



**LAW OFFICES OF
WILLIAM H. LYNCH**

November 18, 2014

Supervisor Gerry Broderick
Milwaukee County Courthouse
901 North 9th Street, Room 201
Milwaukee, WI 53233

RE: What the Proposed Sale of O'Donnell Park Will Mean for Milwaukee County Residents

Dear Supervisor Broderick,

As you know, the Board put over to the Dec. 18th Board meeting consideration of the County Executive's proposal that O'Donnell Park be sold to Northwestern Mutual. Sale of a County park to a private corporation is no small matter. Before such a decision is made, its consequences should be clearly understood by the Board and the public.

As chair of the Lakefront Development Advisory Commission, and because of my long term interest in lakefront development, I have reviewed the over 300 pages of materials the County Executive and Northwestern Mutual have provided to you. An overarching concern is whether after a sale the public will have any legally enforceable right to public use and enjoyment of the property or any of its facilities. Analysis of the significant sale documents leads to the conclusion that the proposed agreement provides for almost no legally enforceable public access and use once the deal closes. The County will not play a significant role in how the buyer or subsequent owners will develop and use their private property.

Enclosed for your consideration is my legal analysis that outlines what the proposed sale does and does not do to assure public access to and use of the property and its facilities. Please give it your consideration when determining your position on the sale as it is proposed. If you have questions or comments, please do not hesitate to contact me. My cell number is 414 732-9142 and my email is wlynch@execpc.com.

Sincerely,



William H. Lynch

Encl.

cc: County Supervisors (w/encl.)
County Executive Abele (w/encl.)
Press (via e-mail w/encl.)

- The buyer does not agree to maintain or improve the plaza area of the park. Nor does the buyer promise not to build structures on what is currently public plaza. The appraisal of the property assumed “that a buyer of the property will keep the top terrace area a public park by simultaneously entering into a public access agreement with Milwaukee County.” The proposed purchase agreement does not include a public access agreement.
- The buyer does not agree to maintain the Miller Brewing Company Pavilion as a public facility. It can put an addition on or replace it with a different building
- The buyer does not agree to any restrictions on commercial development of the southeast part of the property, the grassy area south of the parking facility at the corner of Michigan Street and Lincoln Memorial Drive (the “SE Development Site”). The “SE Development Site” is larger than the land on which the nearby 33-story Kilbourn Tower is built.
- The buyer does not agree to spend money to maintain or improve the parking facility, the plazas, or Miller Pavilion, except that it will receive a \$1.3 million credit toward the \$14 million purchase price for parking facility repairs. The buyer will have “no obligation to repair or replace any part of the Property or Improvements in kind.”
- The buyer does not agree to restrict its use to what City of Milwaukee Park District zoning now allows. The buyer is free to seek changes in, or variances from, City zoning.
- The deed the County proposes to give the buyer does not include any restrictions on future use of the property.
- No deed restrictions require public ownership and/or public park use of the Park’s “South Section”, the approximate one-half of the Park between Wisconsin Ave and Michigan Street.

Secondly, this is what the proposed agreements do provide regarding limits on future use; their legal significance is very limited.

- **Ownership:** The property will be private. The County agrees the buyer “shall have all rights of a private owner to control loitering or other disagreeable behavior on the Property.”
- **Parking Access:** Until December 31, 2033, or earlier, if the buyer in good faith determines the “useful life” of the parking structure has ended, 200 of the 1,332 parking spaces will be available on weekdays for public parking at market rates, and all parking spaces will be available at market rates nights and weekends.
- **Pedestrian Access:** The buyer agrees to allow public access to the Milwaukee Art Museum and Michigan Street pedestrian bridges, but only for the “useful life” of the parking facility (up to the end of 2033), except, “the Bridges may be temporarily obstructed by Owner during special events.” No specific easements or access routes are specified.
- **Miller Pavilion Leases:** The buyer agrees to assume the County’s leases, including the leases with the Betty Brinn Children’s Museum and Zilli Hospitality Group. Those leases are for limited terms. The leases may be terminated under circumstances specified in them or by agreement of the parties.

