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Common Council
Chambers
8640 S. Howell Ave.
PO Box 27
Oak Creek, WI 53154
(414) 768-6500

COMMON COUNCIL MEETING AGENDA

TUESDAY, JUNE 16, 2015
AT 7:00 P.M.

COUNCIL MEETINGS CAN BE SEEN LIVE ON GOVERNMENT ACCESS CHANNELS 25 AND 99

1. Call Meeting to Order / Roll Call
2. Pledge of Allegiance
3. Approval of Minutes: 6/2/15

New Business

MAYOR & COMMON COUNCIL

4. **Ordinance:** Consider Ordinance No. 2767, an Ordinance to Repeal and Recreate Section 2.67 of the Municipal Code regarding the Water & Sewer Utility Commission (by Committee of the Whole).
5. **Ordinance:** Consider Ordinance No. 2764, an Ordinance to Repeal Section 2.65 and to Repeal and Recreate Section 2.44 and 2.46 of the Municipal Code regarding the Civil Service Commission (by Committee of the Whole).
6. **Resolution:** Consider Resolution No. 11623-061615, approving the Second Amendment to the Tax Incremental District No. 11 Finance Development Agreement (Oak Creek Hotel Group, LLC) (2nd District).
7. **Ordinance:** Consider Ordinance No. 2768, amending Section 2 of Ordinance 2743, creating the position of Staff Accountant and establishing a wage range for the position as recommended by the Personnel Committee (by Committee of the Whole).
8. **Resolution:** Consider Resolution No. 11620-061615, authorizing the transfer of a portrait of Gary Wetzel to Gary Wetzel (by Committee of the Whole).
9. **Motion:** Consider a motion to approve the 2015 Vendor Summary Report (by Committee of the Whole).

ENGINEERING

10. **Motion:** Consider a motion to award the 2015 Park Improvements contract to the lowest responsive, responsible bidder, Payne & Dolan, Inc. at an estimated cost of \$237,842.40 (Project Nos. 15011-15014) (Various Districts).

11. **Motion:** Consider a *motion* to approve a contract amendment with Strand Associates Inc. for an actual cost fee not-to-exceed \$73,606.00, for additional design services for S. 5th Avenue Relocation. (Project No. 12026) (4th District).
12. **Motion:** Consider a *motion* to enter into an environmental services contract with Ramboll Environ for a not-to-exceed cost of \$74,800; related to the construction of the Lake Vista Drive Improvements (4th District).

LICENSE COMMITTEE

The License Committee met on June 12, 2015. Minutes are attached. Recommendations are as follows:

13. **Motion:** Consider a *motion* to grant an Operator's license to Billy Ferguson, 371 Marshall St., Coldwater, MI (Meijer's)
14. **Motion:** Consider a *motion* to deny an Operator's license to Tanya Schwartz, 3525 E. Van Norman, Cudahy for being a habitual offender (The Saloon / Classic Lanes).

The following items came in after License Committee met. Tentative recommendations are as follows:

15. **Motion:** Consider a *motion* to grant an Operator's license to the following (*favorable background report received*):
 - Michael Cairns, 6005 Oriole Ln., Greendale (South Shore Cinemas)
 - Matthew Leonard, 8893 Greenhill Ln., Greendale (Pick 'n Save – 27th)
 - Ezimena Dafetta, 3850 N. 19th Pl., Milwaukee (South Shore Cinemas)
 - Ronald Ricupero, 1800 Forest Hill Ave., South Milwaukee (Meijer)
 - Charles Harrison, 22036 Whispering Pines, Reed City, MI (Meijer)
 - James Roddy, 7371 S. Logan Ave., Oak Creek (Ryan Road Mobil)
 - Scott Sippl, N9595 Horseshoe Ln., Mukwonago (Meijer)
 - Cory Gerhardt, 614 Blake Ave., South Milwaukee (Applebee's)
 - Jon Marunowski, 6163 S. 37th St., Greenfield (Pick 'n Save)
16. **Motion:** Consider a *motion* to grant an Original Alcoholic beverage license for the period July 1, 2015 through June 30, 2016, to WSB Oak Creek Restaurant, LLC dba Water Street Brewery, Robert C. Schmidt, Jr., Agent, 140 W. Town Square Way, subject to department approvals.
17. **Motion:** Consider a *motion* to grant Amusement Operator and Amusement Devices license to the following:
 - Brewer Amusement Company, LLC, 412 Sparta Street, McMinnville, TN
 - Reggie's Amusement, LLC 4918 S. Packard Ave., Cudahy, WI
18. **Motion:** Consider a *motion* to grant a Temporary Class B Beer and Wine license, with a waiver of fees, to the Oak Creek Lions Club, Inc. for the Oak Creek Lions Festival, 9/4-9/7/15 (*department approvals received*).
19. **Motion:** Consider a *motion* to grant a Temporary Class B Beer license to Robert Kastelic, Agent, South Milwaukee Amateur Radio Club, for one day only, 7/11/2015, at Legion Post #434, 9327 S. Shepard Ave. (*department approvals received*).

Adjournment.

Public Notice

Upon reasonable notice, a good faith effort will be made to accommodate the needs of disabled individuals through sign language interpreters or other auxiliary aid at no cost to the individual to participate in public meetings. Due to the difficulty in finding interpreters, requests should be made as far in advance as possible preferably a minimum of 48 hours. For additional information or to request this service, contact the Oak Creek City Clerk at 768-6511, (FAX) 768-9587, (TDD) 768-6513 or by writing to the ADA Coordinator at the Health Department, City Hall, 8640 S. Howell Avenue, Oak Creek, Wisconsin 53154.

It is possible that members of and possibly a quorum of members of other governmental bodies of the municipality may be in attendance at the above-stated meeting to gather information; no action will be taken by any governmental body at the above-stated meeting other than the governmental body specifically referred to above in this notice

City of Oak Creek Common Council Report

Meeting Date: 6/16/15

Recommendation: That the Common Council adopt Ordinance No. 2767, an Ordinance to Repeal and Recreate Section 2.67 of the Municipal Code Regarding the Water & Sewer Utility Commission.

Background: After considerable discussion, there is a recommendation to amend Section 2.67 of the Municipal Code regarding the Water & Sewer Utility Commission. The legal relationship of the Water & Sewer Utility is a unique one under municipal law. Under Wisconsin law, a City may have the Utility governed by a Commission or by another officer of the City. Historically, the Utility has been managed by a Commission. Attached to this report is City Attorney Opinion #689 that discusses various issues that arise as between the Utility and the Common Council.

The primary changes to Section 2.67 are proposed as follows:

- Increase the number of Commissioners from five to seven.
- Deletion of the provision in the Code that the Commission shall have full authority to manage and control the operation of the Utility. The result is that the Utility would be subject to the general control and supervision of the Common Council.
- Utility employees would continue to be subject to the personnel manual approved by the Commission, provided that Utility employees be subject to those personnel policies that affect health insurance requirements of the City for all of its employees.
- The Common Council would have authority to enter into contracts that exceed \$100,000 that are necessary or convenient to the management of the Utility. The Utility Commission would continue to have the authority to enter into contracts that are \$100,000 or less.
- The Utility Accountant would be required to provide a copy of all financial reports and bank statements on a monthly basis to the Commission and to the Finance Director.
- Capital costs for any sewer and water main extensions shall be paid pursuant to Common Council Policy subject to the restrictions and requirements of State law.
- The Utility Accountant would be required to provide the Finance Director with a copy of all documents associated with issuance of Water & Sewer Utility Revenue Bonds prior to the issuance of those bonds.
- Excess revenues of the Utility would be required to be paid into the General Fund as directed by the Common Council subject to the restrictions of State law.
- The Common Council would have exclusive authority to commence litigation in behalf of the Water & Sewer Utility and to advocate for changes in state law.

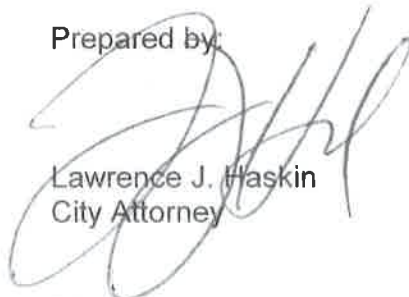
The Water & Sewer Utility has historically been an extremely well run organization. The Utility has received numerous awards for management of the Utility operations and for water quality. This Ordinance change is designed to allow the Utility to continue to flourish while making sure that the operations and management of the utility are consistent with the policies established by the Common Council. As the issues facing municipalities become more and more complex, it is essential that the Common Council and the Utility Commission be aligned on all critical issues facing both the City and the Utility. With the advent of Act 10, levy limits, the increased use of TIF financing as an economic development tool and other complex challenges, there is an ever increasing need for regular and effective communication between the City and the Utility.

Included with the Council Packet are:

- A redline version of Ordinance 2767 showing the change between the current version of Sec. 2.67 and the proposed version.
- City Attorney Opinion 689
- League of Wisconsin Municipalities Legal Opinions 316, 318, 318A, 320 and 349.

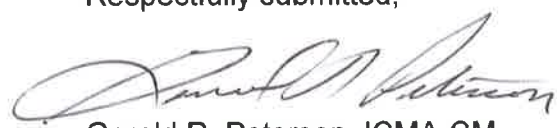
Fiscal Impact: It is anticipated that these changes can positively impact the City from a fiscal perspective.

Prepared by:



Lawrence J. Haskin
City Attorney

Respectfully submitted,



Gerald R. Peterson, ICMA-CM
City Administrator

Fiscal Review by:



Bridget M. Souffrant, CMTW
Finance Director / Comptroller

Approved by:

Douglas Seymour,
Director of Community Development

ORDINANCE NO. 2767

BY: _____

AN ORDINANCE TO REPEAL AND RECREATE SECTION 2.67 OF THE MUNICIPAL CODE REGARDING THE WATER & SEWER UTILITY COMMISSION

The Common Council of the City of Oak Creek does hereby ordain as follows:

SECTION 1: Section 2.67 of the Municipal Code is hereby repealed and recreated to read as follows:

SEC. 2.67 WATER & SEWER UTILITY COMMISSION.

- (a) **Creation.** There is hereby created an independent and non-partisan Water & Sewer Utility Commission to manage and operate the water and sewer utility of the City.
- (b) **Membership; Terms.** The Water & Sewer Utility Commission shall consist of ~~five~~ seven Commissioners. One member of the Commission shall be a member of the Common Council who shall be appointed for a one year term. The remaining members of the Commission shall be appointed for a ~~five~~seven-year term. The terms shall be staggered so that, except for the aldermanic representative, no more than one Commissioner's term shall expire each year. The Mayor shall be an ex-officio member of the Commission without the authority to vote.
- (c) **Appointments.** The Mayor shall appoint the aldermanic representative to the Commission at the second Common Council meeting in April, subject to Common Council approval. The aldermanic representative shall serve the Commission without a salary in addition to the salary received for serving as an alderperson. The Mayor shall appoint the remaining Commissioners, who shall be residents of the City, subject to Common Council approval, at its first regular meeting in August for terms to commence on the October 1 following appointment. In the case of a vacancy on the Commission, the Mayor, at a regular meeting, may appoint a Commissioner to fill the vacancy for the remainder of the term, subject to Common Council approval. Each member of the Commission, other than the aldermanic representative, shall receive such salary as the Council shall from time to time determine.
- (d) **Powers of Commission.**
 - (1) Management and Control. The Commission shall take entire management and control of the City's water and sewer utility ~~and any other public utility authorized by the Common Council. The Commission shall have full authority to manage and control the operation of the utility~~ subject ~~only~~ to the general control and supervision of the Common Council, ~~with such general control and supervision being exercised through the enactment and amendment of this Ordinance.~~
 - (2) Manager. The Commission shall appoint a Utility Manager, fix his/her compensation and duties and provide for the authority of the Manager to act on behalf of the Commission.
 - (3) Other Employees; Consultants. The Commission may employ and fix the compensation of such other employees as the Commission deems necessary or

convenient for the management and operation of the City's utility. ~~The Commission also may employ the services and fix the compensation of such other agents or consultants as the Commission deems necessary or convenient for the operation and management of the utility.~~ The Commission shall provide the City with a written report on a ~~biannual~~ semiannual basis that enumerates the wages and benefits of its employees. Utility employees shall be subject to the Personnel Manual approved by the Commission, provided that Utility employees shall be subject to those personnel policies that affect health insurance requirements of the City for all employees.

- (4) Rates, Rules and Regulations. The Commission shall have authority to fix sewer rates, subject to Common Council approval. The Commission shall have the authority to ~~establish rules and regulations for the governance, management and operation of the utility and~~ fix water rates, subject to the jurisdiction of the Public Service Commission of Wisconsin, and shall have the authority to establish rules for the governance of its own proceedings.
- (5) Contracts. The ~~Commission~~ Common Council shall have ~~full~~ authority to let bids and enter into contracts in the name of the City ~~provided that such contracts are necessary or convenient to the management and operation of the utility that exceed \$100,000.00.~~ The Commission shall have authority to let bids and enter into contracts in the name of the City that are necessary or convenient to the management and operation of the Utility that are \$100,000 or less.
- (6) ~~Other Powers.~~ The Commission shall have such other powers as are necessary or convenient to the management and operation of the City's public utility and the City intends that the Commission shall have full authority respecting the utility unless that authority is specifically withheld by statute.
- (e) **Organization.** The Commission shall choose from among their number a President and Secretary and shall appoint a Utility Accountant who shall perform the duties of a bonded cashier, shall keep accurate books and accounts of utility revenues and expenses, and shall perform such other duties as the Commission shall from time to time direct. The Utility Accountant, before taking office, shall give a bond to the City for the faithful performance of the duties of his/her office in such amount as the Water & Sewer Utility Commission shall direct. The bond shall be approved by the Mayor and filed with the City Clerk. The Utility Accountant shall provide a copy of financial reports and bank statements on a monthly basis to the Commission and to the Finance Director.
- (f) **Utility Expenses.** Utility expenses shall be audited by the Commission at its regular meeting, and if approved by its President and Secretary, shall be paid by the City Treasurer pursuant to Sec. 66.0607, Wis. Stats. The Commission may authorize the payment of labor, salaries and such other regular expenses as the Commission may determine, including but not limited to power and fuel bills, to be paid as they become due, if approved by the President and Secretary. Subject to the requirements of state law, capital costs incurred or to be incurred for any sewer and water main extensions shall be installed pursuant to policies established by the Common Council.
- (g) **Receipts.** All utility receipts shall be paid to the Utility Accountant and be turned over by the Accountant to the City Treasurer, at least once a month. Utility funds shall be separately accounted for by the water and sewer utility and shall be subject to disposition as the Commission shall direct.

