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October 28, 2016

Alderman James Bohl
City Hall
200 E. Wells Street
Room 205
Milwaukee, WI 53202

Re: Whether Wisconsin Statutes § 59.17(2)(b)(3) permits the County Executive to sell land that has been rezoned from park to another use

Dear Alderman Bohl:

You have asked the City Attorney for an opinion on whether Wis. Stat. § 59.17(2)(b)(3) provides the Milwaukee County Executive with the authority to sell land without the consent of the Milwaukee County Board if that land had been previously zoned as park and later rezoned to another use after July 14, 2015. Although we cannot predict with exact certainly how a court would decide an issue of statutory interpretation, we believe that a court would most likely determine that the County Executive does have the authority to sell land that has been rezoned to another use at the time of the proposed sale, regardless of whether that land had been previously zoned as park.

I. Background.

The 2015-17 Biennial Budget Act instituted changes to Wisconsin Statutes § 59.17(2)(b)3 that generally provide the Milwaukee County Executive with the authority to sell county land that is not zoned as park

without the approval of the Milwaukee County Board. Specifically, the revised law provides the County Executive with the authority to:

> Exercise the authority under s. 59.52 (6) that would otherwise be exercised by a county board, except that the county board may continue to exercise the authority under s. 59.52 (6) with regard to land that is zoned as a park on or after July 14, 2015, other than land zoned as a park in the city of Milwaukee that is located within the area west of Lincoln Memorial Drive, south of E. Michigan Street, east of N. Van Buren Street, and north of E. Clybourn Avenue. With regard to the sale, acquisition, or lease as landlord or tenant of property, other than certain park land as described in this subdivision, the county executive's action need not be consistent with established county board policy and may take effect without submission to or approval by the county board. The proceeds of the sale of property as authorized under this subdivision shall first be applied to any debt attached to the property. Before the county executive's sale of county land may take effect, a majority of the following must sign a document, a copy of which will be attached to the bill of sale and a copy of which will be retained by the county, certifying that they believe the sale is in the best interests of the county:
>
> a. The county executive or his or her designee.
>
> b. The county comptroller or his or her designee.
>
> c. An individual who is a resident of the city, village, or town where the property is located, who shall be appointed, at least biennially, by the executive council, as defined in s. 59.794 (1) (d). The individual appointed under this subd. 3. c. may not be an elective official, and he or she must have demonstrable experience in real estate law or real estate sales or development.

Section 59.17(2)(b)3, Wisconsin Statutes (emphasis supplied).

Various parties contend that the phrase "*the county board may continue to exercise the authority under s. 59.52 (6) with regard to land that is zoned as a park on or after July 14, 2015*" precludes the County

Executive, in perpetuity, from selling land that either (1) was zoned as park on July 14, 2015, or (2) was or will be zoned as a park at any time after July 14, 2015, regardless of whether that land is later rezoned to a different use. The alternative interpretation is that the County Executive may sell any land on or after July 14, 2015 which is not zoned as park at the time of the proposed sale.

II. Analysis.

The question is one of statutory interpretation. Under Wisconsin law, the purpose of statutory interpretation is to discern the legislature's intent at the time the statute was enacted. *See, e.g. Juneau Cnty. v. Associated Bank, N.A.*, 2013 WI App 29, ¶15, 346 Wis. 2d 264, 828 N.W.2d 262. Courts assume legislative intent is most clearly expressed by the words that the legislature used in the statute. *Id.* Statutory interpretation analyses therefore begin with the plain meaning of the statute's text in the context in which it is used, and in relation to related statutes. *Id.* All words and phrases are construed according to common and approved usage, unless such construction would produce a result inconsistent with the manifest intent of the legislature. *See* Wis. Stat. §990.01(1).[1]

The County Executive's power to sell land rezoned from park to a different use turns on the word "is," and the phrase "on or after":

> *the county board may continue to exercise the authority under s. 59.52 (6) with regard to land that **is** zoned as a park **on or after** July 14, 2015*

An analysis of both of these terms supports the County Executive's authority to sell any land after July 14, 2015 that is not zoned as park at the time of sale.

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[1] The changes to Wis. Stat. § 59.17(2)(b)(3) were made as part of the 2015-17 Biennial Budget Bill. A review of the legislative history has provided no evidence of the intent of the legislature at the time the bill was passed. Explanations of legislative intent supplied after a statute has passed, to aid the process of statutory interpretation, are not considered evidence of legislative intent by courts. *See Responsible Use of Rural & Agr. Land (RURAL) v. Pub. Serv. Comm'n of Wis.*, 2000 WI 129, 239 Wis. 2d 660, 688, 619 N.W.2d 888, 904.

1. "On or after."

