OFFICE OF CORPORATION COUNSEL

PAUL BARGREN
Corporation Counsel

MARK A. GRADY
COLLEEN A. FOLEY
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ
LEE R. JONES
MOLLY J. ZILLIG
ALAN M. POLAN
JENNIFER K. RHODES
DEWEY B. MARTIN
JAMES M. CARROLL
PAUL D. KUGLITSCH
KATHRYN M. WEST
JULIE P. WILSON
Assistant Corporation Counsel

Date: December 11, 2014

To: Honorable Supervisors of the Milwaukee County Board
County Clerk Czarnezki
Interested Parties

From: Paul Bargren PB
Corporation Counsel

Re: Proposed O'Donnell Parking Structure Transaction

At its meeting of November 6, 2013, the Milwaukee County Board referred to my office for legal opinion the proposed sale of O'Donnell Park, including the O'Donnell Parking Structure, to The Northwestern Mutual Life Insurance Company ("NM"), File No. 14-837. The file was recommended for adoption on a vote of 4-2 by the Committee on Community and Economic Development on October 27, 2014.

The referral to my office was not specific, but a number of questions were raised during debate at that meeting and have been raised in other settings before and since then. After providing some background in Section I, I address a number of questions in Section II.

I. Background

a. Description of the property[1]

O'Donnell Park encompasses about 6.8 acres on roughly two city blocks on the west side of North Lincoln Memorial Drive between Michigan Street on the South and Mason Street on the North. East Wisconsin Avenue terminates at about the midpoint of the western edge of the property and then swings north as Prospect Avenue. The surface of O'Donnell is a plaza with some green space. The surface is at the Wisconsin Avenue grade level and about two stories above the Lincoln Memorial grade level. Most of the area below the surface is a multi-level, 1,332-stall underground parking structure with entries on Lincoln Memorial Drive and Michigan Street, built 1989-1992. Prominent in the southwest quadrant of the parcel is a three-story Miller Pavilion that contains the Betty Brinn Children's Museum, a restaurant space, and the Miller Room community room.

b. Acquisition of the property by the County, including restrictions

The County acquired most of the northern portion of the property from the City of Milwaukee in a deed dated May 8, 1940, Document No. 2261025. *See* Figure 1, marked in yellow. The deed included the following deed restriction limiting use to park land, with a "reverter" of the land to the City if the County violated that restriction:

[1] Figure 1, attached at the end of the memo, is a basic reference for the site.

> It is expressly understood and agreed by the parties hereto that this deed is given upon condition that the lands herein conveyed shall always be used for and as a public park without expense to the City of Milwaukee, except such as may properly be included in the tax levy upon said city for the current year involved; and in the event that the said lands shall at any time in the future cease to be used, kept and maintained for public park purposes, then and in such event, title to said lands shall at once revert to and revest in the grantor, its successors or assigns.

On March 2, 1988, The County acquired the southern portion of the property in a quit claim deed from the State of Wisconsin, Doc. No. 6149930. *See* Fig. 1, marked in green. This was land the state had acquired for the Lake Freeway, a project that was abandoned. There are no deed restrictions.

On January 29, 1991, the City of Milwaukee granted a quit claim deed to the County, conveying Juneau Park and much of the beach and lakefront property north as far as three miles to the City's water filtration plant. *See* Fig. 1, marked in red. This deed covered land north of the southern edge of Wisconsin Avenue extended, so included all of the northern portion of O'Donnell. It overlapped with and was a "regrant" of the 1940 deed, and continued the 1940 restrictions as "running with the land." The 1991 deed included a restriction barring the County from selling the property to a private owner:

> The above described premises are sold and conveyed upon the further express condition that … [the County] will never alien or convey said lands to any private person or to any municipal corporation.

