GRANT F. LANGLEY
City Attorney

VINCENT D. MOSCHELLA
MIRIAM R. HORWITZ
ADAM B. STEPHENS
MARY L. SCHANNING
Deputy City Attorneys

Milwaukee City Hall Suite 800 200 East Wells Street Milwaukee, Wisconsin 53202-3551
Telephone: 414.286.2601 TDD: 414.286.2025 Fax: 414.286.8550

STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOUREN
JOHN J. HEINEN
SUSAN E. LAPPEN
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
GREGG C. HAGOPIAN
ELLEN H. TANGEN
JAY A. UNORA
KATHRYN Z. BLOCK
KEVIN P. SULLIVAN
THOMAS D. MILLER
JARELY M. RUIZ
ROBIN A. PEDERSON
JEREMY R. MCKENZIE
PETER J. BLOCK
NICHOLAS P. DESIATO
JOANNA GIBELEV
JENNY YUAN
KAIL J. DECKER
ALLISON N. FLANAGAN
LA KEISHA W. BUTLER
PATRICK J. LEIGL
HEATHER H. HOUGH
ANDREA J. FOWLER
PATRICK J. MCCLAIN
NAOMI E. GEHLING
CALVIN V. FERMIN
BENJAMIN J. ROOVERS
Assistant City Attorneys

December 8, 2016

Alderman James A. Bohl, Jr.
Fifth Aldermanic District
City Hall, Room 205

Re: Remediation Fee for Lead Water Service Lines

Dear Alderman Bohl:

By letter dated November 22, 2016, you requested an opinion of this office regarding the above-referenced matter. Specifically, you asked whether the City of Milwaukee may impose a "lead remediation fee" on all properties in the city or whether it may impose such a fee on only those properties that have lead service lines. If the latter, then you wish to know whether a fee could continue to be imposed on a property after the lead service line is replaced. Finally, you requested a summary of the legal and policy impacts of creating such a fee, for example, the impacts a lead service line replacement fee would have on the City's levy limit.

As you summarize in your letter, we explained in our January 29, 2016 and March 21, 2016 opinions that under current law, the property owner is responsible for the costs of replacing the customer or private property side of the lead service line. In the March 21, 2016 opinion (copy enclosed), we advised that a good faith argument can be made that Wis. Stat. §§ 66.0911 and 281.45 permit the City to contract for lead service line replacement work and assess the costs to the property, which would allow property owners to pay the costs over the allowable special assessment payment period (currently proposed in proposed Ordinance 160742 to be 10 years). We also advised that any proposal to use water utility ratepayer funds would require approval of the Public Service Commission ("PSC") through a rate case and discussed potential arguments that could be used in advocating for a distinction between Milwaukee and the City of Madison rate case or reconsideration of the determination that use of ratepayer funds to subsidize customer-side lead service line replacements is a prohibited discriminatory rate practice. Finally, we have assisted with drafting a proposed statutory change that would permit use of ratepayer funds for such work, which is part of the 2017-2018 City of Milwaukee State Legislative Package (Resolution 160538).

In the context of your letter, we understand the "lead remediation fee" to be a fee on properties to generate revenue to help pay for the costs of having a contractor replace the

portion of the lead service line that is owned by the private property owner. In this opinion we will refer to the fee as a "LSL replacement fee."

For the reasons explained below, it is our opinion that under current law, the City could not impose a LSL replacement fee on properties, whether applied to all properties in the city or limited to properties with lead service lines, for the purpose of generating revenue for a LSL replacement program. In order to impose such a fee, the City would need express statutory authority through adoption of an enabling statute.

I. **LSL Replacement Fee Would Not Be a Valid Special Charge.**

The proposed LSL replacement fee discussed in your letter would be imposed against real property (either on all properties in the city or on only those properties with lead service lines). Yet, there is no statutory provision expressly granting the City the authority to impose such a fee on real property. Therefore, we must first evaluate the threshold question whether the LSL replacement fee would constitute a valid special charge under Wis. Stat. § 66.0627 and therefore ultimately be collectible through the tax roll.

