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TO: Milwaukee County Board of Supervisors

FROM: Margaret C. Daun, Corporation Counsel
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DATE: November 6, 2020

SUBJECT: Referral of File No. 20-234

At its November 5, 2020 meeting, your honorable body referred File No. 20-234 to the Office of Corporation Counsel (“OCC”) pursuant to § 1.15 of the Milwaukee County Code of General Ordinances. That ordinance allows a one-third minority of the County Board to refer a matter to Corporation Counsel for a “written opinion ... as to the legality of the resolution or ordinance offered, or the recommendation made in any report presented to the county board for adoption.” File No. 20-234 is as follows:

An Action Report Requesting Approval of a New Amended and Restated Development Agreement for UWM Innovation Campus Related to Purchase and Proposed Development of Land by Irgens.

During deliberations on the item, several questions arose related to the scope of the Board’s authority over the transaction and the interpretation of certain provisions in the development agreement and enforcement mechanisms.

QUESTIONS PRESENTED

1. What is the Board’s authority over the transaction?

This is a fundamental question that will govern many of the other answers to the questions set forth below.

As an initial matter, it should be stated at the outset that Milwaukee County no longer owns the property, the property is not zoned as park, and all zoning-related issues are a matter of local control (City of Wauwatosa). Therefore, the Board’s authority is limited to the powers expressly granted to the Board in the Development Agreement with UWM, as amended.

Under the Development Agreement, Board approval is required for any “Material Alteration of the Project.” *See* Development Agreement (“DA”), p.3, §§ 1(g) & 2.1. A “Material Alteration” is defined as either (1) a 20% reduction in the square footage of any phase of the Project, or (2) any change to the definition of Permitted Uses of the Property in the Development Agreement. This item is presently before the Board because Irgens intends to develop the Property for purposes not currently permitted under the Development Agreement, i.e. from a focus on academic to commercial office use. Because of that change, File No. 20-234 requires County Board approval. *See* File No. 234, Revised Report (appended on 09/10/20); Revised Powerpoint (appended on 09/10/20), Slide 4-5. However, Board authority over this file cannot confer to or be otherwise used to imply that the Board has additional powers or authorities not originally granted the Board in the Development Agreement.

2. Does the County have any authority to suggest or compel Wauwatosa to create a TIF? But not environmental restrictions?

Milwaukee County can always make suggestions or recommendations to the City of Wauwatosa; however, as noted above, Milwaukee County does not own the Property and any zoning related matters like TIF Districts or Environments Restrictions are matters of local control.

It should be noted that a TIF District was previously created for Innovation Campus and is likely to see improved cashflows with additional development.

The Development Agreement contains a number of provisions related to “Environmental Restrictions.” *See* DA, p.4, § 2.2; p.12, § 4.14.

3. Was there an RFP by UWM? Why or why not? If UWM did not RFP, is that something that Milwaukee County is allowed to do or could compel UWM at this point in the process?

Any sale or conveyance of the Property is controlled by terms and conditions contained in the Development Agreement. *See* DA, p.9, § 4.1. Under the Agreement, there is no requirement that the University of Wisconsin Milwaukee – Real Estate Foundation (“UWM-REF”) conduct an RFP prior to any sale and any attempts by the County now to compel UWM-REF to issue an RFP could be characterized as a breach of the Agreement. Had the County wished to compel the use of an RFP by UWM, the County needed to have negotiated for that condition years ago, prior to the finalization of the Development Agreement.

By way of background, once it became clear that State funding was not going to be available to fully realize the original vision for Innovation Campus, UWM-REF explored a number of opportunities to transition vacant and developable land for commercial purposes. UWM-REF eventually approached Irgens about acquiring the remaining undeveloped parcels. Irgens is widely recognized as a local developer capable such development and had recently completed development on the last remaining commercial office parcel in the nearby Milwaukee County Research Park. *See* File No. 20-234, attachs. 17 & 18 (Irgens Capabilities (03/09/30) & Irgens Letter of Support (04/06/20)).

