

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: November 30, 2017

MEMORANDUM

TO: Members of the Madison Common Council

FROM: Michael P. May, City Attorney

RE: Public Market Foundation Resolution, Legistar No. 49283

At the Common Council meeting of November 21, the Council asked a number of questions regarding the above referenced resolution (the "Resolution"). The Resolution was referred to the Council meeting of December 5, 2017, with a request that I prepare a memo addressing these questions.

Portions of this memo giving the history and planned structure of the Public Market were prepared by Dan Kennelly of the Economic Development Division.

A. Purpose of Resolution

The City of Madison is leading the effort to build the Public Market with the Public Market Development Committee overseeing the process while the Public Market Foundation (the "Foundation") focuses on raising capital for the Public Market and laying the groundwork for long term operations. The City and the Foundation are closely linked in a collective effort to implement the Public Market project. However, as of now, there is no document establishing a relationship between these two entities. The purpose of Resolution #49283 is for the City of Madison to recognize the Public Market Foundation and its potential role as the Public Market Operator, and to authorize staff to continue to work with the Foundation to implement the plans for the Market.

The Resolution itself does not commit the City to entering into an operating agreement or commit the City to any type of formal partnership with the Foundation. Rather, the Resolution directs staff to begin working with the Foundation on an operating agreement, which would go back to Council for approval. The Resolution requests that an operating agreement come before the Council by June of 2018. The details about the role of the Foundation and its relationship with the City will not be determined until that operating agreement is prepared.

B. Background on the Public Market

The project will be constructed at the intersection of First Street and East Washington Avenue and will replace the aging Washington Plaza strip retail center (locally called

the “Fiore Center”). The Public Market will be built as part of a public/private partnership with a private developer who currently owns the shopping center. The public components are the Public Market and a “Food Innovation Center”. Each will be purchased as condominium units for the City to build out as public works projects. The private development will consist of office space and housing, which will be owned by the developer and be in separate buildings on the property. A parking ramp will also be constructed below grade for use by all components. The Public Market itself will include space for small-scale permanent and temporary food vendors, larger “storefront” retail spaces, a flex space for events and pop-up markets, and the Food Innovation Center will consist of food processing and kitchen space. Surrounding the public market will be privately-constructed retail, residential, and office space. The City is currently working with the developer on the terms of the partnership with them, and the City is continuing to refine the physical plans for the Public Market project.

The final real estate structure is partially dependent on the legal requirements of the New Market Tax Credit (NMTC) program. Funding can only be used for certain purposes, and properly structuring the condominium will assist in both finding investors and ensuring that the NMTC money flows properly into the project. The City has hired a consultant to find NMTC investors for the project, and is in the process of hiring an outside attorney to assist in structuring the real estate transaction to conform to the NMTC program requirements.

The City of Madison staff and the City’s Public Market Development Committee (formerly called the Local Food Committee) have been working on planning for the Madison Public Market since 2012. The Business Plan for the Public Market was approved by the Madison Common Council on October 6, 2015 ([Resolution #38885](#)). The City Staff and Public Market Development Committee then developed a detailed Implementation Strategy identifying key tasks that need to be completed to implement the Public Market project. This Implementation Strategy was approved by the Common Council on March 15, 2016 ([Resolution #41819](#)). In 2015, the City also completed a detailed Racial Equity and Social Justice analysis of the Public Market project using the City’s Equity Tool. This analysis led to ten specific recommendations for how the Public Market can have a positive impact on communities of color in Madison and these recommendations are continuing to guide the implementation of the project. The Public Market Business Plan, the Implementation Strategy, and the Equity Analysis can be reviewed online at www.cityofmadison.com/publicmarket.

Since the approval of the Business Plan and Implementation Strategy, the City staff and the Public Market Development Committee have been working on tasks identified in those planning documents. This includes working to finalize the design of the Public Market building, negotiating an agreement with the private developer, conducting a feasibility study of a capital fundraising campaign, positioning the project for New Markets Tax Credits, and cultivating potential public market vendors (including launching the “MarketReady” training program for potential public market entrepreneurs).

C. Operations and Governance

One of the key next steps for the Public Market project is establishing a governance structure and operating plan. The Madison Public Market Business Plan recommends that the public market be operated by an independent 501(c)(3) organization that is created for the purpose of operating the Public Market, which, in this case, is the Foundation. Based on experiences of other markets around the country, the Public Market experts engaged by the City to complete the Public Market Business Plan recommended an operating structure where a non-profit organization is established for the purposing of running the market.

