



OFFICE OF CORPORATION COUNSEL

PAUL BARGREN
Corporation Counsel

COLLEEN A. FOLEY
PAUL D. KUGLITSCH
Deputy Corporation Counsel

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

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To: Chairman Theo Lipscomb, Sr.
Supervisor Gerry Broderick
Supervisor Deanna Alexander

cc: Members of the Committee on Parks, Energy and Environment
All Supervisors
Comptroller Scott B. Manske
Committee Coordinator Alysson Smith
Research Analyst Jessica Janz-McKnight
Research Director Steve Cady
Interested Parties

From: Paul Bargren *PB*
Corporation Counsel

Re: Marcus Center Issues – File No. 16-100

At its meeting of January 26, 2016, the Committee on Parks, Energy and Environment asked for my assessment of an issue related to File No. 16-100. I believe the issue can be stated as follows:

Would a long-term lease by the County of the Performing Arts Center property to Marcus Center for the Performing Arts, Inc., remain valid if the Wisconsin Center District exercised its ability under 2015 Wisconsin Act 60 § 115 to take control of the property “unencumbered.”

In my opinion, a lease issued now by the County most likely would not survive acquisition of the Marcus property by the Wisconsin Center District. (*See* text of Act 60 § 115 at Exhibit A, attached.) I must note that there is no precedent in Wisconsin law for such a situation, where the legislature has ordered the transfer of county property to a state entity through non-statutory enactment, and further ordered the transfer to be “unencumbered.” However, examining available case law and precedent, I believe my conclusion is the most likely result.

Background

The County owns the real estate and building that constitute the Performing Arts Center at 929 North Water Street. Through a series of agreements and understandings, the County has leased or authorized operation of the building by a not-for-profit entity, Marcus Center for the Performing Arts, Inc. (“MCPA Inc.”). MCPA Inc. holds contracts with the many arts groups that perform at the Center, such as the symphony, ballet, etc., and arranges for their programming there. MCPA Inc. also arranges for Martin Luther King Jr. Day observances and other events of interest to the County. Past County operating subsidies have been paid to MCPA Inc., and past County promises to provide certain capital improvements to the building have also been made to MCPA Inc. as part of the County’s understandings with that organization.

Supervisors and others at the County have expressed interest in extending a long-term lease to MCPA Inc. to cement a long-term relationship with MCPA Inc. in light of or despite the provisions of 2015 Act 60.

Analysis

Any long-term lease issued by the County to MCPA Inc. for the performing arts building would become an “encumbrance” on the real estate (to use the Act 60 terminology). The legal question is whether a forced transfer of the real estate under Act 60 would negate the lease. My analysis of statute and cases leads me to conclude the lease most likely would be negated.

Authority for negating the lease:

Under the US Constitution, the state may take the property of a county without compensation, and there is no due process or property violation in doing so. *Town of Annawan*, 653 F.2d 292 (1981). The County’s interest in the lease is a property interest. The question of compensation (or not) then becomes a matter of state law. *Id.*

Under Wisconsin law, the most likely interpretation would be no compensation to the County for the taking of the property. *City of Columbus*, 82 Wis. 374 (1892) (where an asset is held in trust by one public entity, for the benefit of the public, and a change in title is no impediment to that public use, there is no legal impediment to the exercise by the legislature to change the trustee). In sum, the state has the option whether to provide compensation to the County, and here has chosen not to do so. The County cannot sue the state on a matter such as this alleging an unconstitutional taking. *Madison Metro. Sewerage Dist.*, 260 Wis. 299 (1951).

Applied to the situation at hand, under these authorities, the state would be able to negate any long term lease by the County to MCPA Inc. The state would become the owner of the real estate and the County’s lease would become moot. As part of its “taking” of the property – and as part of its legislative decree that the property transfer “unencumbered” – the state (in the form of the Wisconsin Center District) could simply ignore any lease provisions between the former owner and MCPA, since the Wisconsin Center District would not be a party to those restrictions.

Potential basis for challenging either the transfer or the negating of the lease

If the state acquisition of the performing arts property led to an impediment of the public’s use of that facility, a taxpayer or citizen might be able to bring an action challenging the takeover. *See O’Donnell v. Reivitz*, 144 Wis. 2d 717 (Ct. App. 1988).

An argument might go like this: through its lease and other payments to MCPA Inc., the County subsidizes the center with additional funds needed to operate. Without an infusion of outside money, the performing arts center is not a going concern. *See* March 1, 2016 “Assessment of Marcus Center for the Performing Arts Situation (Informational Only)” from Office of the Comptroller.

If the Wisconsin Center District took title to the property but did not replace the County subsidies, the Wisconsin Center District would be open to allegations and legal action based on an impairment to the public use of the center, which would now be facing financial crisis. Court action might force the Wisconsin Center District to honor past County funding commitments to MCPA, Inc., or to assume the obligations of any County lease.

I note this approach is indirect, requires a willing plaintiff with resources, and may not necessarily result in preservation of the County lease, even if it does result in a court order to fund the performing arts center at levels comparable to County funding.

Assignable lease

One option that has been discussed is the possibility of a lease issued by the County to MCPA Inc. that could be assigned to the Wisconsin Center District. The lease could include incentives that might entice the District to accept the assignment, such as continued County subsidies to MCPA Inc. as long as the District allowed MCPA Inc. rather than some other entity to operate the performing arts center. Accepting the assignment would still be at the District's discretion, however.

Additional obligation

While is not legally an "encumbrance" on the real estate, it should be noted that the County is still paying off approximately \$6.3 million in general obligation bonds that were issued for improvements to the building, and \$2.7 million in cash-financed repairs have been scheduled although not yet authorized. In sum, the County has obligations of at least \$6.3 million and possibly up to \$9.0 million that it will incur related to the building that it will be paying off, regardless of whether it owns the building or not. The Comptroller's Office provided these numbers and has additional details.

Exhibit A

For reference, this is the text of 2015 Act 60 § 115:

Section 115. Nonstatutory provisions.

(1) CERTAIN MILWAUKEE COUNTY PROPERTY. As soon as practicable, Milwaukee County shall transfer, unencumbered, to a district created under subchapter II of chapter 229 of the statutes, the property known as 929 North Water Street, Milwaukee, Wisconsin, which is bounded by the Milwaukee River on the west; East State Street on the north; North Water Street on the east; and East Kilbourn Avenue on the south. The transfer shall take effect upon the adoption of a resolution requesting the transfer by the board of directors under section 229.41 (2) of the statutes and a written proclamation of the Milwaukee County executive supporting the transfer, notwithstanding any policies issued, ordinances enacted, or resolutions adopted by the Milwaukee County board to the contrary. The transfer may take place without the approval of the Milwaukee County board.