

MEMO

From: Corporation Counsel Beth Cate
City Controller Jeffrey Underwood
Public Engagement Director Mary Catherine Carmichael
To: Mayor John Hamilton
Deputy Mayor Don Griffin
Date: November 23, 2022
Re: Options for Convention Center expansion - CIB or 501c3

BACKGROUND

Recently you received a memo comparing and contrasting the relative benefits of a 501c3 nonprofit organization and a Capital Improvement Board (CIB) to achieve the construction and ongoing management function for a convention center expansion. (See attached memo of 10/28/22.) The goals for a convention center expansion project are to improve the marketability of Bloomington as a convention destination while expanding and diversifying the meeting spaces available to locals.

The 10/28//22 memo recommended a 501c3 for several reasons. Primary among them is a belief that a 501c3 holds the greatest potential for achieving a successful convention center expansion that will be architecturally significant, appropriately sized and fitted, and completed in an efficient and timely manner.

On November 9, 2022, the County Commissioners, apparently in reaction to the City's proposal to use a 501c3 for this purpose, and in a brief public meeting with virtually no notice or public input, adopted an ordinance to establish a CIB and asked the City Council and Administration to endorse that ordinance and approach. The ordinance (attached below), indicates it will automatically expire if those endorsements are not received before January 1, 2023. For reasons outlined below, we believe that ordinance, unless substantially altered, should not be endorsed, and the 501c3 continues to offer the much preferable approach to a successful expansion. However, with appropriate modifications, a CIB could potentially be workable.

CIB OPTION

In 2018-19 City and County officials extensively considered and discussed the state-law-defined CIB option for expansion. While officials did not reach final agreement, in December 2019 discussions among the parties sought to identify potential compromises that would allow more representation for the City in decisions regarding the project. Even if a CIB were created with all the potential compromises outlined at the time, City administration officials continued to believe that a CIB posed challenges to being efficient and effective in achieving excellent results for design, construction, and operation, and those concerns persist. But, the City understood at the time that the County recognized and agreed with the need to share decisional authority regarding a CIB with the City.

The recent county ordinance, however, excludes nearly all of the many avenues for inclusion of the City and therefore does not offer a valid path forward. If a CIB were instead created with the following characteristics and assurances, which reflect issues discussed in 2019 as well as ongoing concerns, it could potentially oversee the expansion project. How effective the CIB would be would depend substantially on the demonstrated commitment of the County and City to provide it with the necessary resources to pursue the project expeditiously, how independently the CIB is permitted to operate, and the composition of its board of directors, among other factors.

We consider the following components to be essential to any prospective CIB. None of these is included in the recent ordinance; some will likely require an interlocal agreement to implement:

1. Equal representation on the Convention and Visitors Commission (CVC):
 - a. The County and City each appoint 2 of the 4 CVC members other than the Memorial Union representative. As with CIB, appointees may not be elected officials or work for the City or County.
 - b. City Administration and City Council will determine who makes the City appointments to the CVC; County Commissioners and Council will determine County appointments
2. Approval by both County & City Fiscal bodies of the annual CIB budget
3. Approval by both County & City Fiscal bodies of CIB-issued bonds
4. Approval by both County & City Fiscal bodies of the annual CVC budget
5. County commitment to continued appropriation of Innkeeper's tax proceeds to the CIB to fund convention center (CC) operations, maintenance, etc.
6. Authorization by both City and County for the CIB to select and contract with an entity/entities to operate/manage the expanded CC
7. Authorization by both City and County for the CIB to decide and oversee the process for selecting any hotelier(s) with which to partner
8. Authorization by both City and County for the CIB to decide location(s) of expanded CC components, including Site Plan for exhibit/meeting space, any hotel(s), garage(s), and connections among components
9. Authorization by both City and County for the CIB to hire/retain incidental staff support as needed
10. Expeditious transfer to the CIB of all City and County property purchased via the Innkeepers or Food & Beverage taxes (i.e. no later than 90 days after establishment of the CIB), or the CIB dissolves.
11. Appointment of the City Controller as the statutory CIB Controller
12. To the extent permitted by law, authorization by both City and County for the CIB to have outside, independent audits in lieu of State Board of Accounts audits
13. Authorization by both City and County for the CIB to control the naming of the new, expanded CC
14. Commitment by the City and County to negotiate swiftly and in good faith, prior to CIB establishment, the necessary interlocal agreement(s) to achieve the foregoing components and any additional components such as staffing needs of the CVC and CIB