Various parties have interpreted the phrase "on or after July 14, 2015" to preclude the County Executive, in perpetuity, from selling land that held the zoning designation of "park" on July 14, 2015 or on any day thereafter – even if that land is subsequently rezoned to a different use. That is, those parties interpret the phrase "on or after" to refer to the date that land was zoned as park. Logical extension of this reasoning would lead to an absurd result. For example, this interpretation would prevent a future County Executive from selling any land that had been zoned as park for even a single day "on or after" July 14, 2015, even if that land had been rezoned for decades. Courts are required to avoid construing statutes in ways that lead to unreasonable and absurd results such as this. *See State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110.

A more logical interpretation of the phrase "on or after" is that the phrase does not refer to the time that land was zoned as park, but rather indicates when the County Board's powers first became limited by the changes to the statute (i.e. "the county board may continue to exercise the authority under s. 59.52(6) … on or after July 14, 2015 [with regard to land that is zoned as a park].") This makes more sense in context, because the 2015-17 Biennial Budget Bill was signed only a few days before July 14, 2015. Furthermore, this interpretation does not lead to the absurd result of preventing the County Executive from selling land that has been rezoned to a different use.

2. "Is."

Even if a court did not agree with our interpretation of the phrase "on or before," the legislature's use of the present tense word "is" indicates that the legislature only intended to preserve the County Board's power over land that was zoned as park at the time of a proposed sale.

The phrase "is zoned" can indicate either the state of being zoned, or the act of zoning. Both contexts are examined below.

a. "Is" expressing a present of state of being.

Parties could argue that the legislature intended the County Executive to be precluded from selling land that had been zoned as park before July 14, 2015, and as a result, was zoned (in the state of being sense) as a park on July 14, 2015. This interpretation would be incorrect. A statute is interpreted as speaking in the present, at the time it is read or applied. *See* Wis. Stats. § 990.001 (3), and *McLeod v. State*, 85 Wis. 2d 787, 790–91 (Ct. App. 1978). The phrase "is zoned as a park on … July 14, 2015" simply makes no sense when read today. That would be the same as saying "is zoned as a park yesterday." If the legislature intended the statute to prevent the County Executive from selling land that held the zoning designation of "park" on July 14, 2015, the legislature would have used different words to indicate past tense, such as "land that was zoned as a park" or "land that had been zoned as a park," rather than the present tense "is." Using the present tense "is" indicates that the only relevant zoning designation is the zoning designation of the land at the time of sale.

b. "Is" expressing the act of zoning.

The phrase "is zoned as a park" could also be interpreted to mean the actual act of zoning the park to a specific use on a certain date. Under that interpretation, the phrase "is zoned as a park on … July 14, 2015" also makes no sense because, again, the present tense is being used to refer to an action occurring in the past. Even if the zoning action were yet to occur, as the act of zoning was completed, the same problem would arise. The act of zoning would be historical. If the legislature intended to include past acts of zoning, the legislators would not have used the present tense "is zoned," they would have used the future perfect tense "will have been zoned".

c. Importance of tense in statutory interpretation.

The distinction between tenses is not mere technicality. Both state statutes and case law indicate that the use of present tense does not include past actions or states of being. Section. § 990.001(3), Wisconsin Statutes provides rules for how laws in Wisconsin must be interpreted, and states that "*The present tense of a verb includes the future when applicable. The future perfect tense includes past and future tenses.*" "Is" denotes the present tense, and therefore can only refer to actions occurring at the time

the statute is interpreted, or in the future when applicable. The legislature chose to use the word "is." Use of the future perfect tense, "will have been," could have, by statute, included past actions and states of being; however, the legislature chose not to use the future perfect tense.

The Wisconsin Supreme Court has stressed the importance of tense in statutory interpretation. For example, when discussing the meaning of an action that "was continuing" in the past versus a "continuing action" in the present, the Court explained the importance of drawing a clear distinction between present and past tenses:

> Why therefore does this case not present a case of *continuing* contempt? ... the phrase "was continuing," does not connote the same meaning as the word "continuing." To illustrate, the Thirty Years War *continued* or "*was continuing*" for 30 years, but the Thirty Years War is not *continuing.* For the same reason, we can say the County's contempt *continued* or "*was continuing*" for almost three years, but the County's contempt *is not continuing.*

Christensen v. Sullivan, 2009 WI 87, 320 Wis. 2d 76, 116, 768 N.W.2d 798, 818.