4. Does the agreement, as written, enter into a management agreement for the habitat protection area?

There is a habitat landscape protect plan (the “Habitat Plan”) in the Development Agreement that remains in place. *See* DA, p. 4, § 2.2. The controlling owner, currently UWM-REF (proposed to be Irgens) must adhere to the plan and maintain the area as required. These requirements are in perpetuity (forever) regardless of ownership or control of the Property. Irgens has pledged in writing to work with the Friends group on a management agreement. *See infra* p. 4, Q.8, explaining that any subsequent owner must also adhere to the restrictions and requirements in the proposed agreement, including the Habitat Plan.

5. What if the monarch butterfly becomes endangered species and we have approved a development nearby its habitat?

Any owner or developer must adhere to and abide by any federal, state, and local rules or regulations controlling property adjacent to or nearby any endangered species habitat. Any liability created by violating such laws or regulations would be the owner or developer’s, not the County’s.

6. Is there a development cap on the deal as there was in the original UWM agreement? If it was increased, why was it increased? If we’re allowing increased development to happen at a lesser cost, what is the benefit to Milwaukee County?

There is typically never a cap on development in County agreements. In this case, as in most cases, the price of the land is based in part on the proposed size of the development, which is subject to change. Here, the price of the land was based on the possibility that Wauwatosa would limit the development to 853,271 sf. The sale agreement contemplated that the cap could be raised in the future and that if it was, additional compensation for any land sale would come to the County.

In the proposed agreement Milwaukee County receives a \$1,000,000 up-front payment from Irgens regardless of whether they develop anything. Further, if Irgens exceeds 1,053,271 sf of development, the County would receive an additional compensation at the rate of \$12.00/sf.

This newly negotiated up-front payment described above and captured in the proposed amended development agreement provides a new benefit to the County that would not exist under the existing Development Agreement. Under the existing Development Agreement, the County is entitled to zero dollars up front and would be paid only if/when the development actually occurred and additional payments were to be made to the County and only if the development actually exceeded 853,271 sf. *See* File No. 20-234, Revised Report (appended on 09/10/20), p.3. In contrast, the new term guarantees the County \$1,000,000 regardless of whether the development actually occurs and provides for additional payments if the size of the development is greater than currently planned.

To be clear: If the County Board approves this project by adopting File No. 20-234, the new agreement will immediately generate a guaranteed \$1,000,000 in revenue that the County would not otherwise be immediately entitled to and therefore, presents a sizable and immediate economic benefit to the County. In contrast, if the County Board rejects File No. 20-234, the original Development Agreement would not provide that immediate benefit as it guarantees only the potential for some future payment at \$12/sf for square footage in excess of 853,271 if/when a development actually occurs.

As such, the newly negotiated term balances maximizing value to the County while incentivizing completion of the development in the opinion of the County's Director of Economic Development and the Supervisor in whose district the planned development will occur.

Furthermore, there are numerous other new, additional benefits that the County would gain if this development proceeds, including:

- Developing areas agreed to as development zones in the Life Science District Master Plan.
- Remediation of brownfield contamination
- High-quality LEED pre-certified development
- 100,000s of constructions hours
- The addition of Community Benefit Requires to the deal (not part of the original agreement)
- \$80M development, with estimated additional \$1.8M in tax revenue
- Estimated 2,542 permanent jobs
- Class A office space to recruit/retain businesses in Milwaukee County

See File No. 20-234, attch.26, Irgens Powerpoint (received on 09/04/20) (full listing and details of each benefit).

7. What recourse would Milwaukee County have if Irgens developed beyond the development cap?

As with any agreement, Milwaukee County could seek redress in the courts if there is a breach. Likewise, any development beyond what was approved by the City of Wauwatosa would require further review and approval by the City.

8. If Irgens were to go bankrupt, or for whatever reason were to choose not to complete the project, what recourse does Milwaukee County have?