The 1991 deed also included two different park use restrictions and a "reverter" clause like the 1940 deed stating that a violation of the deed restrictions would cause the land to revert to City of Milwaukee ownership.

c. Zoning

The entire property is subject to the City of Milwaukee zoning map. It is zoned Parks District but is also in the Lakefront Overlay Zone, which therefore controls. Zoning Code 295-1015(3)a (Lakefront Overlay Zone "use classifications replace the classifications of the underlying zoning district") This zoning permits a limited number of uses, evidenced by the uses seen there now (including underground parking). Zoning acts as the key limitation on the southern half of the property because there are no deed restrictions south of Wisconsin Avenue extended. The appraisal report obtained by the County from The Nicholson Group LLC concluded "it is highly speculative to assume that the zoning could be changed to allow for a commercial and/or multi-family use on all or a part of the property." In making its appraisal, Nicholson Group "assumed that the current zoning will remain in effect for any buyer of the property." Under the rules of the Milwaukee Common Council, if NM bought the property and sought a future zoning change, the County as an adjacent landowner could object and that would trigger a requirement for a three-fourths majority (12 of 16 aldermen) to approve the zoning change on the Common Council.

d. The proposed transaction

The Executive has already endorsed the sale to NM. A majority vote of the County Board would put the deal in motion as set out in the Purchase Agreement and other documents in File 14-837. It would move forward as follows:

- NM would have a 6-8 month due diligence period to firm up details. This would include seeking agreement from the City to lift the deed restriction on private ownership and to lift the reverter language the puts the land back in City ownership for violations of the deed restrictions.[2]
- If NM decides to go ahead with the deal, it will pay the County $12.7 million cash. After paying off bonds and other obligations, the County will net about $5.0 million, which the Economic Development Office has recommended be allocated to Parks improvements.
- Before the deal is final, my office and others at the County will work closely with the City and NM to make sure the transaction documents reflect the protections the County is expecting. The County and NM have formalized this process in a side agreement.

e. Additional key provisions

- A uniform parks-only deed restriction agreed to by the City, the County and NM will be recorded against the property, requiring that the northern segment of the parcel "shall **forever solely and exclusively be used as a public park…."** *See* II.b.iv, below. This deed restriction will be binding on NM and any subsequent property owner. A request by NM to the City to remove it can be blocked by the County (through normal Board and Executive action) pursuant to Section 2 of the Operations Contract:

  2. If Owner ever seeks to have the deed restrictions, as amended upon Owner's acquisition of the Property, contained in the Quit Claim Deeds between the City of Milwaukee as grantor and Milwaukee County as grantee dated (a) December 1939 and recorded as Document 2261025 and (b) dated January 1991 and recorded Document 6453546 either removed or revised, Owner shall notify County not less than 90 days prior to seeking such removal or revision. If County notifies Owner prior the end of such period that it objects to such removal or revision, Owner shall not proceed with such action.

- If NM seeks a change in zoning for the property, NM will give the County 90 days' notice so that the County, if it chooses to do so, will have time to lodge an objection with the Milwaukee Common Council and force a three-fourths vote for approval.
- NM has agreed to continue the leases of Betty Brinn and the restaurant in the Miller Pavilion.

[2] It's safe to say that few if any private concerns other than NM have a reputation for corporate good works that would prompt the City to consider lifting a private ownership clause. The City has already done so once for NM, for a corner of land just across Prospect Avenue from O'Donnell. *See* Figure 1 reference to 910 East Wisconsin Ave.

- NM has stated it plans to spend $6 million repairing the parking structure, compared to about $1.3 million the County had been able to budget. NM plans to use the parking for employees of its new office tower but will also make spaces available to the public during the day and especially for nights and weekends.

II. Questions and concerns

Questions about the deal have arisen in a few categories. Some have questioned the scope of the parks-only restriction, whether it will be binding on NM or future owners and whether it could be lifted unilaterally by the City in the future. Others have suggested NM will not be bound by current zoning, or by the current lease for Betty Brinn. Others have wondered whether NM could itself sell the property in the future, and what would happen then. A public trust doctrine question has also arisen.

A number of arguments or assertions have been made on these issues without benefit of legal authority or reference to terms of the documents that will control the transaction. I question the value of such generalized comments. I have tried to provide a solid framework in my responses.

a. The parks-only covenant on the northern portion of the property is enforceable

The law recognizes a deed restriction as an enforceable limitation on use of property that runs with the land and is binding on subsequent owners. "Real property is burdened with [a] restriction that runs with the land." *Diamondback Funding, LLC v. Chili's of Wisconsin, Inc.*, 2004 WI App 161, ¶ 8, 276 Wis. 2d 81, 687 N.W.2d 89. Where a "restriction was impressed upon all the property, [ ] the transfer of any portion of it passed to the grantee burdened with the restriction." *Boyden v. Roberts,* 131 Wis. 659, 111 N.W. 701, 703 (1907).

