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LAWYERS

5 May 2015

VIA U.S. MAIL AND EMAIL MSCHULTZ@WESTALLISWI.GOV

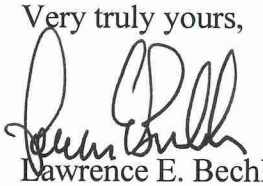
Ms. Monica Schultz, City Clerk
City of West Allis
West Allis City Hall, Room 108-110
7525 West Greenfield Avenue
West Allis, WI 53214

Re: Sewer Lateral Replacement Program

Dear Ms. Schultz:

City Attorney Post has asked me to prepare the attached legal opinion for distribution to Mayor Devine and the members of the Common Council of the City. I would appreciate it if you could arrange for the distribution of this opinion to Mayor Devine and all of the Common Council members. Thank you very much.

Very truly yours,



Lawrence E. Bechler

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Enclosure
cc: City Attorney Scott Post (w/enc.) by e-mail only
Assistant City Engineer Joseph Burtch (w/enc.) by e-mail only

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5 May 2015

Mayor Dan Devine
Members of the Common Council
West Allis City Hall
7525 West Greenfield Avenue
West Allis, WI 53214-4648

Re: Sewer Lateral Replacement Program

Dear Mayor Devine and Members of Common Council:

City Attorney Post asked me to review the options for addressing the current issues with the City's sewer lateral replacement program. He has furnished me with materials beginning from the Stipulation resolving litigation in *State of Wisconsin v. Milwaukee Metropolitan Sewerage District et al.*, Case No. 2005-CX-13. Based on those materials and my independent review, I am working from the following assumptions:

A. The Wisconsin DNR has issued a WPDES Permit to the City of West Allis and it is in compliance with that permit.

B. Despite that fact, the City of West Allis recognizes that it has significant issues from inflow and infiltration into the municipal separate sanitary sewer system, which results in substantially greater sewerage treatment charges at Milwaukee Metropolitan Sewerage District (MMSD).

C. City staff has concluded that it should begin a long-term program to rehabilitate or replace the private sanitary sewer laterals in all residential properties with one to three dwelling units in the City – a total of some 17,000 private sewer lateral replacements.

D. The City wishes to develop a program that will provide funding to assist in the sewer rehabilitation program.

1. The Fee Proposal. The City's proposal to develop a fee to fund the sewer rehabilitation program makes sense, though it must be approached cautiously.

I agree with City Attorney Post that through the municipal Police Power and the Public Purpose doctrine, the City has the ability to require improvements to the private portions of sanitary sewer laterals. The problems of inflow and infiltration into the sanitary sewer system are matters that affect the public interest in the entire City. After all, despite compliance with its WPDES permit, the City is being required to take measures to reduce inflow and infiltration into the MMSD system. Similarly, and not surprisingly, MMSD is insisting that all of its customer municipalities reduce the amount of inflow and infiltration. Despite being from Madison, I am quite cognizant of MMSD's problems that ultimately resulted in the creation of the Deep Tunnel system for temporary storage of wastewater given MMSD's treatment of surface water runoff as well as wastewater from public sewers. The reduction of inflow and infiltration in the City is one of many steps that should ultimately reduce the problems that MMSD's Deep Tunnel system has had over the years. It is difficult to envision any court finding that the City's efforts were outside of the Public Purpose Doctrine and clearly within its Police Power.

2. Funding Method. The City has suggested funding the fee via a fee on the utility bill of all residential properties with one to three dwelling units.

This is one of several possible ways of funding this program. One concern to consider arises from the application of Wis. Stats. § 66.0602, the Local Levy Limit Law. While it is clear that general obligation debt from a borrowing is exempt from levy limits pursuant to Wis. Stats. § 66.0602(3)(d)2., the fact that the program would be implemented over a long period of time creates at least the theoretical possibility of violating the arbitrage rules of the Internal Revenue Service.