The Wisconsin Court of Appeals followed similar reasoning when interpreting language strikingly similar to the language at issue here ("is located" versus "is zoned"). The court concluded that by using the present tense of the verb "is," the statute at issue did not require the Department of Natural Resources to pay a withdrawal tax to a municipality in which land had previously been located during enrollment in a specific program; rather, use of the present tense "is" required payment to the municipality in which the land was located at the time the payment was due:

> Wisconsin Stat. § 77.89(1) requires the Department to pay "100 percent of each withdrawal tax payment received under s. 77.88(7) to the treasurer of each municipality in which *is located* the land to which the payment applies." (Emphasis added.) By using a present tense verb form, the statute clearly specifies that the Department is to remit the payment to the

> municipality where the property is located at the present time. The statute does not require the Department to pay the withdrawal tax to each municipality where the land *was located* during its enrollment in the MFL program. Instead, based on the plain language of the statute, it is the present location of the property that matters for purposes of making the withdrawal tax payment. ... By using the present tense, the statute unambiguously limits withdrawal tax payments to municipalities where the land is presently located.

Town of Somerset v. Wisconsin Dep't of Nat. Res., 2011 WI App 55, ¶¶ 8-10, 332 Wis. 2d 777, 783–84, 798 N.W.2d 282, 286. By extension, the same logic that requires the DNR to pay a withdrawal tax to the municipality in which land "is located" at the time a payment is due, requires a court to interpret the phrase "is zoned" to provide the County Board with the authority to prevent a sale only if land "is zoned" as a park at the time the proposed sale is scheduled to take place. It would not provide the County Board with the authority to prevent a sale if the land had been zoned as park in the past, but had been rezoned to another use at the time of sale.

The Wisconsin Court of Appeals has consistently interpreted the word "is" to refer to present actions and present states of being. Yet another example of the court's focus on the importance of tense and the word "is" is found in *McKnight v. Teachers Ret. Bd. of Wisconsin*, 2001 WI App 146, ¶¶ 7-8, 246 Wis. 2d 670, 630 N.W.2d 276 (citiation omitted):

> McKnight contends that the University should have certified either that she was on a leave of absence due to a disability at the time of her termination or that she was terminated due to a disability. Her argument of having been on a leave of absence due to a disability is misplaced because it fails to recognize the relevance of verb tense in the statute. The statute refers to a certification by the employer that an employee "is" on a leave of absence from which she is not expected to return or "has been" terminated from her employment due to a disability. This distinction in verb tense is purposeful, and

> plainly sets forth two points in time at which the Board certification may occur: while an employee is on leave status, or after the employee has been terminated. In other words, the statute requires the employer to certify the employee's status *at the time of the certification.* McKnight was not on a leave of absence at the time of the certification; her employment had already been terminated well before then. Therefore, the record plainly supports the employer's refusal to certify that she was on a leave of absence due to a disability.

Given the controlling statute and the relevant case law described above, it is unlikely that a court would determine that the County Executive would be precluded from selling land that was zoned to a non-park use at the time of the sale, whether or not that land had been previously zoned as a park.

III. Wisconsin Legislative Council Memorandum.

On October 24, 2016, the Wisconsin Legislative Council released a legal memorandum ("WLC Memorandum") analyzing this same question. A copy of the WLC Memorandum is attached hereto. The WLC Memorandum concludes that that there are valid arguments to be made in favor, and in opposition to, the position that the County Executive has the authority to sell land rezoned from park to another use after July 14, 2015. The WLC's argument in favor of the position that the County Executive may sell rezoned land is sound and reflects the analysis above. The WLC's second argument, in opposition to the position that the County Executive may sell rezoned land, is based on the faulty assumption that the statute refers to past zoning actions.

The WLC memorandum's first argument is sound and makes the point that that the County Executive may sell land that is zoned as park at the time of the sale because the statute uses the present tense:

> The legal argument supporting the view that the Milwaukee County Executive may sell the re-zoned property is that the parkland exception is intended to apply to land that is currently zoned as parkland, not land formerly zoned as parkland. The present tense

> phrase "is zoned as a park" in the statutory exception provides evidence in support of that argument.

The WLC memorandum's second argument supports the County Board's authority to prevent the sale of land that either was zoned as park on July 14, 2015, or was zoned as park at any time after July 14, 2015; however, this second argument is based on the incorrect assumption that the park zoning action may have occurred in the past:

> The legal argument on the other side is that the parkland exception is intended to apply to land that was zoned as parkland, either on July 14, 2015, or any time after that date, including land that is no longer currently zoned as parkland. Possible textual evidence in support of that argument is that the present tense "is" in the phrase "is zoned as a park" applies to the act of zoning (which may have happened in the past), and not the present condition of being zoned.

Given the statutory rules of construction regarding verb tense and the Wisconsin court's application of those rules described above, a court would most likely determine that the County Executive does have the authority to sell land that has been rezoned to another use at the time of the proposed sale, regardless of whether that land had been previously zoned as park.

Very truly yours,

GRANT F. LANGLEY
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c: Mayor Tom Barrett
Mr. Jim Owczarski, City Clerk

AJF:ajf
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