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To: Public Protection & Judiciary Committee

From: David R. Gault, Assistant Corporation Counsel

Date: August 27, 2019

Subject: Confidential Report Pursuant to 2019 RES 86 Regarding Responsibility For Public Safety Building Structural Design Mistakes

2019 Resolution 86 directed the Corporation Counsel, with the assistance of the Department of Public Works, Highway and Transportation to investigate whether it is feasible for the county to hold the architectural firm, the general contractor, their insurers or any responsible party liable for the Public Safety Building (PSB) not being built as specified by the County Board. Specifically, the County Board is concerned that Mead & Hunt (the current architects and engineers) have recently concluded that the PSB as constructed will not support vertical expansion as contemplated in 1993. It is my opinion that the County has no viable cause of action against any party for failure of the building design to meet expectations 26 years after completion of construction. Any potential claim would be contractual in nature subject to the six year statute of limitations in Wis. Stat. §893.43. The statute of limitations for a breach of contract begins to run from the moment the breach occurred rather than when damages are discovered. Therefore, any contractual cause of action accrued no later than when the design was completed and approved. It is unclear exactly when that was, but it was probably late 1992. We do know that construction was complete in late 1994. Therefore, under the best-case scenario any action by the County was barred by the statute of limitations after 2000.

## FACTS AND ASSUMPTIONS

1. On February 21, 1991, the County Board adopted Res. 329, 1990-91, approving a contract with Durrant Group, Inc. for \$450,000 to design the PSB.
2. On October 17, 1991, the County Board adopted Res. 138, 1991-92 that recognized the need for a 400-bed jail and that persons responsible for designing the facility should plan accordingly.

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3. On December 19, 1991, the County Board adopted Res. 232, 1991-92 that endorsed a plan that included 400 beds of minimum-security housing on the third and fourth floors “and authorizes preparation of architectural plans and specifications accordingly.”
4. On February 6, 1992, the County Board adopted Res. 263, 1991-92 that amended the original contract with Durrant Group. The original contract was to design a 200-bed facility. The scope was expanded to 400 beds and space for the Sheriff’s Department and other departments. The resolution stated, “the design needs to consider future vertical expansion.”
5. On October 15, 1992, the County Board indefinitely postponed Res. 175, 1992-93 that directed inclusion of additional floors in the construction of the PSB. I am advised that the Board took this action because County Executive Rick Phelps stated he would veto the resolution.
6. On December 3, 1992, the County Board adopted Res. 241, 1992-93 that awarded a contract to J.H. Findorff & Son, Inc. to construct the PSB at a cost of \$15,250,000.00.
7. Construction of the PSB was completed and the building was occupied on or about November 1, 1994.
8. There are physical indicia that the PSB was designed and built for future vertical expansion. This includes support columns that extend above the roof and two empty elevator shafts for future elevators. Additionally the documents submitted to the City of Madison for zoning approval in 1992 referenced vertical expansion of three additional floors for prisoner housing.
9. I interviewed Ken Koscik who was Public Works Director at the time of construction, John Schraufnagel who was a project engineer at that time, Jerry Mandli, current Public Works Director, and Scott Carlson, current project engineer. During the PSB construction, the County contracted for full time construction supervision. All of these individuals expressed the opinion that the structure was built as designed by Findorff.
10. Ken Koscik expressed the opinion that Durrant Group’s design of the PSB was reasonable and appropriate and in conformance with the requirements of the contract. He further stated that the plans were reviewed by the Wisconsin Department of Industry, Labor, and Human Relations (DILHR) and stamped as approved.
11. On January 26, 2012, the Durrant Group, Inc. filed for bankruptcy. The company ceased operations on April 19, 2012. The corporation was administratively dissolved on November 5, 2014.
12. The design and construction of the PSB has not resulted in any injury to other property or to any person.
13. Both the Department of Public Works and the County Clerk’s Office have searched for the contract documents with Durrant Group, Inc. for design of the PSB. A diligent search by both departments has been unable to locate either the original contract or any amendments. Without

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the actual contract documents it is impossible to determine what Durrant's contract obligation was as far as design for vertical expansion.