> "Real covenants are those which are annexed to the estate and which are incidents of its ownership and enjoyment irrespective of the fact that the original parties to the covenant are no longer in possession thereof. Such covenants are usually to be performed upon the land and are therefore said to run with the land."

Lincoln Fireproof Warehouse Co. v. Greusel, 199 Wis. 428, 224 N.W. 98, 101 *adhered to on reh'g*, 199 Wis. 428, 227 N.W. 6 (1929), quoting Underhill on Landlord and Tenant 614 § 387.

Wisconsin courts have consistently held that a servitude [i.e., a deed restriction] that is unambiguous at the time of its creation will be strictly enforced. *Gojmerac v. Mahn,* 2002 WI App 22, ¶ 31, 250 Wis.2d 1, 640 N.W.2d 178 (citing *Hunter v. McDonald,* 78 Wis.2d 338, 342–43, 254 N.W.2d 282 (1977)). *Solowicz v. Forward Geneva Nat., LLC*, 2010 WI 20, 323 Wis. 2d 556, 584-85, 780 N.W.2d 111, 125.

Thus the parks-only deed restriction on the northern parcel of land will remain binding on NM and will remain binding on any subsequent owners if NM should ever sell that parcel.

Further, even though the NM land would be in private hands, under the terms of the deed restriction, it would be available to the public "solely and exclusively [to] be used as a public park," just as it is now. *See* Sec. iv., below. It is incorrect to suggest, as some have, that the proposed sale does not protect the public's right to use the park on the northern half of the property.

b. The City alone, or the City and NM, would not have the ability to release the parks-only restriction without the County, and the County could enforce the restriction.

It is true that the parties to a deed restriction may agree to release or modify it. *See Vikes v. Pedersen*, 247 Wis. 288, 19 N.W.2d 176 (1945) (restriction against mercantile development on adjoining parcel lifted by agreement of original grantor and grantee). However, if the NM deal goes through, the parks-only restriction will involve three parties – the County, NM and the City. Not only would the County's approval be required for a change in the parks-only covenant, the County could enforce the restriction if for some reason the City did not.

i. As a matter of law, the City could not unilaterally release the restriction

Where a deed restriction is granted for the benefit of more than one party, it cannot be lifted at will by the grantor. Here, the City will be imposing a parks-only deed restriction on the NM land that is essentially identical to the parks-only restriction imposed in the past by the City on the adjacent lands the County will continue to hold. The restriction imposed on the NM land benefits the County(and presumably NM as well). Under those conditions, as a matter of law, the City could not lift the deed restriction without the County's agreement.

In its decision in the case of *Nettesheim v. S.G. New Age Products, Inc.*, 2005 WI App 169, 285 Wis. 2d 663, 676, 702 N.W.2d 449, 455, the Court of Appeals explained why. There, the developer of a secluded 14-lot subdivision in the North Woods had included a restrictive covenant (equivalent to a deed restriction) that barred anything "which may become an annoyance or nuisance to the neighborhood." The covenant promised "to preserve, so far as practicable, the natural beauty of" the property. About 15 years later, the developer tried to use the subdivision's private access road as the access road to a new development it was building next door. The Court of Appeals found that this amounted to an attempt by the developer to rescind unilaterally the restrictive covenant. The court held that this was illegal, because the developer was bound by the restrictive covenant it had granted to the property owners in the first subdivision. Based on the covenant, the court permanently enjoined the developer from using the road as access for the new development.