The Business Plan recommends that the Foundation be governed by a Board of Directors representing key Public Market constituencies, and that it be responsible for hiring staff that will manage the day-to-day operations such as management, maintenance, marketing, vendor recruitment, leases, programing, and events.

In the near term, although the Foundation will manage the operations of the market, the City will own the Public Market real estate and will have oversight through a master lease and operating agreement with the Foundation. The relationship is intended to preserve City oversight of the project, while providing adequate independence the operation of the Public Market. For example, the operating agreement might require the Foundation to abide by some rules normally applicable only to public bodies, such as the Open Meetings Laws.

The end goal is for the Foundation to be an independent organization that is governed by its own board of directors, run by a professional staff, and overseen by the city through an operating agreement. Again, balancing independence and flexibility for the operator while maintaining City oversight will be one of the key aspects of the operating agreement that will be negotiated during the next several months with review and final approval by the Common Council.

A chart is attached to this memorandum showing the stages and duties pursuant to the plans adopted by the Council.

D. Creating The Madison Public Market Foundation

At this time, there are no organizations with the experience and expertise necessary to operate the Public Market in the City of Madison. Further, the Business Plan did not contemplate an operator from outside the City of Madison, and having the Market operated by a national organization would likely not be practical. As such, the Public Market Business plan recommends that a *new* local organization be created for the purpose of operating the Public Market rather than the City issuing a Request for Proposals to solicit interest in operating the Public Market from existing organizations. Because the City's Public Market Development Committee (PMDC) has been leading the effort to create the Public Market, members of the PMDC were a natural starting place for the founding board of the non-profit. As such, the Madison Public Market Foundation was established in the spring of 2017 and was created by three members of

the City's Public Market Development Committee (Anne Reynolds, Mayra Medrano, and Alder Larry Palm). The Public Market Foundation was created for two purposes:

- 1) **Fundraising** – The initial focus of the Foundation will be fundraising. The City's Capital Budget identifies that \$2.5 million in funding for the Public Market will come from private donations. The Foundation will lead the effort to raise those funds. The Foundation has incorporated as a non-profit and has applied for 501c3 status. The Foundation also has an agreement with a Fiscal Sponsor to provide for tax deductible donations.
- 2) **Public Market Operations** – As the Public Market fundraising effort and the project moves forward, the role of the Foundation will shift toward the Operations of the Public Market. Over time, the organization will add additional board members, hire an executive director, and prepare to take on the responsibility of managing the Public Market facility.

Because its primary initial function is fundraising, the organization's founders decided to call itself the Public Market Foundation to make clear that it's role is to raise capital for the project. Over time, as the organization's role evolves to focus more on operations of the market, it may change its name and/or the organization may split, with one non-profit for operations and the Foundation as a separate organization for long term fundraising.

E. Ethics Issues

The City's Ethics Code forbids incumbents (employees, elected officials or committee members) from taking official action on a matter that might benefit an organization with which the incumbent is "associated." Sec. 3.35(5)(a), MGO. An incumbent is "associated" with an organization if, among other things, the incumbent is a director or officer of the association. Sec. 3.35(2)(b), MGO.

But the Code has an exception if the incumbent is placed on the outside organization as an official representative of the City of Madison. Under sec. 3.35(2)(b), MGO, if such an appointment is made by the Mayor or Common Council and the appointee is a representative of the City, the incumbent is not "associated" with the organization and there is no conflict. The City has authorized many of these appointments from time to time, some of which were consolidated in a resolution adopted in 2014, Legistar no. 31253:

<https://madison.legistar.com/LegislationDetail.aspx?ID=1467624&GUID=41402A8B-B139-4273-8A98-3D0A8462141E&Options=ID%7cText%7c&Search=31253>

Sometimes it is done for specific entities, such as the resolution authorizing city officials or employees to serve on the Olbrich Botanical Gardens Board, Legistar no. 44551, adopted in 2016:

[https://madison.legistar.com/ViewReport.ashx?M=R&N=Master&GID=205&ID=2843091&GUID=1793791B-898A-488A-A3FD-619E1777F192&Extra=WithText&Title=Legislation+Details+\(With+Text\)](https://madison.legistar.com/ViewReport.ashx?M=R&N=Master&GID=205&ID=2843091&GUID=1793791B-898A-488A-A3FD-619E1777F192&Extra=WithText&Title=Legislation+Details+(With+Text))

As noted above, this interim arrangement is not dissimilar to what the City has done with Olbrich. In order to remove the potential conflict issues, I am recommending that an amendment be approved that adds the following Resolved clause to the Resolution:

BE IT FURTHER RESOLVED, that any city officials, employees or committee members serving on the Public Market Foundation board are doing so as representatives of the City of Madison pursuant to sec. 3.35(2)(b), MGO, and that the City will reexamine this interim determination at such time as the more permanent structure of the Public Market is determined;

Because the Foundation Board is essentially acting as an agent for the City and, until an Operating Agreement or Lease is negotiated has the same interests as the City, this determination makes sense. It would have been better to have included this in an earlier resolution adopted by the Council. At some future point, it may well be that the Foundation will need its own legal counsel and the determination recommended above may need to be reexamined.

