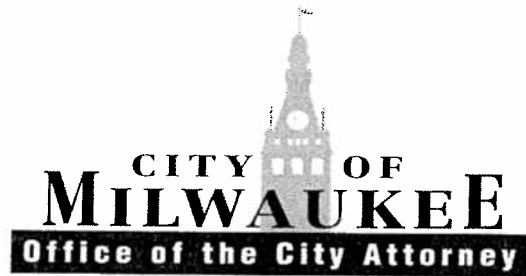


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September 1, 2009

Mark Nicolini  
Budget & Management Director  
City Budget Office  
City Hall, Room 603

Re: Charter Ordinance Relating to the Appropriation of Surplus  
Earnings from the Water Works to the City General Fund

Dear Mr. Nicolini:

You requested our assistance in drafting a proposed charter ordinance relating to the appropriation of surplus earnings from the Water Works to the City general fund. We have worked with the Legislative Reference Bureau to prepare the enclosed proposed charter ordinance, which amends City Charter §§ 14-08-1 and 14-08-2 (§§ 1 and 2, Chap. 469, Laws of 1905).

By way of background, Wisconsin Statute § 66.0811(2) provides that the surplus income of a municipal public utility may be paid into a city's general fund after all payments have been made for "operation, maintenance, depreciation, interest, and debt service fund requirements, local and school tax equivalents, additions and improvements, and other necessary disbursements and indebtedness." The statute, which does not contain an exception for cities of the first class, applies uniformly to all municipal public utilities and municipalities that own or operate such utilities.

City Charter § 14-08-1, a session law enacted by the Wisconsin legislature in 1905, contains additional limitations that permit the City to appropriate surplus earnings only if the Water Works possesses retained earnings sufficient to pay two year's installment on principal and interest on the utility's bond debts. Section 14-08-1 also contains archaic language that arguably restricts the amount of any appropriation to the amount that the City raised through general taxation and bond issues for construction of the Water Works.

Pursuant to the City's constitutional home rule power (Wis. Const. Art. 11, § 3) and Wis. Stat. § 66.0101(4), the proposed charter ordinance, as you have requested, amends § 14-08-1 to elect that these additional limitations no longer apply to the City. Specifically, the charter ordinance amends § 14-08-1 to permit the appropriation of surplus earnings if the Water Works has sufficient retained earnings to pay one year's installment, rather than two years, on principal and interest on its bonded debts and repeals the arguable limit on the dividend amount.

In our opinion, the proposed charter ordinance is a proper exercise of the City's constitutional home rule power. The broad issue of the disposition of municipal public utility revenues may be a matter of statewide concern. However, given the uniform application of Wis. Stat. § 66.0811 to all municipal public utilities<sup>1</sup>, the narrow issue of the retention of additional limitations on the City of Milwaukee's ability to appropriate surplus earnings from its municipal public utility, is a matter primarily of local affairs<sup>2</sup>. *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 209 N.W. 860, 862 (1926); *State ex rel. Brelsford v. Retirement Board*, 41 Wis. 2d 77, 163 N.W.2d 153 (1968).

Because the additional limitations on the City's ability to appropriate surplus earnings are predominately matters of local concern, under Wis. Stat. § 66.0101(4), the City may elect that portions of City Charter § 14-08-1 not apply to the City through a charter ordinance. We note that the Common Council can choose to retain these restrictions if it wishes.

As you requested, the proposed charter ordinance also amends City Charter § 14-08-2, which was also enacted by the 1905 session law. Section 14-08-2 permits the Common Council, by resolution or ordinance, to exempt "the various city departments, public schools, parks and fountains of such city" from paying water rates if the Water Works has surplus funds sufficient to pay two year's installment on principal and interest on its bond debt. The proposed charter ordinance amends

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<sup>1</sup> Wisconsin Statute § 66.0801 defines "municipal public utility" as a "public utility owned or operated by a city, village, or town" and adopts Wis. Stat. § 196.01(5)'s definition of "public utility": "every...city that may own, operate, manage or control...all or any part of a plant...for the delivery or furnishing of...water...either directly or indirectly to or for the public." See also *Pabst Corp. v. City of Milwaukee*, 190 Wis. 349, 208 N.W. 493, 494 (1926) ("By so defining a public utility as to include "every" city that owns and operates its water plant, the Legislature has plainly manifested an intention to make the statute apply to the Milwaukee water plant, even if regulation by the [PSC] be at variance with the provisions of the city charter.")

<sup>2</sup> The 1905 session law was tailored specifically to the City of Milwaukee as the only city of the first class and pre-dates both Wis. Stat. § 66.0811 and the Public Utilities Act, Chapter 499, Laws of 1907 (now Chapter 196, Wis. Stats.).

Mark Nicolini  
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that section to permit the Common Council to consider such an exemption if the Water Works has surplus sufficient to pay one year's principal and interest.

As with the amendment of § 14-08-1, it is our opinion that this election is within the City's constitutional home rule power. However, we caution that this charter provision is archaic, having been enacted before the Public Service Commission's ratemaking authority was established. Accordingly, it will be necessary to address the legality and enforceability of any proposed resolutions that would exempt entities from paying water rates under § 14-08-2.


Finally, with regard to both §§ 14-08-1 and 2, the proposed charter ordinance sufficiently designates those portions of the 1905 session law that no longer apply to the City. "A charter ordinance that makes the election under [§ 66.0101(4)] shall designate specifically each enactment of the legislature or portion of the enactment that is made inapplicable to the city or village by the election." Wis. Stat. § 66.0101(2)(b).

If you have any comments or concerns or require any additional information, please do not hesitate to contact the undersigned.

Very truly yours,



GRANT E. WANGLEY  
City Attorney



THOMAS D. MILLER  
Assistant City Attorney

TDM:tdm

Enclosures

c(w/enclosures):

Carrie Lewis, Manager, Water Works

Barry Zalben, Manager, Legislative Reference Bureau

Ronald D. Leonhardt, City Clerk

1127-2009-2290:149148

Enclosure