- (h) Internal Control Policy. The Utility shall be subject to the Internal Control Policy approved by the Commission.
- (i) Revenue Bonds. The Utility Accountant shall provide the Finance Director with a copy of all documents associated with the issuance of Water & Sewer Utility Revenue Bonds in a reasonable amount of time prior to issuance.
- (j) Annual Report. The Water & Sewer Utility Commission shall submit to the Common Council, on or before July 1st of each year, a detailed report of all its doings for the preceding year, together with an itemized statement of all its expenditures, as well as a list of its employees, together with their salaries and a statement of the income, together with the inventory of the property of every character under its control and such other information as may be determined by its essential to inform the Common Council of the condition of the Utility financially otherwise. Excess revenues of the Utility shall be paid into the general fund, as directed by the Common Council, subject to restrictions imposed by the Public Service Commission.
- (k) Real Estate. Title to real estate which is used by the water and sewer utility for its operations shall be held by the City and shall be subject to the management and control of the Commission.
- (k)(l) Authority to Commence Litigation. The Common Council shall have the exclusive authority to commence litigation in behalf of the Water & Sewer Utility. The Water & Sewer Utility Commission shall not have independent authority to commence litigation. The Common Council shall have the exclusive authority to advocate for changes in state statutes or changes to the Wisconsin Administrative Code that affect the Utility operations. The Water & Sewer Utility shall not have independent authority to advocate for changes in state statutes or changes to the Wisconsin Administrative Code that affect the Utility operations.
- (l) Construction; Definition. This Ordinance shall be liberally construed to effect its purpose. ~~As used herein, the terms "management and control" or "management and operation" shall be construed broadly and shall include, without limitation by enumeration, all authority related to the utility properties of the City, and all authority related to purchasing, acquiring, leasing, constructing, adding to, improving, conducting, controlling, operating, or managing the City's public utilities, except as specifically withheld statute.~~

SECTION 2: Be it further ordained that the terms of any commissioners, except the alderman representative, serving as of the date of this Ordinance shall be extended from five years to seven years beginning on the first day of October. The term of one of the commissioners appointed after adoption of this Ordinance shall be for seven years. The term of the other commissioner appointed after adoption of this Ordinance shall be for six years. The terms of all the Commissioners shall expire successively one each year on each succeeding first day of October.

SECTION 3: All ordinances or parts of ordinances contravening the provisions of this ordinance are hereby repealed.

SECTION 4: This ordinance shall take effect and be in force from and after its passage and publication.

Introduced this ____ day of _____, 2015.

Passed and adopted this ____ day of _____, 2015.

President, Common Council

Approved this this ____ day of _____, 2015.

ATTEST:

Mayor

City Clerk

VOTE: Ayes _____ Noes _____



MEMORANDUM

OFFICE OF THE
CITY ATTORNEY

Lawrence J. Haskin,
City Attorney

Melissa L. Karls
Assistant City Attorney

TO: Mayor Stephen Scaffidi
Common Council Members

FROM: Lawrence J. Haskin, City Attorney

DATE: June 9, 2015

RE: **Legal Status of Water and Sewer Utility
(CAO #689)**

This opinion addresses the legal status of the Water and Sewer Commission.

The legal status of the Utility Commission is controlled by Wis. Stats. §66.0805 which provides as follows:

66.0805 Management of Public Utility by Commission

(1) Except as provided in sub. (6), the governing body of a city shall, and the governing body of a village or town may, provide for the nonpartisan management of a municipal public utility by creating a commission under this section. The board of commissioners, under the general control and supervision of the governing body, shall be responsible for the entire management of and shall supervise the operation of the utility. The governing body shall exercise general control and supervision of the commission by enacting ordinances governing the commission's operation. The board shall consist of 3, 5 or 7 commissioners. (Emphasis added.)

(6) In a 2nd, 3rd or 4th class city, a village or a town, the council or board may provide for the operation of a public utility or utilities by the board of public works or by another officer or officers, in lieu of the commission provided for in this section. (Emphasis added.)

I am attaching copies of several opinions from the League of Wisconsin Municipalities (the "League") which address a variety of issues regarding the legal relationship between the Common Council and the Utility Commission.

The following are some key points from those opinions:

- A municipal utility is a City department. (League Opinion #320)
- The Utility Commission is an agency of the City. (League Opinion #316)
- The degree to which the Utility is subject to ordinances is generally up to the Common Council. (League Opinion #320)
- Excess funds of the Utility may be paid to the general fund. (Wis. Stats. §66.0811(3) and League Opinion #320)

The Common Council has ceded a great deal of authority to the Water and Sewer Utility Commission by virtue of §2.67 of the Municipal Code, a copy of which is attached. State law allows the Common Council to enact changes to §2.67.

The following is clarification of the authority of the Common Council versus the Utility Commission on several issues based upon our current Ordinances and based on state law.

Compensation: Under state law, the Utility Commission has the right to set compensation for its employees. This cannot be changed by a City Ordinance. The League says it may be possible to enact a Charter Ordinance for the Council to set compensation levels for Utility Employees. Wis. Stats. §66.0805(3)

Employment Policies: The Utility Commission is subject to the “general control and supervision of the governing body” and, according to the League of Wisconsin Municipalities, the Common Council can set vacation, sick leave and residency policies that would apply to the Utility employees (League Opinions #320 and #349).

Contracts: By virtue of §2.67, the Common Council has given the authority to the Utility Commission to let bids and enter contracts in the name of the City provided that such contracts are necessary or convenient to the management and operation of the Utility. However, under state law, the Common Council can retain the right to enter into contracts in behalf of the Utility. A Utility Commission is not “an independent autonomous body with authority to enter into contracts and bind the City” unless the Common Council delegates contract authority to the Utility Commission (League Opinions #316 and #349).

Finance: The Common Council may use funds derived from its water plant to meet operation, maintenance, depreciation, interest and debt service funds; new construction or equipment or other indebtedness for sewerage construction work other than that which is chargeable against abutting property; or the funds may be placed into the

general fund to be used for general city purposes or in a special fund to be used for special municipal purposes (§66.0811(3)). Having said that, the Wisconsin Public Service Commission (“PSC”) is empowered to “supervise and regulate” public utilities that furnish “water, light, heat and power” Wis. Stats. §196.02(1). Notably, sewer utilities are excluded. However, if a sewer utility thinks sewer rates are “unreasonable or unjustly discriminatory” the user may file a complaint with and have the rates reviewed by the PSC. (Wis. Stats. §66.0821(5)(A) and League Opinion #349)

The League states: “excess revenues generated by fees that have been imposed to pay the principal and interest for general revenue bonds may provide yet another non-tax revenue source for cities and villages that may be used for non-utility purposes” (League Opinion #349).

Budget: Wis. Stats. §62.12 provides as follows:

(2) Budget: Annually on or before October 1, each officer or department shall file with the City Clerk an itemized statement of disbursements made to carry out the powers and duties of the officer or department during the preceding fiscal year, a detailed statement of the receipts and disbursements on account of any special fund under the supervision of the officer or department during the year and of the condition and management of the fund in detailed estimates of the same matters for the current fiscal year and for the ensuing fiscal year.

The Utility, according to the League, is bound by §62.12 Stats. to provide such reporting on or before October 1st. However, the Utility’s budget is not part of the budget adopted by the Common Council and is not part of the notice that is required to be published prior to the public hearing on the budget.

Debt: The Utility does not have independent authority to incur debt. This is a matter for the Common Council to decide (League Opinion #320).

Purchasing: By virtue of §2.67, complete authority regarding purchasing has been delegated to the Utility. However, if the Council had not delegated this authority to the Commission, the Common Council would retain the authority to approve Utility bills and expenditures. Alternatively, the Council could require that expenditures of the Utility be audited by the Commission. Under this procedure, the Commission would file with the City Clerk certified bills, vouchers or schedules signed by the President and Secretary of the Commission (League Opinion #316).

Supervision of Construction Work: According to §66.0805(4)(a), construction work shall be under the immediate supervision of the board of public works or corresponding authority. Since the City does not have a board of public works, the corresponding authority would be the Common Council. This responsibility has been delegated to the Utility.

Title to Real Estate: Section 2.67 provides that the title to real estate which is used by the Water and Sewer Utility for its operation shall be held by the City and shall be subject to the management and control of the Commission (League Opinion #318).

Conflicts between the Utility Commission and the Plan Commission: According to League Opinion #316, the Common Council retains supervisory power of control over the Utility Commission. When a conflict arises between a position adopted by the Plan Commission, or for that matter the Common Council and the Utility Commission, the conflict would typically be predicated on policy considerations. According to the League, “Since the City Council is the ultimate arbiter of overall policy within the City, I am of the opinion that it can reasonably interpose its will and resolve any conflicts between the Commissions. In fact, to ensure that no confusion of policies exists between the various Commissions, the Council necessarily is obliged to intervene to ensure consistent policy among the various Boards and Commissions and the overall policy plan of the City.”

Hiring Outside Counsel: Currently since §2.67 of the Municipal Code delegates to the Commission “full authority respecting the Utility unless that authority is specifically withheld by statute.” Therefore, under the current Ordinance the Commission has the right to retain outside counsel. However with the changes to §2.67 as proposed the Commission would not have the authority to hire outside counsel without Council approval (League Opinion #318A).

Standing to Bring a Lawsuit: The Commission is not a separate legal entity, does not have corporate status and does not have the authority to bring a lawsuit. (League Opinion #318A)

There may be other issues that have not been addressed in this Opinion. This opinion addresses legal issues that may arise regarding Ordinance 2767 which is on the June 16, 2015 agenda.

League of Wisconsin Municipalities - Legal Opinions

Public Utilities / PUBLIC UTILITIES # 316 October 26, 1982

Summary - PUBLIC UTILITIES # 316

Opinion generally discusses the authority and responsibility of the city council and the city administrator in respect to the operation of municipal public utilities managed in accordance with sec. 66.068, Stats.

City Attorney C. M. Bye

P.O. Box 167

River Falls, WI 54022

Dear Mr. Bye:

By ordinance, your city owns and operates separate and distinct waterworks and sewerage systems. These distinct public utilities are managed in accordance with the provisions of sec. 66.068, Stats. However, in the recent past, a controversy apparently has arisen regarding the extent of the city council's and the city administrator's authority to exercise control over the operation of these municipal utilities. This ongoing concern has prompted you to ask several related questions which I will answer in the order posed.

First, you ask whether or not the city council is the approving authority for utility bills and expenditures. Absent an express delegation of authority by the council to the various utility commissions to audit their own expenditures, the answer necessarily is yes.

Section 66.068(4), Stats., provides in part:

"It may be provided that departmental expenditures be audited by such commission, and if approved by the president and secretary of the commission, be paid by the city or village clerk and treasurer as provided by s. 66.042..."

The implication of this language is clear and unambiguous. If the city council has not expressly conferred on the utility commission the authority to approve utility bills and expenditures, it legally retains that authority consistent with sec. 62.02(8), Stats. On the other hand, the council may require that the expenditures of a municipal utility be audited by that commission established under sec. 66.068, Stats. If this alternative procedure were implemented, the commission would file with the municipal clerk certified bills, vouchers or schedules signed by the president and secretary of the commission, giving the name of the claimant or payee and the

amount and nature of each payment.

Based on the materials submitted to me, however, I am of the opinion that the city council has not vested this audit authority in the various utility commissions. Accordingly, for all utility bills and expenditures, the general procedure for approval of claims prescribed by sec. 62.12(8) must be followed.

Second, you ask which body has the final authority over the management of personnel, wages and union negotiations for the various municipal utilities. As will be apparent, this question is not susceptible to a "yes-no" or "that body or this body" answer.

Section 66.068(3), Stats., provides in relevant part:

"The commissioners shall choose from among their number a president and a secretary. They may command the services of the city engineer and may employ and fix the compensation of such subordinates as shall be necessary. They may make rules for their own proceedings and for the government of their department..."

In a fairly recent case, the Wisconsin supreme court specifically considered this particular language and declared it to be facially unambiguous. Schroeder v. City of Clintonville, 90 Wis.2d 457, 280 N.W.2d 166 (1979). On this point, the court stated:

"...The language of sec. 66.068(3), Stats., is clear and unambiguous. It simply states that the commission 'may employ and fix the compensation of such subordinates as shall be necessary.' This specific statutory language was first enacted by the Laws of 1907, ch. 467. Except for being renumbered, it has remained substantively unchanged. Since sec. 66.068(3) is a specific statute relating to a particular subject it controls over any general statutory language contained in either sec. 62.11(5) or sec. 66.068(1)." Schroeder, supra, 280 N.W.2d at 168.

Based on this reasoning, the court finally concluded:

"We conclude that sec. 66.068(1) and (3), Stats., are specific statutes and supersede the general statutory provisions. The commissioners are expressly granted the authority to employ and fix the compensation of such subordinates as shall be necessary to operate the utility." Schroeder, supra, 280 N.W.2d at 170.

As is evident, the Schroeder court merely addressed and construed that language in sub. (3) which confers on utility commissions the authority to employ and fix the compensation of subordinates. It did not, however, also consider and interpret the precise scope and application of that additional authority conferred on commissions under sub. (3), namely, the making of

rules for the government of their department. This commission power seemingly would apply not only to the internal governance of its proceedings but also to its management of the utility and its personnel. This "government" of the department by the commission likely would take the form of work rules and personnel procedures. Since work rules generally are deemed conditions of employment, they would be subject to negotiations if the public utility employees are represented by a collective bargaining agent.

The only possible limitation on the commission's authority in the area of personnel management and wages is contained in the last clause of sub. (1) of sec. 66.068(1). This particular provision authorizes the commission to supervise the operation of the utility "under the general control and supervision of the council." However, in my opinion, this limiting language should be interpreted as merely placing the utility commission under the general supervision of the council and not requiring council approval of a specific commission decision on the establishment of wages and work rules for utility department employees. This general control by the council which is prescribed by sec. 66.068(1) more appropriately extends to matters of budgetary control and general utility policy relating to the provision of services and service areas.

In summary, I am of the opinion that the various public utility commissions have been granted by statute the authority over utility personnel management and wages. As a logical extension of this conclusion, the commission appropriately is that body imbued with the responsibility of negotiating with the designated bargaining representative on matters relating to hours, wages and conditions of employment of the public utility employees. However, the commission, in my opinion, is not able to exercise absolute control over the negotiations of a contract, because the final approval of a contract resides with the city council. A collective bargaining agreement, like any other contract of the utility, is a contract of the city and must be approved by both the council and utility commission. In the end, therefore, the city council necessarily has an opportunity to provide input into the actual wages of the employees by disapproving an agreement concluded between the union and the utility. However, it cannot actually establish the wage levels nor can it intervene by incorporating into the agreement those rules which it deems to be reasonable and proper for the governance of the department.

