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OFFICE OF THE CITY ATTORNEY
Scott E. Post
City Attorney
Sheryl L Kuhary
Jeffrey J. Warchol
Jenna R. Merten
Assistant City Attorneys

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Mayor Devine and
Members of the Common Council
West Allis City Hall
West Allis, Wisconsin

Re: Opinion Regarding Legal Issues Involved in Proposed Ordinance Creating a User Fee for the Purpose of Establishing a Fund to Deal with Collapsed Laterals on Private Residential Property.

Dear Mayor & Common Council Members:

You have asked me for an opinion regarding the legal issues involved in the proposed (but not yet introduced) ordinance creating a user fee for the purpose of establishing a fund to deal with collapsed laterals on private residential property. The goal of the fee and fund, as I understand it, is to:

1) Reduce inflow and infiltration (I&I) into the sanitary sewer system and
2) To ameliorate the financial burden on residential property owners when their lateral fails and must be replaced.

To my knowledge, no such fund has been created anywhere else in the State of Wisconsin. Assistant City Engineer Burtch has identified a program in the City of Racine which applies to laterals within the road right-of-way. Notably, Racine's program does not apply to that portion of the lateral on private property. It is this proposed use of a fee and expenditure of funds on private property for the benefit of private property that raises a myriad of legal issues.

As I understand this proposal, it is not intended that the City assume all ownership of the laterals. For example, they must continue to be installed and maintained by the property owner. It is only when the lateral fails does this program kick in. Essentially, it is a method to help residential property owners pay for the cost of the lateral replacement. In addition, because it has been the City's experience that some property owners do not timely replace failed laterals, there is opportunity for I&I into the system. This I&I burdens an already overburdened system.

If the City were to assume ownership of the laterals as part of the sanitary sewer system, it would be easy to conclude that the proposed ordinance is proper. It would also be enormously expensive and raise constitutional concerns. Since that is not the proposal, I will not address it further. Section 66.0821, Wis. Stat., grants authority to municipalities to create and operate sewerage and storm water systems. Included in that grant of authority is the ability to "extend or improve" the system, "including necessary lateral" sewers. However, in my opinion, the laterals on private property are not part of the City's system. They are private connections to that

system. That is why it is the property owner's responsibility to install, maintain, and replace the lateral. If the lateral were part of the City's system, the authority to replace the lateral and pay for it through taxation, special assessment, or fee is clear. Section 66.0821(3)(a), Wis. Stat., provides that all or a portion of the cost of operating and maintaining such a system may be funded through these methods. Because the laterals at issue are not part of the system, this statutory authority does not apply.

Without statutory authority, the City may not impose a tax on residential properties to pay for lateral replacement. At first blush, a City's ability to tax seems to be rather broad. Section 62.11(5), Wis. Stat., provides that a common council has wide authority regarding the management and control of city property, finances, highways, and public services. Included within those powers is the power to tax. However, the courts in Wisconsin have long held that a City must have a specific grant of authority to impose a tax. "Wisconsin recognizes the general rule of construction that a tax cannot be imposed without clear and express language for that purpose and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax." *Plymouth v. Elsner*, 28 Wis. 2d 102, 106 (1965). Since there is no specific authority to impose a tax for the type of fund at issue, the City may not impose a tax to pay for it.

As a tax is not permitted, a fee was proposed. The authority to impose a fee is contained in both the statutory and constitutional home rule powers given to municipalities. Municipalities have the ability under the police power to assess fees "to promote the general welfare." *Rusk v. City of Milwaukee*, 298 Wis. 2d 207, 414 (ct. App. 2006). Furthermore, such police power "covers all matters having a reasonable relation to the protection of the public health, safety or welfare." *Id.*

In addition, to the general authority to impose fees, municipalities have the statutory authority to impose charges related to sewerage and storm water systems under Section 66.0821, Wis. Stat. However, whether this statute provides additional authority for the proposed fee is questionable. Under the statute, a municipality has the authority to "construct, acquire or lease, extend or improve any plant and equipment" related to the storm water or sewerage system "including necessary lateral, main and interceptor sewers..." As noted above, the laterals at issue are not part of the City's system. Rather, they are private laterals. Therefore, I have serious doubts that Section 66.0821 can be used as a basis for authority to impose the contemplated fee. Instead, I am of the opinion that the authority for the fee rests with the general police power.

The fee implicates the police power because of the ultimate goal to eliminate or reduce I&I. The City, the Milwaukee Metropolitan Sewer District (MMSD), and all other municipalities within MMSD's boundaries were sued by the State of Wisconsin in 2005. The complaint alleged that MMSD and the member municipalities were in violation of numerous regulations relating to sanitary sewers, combined sewers and water quality. A stipulation was entered into between the State and member municipalities. As part of that stipulation (and the City's Wisconsin Polution Discharge Elimination System permit) the City is required to take certain measures to reduce I&I. In addition, MMSD regulations also require efforts to reduce I&I. The City has taken numerous measures over the years to reduce I&I within the City's system. The major source of I&I now comes from private laterals. Because of this, the

Engineering Department has proposed several measures to reduce I&I from private sources, including the fee at issue. Because of the problems I&I presents to the City's sanitary sewer system and due to the potential for further regulatory enforcement, I have no difficulty concluding that this proposed fee is within the police power of the City. Reduction of I&I will reduce the volume of clear water entering the sanitary sewer system. This benefits the public health and welfare.