- **Pavilion Post-Sale Public Access:** After the park is sold, the County will have no role respecting leases, nor in how the space will be used if they are terminated, nor in how space not now subject to leases will be used. The buyer does not promise the County to use the Miller Pavilion for public purposes, nor to make it accessible to the public.
- **Zoning:** The buyer acknowledges the Property is currently zoned as a Park District. If the buyer requests the City to change the zoning designation of the property, it must notify the County. If the County chooses, it can exercise its right as an owner of abutting property to require a 75% vote of the City Council on a change of zoning designation. This will only apply if the 75% vote requirement remains a part of the City zoning procedure. This notice requirement does not cover City zoning changes that are not the result of the buyer filing a request, or, by its terms, to requests for variances from the zoning requirements. The City is free to change the zoning at any time. The City is not a party to the proposed sale and park district zoning will be changed before closing to permit private ownership of park structures. The County will have no recourse if the City changes the zoning to permit commercial development.
- **City Deed Restrictions on North Section:** In its deeds the City of Milwaukee restricted ownership and use of the parks it transferred to the County in the 1930's, including Juneau Park. The north part of O'Donnell Park between Wisconsin Avenue and Mason Street, the "North Section", was part of Juneau Park and is subject to these City deed restrictions. The south approximately one half (the "South Section"), which includes the Miller Pavilion, the South Garden Plaza and the SE Development Site, is not. The City's deed required that the Park be forever publicly owned. Before closing buyer will ask the City for a revision that will allow privatization of ownership of the North Section. This will leave a restriction that the North Section will forever solely and exclusively be used as a public park. The deed restriction on the North Section of the park can only be enforced by the City, not by the County.
- **North Section Deed Restriction Changes after Closing.** If, after the deal closes, the owner seeks to have the City remove or revise the deed restriction that requires use of the North Section as a public park, the owner is to notify the County. If the County objects, the owner agrees it will not proceed with seeking to have the deed restrictions changed by the City. But the City is not a party to these promises. The City can revise or release the owner from having to use the property as a public park without a request from the buyer. Also the City can release the owner from having to use the property as a public park even if the County objects and the buyer agrees not to proceed with its request.

In short, the buyer is not agreeing that it will use O'Donnell Park solely and exclusively as a public park, either now or in the future. The City is free to revise or release its restriction to public park use that applies only to the North Section of the property. If the City does so, whoever owns the property at the time will be able to develop and change, not just the South Section, but also the entire property, as any owner of private property may. Any representations of a present intent not to change some or any of the park's uses or facilities will "not be binding on the parties."

The law does not give the County the right to determine how the property will be zoned or what City deed restrictions will apply to it in the future. The support City officials have expressed for this sale makes it likely that the City will grant variances to, or changes in, its zoning and revise or release its deed restrictions.

Legal Summary: What Does This Mean for the Public?

The buyer has publicly stated that they intend to keep O'Donnell Park as it is and enhance it for the public, for 19 years or less, whenever the owner determines that the "useful life" of its parking structure has expired. However, the buyer is not legally bound to make any concessions for public use except, during the useful life period, 1) to provide specified numbers of parking spaces available to the public at market rates at specific times and 2) to provide access for pedestrians to the Art Museum and Michigan Street walkway bridges except during special events. No other public use is enforceable by the County. Promises and representations respecting future use of the property not in the express language of the agreement are not enforceable.

The sale contract requires the buyer to honor existing leases. As with any lease, the parties may renegotiate the terms at any time. There is no current lease for the Miller Room or the public lobby space of the Miller Pavilion. The buyer may use the facilities not covered by a long-term lease for corporate purposes, and not for the public.

For a time, as a gesture of goodwill, the buyer may, but is not legally required to, continue to make the park plazas available for public enjoyment. As a private owner, it can set any parameters that it wishes, including limited hours. The owner will not be required to allow the public to reserve either the North Garden Plaza or South Garden Plaza for weddings and other events that may now be arranged through a park permit. The buyer will not be required to provide the same levels of access the public now enjoys.

City zoning, because it can readily be changed, provides little protection for public access to and enjoyment of the property. Likewise, the restriction to park use in the City's deed to the North Section of the park is also subject to change, solely at the City's discretion. They can be modified to end park use and allow commercial development. The County will have no legal recourse.

The future of public use and enjoyment of the property is very limited and beyond the County's control.

Nov.18, 2014

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