

February 11, 2010

The following memorandum was sent to the BOV executive committee on February 3, 2010. We discussed the subject at the executive committee meeting on February 5th. No decisions were made. David Chappell and the other members of the executive committee wanted the memo to be forwarded to the full membership of the Board of Visitors.

If you have any comments or suggestions about creating a foundation to support McDonald Observatory, please advise me at [sbickerstaff@law.utexas.edu].

Thank you, Vice-Chairman Steve Bickerstaff

To: Executive Committee of the McDonald Observatory Board of Visitors
Re: Creation of a Foundation to Support the goals of McDonald Observatory

For several years some BOV members have suggested that a foundation (501[c] [3] corporation) be created to support the goals of McDonald Observatory. This brief memorandum is designed to provide some guidance on that suggestion.

This memo identifies some of the issues arising around the creation and operation of a foundation. It does not address specific legal questions. **Perhaps the best attorney in Texas on the creation and operation of not-for-profit organizations, Andy White, will join us at the executive committee meeting on February 5, 2010. Please do not hesitate to ask him any questions you think relevant.**

Review Process. In an effort to explore the various attitudes about creating a foundation and the possible legal hurdles, I spoke with Dean Mary Ann Rankin, the general counsel of UTIMCO, an attorney in the UT regents' legal office, Astronomy Department Chairman Neal Evans, McDonald Director David Lambert, various members of the BOV executive committee, past chairman Bill Nowlin, past director Frank Bash and several attorneys specializing in foundations.

Legal Impediments to Creation of a Foundation. I found no legal impediment to creation of a foundation to support the goals of McDonald, although some requirements may affect the form of that foundation. The Regent's counsel assured me that there were no UT rules blocking such action by private persons. UTIMCO's requirements apply only to funds under the authority of the Board of Regents (e.g. endowments set up by a UT department) and not to any foundation or endowment set up by a private group even if the objective is the support of UT or a part of UT. An example is the Law School Foundation, which was created before UTIMCO by a handful of law school alumni. The governance of the Foundation has changed over time and the Foundation's funds are now invested by UTIMCO, but only because of a contract between the Foundation and the Regents allowing such investment. Numerous other examples of similar foundations exist, including many for community colleges.

UT Attitude about Creation of a McDonald Foundation. Dean Rankin indicated to me that she was unsure whether such a foundation would be helpful, but that she certainly did not oppose it. As we spoke, she actually on her own came up with some potential advantages of a foundation. Chairman Neal Evans expressed similar views in an e-mail to me, but, understandably wants to learn more. Director David Lambert seems supportive of the concept of a foundation and has indicated that, among other potential advantages, a foundation might provide a means of “parking” funds solicited for the Giant Magellan project while waiting to see whether the other university and national funds are raised.

Potential Advantages of a Foundation. In general the potential advantages are best described as giving added “flexibility” for supporting the objectives of McDonald or the astronomy program. One observer described a foundation as “giving another tool in the toolbox.”

The following are more specific potential advantages of a foundation:

- Expenditures Unlikely or Impossible for the University. For example, a foundation could partially sponsor media programs (such as on NOVA) that highlight research and astronomers from McDonald.
- Immediate Funding of Projects that could Languish Awaiting UT Funding. For example, public viewing programs at the 82 inch telescope have been curtailed because of safety concerns of the UT Fire Marshall. Any solution to this problem requires both official UT Facilities approval of a remedial plan (e.g. adding available space to the dome floor) and the funding of the necessary changes. A foundation might provide a means for quicker funding than UT of an outside fire escape.
- Immediate Availability of Funds. Part of the frustration with depending on endowment funding within the UT system is the limitation on availability of such funding once it is in the system. UTIMCO is required to hold back some of the funding. Funds present in a foundation (if any) could at least theoretically be available sooner if needed.
- Ownership and Construction of Facilities. One of the potential projects initially suggested for a foundation was the funding of a pavilion at McDonald Observatory for BOV and observatory functions. As usually envisioned, the project would entail the borrowing of the funds necessary for construction of such a pavilion (to be repaid from BOV funds usually spent annually to pay for a temporary facility [tent]) and the gift or lease of the facility back to McDonald. Obviously the mere presence of the foundation would not be sufficient for a loan to buy land or build the pavilion. Banks (or UT itself) might require some personal guarantees. Whether these issues could be resolved is unclear, but are not necessarily determinative of whether a foundation should be created.
- Greater Appeal to Persons Unassociated with UT, but Supportive of McDonald. McDonald Observatory is truly a treasure for the entire State of Texas. A foundation might be more successful raising funds from individuals or organizations unassociated with the University of Texas, but for projects that benefit McDonald Observatory as an international institution.
- Solicitation and Husbanding of Funding for Long-term Projects. Some persons have suggested that a foundation might be more successful at soliciting cash and pledges for a long-term project (e.g. GMT) because the foundation’s use of the funds might be more transparent and the funds, if necessary, could be restricted

to a specific purpose or remain unused pursuant to agreement with the contributor until the underlying feasibility of the long-term project is demonstrated.