Wis. Stat. § 66.0627 authorizes a municipality to impose on real property a special charge "for current services rendered by allocating all or part of the cost of the service to the property served." A special charge is not payable in installments and the special charge is delinquent if not paid within the time determined by the municipal governing body. § 66.0627(4). A delinquent special charge becomes a lien on the property as of the date of delinquency and the delinquent special charge shall be included in the current or next tax roll for collection under Wis. Stat. ch. 74. Once the delinquent special charge is certified to the tax roll, the special charge may be paid in 10 equal monthly installments. Wis. Stat. § 74.87(3); City Charter § 19-15-1; City Attorney Opinion, dated March 19, 1999.

Pursuant to Wis. Stat. § 66.0627, we could defend in good faith the imposition of a special charge of "all or part of the cost" of having a contractor replace the private property's lead service line. But, the special charge could be imposed only on the individual property that received the service, i.e., replacement of the lead service line. The owner could not pay the special charge in installments until the special charge becomes delinquent and is placed on the tax roll; and in that case, the owner would only be able to pay in 10 monthly installments. We do not understand that to be the "lead remediation fee" discussed in your request.

In contrast to a special charge on individual properties for lead service line replacement on the individual property, a LSL replacement fee to generate revenue for replacement costs, whether imposed on all properties within the city or only on properties with lead service lines, would not be a charge "for current services rendered" and would therefore not constitute a special charge under Wis. Stat. § 66.0627. To impose a special charge, a city "must establish that *current* services of the type described in the statute are rendered

to the property or properties sought to be charged." *Grace Episcopal Church v. City of Madison*, 129 Wis. 2d 331, 337-38 (1986) (emphasis added). A fee charged monthly or annually for a service not rendered for possibly many years would not be a charge for "current services rendered." The vast majority of properties with lead services paying this fee would not receive a service for several years when their lead service is replaced. If applied to properties with copper service lines, then it would not be a charge for "current services rendered" because there would be no services rendered to those properties (presumably ever).

The conclusion that the proposed LSL replacement fee would not be a special charge is important. Without the authority to impose the proposed LSL replacement fee as a special charge under § 66.0627, the City would appear to lack any statutory authority to impose the fee against real property, depriving the City of a fundamental collection method. We contrast that with the statutory grant of authority to impose against real property, the following charges for example: water rates (Wis. Stat. §62.69(2)(f)); and local sewer and storm water management charges (Wis. Stat. § 66.0821(4)). As a result, throughout the remainder of this opinion, when we discuss the City's authority to impose a LSL replacement fee on "properties," whether all properties or only those with lead service lines, we are referring to the City's ability to impose the fee on the owners of such properties.

II. <u>Fee vs. Unauthorized Tax</u>

The legality of a municipal fee, and who may be required to pay the fee, depends on whether it is truly a fee or an unauthorized tax. "A tax is an enforcement of proportional contributions from persons and property, imposed by a state or municipality in its governmental capacity for the support of its government and its public needs." *City of River Falls v. St. Bridget's Catholic Church of River Falls*, 182 Wis. 2d 436 (Ct. App. 1994) (citation omitted).

Labeling a particular charge as a "fee" is not dispositive of the "fee versus tax" question. *Bentivenga v. City of Delavan*, 2014 WI App 118, ¶ 6, 358 Wis. 2d 610, 856 N.W.2d 546. Rather, the test is: what is the primary purpose of the charge? *Id.* "A tax is one whose primary purpose is to obtain revenue, while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision and regulation." *State v. Jackman*, 60 Wis. 2d 700, 707 (1973). "[I]f the primary purpose of a charge is to cover the expense of providing services, supervision or regulation, the charge is a fee and not a tax." *St. Bridget's Catholic Church*, 182 Wis. 2d at 442. If the charge is truly a tax, then it is invalid unless state statutes give the municipality the authority to impose the tax. *Bentivenga*, ¶ 6.

III. Legality of LSL Replacement Fee on All Properties

It is our opinion that a LSL replacement fee on all properties, regardless of whether they have copper or lead service pipes, would be an unauthorized tax rather than a fee. Imposing a LSL replacement fee on all residential properties regardless of whether the property has a lead or copper service line shows that the primary purpose of the charge is to generate revenue to pay for lead service line replacements and is therefore a tax. Properties with copper service lines would by definition receive no services in return for paying a LSL replacement fee. Further, it could not be argued that the charge is to offset the costs of regulation because a regulatory program to replace lead service lines would involve no regulation of properties with copper service lines.

Even if the charge were somehow determined to be a fee, it would likely violate Wis. Stat. § 66.0628(2), which provides that "[a]ny fee that is imposed by a political subdivision shall bear a reasonable relationship to the service for which the fee is imposed." A charge on properties without lead services bears no relation to the police power objective of replacing lead services to protect the public health.

