconsin PACE statute is silent on the ability to place a PACE special charge on public property, the City of Milwaukee's PACE Financing Ordinance (304-26.5) specifically refers to private property and the City's PACE Program Guidelines state that PACE financing is only available to commercial properties including non-governmental, tax-exempt properties. This would exclude the Domes and Park from eligibility for PACE financing. One solution might be to create a condominium structure allowing for private ownership of a portion of the property, but, in addition to the lack of political will to transfer the Domes or any other portion of the Park to a private entity, this would be a dramatic restructuring for a relatively small amount of financing.
- **Financing Amount.** By statute, PACE financing can only be used to finance a "brownfield revitalization project, or for making or installing an energy efficient improvement, a water efficiency improvement, or a renewable resource application." The amount of financing is based on the cost of these qualifying improvements. It is reasonable to assume that a \$60,000,000 project would have \$5,000,000 in eligible PACE improvements but the unique nature of the Domes Redevelopment Project means that there is no certainty in that amount without a PACE engineering study of the detailed project plans and specifications.

Private Sector Capital Campaign

Overview: Private sector funds can come from a number of sources such as individuals or companies looking for a way to give back. These funds do not require repayment or a return on investment.

Proposed Use: The Plan proposed \$13.5 million worth of private sector funds coming in over a 4-year period (2021 – 2025), most of it flows in the first 2 years. The Plan also includes several naming opportunities for larger donations as well as a "campaign giving pyramid." The giving campaign is assumed to reach a pool of national donors and foundations that are not being approached for other Milwaukee-based fundraising campaigns.

The Plan also stipulated that during the consultants' analysis they found no interest in paying for just "fixing up" the Domes. Donor interest was focused on new programs and job creation.

Preliminary Findings:

- **Organizational Structure.** The Plan anticipates that the Conservancy will be the entity that performs the capital campaign and raises private funds for the Domes Redevelopment Project. It is unclear whether the Conservancy would then contribute those funds to the County or would actually have an interest in the Domes, potentially

through a long-term lease, that would allow the Conservancy to raise the private funds and direct their use.

- **Campaign Amount.** The Taskforce performed various focus groups with community partners to determine an estimated campaign amount. It does not, however, appear that this was a full capital campaign feasibility study. Any plan should include a full study before proceeding.

Bond Funds

Overview: The Plan proposed \$13.5 million to come from the County in the form of bonds.

Proposed Use: The Plan proposed \$13.5 million to come from the County in the form of bonds. It is assumed that the funds are to be used for the renovation of the Domes themselves, but it is unclear. It is also unclear as to what type of bonds would be issued. There is mention of a general obligation bond, revenue bond, or a mix of both.

Preliminary Findings:

- **Organizational Structure.** Generally speaking, County bonding for construction projects is limited to public projects. Thus, in order to qualify for County funds, the Domes would have to remain under public ownership and control. Public ownership and operation of the Domes while qualifying the Domes for County funds, may disqualify the Domes from other funding sources discussed in this memorandum.
- **Financing Amount.** The Plan appears to back into the financing request from the County by first attempting to determine what might be available from other sources and then using the County to fill the remaining amount. There is no indication that the proposed \$13,500,000 was reached in conversation with the County or whether the County gave any indication of the availability of those funds for the Domes Redevelopment Project. The County has a finite amount of bonding capacity. Any decisions about use of the County's bonding capacity or priorities would be discussed by the Milwaukee County Board within the context of current market conditions, project priorities, and financial commitments.

Conclusion

While certain Capital Sources likely could be used in the Domes Redevelopment Project, it is highly unlikely (a) that all of the Capital Sources would be available to the Domes Redevelopment Project, and (b) that the Capital Sources that may be available would be available in the amounts required to execute the Domes Redevelopment Project. OZ capital may be the most doubtful capital source. While it is certainly possible that some OZ capital could be raised to support the Domes Redevelopment Project, we find it highly unlikely that the total OZ funds raised would come close to \$12,000,000. Additionally, the fact that various Capital Sources require varied organizational structures means that pursuing one Capital Source may make it impossible to pursue another. This may be the case when we look at County bonding, which must support a public entity, and PACE financing which requires a non-public entity. Similarly, fundraising requires a 501(c)(3), but 501(c)(3)s are generally not eligible for HTCs. While each Capital Source may be available in some amount in isolation, we find it highly unlikely that all Capital Sources will be available in the amounts needed to pursue the Domes Redevelopment Project as envisioned in the Plan.

Next Steps

While the Capital Sources set forth in the Plan are unlikely to support the Task Force's vision, the intention of this Memorandum is not to poke holes in the Task Force's work and then move on. Rather, we hope to set the County on a viable path to the restoration and maintenance of the Domes. To see this path requires a clearer picture of the following:

- The cost of the restoration of The Domes – It is our understanding that the County expects to receive an analysis of the expense to repair and renovate the core structure of the Domes in the fall or early winter of 2022. Having a realistic budget for the essential work that needs to be done to restore the Domes (as well as the cost of ongoing maintenance) is critical and will serve as a basis for forward planning.
- Anticipated revenue from the Domes – An analysis of the anticipated revenues set forth in the Plan was outside the scope of our work. Generally, however, the revenue assumptions in the Plan are unsupported by factual analysis. We would like to see a realistic projection of revenues from a fully restored facility based on historical data. The exploration of additional revenue sources and partnerships will be critical to the future of the Domes, but it's also important to understand what kind of debt service and operating costs the Domes will be able to confidently support upon restoration.
- Structure and initial leadership of a sponsor entity – The Plan envisions several layers of entities and partnerships to achieve its service and revenue goals. We agree that a 501(c)(3) should likely be created to lead capital campaign efforts, and potentially take a leasehold interest in the Domes and serve as the obligor under any financing for the restoration of the Domes. The Milwaukee Public Museum's organizational structure is an example of how this might work. Alternatively, Friends of the Domes could step into this role, which would be a large expansion of the scope of that organization. In either case, if the County is unable to finance the entirety of the restoration, focusing on the formation and leadership of one organization that will lead the project going forward, in conjunction with the County, will be critical.