Concluding that the fee is within the City's police power does not end the analysis. The fee must also satisfy what is known as the public purpose doctrine. The doctrine is a court-created review of public funds to ensure that they are expended for a public purpose. See *Hammermill v. La Plante*, 58 Wis. 2d 32 (1973) and *Town of Beloit v. County of Rock*, 259 Wis. 2d 37 (2003). The analysis has been described by the Wisconsin Supreme Court as a fluid process that changes over time depending upon what people expect from their government. In essence, it is what the court says it is. Theoretically, courts are supposed to defer to the legislative determination of what is a proper expenditure of public funds. In addition, the trend in Wisconsin is to extend the concept of what is a public purpose. Given the widespread expenditure of public funds for the management of storm and sanitary sewers, the prevention of overflows, and the reduction of I&I. I am of the opinion that this proposal is of the same nature and will pass the public purpose doctrine test. The goal of reducing I&I and providing a method to assist residential property owners in doing so are likely to be determined by a court to serve a public purpose.

Now that I have determined that the proposed fee is permissible in principle under Wisconsin Law, we must examine the constraints on fees. A fee, as opposed to a tax, "must be designed to cover the cost of regulation and must be reasonable." *Edgerton Contractors, Inc. v. City of Wauwatosa*, 324 Wis. 2d 256, 267 (Ct. App. 2010). This same principle is set out in Section 66.0628, Wis. Stat. That section provides that: "Any fee that is imposed by a political subdivision shall bear a reasonable relationship to the service for which the fee is imposed." Thus, if the proposed fee is established, it cannot be used merely to generate revenue for general purposes. Rather, it must be reasonably calculated to cover the cost of the expense the City will incur or that is estimated that the City will incur. This requirement does not mean that there must be a dollar-for-dollar benefit to the property assessed. Rather, it must reasonably reflect the amount of service used, needed, or reserved by the payer. For example, in the *Rusk* case cited above, building owners sued the City of Milwaukee due to enactment of a rising scale of re-inspection fees. While the City agreed that some of the fees exceeded the actual cost of each re-inspection, it argued that the fees generated did not exceed the overall cost of the inspection program. In upholding the fees, the Court of Appeals held that the fees were imposed for a regulatory purpose, not as a tax. "Because this is not a revenue generating measure, it is a valid exercise of the City's police power to regulate, not an illegal tax." *Rusk* at page 363.

Applying these concepts to the proposed fee, as long as the amount charged overall is close to the amount expended, it should be upheld as a fee. The problems that can arise with such a fee are two-fold, however. Once established, it will be difficult, if not impossible, for the City to stop replacing failed storm laterals. If the City were to do so, all the property owners who paid the fee but did not get a new lateral would likely sue the City arguing that the fee was actually an illegal tax as they received no benefit. The City would argue that the program as a

whole benefitted everyone as it reduced I&I. The outcome of such litigation is unknown. However, good arguments can be made for both positions. Ultimately, a court could hold that the City is either obligated to replace the laterals for all properties assessed the fee or to return the fee as an illegal tax. The risk of such an outcome should be considered when evaluating whether to adopt this ordinance.

If the City becomes obligated to continue replacing laterals as they fail, two possibilities arise:

1) The fee must be continually increased to cover rising costs or
2) The City must borrow money to meet its obligations. Borrowing funds raises the same tax issues discussed earlier and also implicates the City's debt limit. Under Article XI, section 3 of the Wisconsin Constitution as well as Chapter 65 of the statutes, no municipality can become indebted in an amount that exceeds an allowable percentage of the taxable property within the municipality. If the City is determined to be obligated to replace laterals but fees are not raised to adequately cover the cost, the obligation could well become a debt that goes against the City's debt limit.

Lastly, it was suggested by Mr. Burtch at the November 19, 2013, Common Council meeting that there would also be a charge (I believe $1,000 was mentioned) to each residential property actually receiving lateral repair/replacement under the proposed ordinance. The draft provided to the Common Council at that meeting contains no such language. If the Common Council chooses to adopt the ordinance with such a "co-pay" provision, I suggest that it be treated as a special charge under Section 66.0627, Wis. Stat. Provision of this service to the property certainly applies to these circumstances. Therefore, such a charge is permissible. Furthermore, by charging the property under 66.0627, we create a lien and tax priority.

As can be discerned from the length and complexity of this letter, there are numerous issues related to this proposal. This letter is by no means an exhaustive discussion of all of those issues. No doubt, other issues may also arise during discussion and, if we get to it, implementation of the ordinance. This letter is in response to your direction to raise and discuss the salient legal issues related to this proposal. I trust that I have done so. However, if you have any additional questions regarding the legal implication of this ordinance, please feel free to ask.

Yours very truly,

Scott E. Post
City Attorney

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