IV. Legality of LSL Replacement Fee on Properties with Lead Service Lines

A LSL replacement fee only on those with lead service lines would not be defensible as a service fee because the service (i.e. LSL replacement) would, in most cases, not be provided for many years. Likewise, the fee could not be justified as a user fee as the "use" is the consumption of water, for which the customer pays water rates.

The only potential justification for a LSL replacement fee on properties with lead service lines would be that the fee is a regulatory fee. For example, a potential argument could be made that the proposed Common Council File No. 160742 ("A substitute ordinance mandating the replacement of lead water service lines and establishing a special assessment for lead water service lines on private property") ("LSL Replacement Ordinance") establishes a regulatory program (e.g. regulating the manner in which properties are connected to the public water supply) and that a LSL replacement fee intended to cover the City's cost-share is a regulatory fee reasonably related to the expense of the regulatory program. *See, e.g., Rusk v. City of Milwaukee*, 2007 WI App 7, 298 Wis. 2d 407 (reinspection fees for building code noncompliance were valid regulatory fees and not a tax). Factors that could influence the "regulatory fee vs. tax" determination may include factors that are not clear at this stage, for example: how the revenue raised compares with the overall regulatory program expenditures; whether fee revenues are expended every year on the LSL replacement work or whether they build up over the years; and the amount or frequency of the fee.

Nonetheless, we do not believe that the "regulatory fee" label would withstand scrutiny. The primary purpose of the fee would be to generate revenue for LSL replacements rather than to regulate connections to the public water supply. The costs of regulation and

supervision would undoubtedly be insignificant compared to the cost to pay the contractors to replace lead service lines. The fact that the vast majority of properties with lead services paying this charge would not receive a service in return for the fee for several years would further support a determination that the fee is truly a revenue tax rather than a regulatory fee. Even if a LSL replacement fee could be defended as a regulatory fee rather than a tax, the City's inability to impose the LSL replacement fee against real property and place delinquent fees on the tax roll would present significant enforcement and collection problems.

You also asked whether a LSL replacement fee on properties with lead service lines could continue to be imposed after the replacement of the lead service line. Because the City lacks authority to impose a LSL replacement fee against real property it is difficult to envision any legal and enforceable way to require a property owner to pay the LSL replacement fee after the lead service line is replaced, particularly in the event of a change of ownership. This underscores the need for state enabling legislation if the City wishes to pursue the LSL replacement fee.

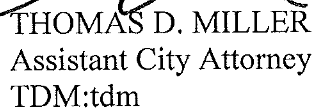
V. Effect on Tax Levy Limit

If a defensible LSL replacement fee imposed on properties with lead service lines were found to be legal and enforceable, we do not believe that there would be any negative impact on the City tax levy limit under § 66.0602(2m). That statute requires that a local government reduce its tax levy limit as a dollar-for-dollar offset of fee revenue collected for providing a "covered service," which is defined as "garbage collection, fire protection, snow plowing, street sweeping, or storm water management…" Under that definition, a fee to cover the cost of privately-owned LSL would not require a reduction in the tax levy limit. Obviously, the legislature could amend the statute at any time to require the offsetting reduction in the City's tax levy limit.

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney



THOMAS D. MILLER
Assistant City Attorney
TDM:tdm
Encl.
c: James Owczarski, City Clerk
1033-2016-2404:234903

GRANT F. LANGLEY
City Attorney

VINCENT D. MOSCHELLA
MIRIAM R. HORWITZ
ADAM B. STEPHENS
Deputy City Attorneys

Milwaukee City Hall Suite 800 • 200 East Wells Street • Milwaukee, Wisconsin 53202-3551
Telephone: 414.286.2601 • TDD: 414.286.2025 • Fax: 414.286.8550

STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOUREN
JOHN J. HEINEN
SUSAN E. LAPPEN
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
KURT A. BEHLING
GREGG C. HAGOPIAN
ELLEN H. TANGEN
JAY A. UNORA
KATHRYN Z. BLOCK
KEVIN P. SULLIVAN
THOMAS D. MILLER
JARELY M. RUIZ
ROBIN A. PEDERSON
JEREMY R. MCKENZIE
MARY L. SCHANNING
PETER J. BLOCK
NICHOLAS P. DESIATO
JOANNA GIBELEV
JENNY YUAN
KAIL J. DECKER
ALLISON N. FLANAGAN
LA KEISHA W. BUTLER
PATRICK J. LEIGL
HEATHER H. HOUGH
ANDREA J. FOWLER
PATRICK J. MCCLAIN
NAOMI E. GEHLING
CALVIN V. FERMIN
BENJAMIN J. ROOVERS
Assistant City Attorneys