Third, you ask which body, the utility commission or the city council, has the final responsibility and authority to enter into contracts on behalf of the municipal utility. As previously indicated, the utility commission may initially define the terms of a contract between the utility and another party. However, final ratification of that contract, since the contract is a contract of the city, must be secured from the city council. Neither the utility nor the utility commission is an independent autonomous body with the authority to enter into contracts and bind the city. Instead, a utility commission is merely an agency of the city which it has created with no defined, separate corporate status.

Fourth, you ask whether or not the city council has the authority to make a decision for the city on behalf of the utilities and the plan commission if a general policy conflict arises between the plan commission and the utility commission. I would answer yes.

As I previously indicated, the city council by sec. 66.068(1) retains supervisory power and control over the utility commission. This power is consistent with the city's principal duty of deciding matters of policy in all fields of municipal activity. Like the utility commission, the plan commission is not a separate corporate entity but is an agency of the city under the ultimate control and supervision of the city council.

When a conflict arises between a position adopted by the plan commission and a utility commission, I assume that that conflict is predicated on policy considerations. Since the city council is the ultimate arbiter of overall policy within the city, I am of the opinion that it can reasonably interpose its will and resolve any conflicts between the commissions. In fact, to insure that no confusion of policies exists between the various commissions, the council necessarily is obliged to intervene to insure consistent policy among the various boards and commissions and the overall policy plan of the city. The council should not shirk its responsibility, for the general welfare of the community may be undermined and the city's long-term plans for orderly and reasonable development may be diminished.

Lastly, you ask whether or not the council may adopt an ordinance to overrule certain authority vested in the utility commission by statute short of completely abolishing the present municipal utility commissions. I would answer with a qualified yes.

Under sec. 66.01(4), Stats., a city or village "may elect in the manner prescribed in this section [sec. 66.01] that the whole or any part of any laws relating to the local affairs and government of such city or village other than such enactments of the legislature of statewide concern as shall with uniformity affect every city or every village shall not apply to such city or village, and thereupon such laws or parts thereof shall cease to be in effect in such city or village." In my mind, sec. 66.068 providing for the management of local public utilities is a matter of local concern and can be amended or modified by delegating to the council greater control over the utility commission in its operation of the public utility.

This conclusion gains significant support from sub. (16) of sec. 66.01, Stats. In that particular subsection, the procedure for a village having a population of 1,000 or more to organize as a city by charter or charter ordinance is prescribed. More specifically, that provision provides that a village may by charter or charter ordinance "elect not to be governed by ch. 62 or this chapter [ch. 66] in whole or in part or may create such system of government as is deemed by the village to be the most appropriate for its situation." To say the least, to permit a village which intends to reorganize as a city by a charter ordinance to disregard or modify certain provisions of ch. 66

while to deny those cities now in existence this same fundamental authority would be totally incongruous.

In my opinion, therefore, your city council can confer on itself greater authority over the utility commission by the enactment of a charter ordinance. This conclusion, in my opinion, is not diminished or invalidated by the decision of the supreme court in Schroeder, because in that case the ordinance attacked was an ordinary ordinance and the court neither mentioned nor addressed the issue of what effect a charter ordinance would have on the provisions of sec. 66.068. Consequently, Schroeder cannot be construed as authority to preclude the modification of sec. 66.068 by charter ordinance.

I trust that this brief overview of the authority and responsibilities of the city council in respect to the operation of the various city's utilities meets your needs. Understandably so, implementation of the utility commission law is somewhat difficult, partially because of the ambiguity and general terms of that statute.

Very truly yours,

Burt P. Natkins

Legal Counsel

BPN:AP

cc: city clerk

League of Wisconsin Municipalities - Legal Opinions

Public Utilities / PUBLIC UTILITIES # 318 Surplus Utility Funds January 24, 1985

Summary - PUBLIC UTILITIES # 318

The governing body of a city or village may decide that the excess income of a municipal public utility may be paid into the general fund, or used for other specified purposes, under sec. 66.069(1)(c) and (d).

City Attorney Ronald W. Damp

City of Sheboygan Falls

P.O. Box 377

Plymouth, WI 53073

Dear Mr. Damp:

You pose a question concerning the use of funds not needed for utility purposes. The materials you sent indicate that the city has established a utility commission, under sec. 66.068, Stats., to manage the waterworks and lighting systems. You ask if the common council may "require that the utility commission pay over to it for use in the general fund of the city surplus funds not reasonable for utility purposes?"

I conclude that the common council may use surplus public utility funds for municipal purposes, as specified in sec. 66.069(1)(c) and (d), Stats.

Section 66.069(1) contains the following provisions regarding the income of a public utility:

"(c) The income of a public utility owned by a municipality, shall first be used to meet operation, maintenance, depreciation, interest, and debt service fund requirements, local and school tax equivalents, additions and improvements, and other necessary disbursements or indebtedness. Income in excess of these requirements may be used to purchase and hold interest bearing bonds, issued for the acquisition of the utility, or bonds issued by the United States or any municipal corporation of this state, or insurance upon the life of an officer or manager of such utility, or may be paid into the general fund.

"(d) Any city, town or village may use funds derived from its water plant above such as are necessary to meet operation, maintenance, depreciation, interest and debt service funds, new construction or equipment or other indebtedness for sewerage construction work other than such as is chargeable against abutting property; or they may turn such funds into the general fund to

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be used for general city purposes, or may place such funds in a special fund to be used for special municipal purposes." (Emphasis added)

These provisions appear to answer your question. Although the language of sub. (1)(c) does not make it clear who makes the determination, the structure of sub. (1)(d) ("any city...may use funds...") suggests that it is the council which makes this decision. This conclusion is further supported by sub. (1)(a) which provides that it is the governing body of the city that "may, by ordinance, fix the initial rates" and provide for the periodic collection of the charges. In addition, the management of the utility is "under the general control and supervision of the governing body." Section 66.068(1)(a). I am aware of no judicial interpretations which would contradict this conclusion.

Finally, I would like to note that the same conclusion is reached in "Municipal Utility Administration" (1956), a publication of the League. In the chapter on "The Relationship Between the Governing Body and the Municipal Utility," the director of finance for Eau Claire, who was the author of the chapter, stated as follows:

"The decision as to whether available cash surplus of the utility should be retained for future utility extensions and improvements or whether it should be paid as a `dividend' to the utility's owners-the community at large-is probably one which would need to be resolved jointly by the commission and the governing body in a spirit of cooperation.

"It may be that the utility commission justifiably prefers to retain the excess income for future expansion, while the governing body-also justifiably-prefers to employ the excess income for alleviation of the property tax burden.

"Or perhaps the commission's or the governing body's reasons for their opposing attitudes may not be based on such sound considerations. Here would be a conflict of financial interests which could create unfavorable relations between these two entities. I suspect that, if the controversy could not be amicably settled, the position of the governing body would prevail.

"More likely, the differences would be resolved by courteous and patient analysis of all factors involved in the opposing views directed toward some sort of reasonable compromise, and thereby maintain a pleasant and effective working relationship between the two groups."

Although this manual is almost 30 years old, it may be of some use to you. I have therefore enclosed a copy of the table of contents; if you are interested in borrowing or purchasing this manual (\$2.00), please contact us.

In addition, I would like to add a note of caution. Since a city's waterworks and electric utility

are "public utilities" under sec. 196.01(5), they are subject to the regulation of the Public Service Commission. I therefore suggest that the PSC staff be contacted to make sure that the funds in question are in fact surplus, and that they are properly accounted for.

Also, in reviewing your ordinance I noted two possible problems. First, sec. 1.25(4) provides that meetings may be called on less than 24 hours' notice in emergencies. Under state law, there is a minimum two hours' notice requirement. Section 19.85(3). Second, sec. 1.25(9) provides that the commission audits and pays its expenditures. Section 66.068(4), however, merely provides that the commission may audit its own expenditures; the actual payment is to be made by the city clerk and treasurer under sec. 66.042.

Finally, I have enclosed a fairly recent League opinion, Public Utilities # 316, which discusses the relationship between the common council and the utility commission. This may prove of interest to you.

I hope this response adequately answers your concerns. Feel free to contact me if you have further questions.

Sincerely,

James H. Schneider

Associate Legal Counsel

JHS:AP

Enc.

cc: city clerk

League of Wisconsin Municipalities - Legal Opinions

Public Utilities / PUBLIC UTILITIES # 318A May 20, 1985

Summary - PUBLIC UTILITIES # 318A

The city attorney serves as the attorney for a public utility commission under sec. 66.068, Stats. The commission does not have authority to appoint its own attorney, but the common council may designate a special counsel for the commission, under sec. 62.09(12)(g).

City Attorney Richard J. Steffens

223-½ Main St.

Menasha, WI 54952

Dear Mr. Steffens:

You pose a question concerning the appointment of an attorney for the city's water and light commission. You observe that the commission cannot sue and be sued in its own name and state that you believe that the League gave the opinion some years ago that since the utility was owned by the city, the utility attorney serves with the approval of the city attorney. You ask whether this is correct, and further ask if "the utility attorney serves with...[the city's] approval or can the commission hire one without same?"

In my opinion, a utility commission probably does not have the authority to hire its own attorney. Instead, the city attorney would be the attorney for the commission, under sec. 62.09(12), Stats., unless the council employed special counsel for the commission. However, the city attorney may appoint an assistant and could assign the assistant the duties of commission attorney, although the assistant would receive no pay unless the city authorized compensation by ordinance.

I assume that your utility commission operates under sec. 66.068(1), which provides for a commission to "take entire charge and management of the utility, to appoint a manager and affix the compensation, and to supervise the operation of the utility under the general control and supervision of the governing body." Section 66.068 also authorizes the commission to "employ and fix the compensation of such subordinates as shall be necessary." Section 66.068(3).

In my opinion, the authority to employ "subordinates" does not include the authority to employ an attorney. The attorney is not actually a subordinate, but is a city officer in his or her own right, under sec. 62.09(1)(a). The duties of a city attorney are to conduct the law business of the city, including the rendering of legal advice when requested by city officers. The commissioners of the utility are city officers, under sec. 62.09(1)(a). The council does have authority to employ special counsel, under sec. 62.09(12)(g), and therefore could appoint special counsel for the

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utility commission. In addition, the city attorney has the authority to appoint an assistant, but the assistant does not receive compensation unless previously provided by city ordinance. Section 62.09(12)(f).

This conclusion accords with previous League legal advice as shown in a manual, Municipal Utility Administration (September, 1956), at page 13, copy enclosed, and Officers # 637 (enclosed).

It should be noted that the Attorney General reached a contrary conclusion in 23 OAG 256 (1934), concluding that a utility commission does have the independent authority to employ counsel. In my opinion, this is incorrect because it does not recognize the fact that the commission is under the general control of the council, the commissioners are city officers and the city attorney has the duty to provide legal advice to city officers. Also, the term "subordinate" does not appear to apply to the attorney, who is a city officer in his or her own right. Finally, I have reviewed the recent case of Schroeder v. City of Clintonville, 90 Wis.2d 457, 280 N.W.2d 166 (1979), which discusses the commission's authority to hire and fix the pay of subordinates. I find nothing in that case that bears on the matter at hand.

Feel free to contact me if you have further questions.

Sincerely,

James H. Schneider

Associate Legal Counsel

JHS:sel

Enc.

cc: city clerk

Public Utilities / PUBLIC UTILITIES # 319 July 9, 1985

**PUBLIC UTILITIES # 319
July 9, 1985**

League of Wisconsin Municipalities - Legal Opinions

Public Utilities / PUBLIC UTILITIES # 320 December 16, 1985

Summary - PUBLIC UTILITIES # 320

The common council has the general control and supervision of a water utility run by a commission under sec. 66.068, Stats., and the council may make the utility subject to city ordinances, subject to certain limitations.

City Attorney Gary Langhoff

709 North 7th Street

Sheboygan, WI 53081-4598

Dear Mr. Langhoff:

You have asked for our opinion on whether the common council can pass an ordinance requiring the water utility, the parking and transit commission and the library to comply with various sections of the municipal code, including "purchasing, finance, collective bargaining committee, preliminary budget and personnel."

In answering this question, I will first discuss the question as it relates to the water utility, and then the transit commission. Because the questions you ask are so broad, I will have to discuss them in relatively general terms. In the interests of answering before too much more time elapses, I will address the question concerning the regulation of the library under separate cover.

A. Water Utility

Turning to the water utility, I will first make the assumption that it is governed by a commission under sec. 66.068, Stats. If it is not, then the answer to your question is easy: it would be subject to the ordinances in the five listed areas just as any other municipal department is.

In a similar vein, the general answer to your question is that the water utility commission may be made subject to the city ordinances just as any other department is, subject to certain exceptions. As a policy matter, though, the council may wish to give the utility more latitude, since it differs from other municipal departments in being essentially a self-supporting business.

The key provision concerning the water utility commission (and other utility commissions) is sec. 66.068, Stats., which provides for the creation of a nonpartisan commission to govern the utility. The commission's duties are to "take entire charge and management of the utility, to appoint a manager and fix the compensation, and to supervise the operation of the utility under the general control and supervision of the governing body." (Emphasis added) Section 66.068(1). In addition, the commissioners "may command the services of the city engineer and may employ and fix the compensation of such subordinates as shall be necessary." They may also make rules for the governance of the utility and have "such general powers in the construction, extension, improvement and operation of the utility as shall be designated,"

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although actual construction work is under the immediate supervision of the board of public works. (Emphasis added) Secs. 66.068(3), (4) and (5).

The language underlined above is important, for unless there is specific authority for the commission (such as in the setting of salaries), it is the governing body which has the ultimate "general control and supervision" of the utility. This means that the degree to which the utility is subject to ordinances is generally up to the governing body as a policy matter.

I will now briefly consider the five areas of regulation you present, but will treat the closely-related areas of personnel and collective bargaining as one area.

1. Personnel and Collective Bargaining Committee.

Regarding the regulation of personnel, the language above quoted is relevant. As the court in Schroeder v. City of Clintonville, 90 Wis.2d 457, 280 N.W.2d 166 (1979), said:

"The language of sec. 66.068(3), Stats., is clear and unambiguous. It simply states that the commission 'may employ and fix the compensation of such subordinates as shall be necessary.'... Since sec. 66.068(3) is a specific statute relating to a particular subject that controls over any general statutory language [relating to the powers of the common council] contained in either sec. 62.11(5) or sec. 66.068(1)." 280 N.W.2d at 168.

The court therefore concluded that the commissioners, not the council, had the authority to employ and fix the compensation of utility subordinates.

