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Date: February 25, 2015

To: Chairwoman Dimitrijevic

cc: Kelly Babilitch

From: Paul Bargren *PB*  
Corporation Counsel

Re: Execution of legislative policies

You had asked for my analysis on the obligation of the County's executive branch to carry out policies or directives included in the adopted County Budget or otherwise adopted in the legislative process. Examples include:

- The adopted 2015 Budget calls for the county administration to submit a proposed \$10 million Parks Capital Improvements list in time for recommendations to be made to the County board for the March cycle. The administration did not meet this deadline. The list has now been promised for the April cycle.
- The adopted 2015 Budget calls for the implementation of the "Go Pass" free bus ride system for the elderly and disabled by April 1. The administration advises it will not meet this deadline and has projected a July 1 start date.

By statute, the policies of Milwaukee County are established through legislative action, consisting of action by the County Board and subsequent consideration by the County Executive. *See* § 59.02, Stats. ("The 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"); § 59.17(6), Stats. (executive approval, veto/override or non-action).

Once the policy of the County is established through legislative action, it is to be administered or executed by the County Executive and the administrative departments that report to the Executive. By statute:

The county executive shall be the chief executive officer of the county. The county executive shall take care that every county ordinance<sup>1</sup> and state or federal law is observed, enforced and

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<sup>1</sup> In this context, "ordinance" includes the adopted budget and any other Board resolution subject to signature or veto by the Executive. The budget itself "become[s] law." *See* Wis. Constitution § 23a and § 59.17(6), Stats. In some

administered within his or her county if the ordinance or law is subject to enforcement by the county executive or any person supervised by the county executive.

Sec. 59.17(2), Stats. The Wisconsin Court of Appeals has described it this way:

The county board's function is primarily policy making and legislative, while the county executive functions as an administrator and manager. *See, e.g.*, 80 Op. Atty Gen. 49 (1991). Policy has been defined as "a high-level overall plan embracing the general goals and acceptable procedures esp. of a governmental body." *Webster's New Collegiate Dictionary* 890 (1977). "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them, or appoint the agents charged with the duty of such enforcement." *See* 2A McQuillin, *Municipal Corporations* § 10.06 at 311 (3d ed. 1996). "The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence." *Id.*

*Schuetz v. Van De Hey*, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996).

A county executive is charged with "[c]oordinat[ing] and direct[ing] all administrative and management functions of the county government not otherwise vested by law in other elected officers." § 59.17(2)(a), Stats. In Milwaukee County, the Executive is specifically designated to "administer, supervise, and direct all county departments." § 59.17(2)(b)1, Stats.

But what does it mean to "administer" the county government? The standard treatise on the operation of local government has a succinct answer.

Administrative and executive functions are designed to **carry out and effectuate the provisions of the laws.**

2A McQuillin *Municipal Corporations* § 10.44 (3d ed.) (emphasis added).

Where the performance of a County official's duties requires at least some level of discretion, the official is not necessarily required to execute a Board policy the official feels is illegal or invalid. *See State ex rel. Roelvink v. Zeidler*, 268 Wis. 34, 41 (1954) (where the Milwaukee mayor felt the Common Council had acted illegally in ordering him to sign a particular deed, he was not required to do so).

However, there has not been any suggestion of illegality raised about the Go Pass or the parks project listing. With no legal basis to challenge the Board action, the administration should proceed to execute the "provisions of the laws" of the County as set out in the Board resolutions.

Where the Board or a supervisor feels the Board's policies are not being properly executed by the administration, the only direct remedy to pursue is a court action for mandamus. "Mandamus is an 'extraordinary writ' that may be employed to compel public officers to perform a duty that

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settings, a resolution may "denote[ ] something less solemn or formal than, or not arising to the dignity of, an ordinance." *Cross v. Soderbeck*, 94 Wis. 2d 331, 338, 288 N.W.2d 779, 782 (1980), citing 5 McQuillin § 15.02. However, McQuillin also states that "a common distinction between a resolution and an ordinance is that only the latter need be signed by, or passed over the veto of, the [executive]." *Id.* A Milwaukee County resolution, including the budget, is subject to the full veto and override process and so is on equal footing with an ordinance.

they are legally obligated to perform.” *In re Doe*, 2009 WI 46, ¶ 10, 317 Wis. 2d 364, 372, 766 N.W.2d 542, 546. To pursue a mandamus action, one or more supervisors or other interested parties would file an action in Circuit Court, naming the Executive or an administrator as defendant, and ask the Court to order that the policies described in the Board resolution be carried out as stated. Outside counsel would be required.

Informal remedies would include:

- asking administrators to attend committee meetings to “to provide information and answer questions” about the issue, *see* § 59.794(3)(b), Stats.;
- require written progress reports (*see* MCO 1.25(3) (“County officers, department heads or boards or commissions shall from time to time report to the county executive and county board the steps that have been taken in carrying out any directive”); Attorney General Opinion OAG-06-13 (August 14, 2013) (“[a] county board lawfully may require county department heads to submit periodic reports as to steps taken in carrying out any directive”));
- imposing budget restrictions or similar controls as a way to compel compliance
- Negotiations or discussions with administrators to achieve the desired results.