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DATE: April 1, 2020

TO: Theodore Lipscomb, Sr.
Interested Parties

FROM: Margaret Daun, Corporation Counsel
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SUBJECT: Self-organization in the Context of a Delayed April Election and Impacts on Milwaukee County

The Office of Corporation Counsel (“OCC”) received a request to discuss the potential impact of a delayed April 7, 2020 general election and if so, whether the County might self-organize. This memo first addresses the potential impact on Milwaukee County if the April 7, 2020 general election is postponed. Second, the memo discusses the possibility of self-organization. Third and finally, the memo addresses the uncertainties and risks associated with self-organization.

I. Vacancies May Result From Postponed Election—Holdover Doctrine Inapplicable

Absent any legally permissible intervening factors, delaying the election beyond the term of any elected incumbent creates a vacancy in office. *See Wis. Stat. § 17.03(10)* (vacancy in elective offices but does not apply to the sheriff, coroner, register of deeds or district attorney).

If the election is delayed, for the Milwaukee County Board of Supervisors, vacancies would occur on the 3rd Monday in April (i.e., April 20, 2020). *See Wis. Stat. § 59.10(2)(b)*. For the County Executive, the vacancy would occur on the 1st Monday in May (i.e., May 4, 2020). *See Wis. Stat. § 59.17(1)(a)*. Absent other actions to fill the vacancies, the supervisory district offices and the

office of the county executive would remain vacant until another election is held. *See* Wis. Stat. § 17.21(5) (Board);¹ Wis. Stat. § 59.17(7) (Executive).^{2,3}

Under Wisconsin law, neither the County Executive nor County Board Supervisors may legally “hold over” in their respective offices.⁴ *See, e.g., Hamilton v. Krex*, 88 Wis. 135, 59 N.W. 593, 594 (1894), (holding that the state legislature’s action to extend the term of an incumbent city attorney (a statutory officer under article 13, section 9 of the state constitution⁵) from two to four years was unconstitutional, but also concluding that the legislature could change the term from two years to four or make the city attorney an appointed position.); *O’Connor v. City of Fond du Lac*, 109 Wis. 253, 85 N.W. 327, 331-333 (1901).⁶

¹ The election for supervisory district offices would occur on the earlier of (i) the next April election or (ii) at a special election ordered by the county executive. *See* Wis. Stat. § 17.21(5). The current County Executive would still be in office at the time of the vacancies, and, therefore, could order a special election.

² The election for the county executive would occur at a special election ordered by county clerk or November’s general election. The clerk has seven (7) days following the vacancy to order the election. *See* Wis. Stat. § 59.17(7).

³ In this instance, because there would be no Board Chair, there would be no one to “immediately succeed to the office [of the county executive] and assume the duties and responsibilities” of the executive. Wis. Stat. § 59.17(8)(b).

⁴ The vacancy for the Comptroller would occur on the 3rd Tuesday in April (i.e., April 21). *See* Wis. Stat. § 59.20(2)(am). However, unlike the County Executive and supervisors, the Comptroller may legally hold over in office after the conclusion of his term. *Id.* (emphasis added) (“Beginning in 2012 and quadrennially thereafter, a comptroller shall be chosen at the spring election by the electors of each county having a population of 750,000 or more for the term of 4 years. The regular term of office of each comptroller shall commence on the 3rd Monday in April next succeeding his or her election and shall continue 4 years *and until his or her successor qualifies.*”).

⁵ Wis. Const. art. XIII, § 9, states (emphasis added): “ARTICLE XIII. Election or appointment of statutory officers. SECTION 9. All county officers whose election or appointment is not provided for by this constitution *shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct.* All city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct.”

⁶ *O’Connor*, 85 N.W. at 331-333 (internal citations and quotations omitted), states:

As to offices known and in existence at the time of the adoption of the constitution, this provision is absolute in its prohibition of an appointment by the central government or its authority, or by any body other than the local electors or some local authority designated by law. This right of self-government lies at the very foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded

II. Can Milwaukee County “Self-Organize” to Fill Board Vacancies by Appointment?

As a result of the below-noted legal risks, the OCC respectfully but strongly recommends that the Board take no action with respect to self-organization unless and until the election is delayed by action of the Governor, state legislature, or by order of a court of relevant jurisdiction.

Possibly, yes. If the election is delayed, an argument can be made that County Board may then act to “self-organize” Milwaukee County and fill vacant board seats by appointment, subject to the typical County Executive signature/veto process.⁷ Under Wis. Stat. § 59.10(1), and sub (d),⁸ the County Board would first, adopt a resolution and ordinance declaring itself to be self-organized,⁹

by every department of the government, but every infraction or invasion of it is to be promptly met and condemned by the courts when such acts become the subject of judicial investigation... [I]t by no means follows [from the language or art. XIII, §9], as suggested, that such appointment or election can be made directly by the legislature. ... But it is said that the mere continuance in office by legislative enactment, of a person whose installation in the position was by a constitutional agency is not a legislative appointment, and that the term of office of respondent, regardless of the law of 1897, having commenced by a municipal appointment and being for one year and until his successor should be elected and qualified, strictly speaking and in a constitutional sense, it was not extended by such law. That proposition was advanced in *People v. Batchelor*, and was there adopted, but the case was soon overruled and has not been considered authority for nearly half a century. The rule in New York is the same as that declared in *Hamilton v. Krez*, that the continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office and void if the office be one that the legislature cannot fill by direct appointment or election.