Although the commission is given explicit authority in certain limited instances, it is otherwise granted general authority to run the utility, but this is subject to the general supervision of the council. It therefore appears that where the commission does not have specific authority, the council could establish personnel policies, such as vacation and sick leave policies, or residency requirements, that would be applicable to all city employees. This question of council control over a utility governed by a commission is further discussed in Public Utilities # 316 (enclosed).

The enclosed opinion also discusses the relationship of the commission with the governing body as concerns collective bargaining agreements. It notes that the commission is the body with the responsibility of negotiating with the bargaining representative over matters relating to hours, wages and conditions of employment. However, the commission does not have absolute authority over the contract negotiations, because the final approval of the contract resides with the city council. As with any other contract of the utility, a collective bargaining agreement is a city contract and must be finally approved by the council. Therefore, through the ultimate authority of the council, it does have an influence on the actual wages and conditions of employment of the union utility employees.

If the city council wishes to have greater authority in the area of employing and fixing the compensation of water utility employees, then this could be done by restructuring the management of the utility, as authorized by sec. 66.068(7), or by the enactment of a charter

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ordinance under sec. 66.01(4) to alter the applicability of sec. 66.068. The legality of such a charter amendment as regards a water utility, however, is not without some doubt. See the enclosed opinion, Commissions # 162.

In addition, I have also enclosed a recent opinion, Public Utilities # 318A, which concludes that the utility commission does not have the authority to hire a special counsel, without the approval of the governing body.

2. Purchasing.

As with other areas of utility management, it generally appears that the degree to which the council gets involved is largely a matter of discretion. However, should note that, although sec. 66.068(4) authorizes the council to provide that the commission audit and approve departmental expenditures, the actual disbursement of funds must be made by the clerk and treasurer as provided in secs. 66.042 or 66.044, Stats. See Financial Procedure # 193 and 163 (enclosed).

It appears that there might be a good reason to have a purchasing policy uniform throughout city government, so that purchases could be made in bulk, to assure economical buying. The city might also want to consider authorizing utility employees or management to make purchases up to a certain level, but then require further approval for more expensive items. Such further approval could be made by the commission and/or the council before more expensive items were ordered.

In a related matter, I should note that the council is the body which must enter into contracts on behalf of the utility commission. In Public Utilities # 316 it was stated that "the utility commission may initially define the terms of a contract...However, final ratification of that contract, since the contract is a contract of the city, must be secured from the city council....A utility commission is merely an agency of the city which it has created with no defined, separate corporate status." See also Flottum v. Cumberland, 234 Wis. 654, 664, 291 N.W. 777 (1940); and 65 OAG 243, 245 (1976) (municipal utility commission not a body corporate separate from the city).

In another related matter, the acquisition and sale of property must also be made by the city council, under sec. 62.22, Stats.; and, in a similar vein, the title to property is in the name of the municipality, not the utility. Public Utilities # 305.

3. Finance.

You do not state what you mean by "finance," and obviously this broad area is related to purchasing and budget, which are also discussed herein.

As far as accounting is concerned, a water utility must follow the procedures required by the Public Service Commission. Section 66.068(3). In addition, the council may require the utility to be audited, and to make periodic financial reports. Sec. 66.041. Also, the utility has no independent authority to incur debt; this is a matter for the governing body to decide. As far as

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investments are concerned, the ultimate authority is with the governing body. Receipts must be turned over to the city treasurer, at least once a month. Sec. 66.068(4). Excess funds may be paid into the general fund, at the discretion of the governing body. Section 66.069, Stats. See Public Utilities # 318 (enclosed). However, as in other matters, it would probably be more workable to have investment decisions made with the cooperation of the commission. See Public Utilities # 318.

4. Preliminary Budget.

By this term I assume you mean the requirement under sec. 62.12(2) that, on or before October 1, each officer or department must file with the city clerk an itemized statement concerning the finances of that department for the past and current years and detailed estimates for the balance of the current year and for the following year. As stated above, a municipal utility is not considered independent of the city but is rather considered a city department. Therefore, the commission is covered by the preliminary budget requirement of this section. Certainly, any reasonable ordinance pertaining to such requirements could be made applicable to the utility.

B. Parking and Transit Commission

I will next consider your question as it relates to the city's parking and transit commission.

You do not provide me with any information on how or under what authority this commission is organized. Section 66.079 provides that a city may establish a parking system and the provisions of this section primarily concern the financing of the system. Certainly, there is no question that the city could establish a commission or board to run the parking system, under the authority of sec. 62.09(1)(a), Stats. I see no limitation in this section on the city's powers, in contrast, for example, to the grant to the utility commission of the power to employ and fix the salary of employees under sec. 66.068, discussed above. I therefore must conclude that, under sec. 66.079, the city may treat a parking commission as any other city department, unless, of course, the city in establishing the commission has delegated powers to that commission.

Concerning a transit commission, it appears that such a commission could be set up under sec. 66.943 (establishing a transit commission), under the general powers of the city [secs. 62.11(5) and 62.09(1)(a)], or possibly under sec. 66.068. It is clear that the general powers are sufficient to establish a transit board, since sec. 66.066, which predates sec. 66.943 specifically provides for the acquisition of a municipal bus transportation system under certain circumstances. Section 66.065(5), (6) and (7). Although the section authorizing utility commissions is possibly limited by sec. 66.06(1) to utilities as they are defined in ch. 196, and thus could be interpreted to exclude transportation utilities, another argument can be made. Section 66.06(1) states that the definition of public utility in sec. 196.01 "is applicable to sec. 66.06 to 66.078." This suggests that because that definition is "applicable," it is not necessarily all encompassing and that a municipality may treat a transit utility as coming under these provisions. Support for this view may be gathered from a reference in sec. 66.068(3) which provides that the accounting of a utility governed by a commission is subject to the methods prescribed by the office of the

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commissioner of transportation.

Specific authority to create a transit commission is contained in sec. 66.943, Stats. The degree of independence of the transit commission is not altogether clear to me, based on my reading of the statute. Unfortunately, there is no judicial interpretation of this relatively recent section, created by the 1969 legislature. As with a utility commission, the transit commission does have specific powers to hire employees and fix their compensation. The commission may also "purchase such furniture, stationery and other supplies and materials, as are reasonably necessary..." Section 66.943(6). The transit commission may adopt rules, conduct investigations and hearings on complaints, and it may adopt a seal for "any process, writ, notice or other instrument which the commission may be authorized by law to issue..." Section 66.943(7). The commission also has some extraterritorial powers, in that its jurisdiction extends outside of the city not more than 30 miles, and also may extend beyond its boundaries for rail service.

It will be noted that the powers of the transit commission are not limited by any express language similar to that found in sec. 66.068(1), which provides that the operation of a utility commission is "under the general control and supervision of the governing body." In my opinion, the best interpretation of sec. 66.943, however, is that such a transit commission would be under the general control of the city council. I reach this conclusion because it is the city which has the authority to establish the commission, and which presumably may disband a commission. I think that the lack of specific authority placing it under the city's general control does not mean that it is not under the city's general control, because the city's constitutional home rule powers under art. XI, sec. 3, and broad police powers under sec. 62.11(5) would be sufficient to regulate city-created commissions.

In support of this conclusion, I note that the "initial acquisition of the properties for the establishment of and to comprise the comprehensive unified local transportation system shall be subject to s. 66.065 or ch. 197." Section 66.943(9), Stats. Section 66.065 provides a method by which a city or other municipality may construct, acquire or lease a utility. It is clear in this provision that it is the city council which must take this action, although the action is subject to a referendum. Likewise, ch. 197 makes it clear that it is the municipality, rather than a municipal commission, which has the authority to acquire a utility.

Therefore, although there is some ambiguity in sec. 66.943, I conclude that it is under the general control of the city council. Where the legislature intends to authorize the creation of a wholly independent municipal body, it does so in clear language. See ch. 198 (municipal power and water districts), under which the governing bodies of municipalities may create independent municipal corporations that have the power to sue and be sued, take by eminent domain and hold property, for example. Sec. 198.12, Stats.

Turning, then, to the specific subject areas you have asked us to comment on, I note that my answers regarding the transit commission are essentially the same as those for a utility commission under sec. 66.068. Specifically, I think the answers for the personnel, collective bargaining committee, preliminary budget and finance topics would be the same.

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As regards purchasing, though, I note that sec. 66.943(6) provides the commission with the authority to "purchase such furniture, stationery and other supplies and materials, as are reasonably necessary to enable it properly to perform its duties and exercise its powers."

Therefore, it appears likely that the commission could establish its own purchasing policy. If the city wished to make the commission subject to the city purchasing ordinance and the commission did not wish to go along with this, as long as it was operating under sec. 66.943, it would appear that a charter ordinance to make this change would be necessary. However, I would note that there is some possible doubt as to whether a charter ordinance could accomplish this matter, since it is arguable that, given the extraterritorial jurisdiction of the commission, it might be concluded that the section refers to a matter of statewide concern that should uniformly affect all municipalities. Nevertheless, I think that the correct view, as argued in Commissions # 154 (enclosed), is that the effect of sec. 66.943 may be altered by charter amendment.

To sum up, it appears that the city council with its general supervisory powers, its authority to create and disband commissions, and its budget approval authority, exercises significant control over city commissions. The extent to which city commissions are made subject to city ordinances is therefore largely a matter of policy, although in some specific areas, as noted above, the commission has particular statutory powers which the city may not exercise, except possibly through the enactment or charter ordinances. If the city is experiencing difficulty controlling a commission, then perhaps an alternative form of structure would be warranted.

Feel free to contact me if you have any questions.

Sincerely,

James H. Schneider

Associate Legal Counsel

JHS:5012:AP

Enc.

cc: city clerk

Public Utilities / PUBLIC UTILITIES # 321 December 1, 1987

PUBLIC UTILITIES # 321

:"League of Wisconsin Municipalities"

Public Utilities / Public Utilities # 349 April 30, 2013

Summary - Public Utilities # 349

Legal comment provides introduction to some key legal issues associated with a municipally-owned utility including sources of authority to create a utility, management of the utility in light of divided management authority and utility financing. 4/30/13.

Public Utilities / Public Utilities # 349 April 30, 2013 / Municipally-Owned Utility Legal Issues: An Introduction

Municipally-Owned Utility Legal Issues: An Introduction

By Daniel M. Olson, Assistant Legal Counsel

A common feature of contemporary cities and villages is a municipally-owned utility that provides water, electricity, transportation or some other good or service to the general public. There are many potential benefits to a city or village from such ownership. However, a municipally-owned utility also generates significant legal issues for municipal officials.

The universe of municipally-owned utility legal issues is substantial and it is not possible to provide even a nominal review of them all in a magazine article. However, it is feasible to review some key issues regarding the creation, management and financing of municipally-owned utilities and, thus, provide a basic foundation that city and village officials can use to start to understand how a municipally-owned utility does or might function in their community.

Public Utilities / Public Utilities # 349 April 30, 2013 / Municipally-Owned Utility Legal Issues: An Introduction / Utility Creation: Sources of Authority

Utility Creation: Sources of Authority

Municipal ownership or regulation of essential utilities and urban services was a major theme of the Progressive Movement from the late 1800s into the twentieth century. In urbanized areas, key services such as water, gas, public transportation, and electricity were viewed as “natural monopolies” that prevented effective competition. Concerned that private companies could dominate delivery of these types of services to the detriment of consumers and governments, reformers in the late eighteenth century pushed municipal ownership as a solution.

However, in the early stages of the municipal ownership movement, state laws expressly authorizing cities and villages to own and operate water or other public utilities did not exist. Accordingly, municipalities in Wisconsin and elsewhere relied on non-specific authority for the

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power to create and operate a municipally-owned utility.

Notably, the Wisconsin Supreme Court determined fairly early that Wisconsin municipalities do not need explicit statutory authorization to create a municipally-owned utility. In 1895, the Court held that “it is not necessary to seek an expressed delegation of power to the city to build a water works and an electric lighting plant, because the power expressly granted to the city to pass ordinances for the preservation of the public health and general welfare includes the power to use the usual means of carrying out such powers, which includes municipal water and lighting services.”¹ Thus, a general grant of authority to act for the public health or general welfare is adequate legal authority for Wisconsin cities and villages to create and operate a municipally owned utility.

Presently, Wisconsin cities and villages are vested by the state legislature with very broad general authority. For example, Wis. Stat. sec. 62.11(5), the general authority statute for city councils, provides:

Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

A similar delegation of authority by the state legislature is provided to Wisconsin village boards by Wis. Stat. sec. 61.34(1). These grants of power are substantial and give the governing body of a city or village “all the powers that the legislature could by any possibility confer upon it.”² Therefore, there is little doubt that secs. 62.11(5) and 61.34(1) are sufficient to vest city councils and village boards with the power to create a municipally-owned utility subject to important limitations.

The general authority granted by secs. 62.11(5) and 61.34(1) may be limited or preempted by the state.³ In general, the authority granted by secs. 62.11(5) and 61.34(1) may not be exercised where: the legislature has expressly withdrawn the power of municipalities to act; municipal action would logically conflict with state legislation; municipal action would defeat the purpose of state legislation, or; municipal action would go against the spirit of state legislation. Nonetheless, municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but rather complement,

the state legislation.⁴

The exercise of authority under secs. 62.11(5) or 61.34(5) must also serve a legitimate public purpose. This is usually not a significant bar to action because Wisconsin courts have adopted a very expansive view of public purpose.⁵ The public purposes that may be served by creating a municipally-owned utility are consequently also quite broad and include the health, safety and general welfare of the public as well as the commercial benefit of the municipality. For example, the Wisconsin Supreme Court found in *Libertarian Party v. State of Wisconsin*, 199 Wis.2d 790, 546 N.W.2d 424 (1996), that expenditures for baseball park facilities serve the public interest by providing recreation, as well as encouraging economic development and tourism, and reducing unemployment.

Wisconsin cities and villages need not always rely on their general grants of authority to create a municipal utility. As in other states, the Wisconsin legislature has specifically authorized many types of municipally-owned utilities by statute. These include water utilities (Wis. Stat. sec. 66.083(1)(a) and sewerage systems (Wis. Stat. sec. 66.0821). Municipal bus transportation systems (66.0801(2)(a), electric companies (66.0825) and parking systems (66.0829) are also specifically authorized. Broad descriptions or definitions of public utility also authorize the creation of municipally-owned utilities to “furnish water, light, heat or power to the municipality or its inhabitants” (66.0801(1)(a)) as well as “any revenue producing facility or enterprise owned by a municipality and operated for a public purpose . . . including garbage incinerators, toll bridges, swimming pools, tennis courts, parks, playgrounds, golf links, bathing beaches, bathhouses, street lighting, city halls, village halls, town halls, courthouses, jails, schools, cooperative educational service agencies, hospitals, homes for the aged or indigent, child care centers, regional projects, waste collection and disposal operations, sewerage systems, local professional baseball park facilities, local professional football stadium facilities, local cultural arts facilities, and any other necessary public works projects undertaken by a municipality” (66.0621(1)(b)).

