



WISCONSIN LEGISLATIVE COUNCIL

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TO: REPRESENTATIVE LOUIS MOLEPSKE, JR.
FROM: Mary Matthias, Senior Staff Attorney
RE: Building Commission Spending Authority Under 2009 Senate Bill 616
DATE: May 17, 2010

BACKGROUND

This memorandum responds to your request for a discussion of the impact that enactment of 2009 Senate Bill 616 (the bill) may have on the authority of the Building Commission to authorize state agencies to expend funds for maintenance of existing state buildings. The provision that is discussed in this memorandum is the following:

The building commission shall apply all moneys available for its use under the authorized state building program to achieve certification as of January 1, 2015, by the U.S. Green Building Council for not less than 15 percent of the total gross square footage of conditioned space in buildings, structures, and facilities that are owned or leased by agencies on that date, as determined by the department of administration under s. 16.856 (3), as conforming at a minimum to LEED performance requirements for the operation and maintenance of existing buildings, as defined in s. 16.856 (1) (h), Stats. [s. 13.48 (2) (jm) 4., Stats., as created by 2009 Senate Bill 616.]*

Concerns have been raised that enactment of the bill would limit the ability of state agencies to expend funds for various purposes, such as maintenance of existing buildings, that are not directly related to achievement of the 15% LEED certification goal.

*Under the bill, “minimum LEED performance requirements for the operation and maintenance of existing buildings” means the performance requirements so designated under the LEED Green Building Rating System, as prescribed by the U.S. Green Building Council, or its current equivalent as determined by the Department of Commerce. “Conditioned space” means space that is designed to have controlled environmental conditions.

Current law governing the state long-range public building program provides, in general, that no state board, agency, officer, or department may enter into a contract for the construction, reconstruction, remodeling of, or addition to any building, structure, or facility, in connection with any building project which involves a cost in excess of \$150,000, without completion of final plans and arrangement for supervision of construction and prior approval by the Building Commission. [s. 13.48 (10) (a), Stats.]

The Building Commission may not authorize the design and construction of any building, structure, or facility costing in excess of \$500,000, regardless of funding source, unless that project is enumerated in the authorized state building program. [s. 20.924 (1) (a), Stats.]

The Building Commission may not authorize the acquisition of land, or the repair, remodeling, or improvement to any existing building, structure, or facility costing in excess of \$500,000, regardless of funding source, unless that project is enumerated in the authorized state building program. [s. 20.924 (1) (b), Stats.]

The biennial state budget enumerates the specific projects that various state agencies are authorized to undertake as part of the authorized state building program. These are referred to as “enumerated projects” and are set forth in SEC. 9106 (1) (a) through (q) in 2009 Wisconsin Act 28 (the 2009-11 Biennial Budget Act).

The Biennial Budget Act also contains an appropriation entitled “All Agency Project Funding,” under which broad types of projects, rather than individual projects, are enumerated under titles that indicate a general category of spending and that establish an overall expenditure limit for the biennium for that purpose. The “All Agency” enumerations are used for types of projects, such as maintenance, that recur, but where the commission may need to address unanticipated needs during the biennium. In the 2007-09 building program, funding for “All Agency” projects represented 19.5% of the total building program.

DISCUSSION

The University of Wisconsin System (UWS) administration has stated that implementation of the bill’s provision cited above would “freeze building commission spending” until 15% of the total gross square footage of conditioned space in state-owned buildings is LEED certified. It appears that the UWS bases this conclusion on its reading of the provision in the bill which states that the Building Commission shall apply “all moneys available for its use” to achieve LEED certification of 15% of state buildings by 2015.

Since the bill’s provision does not contain cross-references to identify the specific appropriations to which it applies, it is unclear what money is to be considered “available” to the Building Commission for the bill’s purposes. However, it seems unlikely that the Legislature contemplated that this provision would “freeze” Building Commission spending upon enactment of the bill. Under this interpretation, the bill’s provision would apply to funds that have been enumerated by the Legislature for specific projects in the Biennial Budget Act, and would effectively override the bulk of the state authorized building program for the biennium. When taking up the bill, the Joint Committee on Finance, which devoted a considerable amount of its attention to the details of the state building program in the budget deliberations in 2009-11 budget process, did not discuss this possibility or give any indication that it intended to rescind its previous decisions regarding the state authorized building program. Likewise, a

fiscal estimate prepared by the Department of Administration (DOA) does not identify this as a possible interpretation of the bill.

Also, under this interpretation, the Building Commission would lack authority to make any of the expenditures identified in the "All Agency Project Funding" appropriation. This would prohibit the Building Commission from authorizing needed repairs, preventive maintenance, and similar expenditures that were authorized and delineated in the budget act. The bill does not repeal or amend the budget act language governing this appropriation category. It would be reasonable, therefore, for the Building Commission to conclude that the Legislature intended to grant it sufficient discretion in implementing the bill to undertake projects necessary to maintain the state's current investments in facilities. Under this interpretation, "moneys available for its use" refers to money that the Building Commission, in its discretion, has determined is available after ensuring that expenditures necessary to adequately and responsibly maintain the state's investment in existing state facilities have been made.

Since the bill does not relieve the Building Commission of its existing statutory responsibilities and does not require the 15% LEED certification level to be met until 2015, it is reasonable to conclude that the Legislature did not intend to mandate all spending under the auspices of the Building Commission be immediately redirected for the purposes of the bill. Rather it is reasonable to conclude that it intended to provide the Building Commission discretion to determine the best method to achieve the 15% LEED level over the next five years along with meeting its other statutory responsibilities. This interpretation is bolstered by several specific provisions in the bill.

First is the fact that it would not be possible for the Building Commission to be legally out of compliance with the provision until 2015. This could reasonably be interpreted to indicate that the Legislature intended to provide the Building Commission with considerable discretion to determine the best way to achieve the certification goal by that date.

Second, the bill requires DOA to maintain an inventory of all conditioned space in buildings that are owned or leased by the state that includes the information regarding whether that space is LEED certified or eligible for LEED certification. This reflects an understanding that before a plan for expenditure of funds to obtain the required level of LEED certification can be developed, the extent to which current buildings are or could become LEED certified must be determined. This would indicate an expectation that all Building Commission spending will not be immediately redirected to achievement of the 15% certification level upon enactment of the bill.

In a related vein, the bill's provision does not apply to property owned or leased by the state on the effective date of the bill, but rather to the property it owns or leases on January 1, 2015. In order to determine what steps must be taken to meet the certification level by the required date, a survey would have to be done that would include, among other information, a schedule of lease renewal dates to determine which buildings would potentially be leased by the state on January 1, 2015.

In conclusion, the Legislature has knowledge of the planning and process aspects of the state long-range building program. It seems unlikely that it intended to override the detailed and well-established procedures for orderly maintenance and development of state facilities without using explicit language or even statutory cross-references to make such far-reaching alteration of established practice. The five-year phase-in demonstrates the legislative intent to direct the Building Commission to accomplish the 15% certification level in the same orderly, strategic fashion that the Building

Commission normally operates, concurrently with the implementation of the Legislature's directives, as indicated in the authorized state building program.

If you have any questions, please contact me directly at the Legislative Council staff offices.

MM:ksm