⁷ If the election is delayed, it is critical that this process be completed before April 20, when the supervisory offices will become vacant, *see supra*.

⁸ Wis. Stat. § 59.10 states:

Boards: composition; election; terms; compensation; compatibility. The boards of the several counties shall be composed of representatives from within the county who are elected ... unless the board enacts an ordinance, by a majority vote of the entire membership, to [become self-organized]. If a board enacts such ordinance, a certified copy shall be filed with the secretary of state.

(1) Self-organized counties. (d) Vacancies. A board may determine the procedure for filling a vacancy.

Note that other powers of a self-organized county (to stagger supervisor terms and determine supervisor compensation), do not apply to Milwaukee County because of Act 14.

⁹ The self-organizing resolution and ordinance alone, absent more, has zero impact on Milwaukee County.

and then second, adopt a resolution to fill Board vacancies created by the delayed election by appointing persons to those seats, persons who could be anyone, but likely incumbents or those running unopposed to hold the open supervisory seats.¹⁰

The appointment resolution must also:

- Make clear whether the new “appointed” supervisors will newly elect a Board chairperson, vice chairperson, as well as make clear when and how that will occur, or whether the incumbents will continue in those roles,¹¹ and how committee memberships will be determined. For a variety of reasons beyond the scope of this analysis, the OCC respectfully but strongly recommends that newly appointed supervisors conduct a new election for Board chairperson and vice chairperson and proceed then to permit the Board chairperson to designate committee memberships and leadership in the usual manner.
- Include as exhibits to the appointment file the notarized, sworn, signed acknowledgement from each “appointee” that they (1) agree to serve; (2) will resign in writing as of a date certain (i.e., the date of swearing in of the newly elected supervisors after the rescheduled election), *see* Wis. Stat. § 17.01(13); and (3) will surrender the balance of the term to the newly elected supervisors after the rescheduled election, as of the date of the swearing in of the newly elected supervisors.

Importantly, as noted above, there is no need for the Board to undertake any of these actions if the election proceeds as scheduled on April 7.

In summary, on or after April 7, if the election is actually delayed, the County Board could then convene a special meeting (or add this to the agenda for the April 9 meeting), to adopt (1) a “self-organizing” resolution and ordinance¹² and (2) a resolution to appoint persons to Board vacancies per the above. *Cf.* Opinion of the OCC, March

III. Substantial Uncertainty and Risks

There are significant risks that the actions described above to fill vacant board seats after self-organizing could be subject to meaningful legal challenges. Whether Wis. Stat. § 59.10 properly

¹⁰ Care should be taken to think through when selecting an approach such as appointing all current Supervisors or some other approach (i.e., consider whether anyone is running unopposed for a seat that will be vacated by a supervisor that is not running for reelection), as well as ensuring the consistent application of those decision rules for all supervisor seats.

¹¹ It should be noted that other potential powers arising from self-organization under Wis. Stat. § 59.10 (1) (compensation, staggered terms) likely are not applicable to Milwaukee County because, under the rules of statutory construction, there are other state statutory provisions that are more specific and later-adopted than Wis. Stat. § 59.10(1), which would take those issues outside of the County Board’s control, even if it were self-organized (namely, Act 14).

¹² *Supra* n.8. A certified copy of the ordinance must be filed with the secretary of state.

functions to fill every seat of a county board in Milwaukee County because of the postponement of an election due to a public health emergency is, very generously, uncertain.

In addition, there are other statutory provisions, *see, e.g.*, Wis. Stat. § 17.21(5) (addressing election timing in the case of vacancies), case law, and other nonbinding guidance¹³ that create uncertainties that cannot be resolved because these other provisions, just like Wis. Stat. §59.10, were also not likely intended to be used as contemplated under the current circumstances.¹⁴

To reduce these risks and uncertainties, if the election is actually delayed, the OCC recommends that in addition to the actions described above to self-organize and fill vacancies by appointment, the Board also formally request from the Governor public support affirming that its actions are appropriate at this time, potentially in the form of an Executive Order issued based upon the declared state of emergency. Under Wis. Stat. § 323.12(4)(b), the Governor can issue orders that are “necessary for the security of persons and property.” Having a functioning government with leadership arguably qualifies. And, the Board should also request that state legislature ratify the Governor’s order as soon as possible thereafter.¹⁵

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¹³ *See, e.g.*, Wisconsin County Official’s Handbook (6th ed., 2018), pp. 17-18 (stating that 70 of 72 counties are “eligible” to self-organize), available at <https://indd.adobe.com/view/ea5f42ac-0f67-44ce-ae3c-c3ab68e0d26f> (April 1, 2020).

¹⁴ Related but separately, there are numerous questions regarding the operation of different statutory and constitutional provisions as to the vacant county executive seat. It is beyond the scope of this opinion to address potential approaches to fill a vacant county executive seat, of which there are many, *see, e.g.*, Wis. Stat. § 59.17(8)(b), each of which would likely be subject to meaningful legal challenges.

¹⁵ Certainly, if the Governor decides to postpone the election through an Executive Order (although that appears highly unlikely given public statements to date), through the Wisconsin Counties Association or directly, the Board should request that the order not only postpone the election, but also endorse self-organization and appointments to fill vacancies under Wis. Stat. §59.10 to avoid an empty board of supervisors on April 20. And, the Board should request that the state legislature ratify the order as soon as possible thereafter.