It is also possible that a city or village may rely on its constitutional home rule authority to create a municipal utility. This authority is found in Article XI, Sec. 3 of the Wisconsin Constitution, adopted in 1924, which provides, “Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.” However, municipalities have historically not fared well in asserting constitutional home rule in the courts, which suggests, for the time being, that it may be the least important source of authority for creating a municipally-owned utility when compared to the general and specific

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authority provisions identified above.

So, how does a municipality create a municipally-owned utility? Notably, the laws authorizing creation of a municipally-owned utility provide a variety of methods for establishing such an enterprise.

If a city or village relies on its general authority under secs. 62.11(5) or 61.34(1) respectively, the methods for creating a municipal utility are stated in broad terms. Under sec. 62.11(5), a city council may carry out the powers granted to it by that section “by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means.” Similarly, a village board may carry out the powers granted by sec. 61.34(1) “by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means.” Thus, both general authority statutes authorize creation of a municipally-owned utility by a number of general methods.⁶

Statutes granting specific authority to create a municipal utility may also describe the process for creating a municipal utility in broad terms. For example, section 66.0803, which specifically authorizes cities and villages to create utilities that furnish water, light, heat or power, states that cities and villages “may construct, acquire or lease any plant and equipment located in or outside the municipality, including interest in or lease of land, . . . acquire a controlling portion of the stock of any corporation owning private waterworks or lighting plant and equipment; and may purchase the equity of redemption in a mortgaged or bonded waterworks or lighting system, including cases where the municipality in the franchise has reserved right to purchase” for such purposes.

Significantly, while the sec. 68.0803(1)(a) process for creating a municipal utility that furnishes water, light, heat or power is described broadly, there is a specific step that must be met in most cases. Except for the acquisition by dedication or without monetary or financial consideration of any plant, equipment or public utility for furnishing water, the method of payment for the initial construction, acquisition, etc. of a sec. 68.0803(1)(a) municipal utility must be submitted to public referendum for approval pursuant to Wis. Stat. secs. 66.0803(1)(b), (c), (d) and (e).

Some statutes that specifically authorize creation of a municipal utility also specify a particular method for creating it. For example, cities and villages are authorized to create electric utility systems by Wis. Stat. sec. 66.0825(4). Notably, the authorizing statute specifies that such systems are to be created by a combination of municipalities “by contract with each other.”

Lastly, it should be noted that utilizing constitutional home rule amendment authority to create a municipal utility will require compliance with some very specific steps. Constitutional home rule

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amendment authority must be implemented by charter ordinance in accordance with the process established by Wis. Stat. sec. 66.0101. The sec. 66.0101 process includes enactment of a charter ordinance by a two-thirds vote of the members-elect of the city council or village board which is subject to a public referendum as provided by the statute.

Public Utilities / Public Utilities # 349 April 30, 2013 / Municipally-Owned Utility Legal Issues: An Introduction / Utility Management: Divided Authority

Utility Management: Divided Authority

Municipal utility legal concerns do not end when the utility is created. Management of the utility also generates important legal issues for local officials, which can be federal, state or local in origin because direct or indirect utility management authority is divided amongst all three levels of government.

A number of federal agencies are empowered to regulate public utility management and operation. These include the Federal Communications Commission, the Federal Energy Regulatory Commission, and the Department of Energy. Accordingly, federal law may impact the management and operation of a municipally-owned utility.

Some state agencies also have power to affect public utility management and operation through a wide range of state laws. The most significant state agency is probably the Public Service Commission of Wisconsin (PSC). The PSC is empowered to "supervise and regulate" public utilities in Wisconsin that furnish "water, light, heat and power," including those that are municipally-owned. Wis. Stat. sec. 196.02(1).

Legal issues related to utility management or operation also arise at the local level. They frequently surface when the utility operation and management involves a utility commission exercising authority under Wis. Stat. sec. 66.0805 while also subject to governing body oversight.

Section 66.0805(1) states that

"[e]xcept as provided in sub. (6), the governing body of a city shall, and the governing body of a village or town may, provide for the nonpartisan management of a municipal public utility by creating a commission under this section." It further provides that

"[t]he board of commissioners, under the general control and supervision of the governing body, shall be responsible for the entire management of and shall supervise the operation of the utility." Lastly, the statute states that "[t]he governing body shall exercise general control and supervision

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of the commission by enacting ordinances governing the commission's operation.”

The plain language of 66.0805(1) makes clear that a utility commission has “entire charge and management” of and is to “supervise the operation” of the utility. On the other hand, the municipal governing body has “general control and supervision” of the commission pursuant to enacted ordinances, which eliminates the possibility of a governing body exercising control of utility operations through specific resolutions and second guessing of commission decisions. While significant, the authority granted to utility commissions by sec. 66.0805(1) however should not be read too broadly because it is subject to significant legal limits.

One important limitation restricts the power of a utility commission to enter into contracts. In League Opinion Public Utilities 316, League counsel concluded that a utility commission is not “an independent autonomous body with the authority to enter into contracts and bind the city.” Rather, a utility commission “is merely an agency of the city . . . with no defined, separate corporate status.”⁷ Accordingly, in cities and villages with utility commissions, the governing body, not the utility commission, holds final authority over a contract between a municipally-owned utility and a third party, unless the governing body specifically delegates contract authority to the utility commission.

The statutory authority granted to governing bodies to exercise “general control and supervision” over a sec. 66.0805 utility commission is another important limitation on utility commission power. In League Legal Opinion Commissions 165, League counsel concluded this governing body authority applies wherever a utility commission does not have “specific authority” under sec. 66.0805, allowing a governing body for example to establish sick leave and vacation policies for utility employees because a sec. 66.0805 utility is only specifically authorized to “employ and fix compensation” of subordinates. In League Legal Opinion Public Utilities 316, League counsel also determined that governing body supervisory authority “extends to matters of budgetary control and general utility policy relating to the provision of services and service areas.” Thus, the authority to decide whether to extend water utility services outside the jurisdiction of a city or village pursuant to sec. 66.0813 belongs to the city council or village board, not a sec. 66.0805 utility commission.

Can the statutory relationship between a city council or village board and a sec. 66.0805 utility commission be altered? Notably, section 66.0805 does not provide a method for modifying the division of authority between utility commissions and governing bodies it creates. Thus, a city council or village board must look for a different source of authority to alter the legal relationship between it and a 66.0805 utility commission. A potential source of authority is the constitutional home rule amendment power of cities and villages.

The constitutional home rule power vested in cities and villages by Article XI Section 3 must be

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exercised pursuant to Wis. Stat. sec. 66.0101(4). Section 66.0101(4) provides that a city or village “may elect in the manner prescribed in this section [sec. 66.0101] that the whole or any part of any laws relating to the local affairs and government of such city or village other than such enactments of the legislature of statewide concern as shall with uniformity affect every city or every village shall not apply to such city or village, and thereupon such laws or parts thereof shall cease to be in effect in such city or village.”

In League Legal Opinion Public Utilities 316, League counsel concluded that the provisions of sec. 66.0805 providing for the management of municipally-owned public utilities are a matter of local concern and can be amended or modified by charter ordinance under sec. 66.0101 to vest a governing body with greater control over a utility commission’s operation or management of a municipally-owned utility. In the opinion, League counsel opined that a “city council can confer on itself greater authority over the utility commission by the enactment of a charter ordinance” and observed that the conclusion was not undermined by the Wisconsin Supreme Court ruling in *Schroeder v. City of Clintonville*,⁸ because the ordinance challenged in the case, which attempted to alter the 66.0805 utility scheme, was an ordinary ordinance and the Court “neither mentioned nor addressed the issue of what effect a charter ordinance would have on the provisions of sec. [66.0805].” This, according to the League counsel, meant that “*Schroeder* cannot be construed as authority to preclude the modification of sec. [66.0805] by charter ordinance.”

Subsequent opinions of League Counsel have however raised some doubt about the use of constitutional home rule authority to alter the relationship between sec. 66.0805 utility commissions and governing bodies. In League Legal Opinion Commissions 162, League counsel specifically questioned the use of constitutional home rule authority in relation to water utility commission authority given the significant state control over water utility functions pursuant to the PSC’s authority under Chapter 196 of the Wisconsin Statutes. Significantly, this reasoning raises the same home-rule power question for any other sec. 66.0805 utility commission that manages a municipally-owned utility subject to PSC regulation under Chapter 196.

The home rule authority question raised by PSC Chapter 196 regulation prompts one other point on sec. 66.0805. The sec. 66.0805 utility commission structure, which divides operation and management authority between utility commissions and governing bodies, does not apply to all types of municipally-owned utilities. The term “public utility” in sec. 66.0805 is defined by Wis. Stat. secs. 66.0801(1)(b) and 196.01(5). Under these provisions, a 66.0805 “public utility” is limited to toll bridges, heat, light, water or power facilities, and natural gas delivery or telecommunications operations. This means a municipally-owned public utility service that does not fall within this definition (e.g., municipal swimming pool, community center, baseball facility) is not within the scope of sec. 66.0805 or subject to PSC regulation. Thus, a governing body has much greater discretion to create unique management structures for a non-sec. 66.0805

utility since sec. 66.0805 does not apply to such a utility.

Public Utilities / Public Utilities # 349 April 30, 2013 / Municipally-Owned Utility Legal Issues: An Introduction / Utility Financing: Sources

Utility Financing: Sources

Cities and villages can tap a wide range of sources for financing a municipally-owned utility. These include property taxes, special assessments, user fees and revenue bonds. Notably, a city or village is not limited to a single source for financing a city or village utility.⁹ Not only does this allow a diversified financing base, it also permits a municipally-owned utility to apply different payment methods to different groups of utility users or beneficiaries.¹⁰

a. Property Taxes

Cities and villages are generally empowered by secs. 62.11(5) and 61.34(1) respectively to use their tax levy to implement the general authority granted them by the state legislature. This means cities and villages have general authority to use property tax revenue to finance a municipally-owned utility.

Specific authority to use the tax levy to finance a municipally-owned utility also exists in some cases. For example, the statute authorizing the creation of certain utility districts, Wis. Stat. sec. 66.0827, requires in subsection (2) that the "fund of each utility district shall be provided by taxation of the property in the district."

Although authorized, using property taxes to finance a municipally-owned utility would force utility operations to compete with non-utility government services for a portion of property tax revenue that is severely constrained by the property tax levy limits imposed by the state legislature. This circumstance is avoidable because cities and villages may use other non-tax revenue sources to operate a municipally-owned utility and, in some cases, generate additional revenue for non-utility purposes.

b. Special Assessments

Like property taxes, cities and villages are generally empowered to use their special assessment powers to implement the general authority granted them by the state legislature.¹¹ So, cities and villages have general authority to use special assessments revenue to finance a municipally-owned utility.

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Specific authority to use special assessments to finance a municipally-owned utility also exists. For example, sewerage and storm water system related activities authorized by Wis. Stat. sec. 66.0821(2) may be funded in whole or part by special assessment revenue.¹² In addition, Wis. Stat. sec. 66.0723 provides specific authority to fund the construction, extension or acquisition of “a distribution system or a production or generating plant for the furnishing of light, heat or power to any municipality or its inhabitants” in whole or in part by special assessment.

In general, special assessments are charges levied by municipalities against real property to recover some or all of the costs of a public work or improvement that benefits such property. Special assessments may be levied against any property, including tax exempt parcels, for all or a portion of the cost of a public work or improvement as long as the following basic requirements are met:

1. the property is in fact specially benefited by the improvement; and
2. the amount of the assessment is made on a “reasonable basis.”¹³

The procedure for levying special assessments is set forth in the statutes at Wis. Stat. sec. 66.0703, and must be strictly followed. However, the statutes also allow a common council or village board to establish local special assessment procedures by ordinance provided the ordinance includes provisions for reasonable notice and hearing.¹⁴ The League has published a manual, *Special Assessments in Wisconsin*, which contains detailed information about special assessment procedures in Wisconsin and some useful forms and is available for purchase.

As authorized, special assessment revenue may be used for the infrastructure and other capital expenses of a municipally-owned utility and is an extremely valuable non-tax alternative for these purposes. But, special assessment revenue is not available for the day-to-day operation expenses of a municipally-owned utility. Funds for these purposes must come from a different source, which is most commonly user fees or charges.

c. User Fees

It is well established that when a municipality provides a service through its own public utility, it has the right to charge users for the service. General authority for user fees can be found in the general authority delegations to cities and villages, which declare that they may exercise and carry out the powers granted to them by “other necessary or convenient means.”¹⁵ This language is sufficiently broad to encompass user fees for utility charges.

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Some state laws specifically authorize user fees. For example, section 66.0809(1) grants authority to city councils and village boards to set rates for the services provided by a sec. 66.0801(1)(b) utility (water, light, heat or power facilities) and provide for their collection. Section 66.0821(3)(a) specifically authorizes the use of user fees to fund a municipally-owned sewer or storm water utility operated under that section. In addition, a city council and village board are authorized by sec. 66.0621(4)(i) to adopt ordinances containing provisions for “the rates or charges to be made for service” provided by a 66.021 utility (“any revenue producing facility or enterprise owned by a municipality and operated for a public purpose.”)

User fees are payment for the service received from the municipally-owned utility. Usually, fees are payable only when a service is used and as long as the service is not requested a fee cannot be demanded.¹⁶ However, the Wisconsin court of appeals ruled in *City of River Falls v. St. Bridget’s Catholic Church*, 182 Wis.2d 436, 512 N.W.2d 673 (Ct. App. 1994), that charging user fees for making water available for fire protection services was valid, even though the party assessed the fee had not used the water.

In addition, there are some statutory exceptions to the rule that a demand for payment requires service. For example, Wis. Stat. sec. 66.0809(1) specifically authorizes that utility “rates may include standby charges to property not connected but for which public utility facilities have been made available.”

Whereas, special assessments may be used only for utility capital improvements, user fees can be used for capital costs and operation expenses.¹⁷ However, user fees are not limited to paying the capital and operational expenses of a municipally-owned utility.

Notably, user fees for municipally-owned utilities may include a profit or return on investment.¹⁸ For example, sec. 66.0621(4)(h) specifically authorizes that the rates for services rendered by a 66.021 municipally-owned utility include “a sufficient and adequate return upon the capital invested.” Section 66.0811(2) also reflects this point by permitting excess income of a municipal public utility to be placed in the municipality’s general fund. Thus, utility user fees may provide a non-tax revenue stream for cities and villages that may be used for non-utility purposes.

Utility user fees are subject to some important restrictions. One of the most significant is state oversight through the PSC.