The parallels to the County's situation are obvious. Having granted a restrictive easement to insure that the northern O'Donnell parcel will be used as parkland for the benefit of neighboring property owners (among others), the City will not be permitted to unilaterally withdraw it.

ii. The County could enforce the parks-only deed restriction even if the City did not

Should the deal be completed, NM and the County will hold title to adjacent parcels – both originally granted by the City, both containing a virtually identical parks-only deed restriction. Under those conditions, **the County could enforce the parks-only deed restriction on NM's land, even if the City did not.** The City's grant of parkland under a parks-only restriction constitutes a general plan to use deed restrictions to preserve the lakefront property for public parkland. As courts have held:

> [Where] there was a general plan or scheme[,] [t]he restrictive covenants which were a part of that plan could be equitably enforced by all of the grantees whose titles derived from the common grantor.

Crowley v. Knapp, 94 Wis. 2d 421, 429, 288 N.W.2d 815, 819 (1980).

As one of the grantees from the City, the County could enforce the restriction against NM, whose title also derives (one-step-removed) from the City. The County could likewise enforce the parks-only restriction against any subsequent owner of the northern parcel should NM sell it in the future.

"It is well settled that, when restrictive covenants are entered into with the design of carrying out a general scheme for the improvement and development of property, **they are enforceable by any grantee against any other grantee having notice.** In such a case there is a consideration and mutuality of covenant binding upon each." *Stein v. Endres Home Builders, Inc.*, 228 Wis. 620, 626, 280 N.W. 316, 318 (1938) and cases cited. Under this rule, the County holds enforcement power over the parks-only restriction.

iii. The County has standing as a third party beneficiary to enforce the parks-only restriction granted to NM

The County's specific rights as an adjacent grantee taking land under an equivalent parks-only deed restriction and its specific right under the Proposed Operation Contract (*see* sec. iv, below) to object to an attempt by NM to seek a change from the City in the parks-only restriction demonstrate that the County is intended as a third-party beneficiary in these matters. The County could invoke that status to protect broader rights if needed. "It is black letter law that a contract provision designed to benefit a third party may not either be rescinded or modified without consent of that third party." *Diamondback Funding*, 2004 WI App 161, ¶ 9, 276 Wis. 2d 81, 687 N.W.2d 89. A modification of the terms of a contract between two parties cannot dilute the rights of a third-party beneficiary. *Id.* NM and the City could not forge an agreement without the County's participation that would dilute the County's rights under the Proposed Operation Contract or other deal documents.

iv. The County's agreement would be necessary to modify the parks-only covenant

In addition to these legal rights as an adjacent landowner taking land from the same original grantor, the County hold substantial enforcement rights as a matter of contract law, arising from the deal agreements.

Under § 7.2(iv) of the Proposed Purchase and Sale Agreement between the County and NM, NM will approach the City of Milwaukee and obtain as a condition of closing the deal as follows:

> (iv) The City of Milwaukee ("City") shall have amended the existing use restrictions contained in the Quit Claim Deeds between the City of Milwaukee as grantor and Milwaukee County as grantee dated (a) December 1939 and recorded as Document 2261025[3] and (b) dated January 1991 and recorded Document 6453546 to remove the conflicting provisions and insert consistent language substantially as follows:
>
> > "It is expressly understood and agreed by the parties hereto that **this deed is given upon condition that the lands herein**

[3] This is the "1940 Deed;" it was recorded in 1940.

> **conveyed shall forever solely and exclusively be used as a public park**, amusement and recreation grounds or parkway and for such purposes as municipal public park grounds are generally used without expense to the City of Milwaukee, except such as may properly be included in the tax levy upon said city for the current year involved."

Section 7.2(iv), Proposed Purchase and Sale Agreement at 11-12, found at pdf page 53-54 of "Exhibits A-P" in File 14-837 on Legistar (boldface added).

This creates the ironclad deed restriction that, under the law, "runs with the land" and is binding not only on NM but would be binding on anyone who would purchase the property from NM in the future.

But the County's safeguards continue with language included in the Proposed Operation Contract, which states as follows:

> 2. Deed Restrictions. If Owner [i.e., NM] ever seeks to have the deed restrictions, as amended upon Owner's acquisition of the Property, contained in the Quit Claim Deeds between the City of Milwaukee as grantor and Milwaukee County as grantee dated (a) December 1939 and recorded as Document 2261025 and (b) dated January 1991 and recorded Document 6453546 either removed or revised, Owner shall notify County not less than 90 days prior to seeking such removal or revision. **If County notifies Owner prior the end of such period that it objects to such removal or revision, Owner shall not proceed with such action.**

Section 2, Proposed Operation Contract at 1, found at pdf page 72 of "Exhibits A-P" in File 14-837 on Legistar (boldface added).

