BEFORE THE ARBITRATION PANEL

IN THE MATTER OF ARBITRATION BETWEEN:

DANE COUNTY
City-County Building, Rm. 419
210 Martin Luther King Jr. Blvd.
Madison, WI 53703

-and-

CAPITAL AREA REGIONAL PLANNING COMMISSION
City-County Building, Rm. 362
210 Martin Luther King Jr. Blvd.
Madison, WI 53703

ARBITRATION AWARD

This is an arbitration under Wis. Stat. § 66.0309(14)(d)1. Dane County challenges as unreasonable the $815,707 charge to the County certified by the Capital Area Regional Planning Commission (CARPC). Under Wis. Stat. § 66.0309(14), the County must take legislative action to provide the funds called for in the certified statement unless the County Board finds the charge unreasonable and the County takes the steps necessary to invoke arbitration or institute a proceeding for judicial review under Wis. Stat. Ch. 227.

Here the County has taken the proper steps to invoke arbitration. Hearings were held on October 24 and 25, 2011.

The arbitration panel (Panel) must decide whether or not the charge was unreasonable. The burden of proof is on Dane County to prove unreasonableness. If the County fails to meet its burden, the Panel affirms the certified charge, meaning the Dane County property tax levy will need to include $815,707 to fund, in part, CARPC's operations in 2012. If the County does establish that the certified amount is unreasonable, the Panel is authorized to modify the amount of the charge to Dane County. For the reasons discussed below, the Panel finds the certified charge unreasonable and reduces the charge by $60,000.

A. Background.

The process for creating a regional planning commission is set forth in Wis. Stat. § 66.0309(2). CARPC was created in May 2007 by Executive Order #197 issued by then-governor Jim Doyle. A predecessor regional planning commission, the Dane County Regional Planning Commission, had been dissolved in 2004 and in the meantime Dane County had been without a regional planning commission.

The governor acted upon petitions in the form of resolutions by the governing bodies of 46 out of 62 local governmental units in Dane County. The County itself was one of the petitioners. The petitions all followed the same form and addressed several topics relative to the new regional planning commission to be created by the governor.

Section 66.0309(14) recognizes and gives legal effect to some topics covered in the petitions (composition of the commission and terms of office for commission members). The executive order recognized and incorporated "the membership plan as it is proposed within the referenced resolutions." The executive order did not recognize or incorporate the terms of the resolutions on other topics. Nor does Wis. Stat. § 66.0309 give effect to the resolutions on other topics.

B. Reasonableness of CARPC's Certified Charge.

As a preliminary matter the Panel must determine what standard to apply in reviewing the certified amount. CARPC argues that the Panel should give deference to the CARPC, giving its determination "great weight" or "due weight" on the ground that such deference would be given if the County had chosen its alternate route to raise a challenge -- namely, judicial review under Chapter 227. The County argues essentially that neither the "great weight" nor "due weight" standard would apply even if this were a Chapter 227 proceeding.

The Panel are of the belief that the question of whether deference is afforded arises in situations where what is being reviewed is an agency's interpretation of a statute or code provision that the agency is charged to administer. That is not the situation here, so the concept of deference in that sense does not apply.

We look to Wis. Stat. § 66.0309(14) for the applicable standard, which is simply that the CARPC's determination will be affirmed unless it was unreasonable. That,

coupled with the burden of proof lying with the County, affords the appropriate level of "deference" to afford CARPC's determination.

We begin our analysis by referring to Wis. Stat. § 66.0309(14). Subsection (a) provides that the CARPC shall "prepare and approve a budget reflecting the cost of its operation and services to the local governmental units within the region." The County concedes CARPC's budget was based on a work plan to accomplish what the statute prescribes. The County did not identify any proposed activities that were beyond the scope of CARPC's proper responsibilities. Nor did the County establish that CARPC's cost estimates of its budget work were excessive. The County did identify some items that CARPC may have been able to cut from its budget, but the fact that further cuts may be available does not make the budgeted amount unreasonable. There is no single number that defines a reasonable budget. There is instead a zone of reasonableness, and the budgeted amount is unreasonable only if it falls outside that zone. Moreover, CARPC pruned its budget before certifying a charge to the County. The Commission initially approved a certified amount of $861,007. The Budget and Personnel Panel (BPP)[1] reduced that amount by $30,000 and the Commission ultimately imposed further cuts to reach the $815,707 amount ultimately certified.