Levy limits are also an issue if the State Department of Revenue would determine that the fee was recharacterizing an amount that would otherwise be charged on the property tax. Thus, the 2013 changes to the Levy Limit Law created § 66.0602(2m). Under this statute, communities have abandoned utility district programs recovered by fee where the fee covered what the statute defines as "covered services" – "garbage collection, fire protection, snow plowing, street sweeping, or storm water management." The statute provides that if new fee revenue is "designated to pay for a covered service that was funded in 2013 by the levy of the political subdivision" such fees would violate the Levy Limit Law requiring a negative adjustment of state aids unless the local community passed a referendum permitting the fee to exceed applicable levy limits.

Accordingly, it is critical to designing the fee that it be carefully designed and expressed only as a matter of covering sanitary sewer program costs rather than being deemed "storm water management" under the Levy Limit Law.

Based upon my discussion with City Attorney Post, it is my understanding that the sewer utility would not collect the fee from any properties that are not residential properties with one to three dwelling units. In my opinion, this program design reduces the risk that the fee could be considered an effort to go around levy limits by having a city-wide charge collected on the utility bill.

It is also necessary, in my opinion, to design the ordinance implementing the program with substantial factual recitations expressed in the ordinance. Among these critical facts could be:

a. all sanitary sewer laterals will require replacement at least once every 100 years;
b. the program deals with reducing flow to sanitary sewer laterals designed solely for carrying effluent rather than surface water that entered the lateral through inflow or infiltration;
c. all sanitary sewer laterals from residential properties with one to three dwelling units will need to be replaced over time.

In my view, a factual recitation including these points and a number of others will significantly protect the City from any challenges. The draft ordinance that I have seen is excellent, but I would suggest further elaboration of the purpose of the ordinance.

3. Legal Background. In my opinion, ample authority exists for the City to become involved in replacing the private portion of sanitary sewer laterals. While only indirectly relevant, I have substantial familiarity with the similar program undertaken by the Madison Water Utility to replace the private portion of water laterals made of lead. I served for 16 years as a Madison water commissioner, and so my familiarity is first-hand. Briefly, before 1927, it was common for water utilities to use lead laterals. From the 1980s onward, Madison had replaced all of its City portions of the lead laterals (from the curb stop to the water main) with much safer copper laterals, but at a much slower pace for the residential portion of laterals from the curb stop to the occupied structure. Eventually, the U.S. EPA and the Wisconsin DNR insisted on greatly accelerating the process of replacing the private portions of lead water laterals.

Madison utilized a unique system of carrots and sticks. The carrots were to fund half of the residential property owner's cost of private lead water lateral replacement. The stick was that for property owners who were unwilling to participate, forfeitures could be imposed under the Madison ordinance. The ordinance was premised upon the fact that the presence of lead in the water could be a health hazard to occupants and should be removed as soon as

possible. The Madison program took 11 years to complete and cost in excess of $3 million. There was no litigation challenging the program. The EPA and the American Waterworks Association cited the Madison program as a model for a way to remove the risk of lead from the private portion of water laterals.

In my view, it makes sense to have City support to cover some portion of the sewer lateral rehabilitation or replacement. I recognize that there is not a lot of stomach for taking enforcement actions against violators, but I do believe if the period of time before the City took action was long enough, and the program was publicized adequately, it is likely that the program could be completed without a challenge.

Even though the sanitary sewer laterals are not portions of the City system, nonetheless, in *Dewey v. Demos*, 48 Wis. 2d 161, 168, 179 NW 2d 897(1970), the court validated the use of special assessments to recover the cost of utility laterals. The *Dewey* decision is premised on the doctrine that cities may validly require laterals to be built and where a city has to do the work, the cost is charged to the property owner. See Wis. Stat. § 66.0911.

Of course, it is critical that the funds raised be placed in a separate fund unavailable for use for any other City purposes. After all, the very fact that this is a utility charge demonstrates that the fee is for activities of the City in its proprietary function as an owner of the utility, not as a governmental function. *City of River Falls v. St. Bridget's Catholic Church*, 182 Wis. 2d 436, 442, 513 NW 2d 673 (Ct. App. 1994). In addition, the City must always be prepared to justify the amount of the fee over time. All fees must be reasonable and not for the purpose of raising general revenue, and may not unreasonably exceed the cost of administration of the program. *Sluggy's Lakefront Inn, Inc. v. Town of Delavan*, 125 Wis. 2d 199, 202, 372 NW 2d 174 (Ct. App. 1985).