15. Inclusion in such interlocal agreement(s) of terms that prevent alteration, during the term of any bond(s) issued to support CC expansion, of agreed-to terms governing CIB establishment and operations and City-County mutual rights and obligations. If state law or other mandates substantively affect these mutual rights and obligations, the parties must agree to maintain the negotiated balance of participation by the City and County. If no agreement can be reached, the parties must then establish a 501c3 or alternative governance structure that will maintain the balance.

These components help assure shared oversight and authority for the project and ongoing operations. In addition, reflecting concerns about certain statutory powers and authorities discussed in the 10/28/22 memo, all the parties should affirm publicly and explicitly that they will not use their approval and oversight authorities – including over bonding and annual budgets – to intervene in the basic decisions and activities of the CIB to locate, design, build, and operate the CC and to determine future uses of properties transferred to it for CC-related activities.

While these components help assure extensive process and involvement of relevant public bodies, for that same reason they also threaten extensive bureaucracy and delays, because acquiring multiple approvals may prove extremely cumbersome and unwieldy. A 501c3, in contrast, can avoid these cumbersome structures while assuring balance and full public accountability.

It is our belief that if the 15 proposed components listed above were amended into a CIB agreement, a CIB could potentially be a workable framework to accomplish the project. We understand the County Council plans to meet on November 29 and may consider the CIB approved by the Commissioners at that time. It is our hope that they would not endorse the CIB as approved and that we could continue negotiations and land either on terms of an amended CIB agreement that both county and city officials could support by the end of 2022, or turn to the 501c3 option. We continue to believe that it will be important to be able to demonstrate to the General Assembly that we are making progress delivering on the intended use of the F&B tax dollars.

501c3 OPTION

The 501c3 option we have recommended has elicited some concerns about public accountability and workability, before details were even released. We continue to believe the 501c3 option as outlined in the 10/28/22 memo is more likely to succeed in launching a timely and high-quality expansion. As detailed in that memo, a 501c3 can fully address expressed concerns, incorporating the components of a CIB that assure public transparency and accountability, including open meetings and records, financial audits and accountability, appropriate insurance against loss, and more. Notably, the current convention center has been operated by a 501c6 non profit organization for the past 30 years without issue. We are proposing a c3 instead of a c6, as it is better suited to the design and building phases of convention center expansion, while retaining the ability for robust stakeholder and public input.

A 501c3, besides being flexible – for example avoiding rigid board composition requirements of state law CIBs or imbalanced approval requirements of specific bodies – can assure more efficient oversight from a range of public entities.

For example:

- The CVC need not be adjusted. Its all-county appointments can remain, and have full authority to determine assignments of the Innkeeper's Tax for ongoing operations.
- The County Council retains full authority over the existence of the F&B tax – whether to adjust or terminate it. (An exception in state law is that the tax may not be lowered if it is required to service appropriately approved, existing debt.) In an ideal world, cities could approve their own F&B tax structure, but there doesn't appear to be the political will within the General Assembly to go that route.
- The Food and Beverage Tax Advisory Commission (FABTAC), a body equally representing the county and city bodies, retains full authority to approve or disapprove of all uses of the F&B revenues, consistent with state law. The City Council would have authority over the annual budget of the 501c3 and its bonding, reflecting the fact that virtually all funding for the design and construction of the expansion will come from F&B revenues generated in the city. Any F&B revenue bond would have to be approved by both the City Council and the FABTAC.
- The County Commissioners retain appointment authority for members of the FABTAC and the CVC, and authority to direct the uses of the F&B tax collected outside city limits.