[1] The Budget and Personnel Panel (BPP) is a unique feature of CARPC's structure. The BPP consists of the Mayor of the City of Madison, the Dane County Executive, the President of the Dane County Towns Association, the President of the Dane County Cities and Villages Association and the Chairperson of the Commission as a non-voting member. The BPP has approval authority over CARPC's budget, user fees and the hiring and firing of an Executive Director – a position that has been vacant since CARPC's inception. The BPP is not a statutorily created feature of regional planning commissions generally. It was called for in the petitions to the governor and, although not referenced in Executive Order #197, incorporated as a part of CARPC's Bylaws.

The County also pointed to some additional funding from other sources made available to CARPC after the date of certification. The Panel did not consider these for two reasons. First, the reasonableness of the certified charge should be evaluated as of the date of certification. Otherwise there would be an ever-moving target. Second, there are additional expenses of unidentified amount associated with the new funds.

Here we note an important distinction. There is a difference between CARPC's budgeted expenses and the amount it certifies as a charge to Dane County. The difference arises from the fact that CARPC has some funding sources other than the Dane County tax levy. These include fees charged and collected by CARPC, grants from other government agencies, amounts collected for services performed under contract, and reliance on CARPC's fund balance. CARPC also has "pass-through" revenues, which can be ignored for purposes of our analysis. Historically, the charge to Dane County has been CARPC's primary source of funding.

The distinction between CARPC's budgeted expenses and its certified charge to Dane County is an important one. It is the reasonableness of the charge to Dane County that the Panel reviews, not the reasonableness of CARPC's budgeted expenses. Indeed, if it were the reasonableness of CARPC's budgeted expenses that were under review, we could conclude our analysis at this point with a determination that Dane County did not establish that the budgeted expenses were unreasonable.

The County urges the Panel to reduce the certified charge to $652,313 on grounds that CARPC should have cut expenses further and should have increased revenues from other sources, such as a per-acre user fee for review of proposed urban service area (USA) amendments. Alternatively, the County argues that the percentage increase in the certified charge from 2011 to 2012 should be limited to the percentage increase in Dane County's levy limit under Wis. Stat. § 66.0602.

We have already determined that the budgeted expenses are reasonable without additional cuts. As for user fees for USA amendments, the Panel does not feel at liberty to rule that these should have been incorporated in CARPC's budget. For one thing, whether such fees should be adopted (and, if so, in what amount) involves a significant policy decision beyond the Panel's authority. For another, this record does not establish the dollar amount that might reasonably and reliably be expected from such a fee in 2012. There is no denying, however, that if such a fee were adopted, it likely would materially reduce the charge to Dane County.[2] We shall mention the user fee issue again in our discussion of the levy limit argument, which we turn to now.

Dane County argues that CARPC is contractually obligated to limit the percentage increase in its charge to the County to no more than the percentage increase in the County's levy limit under Wis. Stat. § 66.0602. It relies on subparagraph h of paragraph

[2] CARPC's staff estimated the revenue from such a fee to be from $30,000 to $200,000 annually.

6 in the petitions that led to CARPC's formation by the governor. The first two sentences of subparagraph h read as follows:

> h. The undertaking municipalities agree and hereby contract that the annual levy charged by the CARPC shall not exceed .0017 percent of equalized value under the CARPC's jurisdiction and within the region. The annual increase in the levy for the CARPC may not exceed the increase allowed under any levy limitations which apply to Dane County.

(Emphasis added.)