With these pieces in place, the County can meaningfully review the financing options in front of them. For example, if the total restoration budget was \$30 million, a simplified capital stack might be \$15 million in private contributions, \$5 million in NMTC equity (requiring a total NMTC allocation of \$20 million) and \$10 million in County bonding. In this scenario, the private contributions serve as the leverage for the NMTC investment, meaning that at the end of seven years, the Domes have no outstanding debt relating to the NMTC financing. With a realistic budget, a reliable revenue projection, and a plan for committed private-sector leadership in place, the County can reframe the Task Force's efforts into a viable and meaningful plan for the future of the Domes.

Glossary – Key Terms

Plan – Business Plan and conceptual Design presented to the County by The Domes Task Force in October 2019.

Domes Redevelopment Project – describes the renovation of the Domes, new revenue sources created, and the capital needed to do so.

Capital Sources – represents the multiple funding sources needed to complete the Domes Redevelopment Project. Includes NMTC, PACE, OZ Investment, HTC, and Private Donations.

NMTC – New Market Tax Credits

OZ – Opportunity Zone

HTC – Historic Tax Credits

PACE – Property Assessed Clean Energy

Conservancy – Mitchell Park Domes Conservancy

MPP – Mitchell Park Partners

DSC – Domes Services Corporation

Historic Domes – Historic Domes LLC

QRE – Qualified rehabilitation expenditures

FPE – For-profit entity

CDE – Community development entity

QOF – Qualified Opportunity Fund

QOZBs – Qualified Opportunity Zone Businesses

Milwaukee County, Wisconsin - Domes Business Plan Analysis Summary								
Capital Stack Funding Source	Amount in Plan	Debt vs Equity	Estimated Interest Rates	Typical Payback Period	Transaction Structure	Proposed Ownership Structure	Plan Inaccuracy	Summary Finding
Historical Tax Credits	\$7,000,000	Equity - but likely need a short term loan to bridge portions of the equity that will come in over time. Total benefit is therefore reduced by loan fees and interest.	Bridge Loan - 5%	Approx 2 yr construction bridge loan; paid back through capital contributions made by HRC investor during and upon completion of construction.	Tax credits are earned for Qualified Rehabilitation Expenses (QRE) incurred by the project and monetized by a tax credit investor.	New for-profit entity; Federal HTC investor 99%/ County 1% - This entity could be the fee owner of the Domes or lease the Domes.	No accounting for required for-profit status of entity that incurs the QRE's.	Possible, but may conflict with other funding sources and entity requirements
New Market Tax Credits	\$15,000,000	Approximately : 80% - Debt 20% - Equity	3.50%	7 years, refinance for 10 additional years	CDEs make loans to businesses operating in low-income communities on better rates and terms and more flexible features than the market. Generally structured as loans. The allocation proposed in the plan would be interest only on \$15 million for 7 years. Then refinance \$12 million for approximately 10 additional years and the remaining \$3 million becomes equity in the project.	Could be for-profit or not-for-profit entity. There are tax advantages to a not-for-profit structure.	Understatement of interest expense - use as working capital to the extent represented is unlikely - no reference to competitive nature of inventive - not "only available" if the whole \$66 million project is developed.	Possible
Opportunity Zone Investment	\$12,000,000	Equity - with a preferred return	The preferred return to investors is an ongoing project expense in the same way interest would be. Estimate of 6%.	Not sooner than 10 years	Investors, in the form of Qualified Opportunity Zone Funds, purchase (generally) partnership interest in a qualified business. That purchase Price is equity into the project. Investors then exit after 10 years and gains on their qualified investment are tax free. This exit generally requires a sale of the business or a buy out of the investors (i.e. assuming an increase in value, a payout of everything originally invested plus any appreciation on that investment).	For profit entity; subject to securities laws and reporting	Ongoing costs not conveyed in plan. Likely lack of investor interest	Unlikely
PACE Loan	\$5,000,000	Debt	5.75%	20 years	Commercial loan paid back through a special assessment (property taxes).	Under Milwaukee's ordinance and guidance, it must be a public entity.	Interest rate is too low (projected at 4% in plan); no consideration to the nature of the borrowing entity	Unlikely, unless Domes are privatized
Private Sector Capital Campaign	\$13,500,000	Equity	N/A	N/A	The funds from the capital campaign are donations and do not need to be paid back	Not-for-profit entity	Likely double counting philanthropic donors with OZ "mission-driven" investors	Possible
County - Bond Financing	\$13,500,000	Debt	4%	10-20 years	Obligor will need to pay back principal & interest on the entire bond issuance through debt service payments over the life of the bond.	Not for profit entity - Tax status depends on use of funds	Unclear if the bonds described in the Plan are general obligation or revenue bonds	Possible