In general, the PSC oversees the adequacy and cost of services provided to utility customers. Pursuant to Wis. Stat. sec. 196.03(1), PSC approval is required before any municipally-owned utility that furnishes heat, light, water, or power may set new rates. PSC rate-setting decisions are

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guided by Chapter 196 of the Wisconsin Statutes and agency rules found in the Wisconsin Administrative Code.

Even if not subject to initial PSC approval, user fees or rates may be subject to PSC oversight. For example, if a sewer utility user thinks sewer rates, which may be set without PSC review, are “unreasonable or unjustly discriminatory” the user may file a complaint with and have the rates reviewed by the PSC. Wis. Stat. sec. 66.0821(5)(a).

Limitations on user fees may also be imposed by statutory language. For example, user fees imposed to finance revenue bonds for a 66.0621 municipally-owned utility “shall be reasonable and just” under Wis. Stat. sec. 66.0621(4)(h). Thus, statutes authorizing user fees should be closely reviewed for any specific limitation.

d. Borrowing: Revenue Bonds

Another important source of funding for municipally-owned utilities is borrowing, which may be done under a number of mechanisms.¹⁹ However, one method of borrowing is specifically linked to municipal utility financing, revenue bonds or obligations, which feature at least three key characteristics important to general municipal financing.

Revenue bonds may be used for a wide range of activities related to municipally-owned utilities. Under Wis. Stat. sec. 66.0621, a municipality may issue revenue bonds for the purpose of:

[P]urchasing, acquiring, leasing, constructing, extending, adding to, improving, conducting, controlling, operating or managing a public utility, motor bus or other systems of public transportation . . .

Thus, like user fees, revenue bond money may be used for a broad range of purposes including municipal utility capital improvements and operating costs.²⁰

A “revenue obligation” is one that is issued to finance a “public utility” and whose repayment is made solely from revenues generated by the utility. So, unlike other borrowing mechanisms, revenue obligations have no claim on the taxes or general revenues of the issuing municipality and are not “an indebtedness of the municipality, and shall not be included in arriving at the constitutional debt limitation.”²¹ Therefore, revenue bond debt for a public utility is not subject to the five percent debt limit imposed on cities and villages by Article XI Section 3 paragraph (1) of the Wisconsin Constitution.²²

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Lastly, municipalities are required by Wis. Stat. sec. 66.0621(4)(c) to create a system of funds for utility operations and servicing the revenue bond debt it authorizes:

The governing body of a municipality shall, in the ordinance or resolution authorizing the issuance of bonds, establish a system of funds and accounts and provide for sufficient revenues to operate and maintain the public utility and to provide fully for annual debt service requirements of bonds issued under this section. The governing body of a municipality may establish a fund or account for depreciation of assets of the public utility.

A special redemption fund is also specifically required by Wis. Stat. sec. 66.0621(4)(e) which provides:

The governing body of a municipality shall by ordinance or resolution create a special fund in the treasury of the municipality to be identified as “the special redemption fund” into which shall be paid the amount which is set aside for the payment of the principal and interest due on the bonds and for the creation and maintenance of any reserves established by bond ordinance or resolution to secure these payments.

In some instances, the funds required by sec. 66.0621 may accumulate a surplus. If so, the surplus may be dispersed under Wis. Stat. sec. 66.0621(4)(f), which provides:

At the close of the public utility’s fiscal year, if any surplus has accumulated in any of the funds specified in this subsection, it may be disposed of in the order set forth under sec. 66.0811(2).

Notably, the disbursement order in 66.0811(2) authorizes excess monies “may be paid into the general fund.” Therefore, excess revenues generated by fees that have been imposed to pay the principal and interest for general revenue bonds may provide yet another non-tax revenue source for cities and villages that may be used for non-utility purposes.

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Conclusion

Municipally-owned utilities are an important part of local governance and are a common feature in Wisconsin cities and villages. While municipally-owned utilities may provide significant benefits to consumers and local governance, they also generate significant legal issues for local officials. Some of the key legal issues associated with a municipally-owned utility relate to the authority to create a utility, management of the utility in light of divided management authority

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and utility financing. The introduction to these issues in this comment will hopefully give local officials and others a better understanding of how municipally-owned utilities fit into Wisconsin local government.

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1. *Ellinwood v. Reedsburg*, 91 Wis. 131 (1895).
2. *Hack v. Mineral Point*, 203 Wis. 215, 219, 233 N.W.82, 84 (1931).
3. See *Anchor Savings & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis.2d 391, 355 N.W.2d 234 (1984); *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis.2d 642, 651, 547 N.W.2d 770, 773 (1996).
4. *Johnston v. City of Sheboygan*, 30 Wis.2d 179, 184, 140 N.W.2d 247, 250 (1966).
5. See *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 55, 205 N.W.2d 784 (1973). ("Public purpose is not a static concept. The trend of both legislative enactments and judicial decisions is to extend the concept of public purposes in considering the demands upon municipal governments to provide for the needs of the citizens.")
6. It should be noted though that some of the methods identified only generally by Wis. Stat. secs. 62.11(5) and 61.34(1) are subject to specific procedures by other statutes. For example, use of special assessment power to provide public utility infrastructure would need to comply with the specific special assessment procedures in Wis. Stat. secs. 66.0701 et.seq.
7. See *Flottum v. Cumberland*, 234 Wis. 654, 664, 291 N.W. 777 (1940); and 65 OAG 243, 245 (1976) (municipal utility commission not a body corporate separate from the city).
8. 90 Wis.2d 457, 280 N.W.2d 166 (1979).
9. See *Rubin v. City of Wauwatosa*, 116 Wis.2d 305, 342 N.W.2d 451 (Ct. App. 1983) and see e.g., Wis. Stat. sec. 66.0821(3)(a) (statute provides explicit authority to use combination of revenue sources to fund sewerage and storm water systems).
10. *Id.*
11. See e.g., Wis. Stat. sec. 62.11(5).

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12. Wis. Stat. sec. 66.0821(3)(a).
13. CIT Group v. Village of Germantown, 163 Wis.2d 426, 471 N.W.2d 610 (Ct. App. 1991).
14. Wis. Stat. sec. 66.0701.
15. See Wis. Stat. secs. 61.34(1) and 62.11(5).
16. See City of De Pere v. Public Service Comm., 266 Wis. 319, 63 N.W.2d 764 (1954).
17. See Wis. Stat. sec. 66.0621(4)(h) (The rates for all services rendered by a public utility . . . shall . . . tak[e] into account and consideration . . . the cost of maintaining and operating the public utility.”)
18. In this sense, utility user fees must be distinguished from regulatory fees, which are limited to the cost of regulation and cannot be designed to generate excess revenue. See Edgerton Contractors, Inc. v. City of Wauwatosa, 2010 WI App 45, 324 Wis.2d 256, 781 N.W.2d 228. This regulatory fee principle is reflected in Wis. Stat. sec. 66.0628(2) (“Any fee that is imposed by a political subdivision must bear a reasonable relationship to the service for which the fee is imposed.”)
19. In addition to others, borrowing methods that might be used to finance some aspect of a municipally-owned utility include general obligation bonds under Wis. Stat. sec. 67.04(2)(a), general obligation promissory notes under Wis. Stat. sec. 67.12(2) and special assessment bonds under Wis. Stat. sec. 66.0713.
20. Revenue bond money however cannot be used for every purpose that is somehow connected to a municipal utility. See Roberts v. City of Madison, 250 Wis. 317, 27 N.W.2d 233 (1947) (Use of revenue bonds to repay general fund expenditures by city not allowed).
21. Wis. Stat. sec. 66.0621(3) and see Wisconsin Constitution art. XI sec. 3 para. (5).
22. Significantly, the term “public utility” as used in Wis. Const. Art. XI, Section 3 paragraph (5) is broadly construed by Wisconsin courts “to include all plants or activities which the legislature can reasonably classify as public utilities in the ordinary meaning of the term.” Payne v. City of Racine, 217 Wis. 550, 555, 259 N.W. 437, 439 (1935).

City of Oak Creek Common Council Report

Meeting Date: 6/16/15

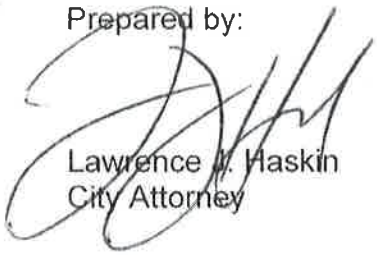
Recommendation: That the Common Council adopt Ordinance No. 2764, an Ordinance to Repeal Section 2.65 and to Repeal and Recreate Sections 2.44 and 2.46 of the Municipal Code Regarding the Civil Service Commission.

Background: The Staff is recommending that the Civil Service Commission be eliminated. Please see the attached Memorandum from Rob Bukiema and Susan Love which indicates that the Common Council has the authority to eliminate the Civil Service Commission. In other words, Wisconsin Law provides that it is up to the discretion of the Common Council as to whether or not to have a Civil Service Commission in place. It is the recommendation of the Administration that the commission be eliminated.

The elimination of the Civil Service Commission necessitates revising several other sections of the Code regarding City employees which makes reference to the existence of the Civil Service Commission. Those references are now being eliminated by virtue of this Ordinance.

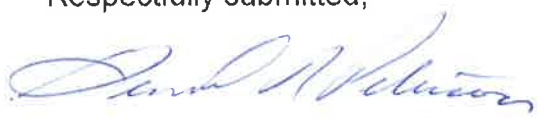
Fiscal Impact: None, except to the extent that there may be cost savings involved in streamlining the hiring process for employees.

Prepared by:



Lawrence J. Haskin
City Attorney

Respectfully submitted,



Gerald R. Peterson, ICMA-CM
City Administrator

Fiscal Review by:



Bridget M. Souffrant, CMTW
Finance Director / Comptroller

ORDINANCE NO. 2764

BY: _____

AN ORDINANCE TO REPEAL SECTION 2.65 AND TO REPEAL AND RECREATE
SECTIONS 2.44 AND 2.45 OF THE MUNICIPAL CODE REGARDING THE CIVIL
SERVICE COMMISSION

The Common Council of the City of Oak Creek does hereby ordain as follows:

SECTION 1: Section 2.65 of the Municipal Code relating to the Civil Service Commission is hereby repealed.

SECTION 2: Section 2.44 of the Municipal Code is hereby repealed and recreated to read as follows:

SEC. 2.44 APPOINTED OFFICIALS

All employees and appointed officials shall perform those duties prescribed in their position descriptions, in addition to the responsibilities prescribed herein. The appointed officials of the City shall be as follows:

(a) **City Attorney.**

- (1) Appointment. The City Attorney shall be appointed by the Mayor, subject to confirmation by the Common Council.
- (2) Term. The City Attorney shall hold office for an indefinite term.

(b) **Assistant City Attorney.**

- (1) Appointment. The Assistant City Attorney shall be appointed by the City Attorney.
- (2) Term. The Assistant City Attorney shall serve at the pleasure of the City Attorney.

(c) **Weed Commissioner.** The Weed Commissioner shall be appointed by the Mayor pursuant to Sec. 66.97, Wis. Stats.

SECTION 3: Section 2.46 of the Municipal Code relating to non-union employees below department manager status is hereby repealed and recreated to read as follows:

(a) **Positions Designated.** The following employment positions, classified by department manager, are hereby created:

- (1) City Clerk. The following positions shall be filled by appointment by the City Clerk:
 - a. Deputy Clerk
- (2) City Administrator. The following positions shall be filled by the City Administrator:
 - a. Personnel Specialist
 - b. Facilities Maintenance Supervisor
 - c. Human Resources Manager

- (3) City Treasurer. The following positions shall be filled by the City Treasurer:
 - a. Deputy Treasurer
- (4) Engineering Department. The following positions shall be filled by the City Engineer:
 - a. Assistant City Engineer
 - b. Municipal Design Engineer
 - c. Environmental Design Engineer
 - d. Environmental Engineer
- (5) Department of Community Development. The following positions shall be filled by appointment by the Director of Community Development:
 - a. Planner
 - b. Zoning Administrator/Planner
- (6) Water and Sewer Utility. The following positions shall be filled by appointment by the Board of Water Works and Sewer Utility Commission:
 - a. Field Operations Supervisor
 - b. Chief Operator, Water Treatment Plant
 - c. Administrative Supervisor
 - d. Utility Engineer
- (7) Recreation Department. The following positions shall be filled by appointment by the Parks and Recreation Director:
 - a. Parks Maintenance Supervisor
 - b. Urban Forester
 - c. Recreation Supervisor
- (8) Library. The following positions shall be filled by appointment by the City Librarian, subject to Library Board confirmation:
 - a. Assistant City Librarian
 - b. Reference Librarian
 - c. Children/Young Adult Librarian
 - d. Library Services Assistant
- (9) Police Department.
 - a. The following positions shall be filled by appointment of the Police Chief, subject to Police and Fire Commission confirmation:
 1. Captain
 2. Lieutenant
 - b. The following positions shall be filled by appointment of the Police Chief:
 1. Dispatch Manager
 2. Dispatch Supervisor
- (10) Fire Department. The following positions shall be filled by appointment of the Fire Chief, subject to Police and Fire Commission confirmation:
 - a. Assistant Fire Chief
 - b. Battalion Chief
- (11) Health Department. The following positions shall be filled by the Community Public Health:
 - a. Public Health Nurse Supervisor/Deputy Health Officer
 - b. Public Health Nurses
 - c. Registered Sanitarian

- (12) Street Department. The following positions shall be filled by appointment of the Street Superintendent:
 - a. Street Supervisor
 - (13) Inspection Department.
 - a. The following position shall be filled by appointment by the Building Commissioner:
 - 1. Inspection Supervisor, who shall be selected from a position identified at sub(b)(1)-(4).
 - b. The following positions shall be filled by appointment by the Building Commissioner:
 - 1. Building Inspector
 - 2. Electrical Inspector
 - 3. Plumbing Inspector
 - 4. Plumbing/Building Inspector
 - (14) Information Technology Department. The following positions shall be filled by appointment of the Information Technology Manager:
 - a. Computer Specialist
 - (15) Finance Department. The following positions shall be filled by the Finance Director:
 - a. Deputy Comptroller/Payroll Coordinator
- (b) **Duties.** The duties to be performed by the employees in the above positions shall be as prescribed in the pertinent position description.
- (c) **Procedure for Appointments.** All appointments under this Section shall be pursuant to personnel policies adopted by the Common Council.
- (d) **Compensation.** All employees and officers appointed pursuant to this Section shall receive such compensation as may be determined by the Common Council from time to time.

SECTION 4: All ordinances or parts of ordinances contravening the provisions of this ordinance are hereby repealed.

SECTION 5: This ordinance shall take effect and be in force from and after its passage and publication.

Introduced this 16th day of June, 2015.