It is the second sentence (underscored above) that the County relies on. The County maintains that the petitions constitute an intergovernmental agreement under Wis. Stat. § 66.0301, either formal or informal. As construed by the County, the second sentence binds CARPC by contract to no more than a 0.92 percent increase for 2012 over the certified charge for 2011. Because the 2011 charge was $686,045, the 2012 charge would be limited to $692,962.

Even though the petitions recite an intention to create an intergovernmental agreement under Wis. Stat. § 66.0301, the Panel concludes no contract was formed. First, we note that CARPC itself was not formed by an intergovernmental agreement consisting of the petitions. It is true that local units of government can create commissions by intergovernmental agreement, but CARPC was formed by executive order of the governor, not by the petitions or by intergovernmental agreement. Second, the petitions are in the form of resolutions adopted by the governing bodies of local units

of government. Intergovernmental agreements may be authorized by resolution, but the agreements themselves are contracts and presumably are in the form of contracts. Third, the contract posited by the County would purport to bind all the municipalities within CARPC's jurisdiction, but not all those municipalities adopted or approved the model resolution-petition. Fourth, the alleged contract would be binding on CARPC, but CARPC did not "sign on;" it did not exist when the resolution petitions were adopted and, as noted, CARPC was not created by the petitions. Some elements of the petitions, notably the BPP, have been adopted by CARPC through inclusion in the Bylaws. The second sentence of subparagraph h has not been so adopted.

In sum, the recitation in the petitions notwithstanding, the petitions created no binding intergovernmental agreement. Rather, they expressed an intention to create an agreement. Witnesses for Dane County testified that the County relied on the second sentence in subparagraph h as a means to protect the County's budget from large yearly fluctuations in CARPC's charge to the County.

CARPC contends that if no intergovernmental agreement was created, the Panel must ignore the second sentence of subparagraph h as irrelevant to its task. The Panel disagrees with that contention. Since its creation, CARPC has treated the resolution-petitions as, at a minimum, important historical documents relative to its formation. A recent internal memo at CARPC referred to the petitions as the CARPC "charter." Exhibit 14 is a CARPC agenda cover sheet regarding the Commission's 2012 draft

budget. The memo states "While state law allows a budget charge up to 0.30 mils of EAV, the 0.17-mil charge represents the maximum allowable charge to Dane County according to the resolutions adopted by local governments which petitioned for CARPC creation (a/k/a the CARPC "charter")."

The limitation discussed in the memo arises from the first sentence in subparagraph h. The first sentence purports to impose a ".0017 percent of equalized value" limit on CARPC's charge to the County. This is barely over one-half of the .003 percent limit set by Wis. Stat. § 66.0609(14)(a). The enforceability of this provision is not at issue here because CARPC's charge in each year, including for 2012, is within the .0017 percent. The legal status of the first sentence is similar to that of the second, however, in that both appear in the petitions and neither appears in the executive order, the statute, or CARPC's Bylaws.

The point is, whether legally binding or not, the petitions have been viewed by CARPC as at least providing guidance as to the intentions of the many municipalities who initiated CARPC's creation by the governor. Working on the Future Urban Development Area (FUDA) program outlined in the petitions appears to be another example of CARPC relying on the petitions for some guidance.

The parties are at odds over how to construe the second sentence in subparagraph h, the "levy limit sentence." The County construes the limit as meaning a percentage of assessed valuation (without exemptions) as determined by Wis. Stat.

§ 66.0602. CARPC believes the levy limit referred to is a dollar amount, not a percentage. The practical difference between the two proposed constructions is enormous in the current climate, where the County faces a severe levy limit in percentage terms. The Panel regards the second sentence as ambiguous and if it were enforceable, we would feel obliged to construe it. Under the County's reading the certified amount would need to be reduced to $692,962. Under CARPC's reading no adjustment would be required.

We have concluded that the levy limit sentence is not enforceable by its terms, therefore we do not feel compelled to give it a particular construction. There is no dispute, however, that it was included in the resolution-petitions at the County's request. Also indisputable is that the obvious intention was to afford the County some protection against a large increase in the certified charge if the County were facing a severe levy limit. How much protection was not clearly stated.