- Matching Legislative Appropriations. At least theoretically, the presence of substantial funds in the foundation that were available to match legislative appropriations could be helpful in gaining such appropriations.

Disadvantages. The attorneys who have set up foundations in the past assure me that the creation of a foundation to support the goals of McDonald Observatory is unlikely to adversely affect donations directly to McDonald Observatory and the UT Astronomy Program. I have no personal experience on which to judge the accuracy of this representation.

The greatest disadvantage of creating a foundation is the assumed responsibility of soliciting cash and pledges, administering the foundation and managing the funds. This is not a minor responsibility particularly if the foundation is successful raising funds. It is a fiduciary responsibility that requires expertise and attention. I will willingly give my time (and some money) in the beginning, but long-term the foundation would require a director and staff. A decision, however, to proceed with initial creation of a foundation does not require resolving these issues at this time. To me, we must simply pay attention to what is legal and what works.

Form of the Foundation. Although the suggestion about creating a foundation is often stated in terms of the BOV creating such a foundation, the corporation may actually be created as an independent entity through individual members of the BOV (not the organization itself). The following are two variations of the public charity foundation:

- Supporting Organization. These 501(c) organizations are tax exempt based on their control at some level by the tax exempt organization that they support. For example, some of the members of the governing board are often appointed by the supported organization.
- Publicly Supported. Many 501(c) (3) corporations that started as “supporting organizations” have changed to “publicly supported” organizations that seek contributions and grants from a broad range of the general public.

A publicly supported independent foundation is apparently preferred by some because they believe it allows more flexibility in seeking a broader range of funding. I am not really qualified to answer questions on these corporate forms, but the attorney present at our meeting can do so.

On a personal basis, I think that trying to convert the BOV to a 501(c) (3) is likely to encounter many problems trying to untangle the legal history and structure of this membership organization. Having the executive committee take official action to create the foundation has some of the same problems. Initially creating the foundation as an independent organization possibly with many or all of the members of the executive committee constituting the board of the corporation may provide a starting point with the ability to change the form and by-laws of the corporation later as necessary.

Whatever form is preferred, it is important that the members of the BOV be kept informed on this issue and have an opportunity to express their views on the desirability of creating a foundation. I have asked David Chappell for an opportunity to advise the BOV membership about the foundation concept at the meeting on February 6th, with a follow-up by e-mail. Nevertheless, it is the executive committee of the BOV, and its

individual members that are likely to provide leadership on this issue and, possibly, to serve as the initial governing board of the foundation.

Purpose of a Foundation. In general, I think we all know that we want any foundation to help McDonald Observatory achieve its objectives. The specific wording of the purpose of the foundation, however, must be carefully chosen to assure that the corporation can achieve tax-exempt status and to allow the foundation the opportunity to take advantage of any attractive money-raising or expenditure opportunity.

The Process of Creating a Foundation. Obviously, creating a foundation and obtaining tax exempt (501[c] [3]) status is a document intensive process. I am assured that initially such a foundation can function in tax exempt status under the umbrella of the Austin Community Foundation while its 501(c) (3) application is pending. I have personal experience with this process on behalf of two tax exempt corporations. One of these (Marfa Public Radio) used the Community Foundation until our 501(c) (3) application was approved. An attorney who specializes in the creation and operation of not-for-profit organizations will be at the February 5th meeting to answer questions.

Conclusion. I do not ask for or expect the executive committee to make any official decision at its next meeting with regard to creating a foundation. I hope, however, we can at least discuss and explore the following questions:

- Is proceeding with the initial steps of creating a foundation desirable at this time?
- If so, should the foundation be independent or controlled by the University?
- If created, how broad should the foundation's authority be to expend funds?
- If independent, should the foundation be created by the BOV, the executive committee, or by individual members of the BOV or executive committee?

Perhaps we have a consensus on these and other questions. Perhaps not. Let's see!

Thanks
Steve Bickerstaff