In total, five public agencies would have some form of oversight either direct or through the approval process: county commissioners, county council, city council, FABTAC and the CVC. The city administration's authority exists only in the appointment of the members of the governing body. If the city-owned College Square site is chosen (as recommended in 2019) as the location for the expanded facility, and the city's portion of the F&B tax is dedicated to the project, it would follow that the City would desire a strong interest in assuring success of the project. We believe this extensive shared oversight assures robust and fair public involvement and control, while significantly lessening the risk of duplicative or overly cumbersome processes.

In order to address concerns about accountability that have been expressed:

- The 501c3 board can and should create a specific advisory board for the convention center expansion project – one that is inclusive of all stakeholders, to provide ongoing, regular advice, ideas and feedback.
- The 501c3 board should hold monthly meetings that are open to the public.
- Those monthly meetings should allow time for public comment.
- A website that includes access to financial and other documents should be developed and kept up to date.
- Indiana Open Door Law practices should be implemented.
- Annual independent and public financial audits should be implemented.
- An expanded convention center facility should be marketed with the existing convention center. The two properties should complement each other, not compete.

- The current management structure should be utilized for both facilities, being operated as an integrated whole.

All of these components could and will be incorporated into the founding documents of a 501c3.

Bylaws for 501c3 organizations have enough flexibility to allow the customization we desire. The bylaws shall address the rules under which the organization will operate as a 501c3 organization under all applicable laws, establish duties and limits of governance powers for officers and the board of directors, establish committees, rules for financial operations and reporting, record keeping and insurance and indemnification obligations. As currently conceived, the 501c3 would contain bylaws that would include specific purposes for its operation, including aiding the design and building of an expansion to the public convention center. The 501c3 would be prohibited from distributing or otherwise using net earnings to members, directors, officers, or any other person except to pay reasonable compensation for services and to pay for activities that further its mission. It would also be prohibited from having a substantial part of its activities used for lobbying, political activity in favor of a political campaign or on behalf of any candidate for public office.

The 501c3 would have five (5) members of its board of directors and officers elected from the board. Four (4) of the directors would be appointed by the Mayor and one director would be appointed by the city council. Officers would be determined by the board of directors, including a president, vice president, secretary, treasurer, and any other officer the board determines is necessary. The board would prescribe the authority of the officers to act on its behalf. The books and records of the 501c3 would be made public as though they were subject to the provisions of Indiana's Access to Public Records Act (Ind. Code Chapter 5-14-3). Similarly, any general or special meeting of the 501c3 would follow the provisions of Indiana's Open Door Law (Ind. Code Chapter 5-14-1.5), unless explicitly modified by the organization's bylaws. Pending support from city and county bodies, bylaws reflecting this or a modified version of this structure will be created in short order.

The 501c3 approach also could allow the city, if desired, to coordinate development and operations of other city-owned assets in the downtown area, including potentially the Waldron, the Buskirk-Chumley, The Mill and other Trades District property, and/or Hopewell, the former hospital site if desired at a future date.

An expansion project is estimated to require at least 3 years between a launch of the organization leading the project and opening of the new facility. We are concerned that a CIB approach could take substantially longer than that given the potentially cumbersome, duplicative, and fraught review and oversight process, including the history of the project to date. We believe a 501c3 offers a substantially better path to success, while assuring full public oversight and involvement.

Attachments:

1. "Convention Center Proposed Plan" Memo, published 10/28/22
2. County Commissioners Ordinance 2022-46, passed 11/9/22

MEMO

From: Corporation Counsel Beth Cate
Controller Jeff Underwood
Public Engagement Director Mary Catherine Carmichael

To: Mayor John Hamilton & Deputy Mayor Griffin
Date: October 28, 2022
Re: Convention Center Expansion Project

Convention Center proposed plan

Goals for convention center expansion - The goal for a convention center expansion project is to improve the marketability of Bloomington as a convention destination while expanding and diversifying the meeting spaces available to locals.

Key features of mechanism(s) used to achieve those goals - City of Bloomington prefers the flexibility of a 501c3 for several reasons; primary among them is a belief that a 501c3 holds the greatest potential for building a successful convention center expansion that will be architecturally significant, appropriately sized and fitted, and completed in a timely manner.