Some have argued that under this language, while the County can object to NM seeking a change, the County would be out of luck if the City itself chose to remove the restrictions unilaterally. As noted above, the City is legally unable to do so, and the County can enforce the restrictions on its own in any event. But in addition, as a simple matter of contract law, the City is also bound to that restriction unless the County agrees to lift it, since both parties to those deeds, namely the City and County, are agreeing to be bound by the new language now. Since both City and County are agreeing to be bound, the restriction can be lifted only if both agree to lift it.

c. The City zoning approval process

The southern portion of the O'Donnell property is not subject to parks-only deed restrictions. The controlling restrictions on use there are the City zoning restrictions that, indeed, apply to the entire property.

Under the City Zoning scheme, The Lakefront Overlay Zone use classifications replace those in the underlying Parks District Zone. Zoning Code 295-1015(3)a.

Under this zoning, the Betty Brinn Children's Museum would be an allowed Cultural Institution (*see* Table 295-1015-3-a in the Zoning Code). Any "Community Center" (presumably the Miller

Room) must be in a facility "owned and operated by a governmental agency or entity," Zoning Code 195-1015-3-b-2, and any sit-down, fast-food or carry-out restaurant is not to exceed 1,000 square feet and is to be located in "a structure owned by a governmental agency or entity." Neither the Miller Room nor the restaurant facility would meet those standards under NM ownership without a special use permit or variance. Under Article VI of the Purchase Agreement, NM would have to work out these zoning issues by obtaining such special use permits or variances prior to closing.

As an adjacent landowner, the County would have the ability to object to any change in the zoning on the NM parcel and force the change to be adopted only if a supermajority of three-fourths of the Milwaukee Common Council (12 of 16 members) agreed. The relevant ordinance provision states:

> 5. PROTEST OF MAP AMENDMENT. In case of a protest against a map amendment, duly signed and acknowledged by the owners of 20% or more of the areas of the land included in the proposed change, or by the owners of 20% or more of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20% or more of the land directly opposite thereto extending 100 feet from the street frontage of the opposite land, the amendment shall not become effective except by the favorable vote of at least three-fourths of the members of the common council voting on the proposed change. A protest against a proposed change, or any modification to a protest, shall be submitted no later than 48 hours prior to the date of common council action on the proposed change.

Zoning Code 295-307.5. To provide ample time for the County to protest any change, the Operations Contract provides 90 days' notice. A protest by the County would be through normal Board/Executive action.

