



OFFICE OF CORPORATION COUNSEL

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MARGARET C. DAUN
Corporation Counsel

PAUL D. KUGLITSCH
ANNE B. KEARNEY
Deputy Corporation Counsel

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

DATE: October 25, 2019

TO: Milwaukee County Board Chairman, Theodore Lipscomb, Sr.

CC: Milwaukee County Clerk, George Christensen
Milwaukee County Comptroller, Scott Manske
County Board Chief of Staff, Kelly Bablitch
County Executive Chief of Staff, Raisa Koltun
Director of Administrative Services, Teig Whaley-Smit
Director of Economic Development, Aaron Hertzberg

FROM: Margaret C. Daun, Corporation Counsel *MD*
Paul D. Kuglitsch, Deputy Corporation Counsel *PK*

SUBJECT: County Executive's Authority to Dissolve Park East Block 26 Agreement and Enter into a New Agreement Without County Board Approval Post-Act 55 (File No. 19-794)

The Office of Corporation Counsel (OCC) has been asked to opine regarding whether actions (i.e., amendment, termination, dissolution, etc.) undertaken by the administration related to agreements or contracts executed prior to Act 55 (requiring County Board approval at that time) require County Board approval now, post-Act 55. In short, the answer is no, so long as the contract relates to nonpark property, does not require appropriations in future years, and the original contract does not itself include a term explicitly requiring County Board review.

This question has been understandably and reasonably vexing to the administration and the County Board alike, due to a variety of factors such as informal past practice by departments and conflicting guidance from the OCC pre-2017.

Since the OCC's issuance of its 2017 opinions regarding the authority of the County Executive to control nonpark property after Acts 14 and 55, *see* Files No. 17-274; 17-275; 17-385 (attached hereto), the OCC has sought to provide unwaveringly clear and consistent advice to all County stakeholders.

To wit, the County Executive has the authority to sell, acquire, or lease nonpark property without any County Board oversight.¹ *See* Wis. Stat. 59.17(2)(b)3.

Furthermore, this authority is not contingent upon the dollar value of the agreement or contract; indeed, whether the contract is for \$1 or \$10,000,000, if the contract relates to nonpark property and does not require expenditures in future fiscal years, the County Executive's authority controls. *See* n.1.

Perfectly consistent with all prior OCC guidance since 2017, the OCC orally advised Director Hertzberg that the dissolution of the Park East Block 26 Agreement and the execution of a new agreement, as contemplated in File No. 19-794, does not require any Board action because these actions relate to property zoned redevelopment – not park.

Also, the existing development agreement does not contain a contract provision requiring County Board approval to terminate or dissolve it, which would be a valid reason (separate and apart from Act 55) as to why an agreement relating to nonpark property could require Board approval, as explained in greater detail below. Therefore, the County Executive may proceed without Board approval.

As noted above, this guidance, now memorialized in the instant opinion, is not new and has been the OCC's position since 2017. Correspondingly, since 2017, the OCC has never advised, in writing or orally, formally or informally, that pre-Act 55 projects are somehow “grandfathered in” and remain under the jurisdiction of the Board. The reason for this is plain: the relevant state statutes do not provide for any such grandfathering and to impute such a limitation on the executive's authority would contradict the plain language of section 59.17(2)(b)3.

If a department adopted such an approach in the past, it was not based on any post-2017 OCC guidance and was in error. Importantly, as evidenced here, grandfathering creates (understandably) confusion and uncertainty, which is suboptimal.

In the interests of completeness, please note that the OCC advised both the administration and County Board, in the below-noted circumstance, that if a pre-Act 55 nonpark property contract explicitly required Board approval to take certain actions related to the nonpark property, then Board approval is still required post-Act 55 because it is a bargained-for contract term. For example, some time back, the Milwaukee Public Museum (MPM) wanted to make structural improvements to the museum. The MPM lease requires those types of improvements to be approved by the Board. The OCC advised that by the terms of the contract, Board approval is required to make those structural improvements. Essentially, the contract provision controls.

The MPM lease also contains a provision on deaccessioning artifacts that says nothing about Board approval. Pre-Act 55, MPM correctly sought Board approval prior to deaccessioning artifacts. In 2017, post-Act 55, MPM wanted to deaccession other artifacts (File No. 17-848). The file was

¹ Of course, to sell such property, the Executive does need the support of either the county comptroller or an appointee of the ICC from the city, village, or town where the property is located. *Id.*

incorrectly submitted to the Board as action item, and after submittal, the OCC advised that Board action was not necessary. Instead of voting on the item, the Parks Committee received the information and placed it on file.

Here, with respect to File No. 19-794, Director Hertzberg mistakenly submitted the item as an action report. There is no provision in the existing development agreement requiring Board approval to dissolve it. So, the Executive may administratively dissolve it and execute a new agreement without action by the Board.

Last, in 2016 the County Board approved an amended and restated development agreement related to Block 26 (File No. 16-90). The OCC did not provide written guidance at that time, and any informal or oral advice from the OCC on that transaction indicating that Board approval was required was in error, and importantly, those who would have potentially provided that viewpoint are no longer with the OCC.²

In sum, the advice of the OCC since 2017, including the guidance provided to Director Hertzberg related to the Park East Block 26 Agreement, has been perfectly consistent on these questions of the Executive's authority over nonpark property.

² Please note that the OCC described in detail the inconsistencies in OCC opinions on this topic prior to 2017 and the (at times) absurd outcomes that resulted from those opinions, *see* File No. 17-274. The OCC's opinions since 2017 have sought to maximally harmonize the relevant state statutes and to give full effect to the language of those statutes, as is required under principles of statutory construction. County stakeholders should not rely upon, refer to, or give credence to any pre-2017 OCC opinion on this topic, nor any past practice based thereon.