Staff have investigated and evaluated options to achieve an appropriate governing body for an expanded convention center project to be built on City of Bloomington owned land. Two models were considered: a Capital Improvement Board (CIB) as established in state law, and a charitable nonprofit organization (501c3) as defined under state and federal law, and any related interlocal or other agreements.

Several key points guide this analysis:

- A CIB or 501c3, would have various authorities depending on the statutory and any interlocal contract specifics.
- An additional entity, the Convention and Visitors Commission (CVC), directs annual operating funds provided to supplement operational needs of the convention center. These funds, derived from the local innkeepers tax, are decided by the CVC whose 5 members are, pursuant to state law, appointed exclusively by the county (3 by council, 2 by commissioners, with quite specific requirements for 4 of the 5 members). The CVC's budget is annually reviewed and controlled by the county council.
- The County Council voted to establish a Food and Beverage Tax in Monroe County. The city's portion of those funds have (largely) been collecting since its inception. This vote took political courage, and that body should be commended for its forward thinking and action. A Food and Beverage Advisory Committee exists to determine the appropriateness of F&B tax expenditures. Written approval from a majority of members is required for expenditures.

- The ongoing F&B tax is not a given. The County Council or the Indiana General Assembly could vote to discontinue the tax should they see fit.
- By state statute, a CIB is created by action of the county commissioners. Appointment powers to name the members of the CIB may be delegated by the commissioners (for example, designating that some of the CIB members be appointed by other governmental bodies). Certain statutorily-prescribed powers, however, may not be delegated and result in specific authorities:
 - The County Commissioners must approve any bond issue by the CIB
 - The County Council must approve the CIB's annual budgets
- A 501c3 entity may be established with a wide range of possible board and oversight structures, operational procedures, and fully equal authority with a CIB.

The administration has made clear that any such organization would need to be fully collaborative with appropriate county entities and share involvement, including the creation of at least one advisory body. Staff recommends the advisory body's membership include representatives from the city council, county commissioners, county council, tourism and hospitality industries, the arts communities, Indiana University, and not-for-profit organizations.

Based on these points, certain conclusions follow.

A CIB is essentially a county body, with specific powers inextricably assigned to the county, including approval of any bond sales and the annual CIB budgets. Regardless of how CIB members are appointed, control of a CIB remains with county – not city or shared – government in these important ways.

By contrast, a 501c3 can be designed more flexibly and can embrace diverse voices and representation to assure effective and representative management over the affairs of the entity. In particular, the 501c3 can be established with autonomy over its own operating budget and its own authority to issue bonds through one or the other governmental entities, or the neutral Indiana Finance Authority. In any of these circumstances, direct public oversight from at least four bodies is assured:

1. The County Council which controls the F&B tax
2. The CVC, which controls necessary operating funding
3. The FABTAC, which controls expenditures of the F&B funding, and
4. The City Council, which must establish authority for and bonding of the 501c3

In terms of coordinating and accelerating downtown development and prosperity, a 501c3 with its more flexible governance structure also could potentially accept additional city properties at some point in the future. Possible examples include the Buskirk Chumley Theater, the Waldron Arts Center, the Mill and Trades District, and perhaps the Hopewell development. As such, a 501c3 structure centered with the City of Bloomington offers significant potential.

Some factors that differ between a CIB and 501c3 have been offered as recommending a CIB. We won't attempt to respond in detail to all these factors, but offer some basics:

- A CIB has statutory tort claim liability protection and a 501c3 would not, but information from individuals consulted in the insurance industry suggests that the relevant insurance coverages required for the two options do not differ substantially in cost, especially where the entity operations are properly structured.
- Annual audited fiscal review and public reporting and meeting requirements are easily incorporated into a 501c3's permanently binding governing documents.
- Board makeup and size can be more flexibly defined in a 501c3.

Note that even if a 501c3 builds and owns an expansion of the convention center, the management and daily operations can be fully integrated with the current center. Indeed, that approach seems advisable and efficient. Thus while different ownership would allow timely and efficient construction of new facilities, the operations can be unified.