Passed and adopted this 16th day of June, 2015.

President, Common Council

Approved this 16th day of June, 2015.

ATTEST:

Mayor

City Clerk

VOTE: Ayes _____ Noes _____

City of Oak Creek Common Council Report

Meeting Date: 6/16/15

Item No.: 6

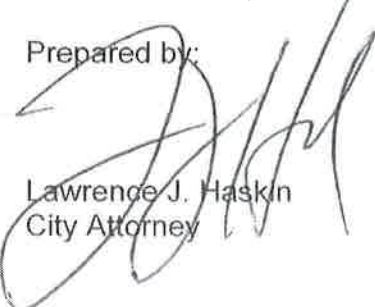
Recommendation: That the Common Council adopt Resolution No. 11623-061615, a Resolution Approving the Second Amendment to the Tax Incremental District No. 11 Finance Development Agreement (Oak Creek Hotel Group, LLC).

Background: On April 15, 2014, the City of Oak Creek and Oak Creek Hotel Group entered into a Tax Incremental District No. 11 Finance Development Agreement (the "Agreement") relating to the construction of a Sheraton Four Points Hotel at Drexel Town Square. The original Agreement provided for commencement of construction on or before August 1, 2014 with substantial completion by December 31, 2015. The original Agreement was amended on December 16, 2014 to provide that construction would commence on or before May 30, 2015 with completion on or before March 30, 2016. Due to weather related matters and concrete shortage at the end of the construction season of 2014, the overall Drexel Town Square project has been delayed. It has been a mutual decision that it is not prudent to have a hotel constructed without the other significant elements of Drexel Town Square including the Main Street Development and Emerald Row Apartments being constructed. Therefore, commencement of construction of the hotel has been delayed. The Staff and the Developer have agreed to further extend the deadline for commencement of construction to October 15, 2015 and completion of construction to December 31, 2016.

The Second Amendment to the Agreement provides for these extensions.

Fiscal Impact: The delay in construction will obviously create delays in collection of increment to pay the debt service on the bonds.

Prepared by:


Lawrence J. Haskin
City Attorney

Respectfully submitted,

Gerald R. Peterson, ICMA-CM
City Administrator

Fiscal Review by:


Bridget M. Souffrant, CMTW
Finance Director / Comptroller

Approved by:

Douglas Seymour,
Director of Community Development

RESOLUTION NO. 11623-061615

RESOLUTION APPROVING THE SECOND AMENDMENT TO THE TAX
INCREMENTAL DISTRICT NO. 11 FINANCE DEVELOPMENT AGREEMENT
(OAK CREEK HOTEL GROUP, LLC)
(Drexel Town Square)
(2nd Aldermanic District)

BE IT RESOLVED by the Mayor and Common Council of the City of Oak Creek that Second Amendment to the Tax Incremental District No. 11 Finance Development Agreement (Oak Creek Hotel Group, LLC) be and the same is hereby approved.

BE IT FURTHER RESOLVED that the Mayor and City Clerk are hereby authorized to execute the same in behalf of the City of Oak Creek.

Introduced at a regular meeting of the Common Council of the City of Oak Creek held this 16th day of June, 2015.

Passed and adopted this 16th day of June, 2015.

President, Common Council

Approved this 16th day of June, 2015.

Mayor Stephen Scaffidi

ATTEST:

Catherine A. Roeske, City Clerk

VOTE: Ayes ____ Noes ____

SECOND AMENDMENT TO TAX INCREMENTAL DISTRICT NO. 11

FINANCE DEVELOPMENT AGREEMENT

(Oak Creek Hotel Group, LLC)

This Second Amendment to Tax Incremental District No. 11 Finance Development Agreement (Oak Creek Hotel Group, LLC) is made and entered into as of the ____ day of June, 2015 (the "Effective Date") by and between Oak Creek Hotel Group, LLC, an Illinois Limited Liability Company (the "Developer") and the City of Oak Creek, a Municipal Corporation of the State of Wisconsin located in Milwaukee County, Wisconsin (the "City").

RECITALS

- A. The City and the Developer previously entered into a Tax Incremental District No. 11 Finance Development Agreement dated as of April 15, 2014 (the "Agreement") relating to Tax Incremental District No. 11 in the City of Oak Creek.
- B. The City and the Developer previously entered into the First Amendment to Tax Incremental District No. 11 Finance Development Agreement dated as of December 16, 2014 (the "First Amendment") relating to Tax Incremental District No. 11 in the City of Oak Creek.
- C. The First Amendment provides:

II. **DEVELOPERS IMPROVEMENTS.** The Developer shall complete Developer's Improvements pursuant to the terms and conditions of this Agreement, and in accordance with the following requirements:

C. **Commencement and Completion of Work.** The Developer shall commence construction of Developer's Improvements on or before May 30, 2015. After commencement, the Developer shall diligently proceed to Substantially Complete all of Developer's Improvements, so that, in any case, Developer's Improvements shall be open for business with the general public on or before March 30, 2016. Commencement of Construction of Developer's Improvements shall be deemed to occur on the date Developer starts to pour the building foundations for Developer's Improvements.

- D. The First Amendment provides:

III. **EVENT OF DEFAULT.**

A. **Event of Default.** An "Event of Default" under this Agreement is any of the following:

- 2. **Failure to Commence Construction.** Developer's failure to commence construction of the Project on or before May 30, 2015, subject to extension by reason of force majeure as set forth below.
- 3. **Failure to Substantially Complete.** Developer's failure to achieve Substantial Completion on or before March 30, 2016, subject to extension by reason of force majeure as set forth below.

- E. Developer has been unable to commence construction as of the May 30, 2015.
- F. The Developer and the City desire to amend the Agreement as set forth herein.

NOW THEREFORE, in consideration of the recitals, terms and conditions contained in this First Amendment and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

AGREEMENT

1. Section II. C. shall be modified as follows:

II. **DEVELOPERS IMPROVEMENTS.** The Developer shall complete Developer's Improvements pursuant to the terms and conditions of this Agreement, and in accordance with the following requirements:

C. **Commencement and Completion of Work.** The Developer shall commence construction of Developer's Improvements on or before October 15, 2015. After commencement, the Developer shall diligently proceed to Substantially Complete all of Developer's Improvements, so that, in any case, Developer's Improvements shall be open for business with the general public on or before December 31, 2016. Commencement of Construction of Developer's Improvements shall be deemed to occur on the date Developer starts to pour the building foundations for Developer's Improvements.

2. Section VII. A. 2. and 3. shall be modified as follows:

VIII **EVENT OF DEFAULT**

A. **Event of Default.** An "Event of Default" under this Agreement is any of the following:

2. **Failure to Commence Construction.** Developer's failure to commence construction of the Project on or before October 15, 2015, subject to extension by reason of force majeure as set forth below.
3. **Failure to Substantially Complete.** Developer's failure to achieve Substantial Completion on or before December 31, 2016, subject to extension by reason of force majeure set forth below.
3. This Second Amendment may be executed in any number of counterparts, each of which shall be deemed an original.
4. This Second Amendment shall be binding upon and inure to the benefits of the parties hereto and their respective representatives, successors and assigns.
5. Except as expressly amended herein, the Agreement and First Amendment shall remain in full force and effect.

In witness whereof, the parties have caused this Second Amendment to the Agreement to be signed as of the date stated in the first paragraph of this Agreement.

“DEVELOPER”

OAK CREEK HOTEL GROUP, LLC

By Salita Development, LLC, its manager

By: _____

Name: Eric Nordness

Its: Managing Member

STATE OF ILLINOIS)

) ss:

COUNTY OF COOK)

Personally came before me this ____ day of June, 2015, the above Eric Nordness, to me known to be the person who executed the foregoing instrument and acknowledged the same.

*

Notary Public, State of _____

My commission: _____

City of Oak Creek Common Council Report

7

Report Date: June 16, 2015

Recommendation: That the Common Council approve Ordinance 2768, an ordinance amending Section 2 of Ordinance 2743, creating the position of Staff Accountant and establishing a wage range for the position as recommended by the Personnel Committee.

Background: This new Staff Accountant position is being recommended to replace the Account Clerk II position recently vacated in the Finance Department. Over the last 5 years, the Account Clerk II position has evolved to adjust to the needs and demands of the City. This position has become an entry level accounting position. The Account Clerk II position originally required a high school diploma, with the evolution of the position I am now asking for an Associate's degree in Accounting or comparable experience.

The pay range for the Account Clerk II position is \$35,348 to \$50,976 in the 2015 full time wage ordinance. The recommended Staff Accountant position is recommended at a range of \$40,000 to \$50,976. I am requesting that the beginning wage for the Staff Accountant be \$40,000 to more accurately reflect the combination of an account clerk and accountant job duties. In 2014, Voorhees & Associates completed a salary survey for the City of West Bend. Using the minimum and maximum wage range for the Account Clerk and Accountant positions they averaged with a minimum starting wage of \$40,041 and a maximum of \$50,955. The former Account Clerk II left at the top of the range (\$50,976).

Fiscal Impact: It is intended that the new employee would be brought in less than the top of the range, resulting in savings in the 2015 budget.

Prepared by:



Bridget M. Souffrant, CMTW
Finance Director/Comptroller

Respectfully submitted,



Gerald Peterson, ICMA-CM
City Administrator

ORDINANCE NO. 2768

BY: _____

AN ORDINANCE AMENDING SECTION 2 OF ORDINANCE NO. 2743 AND FIXING THE SALARY RANGES, SALARY, WAGES AND ALLOWANCES FOR NON-UNION, GENERAL, MANAGEMENT PERSONNEL AND OTHER CITY OFFICES AND POSITIONS FOR THE YEAR 2015 CREATING THE POSITION OF STAFF ACCOUNTANT AND ESTABLISHING A WAGE RANGE FOR THE POSITION

The Common Council of the City of Oak Creek does hereby ordain as follows:

SECTION 1: Ordinance No. 2743 is hereby amended as follows:

Position Title	Starting Salary	Top Salary
Staff Accountant	\$40,000	\$50,976

SECTION 2: All ordinances or parts of ordinances contravening the provisions of this ordinance are hereby repealed.

SECTION 3: This ordinance shall take effect and be in full force and effect from and after its passage and publication and shall apply as of June 16, 2015.

Introduced this _____ day of _____, 2015.

Passed and adopted this _____ day of _____, 2015.

President, Common Council

Approved this _____ day of _____, 2015.

Mayor

ATTEST:

City Clerk

Vote: Ayes _____ Noes _____

City of Oak Creek Common Council Report

Meeting Date: 6/16/2015

Item No.: 8

Recommendation: That the Common Council approve resolution number 11620-061615 authorizing the Transfer of a Portrait of Gary Wetzel to Gary Wetzel.

Background: The Mayor requests a transfer of the portrait of Gary Wetzel that has been displayed in the Oak Creek Common Council Chambers to Gary Wetzel. The upcoming relocation of City Hall will require movement of many decorative and historical objects within the existing City Hall. The Wetzel family would like to acquire this portrait at this time, in exchange for a portrait that includes Medal of Honor coins and context of award.

Fiscal Impact: None.

Prepared by:



Catherine A. Roeske
City Clerk

Respectfully submitted,



Gerald Peterson, ICMA-CM
City Administrator

RESOLUTION NO. 11620-061615

RESOLUTION AUTHORIZING TRANSFER OF
GARY WETZEL PROTRAIT TO GARY WETZEL

BE IT RESOLVED that the portrait of Gary Wetzel be transferred from the City of Oak Creek to Gary Wetzel is hereby approved and the Mayor and City Clerk are authorized to execute the same on behalf of the City of Oak Creek

Introduced at a regular meeting of the Common Council of the City of Oak Creek held this _____ day of June, 2015.

Passed and adopted this _____ day of June, 2015.

President, Common Council

Approved this _____ day of June, 2015.

ATTEST:

Mayor

City Clerk

VOTE: Ayes _____ Noes _____

City of Oak Creek Common Council Report

Meeting Date: June 16, 2015

Item No.:

10

Recommendation: That the Common Council considers a motion to award the 2015 Park Improvements contract to the lowest responsive, responsible bidder, Payne & Dolan, Inc., at an estimated cost of \$237,842.40. (Project Nos. 15011 through 15014) (1st, 2nd, 3rd and 5th Aldermanic Districts)

Background: Earlier this year the Miller and Meadowview Park pathways were advertised for bid. The bids came in high and were rejected. The direction at that time was to re-advertise the pathways as part of a larger project, with the court improvements at Manor Marquette and Willow Heights Parks, and a more flexible construction schedule. This was with the expectation of then receiving lower unit prices. Although the asphalt and crushed aggregate prices are still relatively high, they did come in lower than the previous bid and the project costs are within budget.

The work includes repaving of the asphalt pathways in Miller Park and Meadowview Park; and repaving of the play court areas, color-coat/stripping, and tennis court fence replacement in Willow Heights Park and Manor Marquette Park. These projects were reviewed by the Parks Commission, and subsequently approved and budgeted for by the Common Council in the 2015 CIP.

In the effort to construct these projects within budget, Street Department personnel will perform the existing tennis court fence removals and the asphalt pathway removals.

Plans, specifications and bid documents were prepared and the project was advertised for bids. This is a unit price contract. Thus, the bids have been evaluated based on estimated quantities. The following bids were received on June 5, 2015.

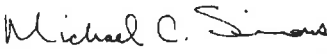
Contractor	Bid
Payne & Dolan	\$237,842.40
Johnson & Sons	\$267,993.00
Black Diamond	\$274,085.00

The costs of the contract work would be generally distributed as follows.

#15011 - Willow Heights Park Court Improvements	\$100,015
#15012 - Miller Park Pathway Repaving	\$35,535
#15013 - Meadowview Pathway Repaving	\$26,635
#15014 - Manor Marquette Park Court Improvements	\$74,920

Fiscal Impact: There are sufficient funds reserved in the CIP under Project Nos. 15011 through 15014 to complete these projects. The funds are park escrows and bike escrows.

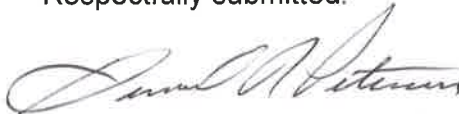
Prepared by:


Michael C. Simmons, P.E.
City Engineer

Approved by:


Ted Johnson
Director of Streets, Parks & Forestry

Respectfully submitted:


Gerald R. Peterson, ICMA-CM
City Administrator

Fiscal Review by:


Bridget M. Souffrant, CMTW
Finance Director/Comptroller

City of Oak Creek Common Council Report

Meeting Date: June 16, 2015

Item No.: 11

Recommendation: That the Common Council considers a motion to approve a contract amendment with Strand Associates Inc. for an actual cost fee not-to-exceed \$73,606.00, for additional design services for S. 5th Avenue Relocation. (Project No. 12026) (4th Aldermanic District)

Background: Strand Associates has been working with Engineering staff on the design of the 5th Avenue relocation project, which will be the new road extension spanning from the intersection of STH 100 (Ryan)/STH 32 (Chicago) to 5th Avenue/Ryan Road. It will be a divided urban section roadway with on-street bicycle lanes, sidewalks, storm sewer and street lighting.