14. If there were a viable cause of action, we would have to consider whether Durrant acted reasonably under 1992 architectural and engineering standards and not 2019 standards. Ken Koscik expressed the opinion that Durrant's design met 1992 standards. Mead & Hunt has indicated that the building and material codes have not changed significantly since 1992, so that what was identified as a deficiency for future construction now would have been a deficiency in 1992. However, the State of Wisconsin Department of Safety and Professional Services stated that the design methodology and code requirements have changed substantially because the State adopted the International Building Code, IBC 2015. Proving what the applicable standard of care was in 1992 would require expert testimony. Because I have concluded as a matter of law that any claims are barred, I have not pursued this issue further.

### ANALYSIS

It seems clear from the physical evidence, the plans submitted to the City of Madison, and the recollection of county officials from that period, that there was an expectation that the PSB be designed and built to accommodate vertical expansion. However, whether that was memorialized into specific contractual language is not clear. Res. 236, 1991-92 authorized an amendment to the Durrant contract and stated "the design needs to consider vertical expansion." Without the actual contract documents I cannot determine what Durrant's actual contract obligation was as far as vertical expansion. Furthermore, regardless of the recollections and expectations of County officials, without the contract documents it would be impossible to prove a breach of contract claim. Nevertheless, even if we had the contracts it is my opinion that any potential cause of action by the County is now barred by the relevant statute of limitations.

There are three statutes of limitations or repose that were analyzed in relation to a potential claim: Wis. Stat. §893.43(Action on contract); Wis. Stat. § 893.52 (Action for damages for injury to property); and Wis. Stat. § 893.89 (Action for injury resulting from improvements to real property). Section 893.43 provides a six-year statute of limitations from the occurrence of a breach of contract. Section 893.52 also provides a six-year statute of limitations for tort claims from the date of injury to property. Section 893.89 is a statute of repose that limits actions for injuries to persons or property after a maximum ten-year period after substantial completion of the real estate improvement project.

There is a substantial difference between when a contract cause of action accrues and a tort action. Wisconsin has adopted the "discovery rule" for tort actions. Tort claims accrue and the statute of limitations begins to run on the date the injured party discovers, or with reasonable diligence should have discovered, the tortious injury. However, for over 100 years Wisconsin law has held that a breach of contract the cause of action accrues, and the statute of limitations begins to run, from the moment the breach occurs. This is true whether the facts of the breach are known.

A party's deficient performance of a contract does not give rise to a tort claim. The economic loss doctrine precludes contracting parties from pursuing tort recovery for purely

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economic or commercial losses associated with the contractual relationship as opposed to claims for physical injury to property or persons. Economic loss is a diminution of value of the property because it is inferior or does not live up to expectations. Stated simply, a tort arises when property is physically damaged or a person is injured; a failure to do what one promised to do gives rise to a contract claim.

In this case, there is no physical injury to property or person. The PSB exists as a functional building and no person has been injured. The design of the building has simply not lived up to the county's expectations. That is solely a contractual claim. Therefore, the six year statute of limitations under §893.43 applies, and the cause of action accrued when the design was completed no later than 1994. As a result, any possible claim for breach of contract was barred after 2000.

Wis. Stat. §893.89 is a statute of repose that limits tort actions for improvements to real estate after a maximum of ten years after substantial completion of the project. As stated, there is no tort claim. Additionally, Section 893.89(3) states that its ten-year time limit be compared with the time limits of applicable statutes of limitation, and the shorter limit applies. Since the 6 year statute of limitations in §893.43 applies to this case §893.89 would not apply. Even if §893.43 did not apply, §893.89 would bar commencement of an action for injury to property or person after no later than 2004.

In conclusion, at this time it is irrelevant as a matter of law whether Durrant had a specific contractual duty to design the PSB to accommodate vertical expansion. Even if we had the contract and there had been a valid claim, commencement of a breach of contract action was barred by the statute of limitations no later than 2000.