The city has remained steadfast in committing its portion of the Food and Beverage tax to expand the convention center. Over the last six years the possibility of partnering with Monroe County government in creating a CIB was explored, and while some progress was made, ultimately the City and County were unable to reach agreement on the best path forward. If the City of Bloomington is to have the ability to move forward with an expanded convention center project in a timely fashion, it will need decision making ability to achieve success and efficiency. With time pressure coming from a General Assembly ready to remove the F&B tax option from those communities who have collected but not employed those funds, there is no time to continue unfruitful debate.

The path of a traditional CIB would require that the City – which will dedicate tens of millions of dollars and coordinate multiple very significant and complex downtown redevelopments – depend upon the frequent approvals of a county body that has demonstrated very different approaches, values, and vision for the convention center project. After six years of unsuccessful negotiations, this path is untenable.

A 501c3 offers advantages in flexibility and real balance among various parties. It may also offer a more successful long-term structure for a vibrant and entrepreneurial center – both in its design and construction, and in its coordination with so much happening in the downtown. We urge further discussion with relevant parties to explore this option.

ORDINANCE 2022-46

AN ORDINANCE OF THE MONROE COUNTY BOARD OF COMMISSIONERS
CREATING A CAPITAL IMPROVEMENT BOARD TO DIRECT
CONVENTION CENTER SITE SELECTION, DESIGN, CONSTRUCTION, AND OPERATIONS

WHEREAS, Monroe County Government established, maintained, and has operated the Monroe Convention Center ("Convention Center") for more than thirty years, using Innkeeper's Tax Funds provided for by Indiana Code 6-9-4 et seq. and appropriated by the Monroe County Council ("County Council"); and,

WHEREAS, the Monroe County Board of Commissioners ("Commissioners") have purchased real property, funded through bonds and appropriations approved by the County Council, for the expansion of the Convention Center; and,

WHEREAS, the Indiana General Assembly enabled the County Council to enact a County Food and Beverage Tax in 2009, with the passage of P.L. 176-2009, SEC. 21; and,

WHEREAS, the County Council, relying upon assurances of collaboration and partnership issued by the City of Bloomington Common Council and Mayor of Bloomington, the County Council adopted Ordinance 2017-51, which authorized the Monroe County Food and Beverage Tax ("Tax"); and,

WHEREAS, local enabling Ordinance 2017-51 confirmed and affirmed the state-law provisions providing for a Food and Beverage Advisory Commission ("Commission") to *"coordinate and assist efforts of the County and City of Bloomington fiscal bodies"* and requiring legislative action to seek and receive the Commission's recommendations of all expenditures prior to the legislative approval of any expenditures of Tax proceeds; and,

WHEREAS, the Commissioners wish to follow state law procedures and those procedures which are required by Ordinance 2017-51, including reliance upon Commission to coordinate and assist the City and the County Council regarding the utilization of Tax receipts and requiring legislative oversight and action, which may not be contradicted or delegated under the guise of Indiana's Home Rule authority; and,

WHEREAS, the Commissioners, County Council, City, and Mayor ("Elected Officials") met on at least three occasions in 2019 in order to resolve issues regarding construction and future operation and management of the Convention Center; and,

WHEREAS, the discussions were delayed due to the COVID-19 pandemic; and,

WHEREAS, in 2022, the City of Bloomington expressed a wish to move forward with the project and expressed urgency due to the possibility of state legislation which would rescind the local Food and Beverage Tax; and,

WHEREAS, the City's offer did not reflect the status of the negotiations from 2019 with the Commissioners; and,

WHEREAS, the Commissioners wish to move forward with the 2019 structure, which included a CIB, however, there is a concern that the City does not; and,

WHEREAS, a Capital Improvement Board ("CIB"), discussed by the Elected Officials and authorized pursuant to Indiana Code 36-10-8 et seq., is a natural option to direct Convention Center site selection, design, construction, and operations, as it is a governmental entity created for this very purpose, protected by the Tort Claims Act, and completely transparent and publicly accountable; and,