The additional risk is for a challenge under Wis. Stat. § 66.0821(5). This is the statute that permits sewerage system appeals to the Wisconsin Public Service Commission (PSC). While my experience is that few such cases are successfully brought each year, it is important to recognize that the PSC's jurisdiction arises only to "rates, rules and practices [that] are unreasonable or unjustly discriminatory." In this case, it is critical to demonstrate that the owners of all residential properties with one to three dwelling units will be required to replace the private portion of their sanitary sewer lateral eventually, and the factual basis for excluding commercial, governmental and industrial properties.

To date, I have not had the time to research administrative proceedings at the PSC to determine whether any cases have been brought on this basis before. It is my opinion that a challenge to the City's program is unlikely to be successful.

4. Cost Recovery. Based on Mr. Post's authorities and my further research, it is my opinion that creating a fee devoted solely to raising funds for the implementation and administration of the private sanitary sewer lateral program is a reasonable and appropriate exercise of the Police Power.

Nonetheless, one must also evaluate the method for recovering the portion of the program cost charged to the individual property owners.

While special assessments are appropriate to recover the portion of the costs recoverable from property owners, a conventional special assessment under Wis. Stat § 66.0703 would be exceedingly clumsy. Instead, I would recommend proceeding under the special assessment ordinance procedure under Wis. Stat. § 66.0701. I have successfully used this statute where special assessments were for a cost that is known and agreed to by the property owner in advance. Thus, I recommend proceeding as follows:

a. Meeting with the property owner to develop the mutually agreed cost for removal or rehabilitation of the private sanitary sewer lateral.
b. Developing the special assessment ordinance pursuant to Wis. Stat. § 66.0701 specifying the cost and the number of installments that would be levied against the property.
c. Specifying that the property owner, already knowing the precise form of the program, agrees to written acceptance of notice for the special assessment and waiving the necessity of a public hearing on the special assessment. Normally, without the waiver of notice and public hearing, I would recommend proceeding under the conventional § 66.0703 process, but I have never had to do that.
d. Adopting the special assessment ordinance. By doing so, this eliminates the necessity for potentially hundreds of public hearings per year through the replacement process, and the similar duplication of special assessment resolutions if the City actually had to do preliminary and final resolutions for every property owner. Certainly if a series of property owners in a neighborhood all agreed, the special assessment ordinance could cover a group of owners just as it typically does under the standard special assessment procedure.

The number of installments could certainly vary by the amount of the assessment. Where the assessment was large relative to the value of the property with the sewer lateral being rehabilitated, I would recommend a large number of installment payments – perhaps as many as 20 years. Given the fact that the fee program would continue to generate revenue to pay for the program, and the fact that as homes were sold, outstanding special assessments are almost certain to be paid at closing, this would seem a reasonable way to avoid the cost becoming overwhelming to individual property owners.

Certainly, it is a policy matter how much of the lateral cost would be assumed by the City Sewer Utility. The 50-50 split that Madison undertook with its lead water lateral replacement program provides one example where a significant contribution from the fee revenue was in the public interest.

The other benefit of the City contribution toward the cost -- the City "carrot" -- is it may provide an incentive for some property owners to voluntarily permit screening of their laterals for problems. I agree with Mr. Post that in the absence of external evidence of a particular problem with a lateral, it is difficult to envision a basis for the City to force inspections of the laterals. Assuming the City had an ordinance requiring it, one possible basis would be the use of special inspection warrants pursuant to Wis. Stat. § 66.0119. It seems to me that the inspection purposes are broad enough in Wis. Stat. § 66.0119(1)(a) to permit the inspection, but I do not recommend this method, given the involvement of police and personnel using specialized equipment to complete the inspection. It cannot be ruled out for unusual cases, however.

Accordingly it is my opinion that the fee program that you have described, properly implemented by ordinance supported by a reasonably generous special assessment program and limited to residential properties of three or fewer dwelling units, is a feasible way of adopting a private sanitary lateral replacement program to reduce inflow and infiltration.

If you have any questions, please let me know.

Very truly yours,

Lawrence E. Bechler

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Assistant City Engineer Joseph Burtch (by e-mail only)