Just like any other development, the proposed agreement, if executed, will be recorded against the Property and bind not only Irgens, but also any of its successors or assigns. That is the case whether those successors and/or assigns take title via sale, mortgage foreclosure, or otherwise. If Irgens goes bankrupt and the property is sold or otherwise transferred in connection with the bankruptcy proceeding, any lender or subsequent owner of the Property will be bound by the terms of the amended development agreement, including any requirement to adhere to the Habitat Plan. If such lender or subsequent owner fails to pay property taxes and the County takes the Property

via in rem tax foreclosure, the County will be required to adhere to the Habitat Plan. *See* Wis. Stat. §§ 75.14(4); 75.521(13)(b). We note also that Supervisor Rolland's amendment conditions board approval on further protection of the lands habitat lands by means of an additional deed restriction protecting such lands in perpetuity. *ee* File No. 20-234, atch.30.

9. How does the agreement mandate/address:

a. The 1,053,271 square-foot cap (that Irgens proposed).

The original sale price to UWM-REF was based on an assumption that municipal restrictions would prevent the land from being developed beyond 853,271 sf. However, the Development Agreement contemplated that the density cap could be increased at some point in the future. The Agreement outlined a process for additional payment to the County if additional development square footage was permitted by the City. The details are outlined in the report and attached files, but Milwaukee County is set to receive a \$1M payment from Irgens for allowing an increase to the square footage cap.

b. Night light pollution reduction: the Dark Skies Protocols. Has Irgens agreed to follow night skies protocols?

No, ECD believes that this type of plan restriction should be reviewed, considered and enforced by the City of Wauwatosa – not Milwaukee County. The County does not have a system in place to fairly consider, review, inspect and enforce such protocols. *See also infra* p. 6 (Question 10).

c. 100% bird-friendly design (including glass) in all buildings.

See infra p. 6 (Question 10).

d. Stormwater management systems that preserve or enhance the area's natural values and follow natural topography.

Irgens refined its proposal after feedback from Friends groups to avoid impacting the existing naturally styled stormwater management systems. *See* File No. 20-234, atch.26, Irgens Powerpoint (received on 09/04/20), Slides 12-14. *See also infra* p. 6 (Question 10).

e. A commitment to fund invasive species control and landscaping with native species.

The project includes native species. *See* File No. 20-234, atch.26, Irgens Powerpoint (received on 09/04/20), Slides 14-15. In acquiring the land, Irgens will also be responsible for managing the Innovation Campus Association. The Association is responsible for caring for the adjacent Habitat Restoration Landscape Plan. *See* File No. 20-234, atch.15, p.38. *See also infra* p. 6 (Question 10).

- f. Will there be public-access trails that link the Irgens-owned parcels to the County conservation lands east of it, as well as to surrounding natural and cultural resources and to public parking?**

Trail connections are part of the project. *See* File No. 20-234. attch.26, Irgens Powerpoint (received on 09/04/20), Slide 15. *See also infra* p. 6 (Question 10).

10. Regarding Question 9, Items A-F, can Milwaukee County mandate that Irgens adhere to those terms? What enforcement policies can we put into place to ensure that these agreements are followed if, in fact, Irgens is committed to doing any of them?

As noted in Question 1, Milwaukee County does not have zoning control. Question 9, Items (b)-(f), are the types of issues that are controlled by local zoning protocols and subject to review, adoption, and enforcement by the City of Wauwatosa – not Milwaukee County.

In this case, the City of Wauwatosa will review and determine the appropriateness of these items, as they have done for projects throughout the City, including other properties abutting County Grounds with feedback from Friends groups. Local review and control includes ensuring compliance with the recently approved Wauwatosa Life Science District Master Plan and local zoning. City staff ensure that any proposed projects, including this project, align with local plans and zoning. Any amendments necessarily must be reviewed by City, public hearings, and consideration by the Wauwatosa Planning Commission, Community Affairs Committee and Common Council.

Milwaukee County does not have the power or appropriate department to enforce local zoning requirements or the specific items listed above in Question 10. Enforcement by Wauwatosa would be done through permitting and eventually issuance of a certificate of occupancy, as well as annual reviews of same.

The proposed development will need to comply with the Life Science District Plan and is proposed to be LEED pre-certified by the US Green Building Council. (Note: this issue was widely discussed at the ECD Committee meetings, videos are linked in the File: 20-234.)

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