WHEREAS, the Commissioners do not support the creation of an independent 501c3 corporation, due to the lack of legally-required transparency, the lack of Tort Claim liability protection, and the inherent risks that are associated with the "flexibility" provided to a 501c3; and,

WHEREAS, the Commissioners wish to see the Convention Center expansion and its ongoing operations advance and be directed by a bipartisan, neutral CIB, which is composed of appointments made by the City and County, who are empowered under state law and Ordinance 2017-51; and,

WHEREAS, the Commissioners look forward to working with their City colleagues to expeditiously move forward making appointments to a CIB so that the Convention Center expansion may proceed and the process no longer stalled.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF MONROE COUNTY, INDIANA.

Section 1. A Capital Improvement Board ("CIB") is hereby created, pursuant to Indiana Code 36-10-8 et seq. to manage and direct the affairs of the Monroe County Convention Center ("Convention Center") and its expansion.

Section 2. The CIB shall be composed of seven (7) members, consistent with IC 36-10-8-4. The units of government which shall make appointments to the CIB are Monroe County and the City of Bloomington. Specifically, Monroe County ("County") shall appoint three (3) members and the City of Bloomington ("City") shall appoint three (3) members. Those six (6) members appointed shall recommend the seventh appointment. The city shall appoint three members to the CIB, no more than 2 of which may be from the same political party. The county shall appoint three members to the CIB, no more than 2 of which may be from the same political party. To create staggered appointments, the first round of appointments made by the City AND the County will include one member who has a 1 year appointment. Subsequent appointments will be two-year appointments to the CIB.

Section 3. The CIB shall have all authority permitted by law, however, the CIB shall not be allowed to employ or have appointed to the Board of Directors any Monroe County or City of Bloomington elected officials, employees, or board members who oversee any potential local governmental funding stream, such as Redevelopment funds, Innkeepers tax, or Food and Beverage Tax. It is the intent of the Commissioners, with this limiting provision, to avoid conflicts of interest and to ensure independent and fair decision-making by the CIB.

Section 4. The CIB shall select the site for the expansion of the Convention Center, choosing between the north and the east options outlined by the formerly-created Steering Committee created by a Memorandum of Understanding signed by the Mayor of Bloomington and the Commissioners, and the need for additional amenities including a parking garage.

Section 5. In accordance with Section 6 and 7, this ordinance is subject to both the City of Bloomington and the Commissioners both agree to provide the requisite land and facilities for this project. The Commissioners vow to work with their colleagues at the City to transfer the necessary real property for the actual expansion, execute all agreements, and take any/all steps necessary in order to allow the CIB to fulfill the statutory duties contained in Indiana Code 36-10-8 et seq., including the financing, construction, equipping, operating, and maintaining of the capital improvements that are and will be a part of the Monroe County Convention Center. The building and parking lot currently utilized for County Election Operations will not be made available until the conclusion of the November General Election in 2024.

Section 6. Since the project requires City of Bloomington and Monroe County participation, the formation of the CIB and the need for speedy action, this ordinance is contingent upon the City of Bloomington's agreement with the terms of this Ordinance by January 1, 2023.

Section 7. This Ordinance takes effect upon passage by the Commissioners and the Commissioners' receipt of the City of Bloomington Mayor and Common Council's agreement with the terms of this Ordinance. Any subsequent legal or administrative action which may be necessary for the furtherance of this Ordinance and to

equip and organize a CIB is hereby authorized. If the terms in this section are not met by January 1, 2023, this Ordinance is void.

Approved this 09 day of NOVEMBER 2022, by the Board of Commissioners of Monroe County, Indiana.

MONROE COUNTY BOARD OF COMMISSIONERS

"AYES"

"NAYS"



Julie Thomas, President

Julie Thomas, President



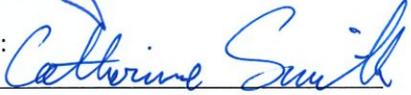
Penny Githens, Vice President

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Lee Jones, Member

Lee Jones, Member

ATTEST: 

Catherine Smith, Auditor