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Date: March 17, 2014

To: Members of the Judiciary, Safety & General Services Committee

cc: All Other Supervisors
Kelly Bablitch
Amber Moreen
Brian Dranzik

From: Paul Bargren, Corporation Counsel *PB*

Re: Application of MCO 1.11(c)(3)2(b)

I was asked at the March 6, 2014, meeting of the Judiciary, Safety & General Services Committee for advice on the application of MCO 1.11(c)(3)2(b). The ordinance addresses authorization of lawsuits by the County. The question arose in the context of a potential court appeal by the County Department of Transportation (or other County entity) of the February 20, 2014, decision by the Administrative Determination Review Committee (ADRC) to reject the transit services RFP award.

A related question asked whether Board authorization would be required to pay attorney fees for such an appeal.

Background

MCO 1.11 establishes the standing committees of the Board, including Judiciary. MCO 1.11(c) sets out the duties of those committees, and Judiciary's duties are described in MCO 1.11(c)(3). As to lawsuits, MCO 1.11(c)(3)2(b) states:

Actions initiated by the county. The committee, subject to full board approval, shall approve the initiation of all suits or claims by the county against other persons or entities where the amount claimed exceeds ten thousand dollars (\$10,000.00) or where the rights sought to be declared have a potential fiscal effect on the county in excess of ten thousand dollars (\$10,000.00), except when the county executive approves the initiation of an action on an emergency basis to preserve property, to protect the life, health or welfare of persons, or to obtain an injunction on the grounds set forth in ch. 813, Wis. Stats. In the event the county executive authorizes corporation counsel to file an action under this exception, corporation counsel shall provide a report to the committee members and the

county board chair immediately upon receiving the county executive's authorization of such action.

Analysis

Two threshold points can be addressed quickly. An appeal of the ADRC decision would have an effect over \$10,000, and there is no emergency situation at issue. Thus my analysis can focus on this operative language:

The committee, subject to full board approval, shall approve the initiation of all suits or claims by the county against other persons or entities...

In my view, based on its plain language, this ordinance requires Judiciary Committee approval, subject to full Board approval, of the initiation of a court action by a county department or entity challenging the ADRC decision.¹ This ordinance would not apply to suits or claims by county officers individually or in their official capacities, since that would not be a suit or claim “by the county.” Whether there is such an official with standing to appeal this ADRC decision may be a question for the courts.

Applicable here are two provisions in the statutes. “Each county in this state is a body corporate, authorized to sue and be sued,” Wis. Stat. § 59.01, and “[t]he powers of a county as a body corporate can only be exercised by the board, or in pursuance of a resolution adopted or ordinance enacted by the board,” *id.* § 59.02(1). Applying MCO 1.11(c)(3)2(b) to a potential appeal by a county entity of the ADRC decision is consistent with the Board’s exercise of the body corporate’s power to sue.

In 2013 Act 14, the Legislature expressly limited home rule powers granted to the Board in § 59.03, *see* §59.03(2)(a), generally prohibited the Board from exercising “day-to-day control,” *see* § 59.794(3)(b), and delegated the County’s administrative power to the County Executive, § 59.17(2)(b)2. But Act 14 did not modify or address §§ 59.01 and 59.02.

MCO Ch. 110 sets out which administrative decisions can be appealed and the process for doing so. Consistent with the common law and the statutes, final decisions under Ch. 110 such as the ADRC decision can be appealed to the circuit court. By statute, “[a]ny party to [an administrative] proceeding resulting in a final determination may seek review thereof by certiorari...” Wis. Stat. § 68.13(1).

Who decides whether a County entity should exercise its right to appeal the ADRC decision is a different question, however. Considering Ch. 110 and MCO 1.11(c)(3)2(b) in concert, it would seem logical to read MCO 1.11(c)(3)2(b) as requiring Committee or Board approval for a county

¹ This provision is ambiguous in one sense, because it addresses suits by the County against “other” persons or entities. One might argue that a suit by the County or a County entity against another County entity, such as a possible appeal by DOT against the ADRC, is not a suit against an “other,” so would not be subject to this approval process. However, Sub. (b) appears intended to address litigation by the County generally, a conclusion reinforced by the title of the subsection: “Actions initiated by the county.” Seen in that context, the word “other” in this sentence does not appear intended to exclude county v. county actions from committee review, but simply reflects the fact that a lawsuit is a claim by one entity against another. Alternately, “other ... entity” in this provision could be read to encompass another *county* entity, as would be the case in an ADRC appeal.

entity to appeal the ADRC ruling. The County has established Ch. 110 to provide an appeal process for aggrieved parties. Here, where the party aggrieved by the ADRC decision is a county department or other entity, it would make sense for the Board to exercise some level of review. This is especially true here, where the result of a court appeal might be a proposed contract that the Board would refuse to approve. The Board might decide that County policies, including conservation of time and resources, are best served by avoiding the suit in the first place.²

Finally, a contract to pay attorney fees for a county entity's appeal of the ADRC decision would be a subject for Board consideration if the contract was more than \$100,000. *See* Wis. Stat. § 59.52(31)(b). Approval of funds would also be required if not otherwise available to the department or entity in the adopted budget.

² The Board might also take into account the deference to the agency decision inherent in a circuit court review, with the review confined to the record used by the ADRC, and that generally speaking, remedies are limited for a circuit court reviewing an administrative decision. The court "can reverse an agency's decision and remand it to the agency to hold a new hearing" but normally "cannot order the Board to perform a certain act." *Guerrero v. City of Kenosha Housing Authority*, 2011 WI App 138, ¶ 9, 337 Wis. 2d 484.