F. Other Questions

Several other questions were raised.

What is the purpose of a foundation as opposed to a non-profit corporation?

The Foundation is a non-profit corporation. The presumed benefit of that name, as opposed to (say) "Public Market Operating Company, Inc.," is that the use of "foundation" may bring more contributions to the organization. Some foundations are operating entities, e.g., Overture Center Foundation. Perhaps at a later stage of development, the Foundation might change its name and establish a separate entity with the name foundation and use it solely for purposes of fundraising.

Shouldn't the Foundation be a separate entity dealing at arms-length with the City?

Yes, eventually, it will have to be such an entity. But at this early stage, where the formation of the Foundation and the resolution before the Council is to get the process started, the City wants to keep control of the structure. At such time as the Foundation and the City enter into negotiations for an operating agreement and lease, the PMF should obtain its own legal counsel to review the agreement. Whether the City will want to retain some representation on the final form of the Foundation Board, as in the Overture Center, will have to be decided at that time.

Why not separate the Foundation from the City now?

For the reasons stated in the last answer, this is not the plan. However, if the Council believes that such a separation is essential, the resolution ought to be amended to provide for that result. One purpose of the resolution is to give staff direction as to how to proceed. It is drafted to match the earlier plans presented to the Council. If the Council wants to change directions, staff should know that now.

Why have the Foundation at all? Why not contract directly with the operator of the Public Market?

The plan is that the Foundation will be the operator. It will hire staff to assist it in the operation of the Market. There is not a class of public market operators that provide this service from city to city or state to state, like a Heartland that operates low income housing. Even if there were such an entity, the idea of hiring the operator of the Seattle market to operate the Madison market was not considered a reasonable plan by the Committee. If the Committee and the Foundation determine that a third person should be hired to be the operator, the structure would be reexamined.

Aren't there too many levels of oversight, with the Public Market Committee and the Foundation and the operator?

As noted above, the plan is for the Foundation to be the operator. Further, once the Market is operating, the Public Market Committee likely would be disbanded.

G. Next Steps

If the Resolution is adopted, the City Staff (led by the City Attorney's Office and Economic Development Division) will formally begin the process of negotiating an operating agreement with the Foundation.

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Madison Public Market Roles of Organizations Over Time				
Era Group	Business Plan (2013-2015)	Pre-Construction (2016-2017)	Construction (2018-2019)	Operations (2019 –)
Public Market Development Committee	<ul style="list-style-type: none"> • Vision for project • Develop scope of work • Oversee Process of creating business plan • Talk to stakeholders • Outreach 	<ul style="list-style-type: none"> • Oversee “MarketReady Program” • Oversee Design Process • Work on operating plan • Oversee NMTC process 	<ul style="list-style-type: none"> • Oversee construction 	<ul style="list-style-type: none"> • Dissolve
Public Market Foundation		<ul style="list-style-type: none"> • Incorporate • Create Initial Board • Launch Fundraising Campaign 	<ul style="list-style-type: none"> • Ongoing Fundraising • Hire Executive Director • Hire Market Operations Staff • Select Vendors • Sign Leases with Vendors • Marketing and Promotions 	<ul style="list-style-type: none"> • Market Operations (vendor selection, programming, leases, marketing, maintenance, management, finances, etc.) • Provide annual report to Common Council
City Staff	<ul style="list-style-type: none"> • Overall project management • Staff committee • Public outreach • Manage consultants • Research and analysis • Develop plans 	<ul style="list-style-type: none"> • Overall project management • Staff committee • Public outreach • Manage consultants 	<ul style="list-style-type: none"> • Manage budget • Manage bid process • Manage contractors 	<ul style="list-style-type: none"> • Liaison to the Public Market Foundation
Common Council	<ul style="list-style-type: none"> • Oversee process • Approve Plans • Review and Approve budget 	<ul style="list-style-type: none"> • Oversee process • Approve Consultant Contracts • Review and Approve budget • 	<ul style="list-style-type: none"> • Review Development Agreement • Review/Approve Designs • Review/Approve Operating Agreement • Review/Approve Bid process 	<ul style="list-style-type: none"> • Oversight of Operations