The levy limit sentence was included in the resolution-petitions adopted by the vast majority of Dane County municipalities. They thereby expressed an intention that the County be afforded some levy limit protection. Just as the petitions have been looked to for guidance on other subjects where the petitions are non-binding, they may be looked to by the Panel for guidance on the subject of levy limit protection when deciding whether the certified charge is unreasonable. The Panel has done so and concluded that the charge is unreasonably too high to the extent of $60,000.

The determination of unreasonableness is based primarily on three things. One, the intention of the petitioning communities was to afford the County some levy limit protection. Two, the County faces severe levy limit constraints in 2012 – significantly more severe than in past years. Three, the certified charge for 2012 represents an increase of approximately 18% compared to 2011. If the intention was to afford the County any meaningful levy limit protection, then the intention was to provide some protection in the current circumstances.

How much protection to afford is a difficult proposition and involves a weighing of several factors. The Panel has weighed the following considerations (not necessarily in order of importance):

1. The County's 2012 levy limit is 0.92% of equalized assessed valuation (before exemptions).

2. The County faces other severe budget limitations, including reduction in state aids and reduction in the base amount to which the percent levy limit is applied.

3. CARPC has relied significantly on consumption of its fund balance in past years. That balance is essentially exhausted now – contributing heavily to a large increase in the certified charge for 2012.

4. The CARPC and BPP have not adopted certain fees that could have mitigated the increase in the certified charge.

5. Dane County departments were required to prepare budgets with cuts in their ongoing operations ranging from 2 ½ to 10 percent. (The range was 2 ½ to 5

percent for a department whose budget would be the size of CARPC's.)

6. CARPC is not a County department, but an independent unit of government, deliberately created by the legislature to have autonomy and its own budget authority.

7. Although CARPC's certified charge to the County is up 18%, its (non pass-through) budget calls for lower expenditures in 2012 than any year in its history.

8. CARPC's budgeted expenditures are reasonable.

9. CARPC is a small unit of government with little flexibility to absorb significant cuts without laying off personnel and adversely affecting its mission.

It was through a weighing and balancing of these factors that the Panel concluded CARPC's certified charge to the County is unreasonably high by $60,000, even though its budgeted expenditures are reasonable. Accordingly, the Panel modifies the certified charge to be $755,707.

C. The Need for a Legislative Fix.

The Panel feels compelled to address one more issue – namely, the primary underlying cause of the conflict that led to this arbitration. It is highly unfortunate that an impasse arose between the County and CARPC that led to the arbitration. Both parties expended precious resources in this dispute at a time when resources are becoming more limited for each of them. Each needs those resources to perform important functions for

the citizens of Dane County. Moreover, both parties likely find the outcome of this arbitration unsatisfactory at least to a degree.

Why then did the arbitration occur? Although a number of things may have contributed, we are convinced that by far the biggest factor was a statutory inequity that ought to be corrected. That inequity arises from the fact that CARPC's charge to the County counts against the County's levy limit. That creates an inherent conflict between CARPC and the County given that CARPC is an independent unit of government that sets its own budget. The inevitable upshot, especially when the County faces severe levy limits and tough fiscal times, is that the County must resent CARPC making its tough budgeting task even worse. At the same time, CARPC must resent what appears to it to be County meddling in the budget of what the legislature intended to be a separate and independent governmental unit.

There may be a number of legislative fixes available, but one simple one would be to make regional planning commission charges, like the charges of library boards, exempt from a county's levy limit.

An independent regional planning commission performs, among other things, the very important function of coordinating in a neutral way the oftentimes competing interests of the various units of local government in the region. Independence is necessary for effective area-wide planning that is insulated, at least to a degree, from raw

politics. The current legislative scheme with respect to the levy limit does a great injustice both to the County and to CARPC.

Dated this 27th day of October, 2011.

Arbitrators:

James R. Cole

Mark A. Frankel

Richard K. Nordeng