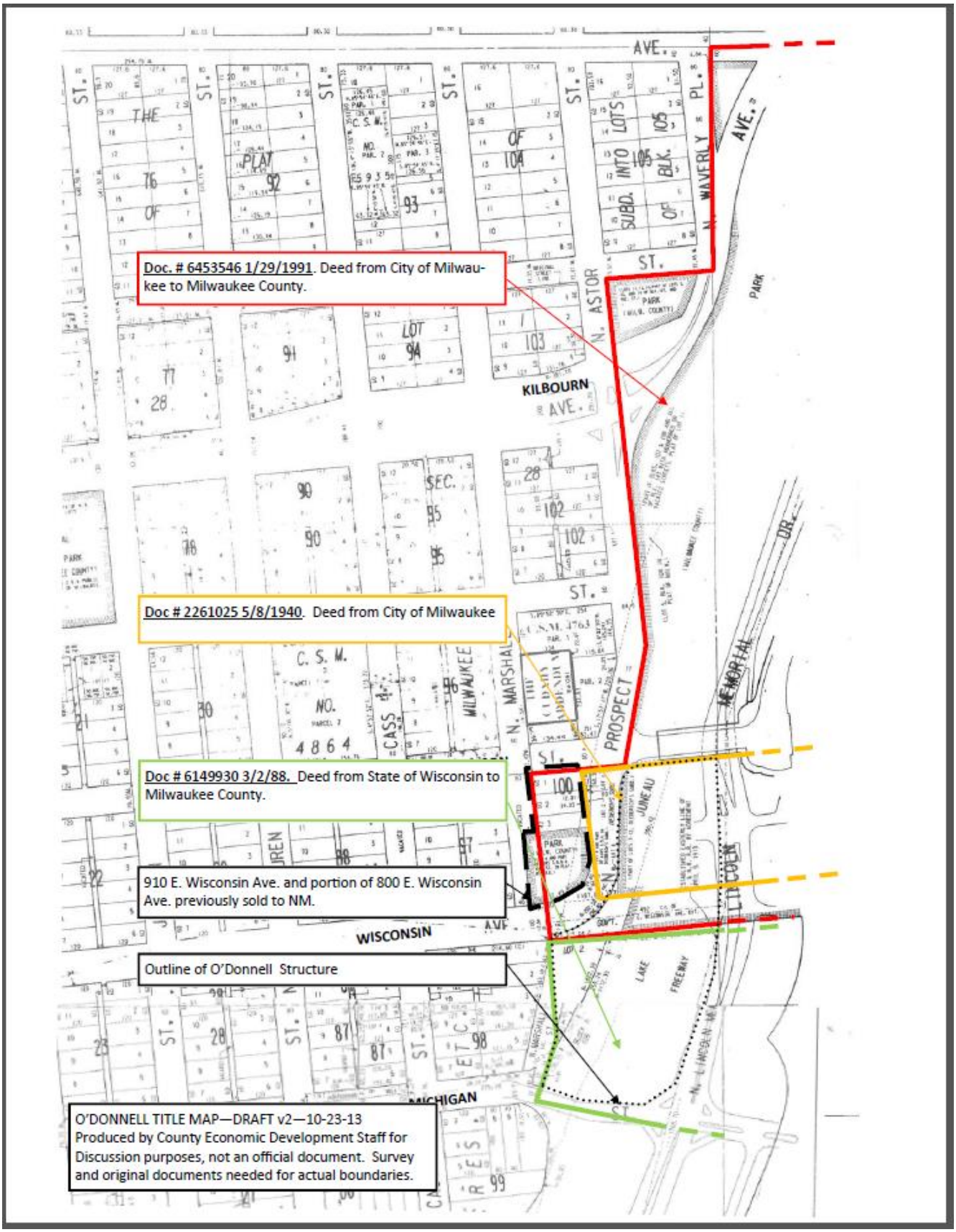
d. Sale of land

To be clear, nothing prevents NM from selling the land in the future should it choose to do so. NM has stated it has no interested in doing so, and the economies of the transaction and the investments NM has stated it intends to make, as well as the restrictions imposed by the deeds and the current zoning, would appear to make a sale economically unfeasible. The deed restrictions would continue, as would the zoning unless changed by the City.

e. Public trust doctrine

Some have suggested that a relatively small segment of the southeast corner of the O'Donnell property is public trust land that cannot be purchased by a private owner or used for private purposes. *Cf.* Nicholson Group appraisal report at 7. My research has led me to conclude this is mistaken. In short, O'Donnell is to the west of the lakebed limit set by the Wisconsin Legislature in 1913 and confirmed in 2014. In any event, NM appears willing to deal with the issue during its due diligence period, should the deal move forward, and is not asking for a warranty deed from the County on this point.

Figure 1


Doc. # 6453546 1/29/1991. Deed from City of Milwaukee to Milwaukee County.
Doc # 2261025 5/8/1940. Deed from City of Milwaukee
Doc # 6149930 3/2/88. Deed from State of Wisconsin to Milwaukee County.
910 E. Wisconsin Ave. and portion of 800 E. Wisconsin Ave. previously sold to NM.
Outline of O'Donnell Structure
O'DONNELL TITLE MAP—DRAFT v2—10-23-13
Produced by County Economic Development Staff for Discussion purposes, not an official document. Survey and original documents needed for actual boundaries.
KILBOURN AVE.
WISCONSIN AVE.
MICHIGAN
N. ASTOR
N. MARSHALL
PROSPECT
JUNEAU
N. WAVERLY PL.
PARK
FREEWAY