The city is anticipating that a major portion of the project construction costs would be covered by a WisDOT-administered federal funding source (STP program), and because of this, there is a required design process that has to be followed and strictly adhered to. Through the review process of Environmental Assessment (EA) and Traffic Impact Analysis (TIA) by state and federal agencies, there were additional environmental document services, intersection modifications of Hwy 100 and 32 and cost increases/adjustments due to overall delays. This amendment covers the additional costs associated with these additional tasks, and cost adjustments due to the project delays.

This amendment covers the following:

- 1) Section A – Design Reports:
 - a. One additional revision (WisDOT/DAAR) to Design Study Report (\$1,180.00)
 - b. One additional revision (WisDOT/DAAR) to Transportation Management Report (\$815.00)
 - i. Report also requested to be resubmitted online through WisDOT's new online management system.
 - c. Trans 75 checklist and additional review meeting (WisDOT/DAAR) (\$2,060.00)
- 2) Section B – Environmental Document (EA):
 - a. One additional final revision (FHWA/WisDOT/DAAR) due to supplemental information regarding public comments (\$2,325.00)
 - i. Original contract included one revision and Amendment #1 included two additional revisions. There were a total of four revisions made to complete this document.
 - b. One additional revision to the Finding of No Significant Impact (FONSI) document (WisDOT/DAAR) (\$2,790.00)
 - c. Additional coordination over a seven-month period (\$7,670.00)
- 3) Section E – Public Involvement (\$650.00):
 - a. An additional court reporter for the Public Hearing (WisDOT/DAAR) (\$650.00).
- 4) Section F – Survey (\$1,000.00):
 - a. Additional topographic survey for O'Malley's lot filling (\$17,702.24)

- 5) Section H – Road Plans:
 - a. Pedestrian movement improvements at the intersection due to Trans 75 reviews (\$7,730.00)
 - i. The cost is for design alternatives, temporary traffic signal adjustments and traffic staging plan adjustments
 - b. Additional plan work associated with lot filling (\$3,000.00)
 - i. Additional work includes digital terrain model, cross section revisions, recalculation of earthwork and revisions to slope limits
- 6) Section L – Plans, Specifications & Estimate (\$2,350.00):
 - a. WisDOT recently implemented a cost justification to the estimate for all project final quantities. This requires time to research area's most recent bid pricing and providing justification documentation.
- 7) Schedule Extension (\$10,280.97):
 - a. PS&E change from November 1, 2014 to November 1, 2015
 - b. Additional 110 hours for project administration and agency coordination with City, DAAR and WisDOT
- 8) Cost Adjustments:
 - a. Cost adjustments are based on a two-year project schedule delay
 - i. Strand Associates – \$19,000.00
 - ii. PSI (Geotechnical sub-consultant) - \$800.00
 - iii. Single Source (Real Estate sub-consultant) - \$8,700.00

Fiscal Impact: This design work will be paid through the sale of promissory notes authorized by Resolution No. 11440-121713.

Prepared by:



Matthew J. Sullivan, P.E.
Design Engineer

Respectfully submitted,



Gerald Peterson, ICMA-CM
City Administrator

Approved by:



Michael C. Simmons, P.E.
City Engineer

Fiscal review by:



Bridget M. Souffrant, CMTW
Finance Director / Comptroller

City of Oak Creek Common Council Report

Meeting Date: June 16, 2015

Item No.: 12

Recommendation: That the Common Council considers a motion to enter into an environmental services contract with Ramboll Environ for a not-to-exceed cost of \$74,800; related to the construction of the Lake Vista Drive improvements. (4th Aldermanic District)

Background: The Lake Vista Drive project involves significant earth moving as the road and utilities are constructed. The Lake Vista site has very strict requirements for soil management related to past industrial site activities and the more recent site remediation work.

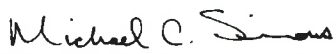
The project has precise and binding requirements for soil handling across different areas of the site. Direction and documentation by a qualified environmental professional (QEP) for all soil management activities as the construction progresses is critical to assure compliance.

Key staff from Ramboll Environ has been involved with the extensive site investigations, development of the remediation plan and coordination with the environmental agencies throughout the process of preparing the site for redevelopment. They are keenly aware of the various constituents in the soil and the specific requirements of how each identified area must be handled from a soils management standpoint.


The Engineering Department will have daily coordination of the QEP site staffing needs. The contract will be administered on a time and materials basis, with the not-to-exceed limit. Engineering believes this work can be accomplished well below the limit.

Fiscal Impact: The costs of this contract work would be paid through Project No. 14024.

Prepared/Approved by:


Michael C. Simmons, P.E.
City Engineer

Respectfully submitted:


Gerald Peterson, ICMA-CM
City Administrator

Fiscal review by:


Bridget M. Souffrant, CMTW
Finance Director/Comptroller

Mike Simmons
 City Engineer – City of Oak Creek
 8640 S. Howell Avenue
 Oak Creek, WI 53154

**PROPOSAL TO PROVIDE OVERSIGHT FOR DEVELOPMENT ACTIVITIES
 LAKE VISTA SOUTH REDEVELOPMENT**

Dear Mike:

As a follow-up to our previous discussions, Ramboll Environ US Corporation (Ramboll) appreciates this opportunity to provide environmental services associated with the referenced property. Pursuant to your request, this proposal provides a brief summary of the tasks required to support additional oversight during site development activities through October 31, 2015.

June 9, 2015

Scope of Work

This scope of work includes:

- Interaction with Wisconsin Department of Natural Resources (WDNR) regarding site development activities.
- Field oversight as needed during redevelopment activities. Assumes up to 20 hours of oversight time per week from June 9 through October 31, 2015.
- Interaction with City of Oak Creek and site contractor as necessary.

Ramboll Environ
 175 North Corporate Drive
 Suite 160
 Brookfield, WI 53045
 USA

T +1 262 901 0099
 F +1 262 901 0079
 www.ramboll-environ.com

The level of effort and degree of certainty for these tasks is estimated based on our discussions of required duration and documentation specifics.

Ref P21-15134

Schedule and Cost Estimate

The on-call oversight and WDNR interaction will begin in early June and will commence through October 31, 2015. Oversight services will be provided on a time and materials basis, not to exceed without approval, in accordance with the negotiated terms and conditions between the City of Oak Creek and ENVIRON International Corporation dated September 7, 2010. Based on the Scope of Work presented above, the estimated costs are summarized below.

Element Summary	Labor Costs	Reimbursable Expenses	Total Cost
Field Oversight	\$50,800	\$7,000	\$57,800
Reporting, Regulatory and Buyer Interaction	\$16,000	\$1,000	\$17,000
TOTAL	\$66,800	\$8,000	\$74,800

*Note: Cost estimates include necessary equipment, incidentals, travel, and other direct expenses. No analytical costs are included.

Basis for Estimated Cost and Schedule

- No scheduling, access, or other unforeseen difficulties in obtaining data will be encountered.
- ENVIRON will provide up to three copies of each report. If additional reports are requested, additional reproduction costs may be incurred.

We appreciate this opportunity to assist City of Oak Creek with this project. If you have any questions or need further information, please contact me at jlhutchens@environcorp.com, or 262-901-0095. If the foregoing terms are acceptable, please sign the Change Order and return it to me (by email, mail, or fax).

Yours sincerely


James Hutchens, PE
Manager

D 262.901.0095
jlhutchens@environcorp.com


Kathryn R. Huibregtse, PE
Managing Principal

D 262.901.0082
khuibregtse@environcorp.com

Authorization to Proceed

Ramboll Environ Proposal No. P21-15134, dated June 9, 2015
OVERSIGHT FOR LAKE VISTA SOUTH REDEVELOPMENT

The City of Oak Creek

By: _____

Title: _____

Date: _____

**MINUTES
LICENSE COMMITTEE
Friday, June 12, 2015 at 9:30 A.M.**

This meeting was called to order at 9:304 a.m.

Present were: Ald. Kurkowski, Ald. Verhalen, and Ald. Gehl. Also in attendance was Assistant City Attorney Melissa Karls, City Clerk Catherine Roeske, Police Chief John Edwards, and Deputy City Clerk Christa Miller.

1. The Committee reviewed an application for Operator license submitted by Billy Ferguson, 371 Marshall St., Coldwater, MI (Meijer's). Mr. Ferguson was in attendance.

On his application, Mr. Ferguson disclosed the following convictions: manslaughter 1989, two other driving on suspended license, and December 23, 2003 was last ticket.

The police record check showed that Mr. Ferguson was convicted on 1/5/1989 of homicide/manslaughter and riving felonious in Pontiac, Michigan.

Mr. Ferguson acknowledged that his is the Night Store Director at Meijers in Coldwater, Michigan and has been asked to relocate to the Wisconsin area to take that position at their new Oak Creek location. He indicated that he has been employed for seven years with Meijer's and obtaining an Operator's License is a requirement of his job.

Mr. Ferguson further acknowledged his conviction and explained that twenty-six years ago he was driving down the road and made a bad decision to pass a vehicle in front of him, while driving up a hill, and he hit another car, head on, and an occupant in that vehicle died. Mr. Ferguson disclosed that he spent three and a half years in prison and was on parole for an additional two years, along with being fined for the accident.

Assistant City Attorney Karls indicated that as the Night Store Director, there should be no liquor sales during that time of day, in which Mr. Ferguson agreed.

Ald. Gehl, seconded by Ald. Verhalen, moved to grant an Operator's license to Billy Ferguson, 371 Marshall St., Coldwater, MI (Meijer's). On roll call, all voted aye.

2. The Committee reviewed an application for Operator license submitted by Tanya Schwartz, 3525 E. Van Norman, Cudahy (The Saloon / Classic Lanes). Ms. Schwartz was notified of the meeting by both written letter and phone call, however, was not in attendance.

On her application, Ms. Schwartz indicated convictions for underage drinking 2012 (3), falsify age 2012, obstructing officer 2012 and faulty speedometer 2014.

The police record check showed convictions for intoxicant in vehicle operator – 2012, underage alcohol, 2012, underage alcohol, 2012, possession/consumption of alcohol by minor, 2012, obstructing an officer, 2012.

Ald. Gehl, seconded by Ald. Verhalen, moved to deny an Operator's license to Tanya Schwartz, 3525 E. Van Norman, Cudahy, for being a habitual offender (The Saloon / Classic Lanes). On roll call, all voted aye.

3. The Committee reviewed an application for Transient Merchant license submitted by William Allbee, S65 W13750 Sherwood Cir., Muskego, WI, selling frozen food products on behalf of Badger Wholesale Foods. Mr. Allbee was notified of the meeting, but contacted the City Clerk's office prior to the meeting indicating that he would be unable to attend due to his work schedule.

On his application, Mr. Allbee disclosed convictions for retail theft, speeding tickets, and parking tickets.

The police record check showed convictions for disorderly conduct 2005, retail theft 2005, transient merchant no permit 2008, disorderly conduct 2012, and criminal damage to property 2012.

Mr. Allbee submitted a letter to be reviewed by the Committee. The letter primarily detailed the events of the disorderly conviction, but not the other convictions.

Ald. Gehl, seconded by Ald. Verhalen, moved to hold action on the Transient Merchant license submitted by William Allbee, S65 W13750 Sherwood Cir., Muskego, WI, to allow Mr. Allbee an opportunity to attend a future meeting to speak on behalf of his other convictions. On roll call, all voted aye.

4. The Committee reviewed a Reserve Class B Combination alcoholic beverage license for the period July 1, 2015 through June 30, 2016, for Hush, LLC dba Bootz Saloon & Grill, 8950 S. 27th St., Christina S. Clausen, Agent. Ms. Clausen was in attendance. Also in attendance was Roger Pyzyk, Attorney for the applicant,

Attorney Pyzyk indicated that he had contacted Soundproof Chicago to request that the construction on the sound barrier wall scheduled for July 13, 2015, be moved up, if possible. Mike Ibarra of Soundproof Chicago indicated during that conversation, that they were booked solid and that at this point, the July 13th date is the first date available for construction, but that if there was an opening sooner, that the job could be moved up,

Attorney Pyzyk noted that since the last meeting (held on 5/26/15), that Bootz held a party on May 30, 2015 and has had bands playing on Saturday nights, with no noise complaints resulting in tickets being issued to the applicant. Police Chief John Edwards confirmed this to be correct.

Attorney Pyzyk indicated that there is still one panel of fencing on the north side of the property that is still in need of repair. The property owner has ordered necessary parts to complete this repair.

Chief Edwards recommended to hold action of their renewal alcohol beverage license until the end of July to allow the noise barrier wall to be constructed and to allow additional weeks, both before and after the wall construction, to monitor the sound level.

Ald. Verhalen indicated that he has met with Matt Sullivan in Engineering to discuss having a "No Left Turn" sign request placed on the next Traffic & Safety agenda. Approval of this request would prohibit left turns from the Bootz property into the residential area to the east and would allow citations by the Police Department to be issued to any offenders.

Ald. Verhalen, seconded by Ald. Gehl, moved to hold action on the 2015-16 Reserve Class B Combination alcohol license to Hush, LLC dba Bootz Saloon and Grill, 8950 S. 27th St., Christina S. Clausen, Agent, to allow for more time to monitor sound levels and for the sound barrier wall to be constructed. On roll call, all voted aye.

5. The Committee reviewed an application for Operator license submitted by Chelsea M. Logemann, 4640 S. 51st St., Greenfield, WI (Pick 'n Save). Ms. Logemann was notified of the meeting, but contacted the City Clerk's office prior to the meeting indicating that she would be unable to attend due to her work schedule.

On her application, Ms. Logemann a disclosed conviction for DUI from 2014.

The police record check showed convictions for OWI (2014) and Retail Theft (2014).

Ms. Logemann submitted a letter to be presented to the Committee on behalf of her retail theft conviction, describing the incident, however, the letter did not obtain information as to why the conviction was not disclosed.

Ald. Verhalen, seconded by Ald. Gehl, moved to hold action on the Operator license application submitted by Chelsea M. Logemann, 4640 S. 51st St., Greenfield, WI to allow Ms. Logemann the opportunity to appear at a future meeting to speak on behalf of her convictions and omission. On roll call, all voted aye.

Ald. Verhalen, seconded by Ald. Gehl, moved to adjourn the meeting at 10:22 a.m. On roll call, all voted aye.