March 21, 2016

Carrie Lewis, Superintendent
Milwaukee Water Works
Zeidler Building, Room 409

Re: Lead Water Services on Private Property

Dear Ms. Lewis:

By letter dated January 21, 2015, you asked several questions regarding replacement of lead water service piping, or laterals, on private property, which we answer in turn. As we explained in our January 29, 2016 opinion to you, the customer is responsible for maintaining, repairing, and replacing the section of lateral that runs from the meter at the house to, and including, the outlet joint of the curb stop ("customer-side lateral"). The customer-side lateral is private property and is located on private property.

The City/MWW has long been in compliance with the U.S. Environmental Protection Agency's ("EPA") Lead and Copper Rule, 40 CFR § 141.80-91, which regulates the level of lead and copper metals in drinking water. MWW has treated water with phosphorous since 1996 to comply with the Lead and Copper Rule by reducing lead corrosion in pipes. The concern posed by lead laterals instead relates to the potential effects of water main replacement, and possibly other street construction, on lead laterals as summarized in a January 20, 2016 letter from the Commissioner of Public Works ("Commissioner") and you to the Public Service Commission of Wisconsin ("PSC").

I. What options are available to replace lead water services on private property? For instance, does the City have authority to require replacement of the private lead water lateral? If so, under what circumstances? If not, what authority is needed?

To address the issue raised in your letter to the PSC, the City could adopt an ordinance requiring the property owner to replace the customer-side lead lateral when the City replaces the water main and the segment of lateral from the water main to the curb stop ("utility-side lateral"). This requirement could also be extended to situations where the City conducts other construction in the street (e.g. replaces the City sewer main and the utility-side water lateral; major street repairs) if the Common Council determines that

there is a health, safety, and welfare justification for doing so. The ordinance would not require PSC approval.

The City has authority to require replacement of the customer-side lateral pursuant to its police power to act for the health, safety, and general welfare of the public. Wis. Stat. § 62.11(5); *Froncek v. City of Milwaukee*, 269 Wis. 276, 69 N.W.2d 242 (1955) (City's resolution providing for fluoridation of water supply is a reasonable and valid exercise of the police power). To survive scrutiny under a substantive due process challenge, the ordinance must be reasonably related to any legitimate municipal objective, i.e., the protection of the health and safety of the City's residents. *Metropolitan Milwaukee Assoc. of Commerce v. City of Milwaukee*, 2011 WI App 45, ¶ 51, 332 Wis. 2d 459, 798 N.W.2d 287.

In response to your general questions, the following are some options that could potentially be incorporated in a lead lateral replacement ordinance:

1. Require each property owner to replace the customer-side lead lateral in conjunction with water main replacement (and other infrastructure work in the right-of-way that the Common Council determines contributes to the disturbance of lead laterals and the elevation of lead levels at the customer's tap, e.g., sewer replacement, major street construction);

2. Require each property owner to contract with a licensed plumber to complete the replacement at the owner's expense;

3. Authorize City rebates or MWW rebates (only if approved by the PSC) for the owner's cost of replacing the lead lateral, discussed in Section III below;

4. In the event of noncompliance with the replacement requirement:

    a. Impose forfeitures;

    b. At the option of the property owner and in lieu of forfeiture, authorize the DPW Commissioner to "have the work performed"[1] and assess the costs of the replacement as a special assessment against the property under Wis. Stat. § 66.0911 or § 281.45, discussed in Section II below.

---

[1] As we explained in an opinion dated March 4, 2016, which we enclose for your convenience, the City and MWW are prohibited by state law from performing the replacement of the customer-side lateral with City or utility employees. Wis. Stat. §§ 145.06; 66.0901(11).

> (i) Require the owner to execute a temporary construction easement to permit City contractor to work on the owner's private property;
>
> (ii) Require the owner to execute a hold harmless agreement releasing the City from any liability resulting from the work on private property.

II. Does the City have the authority to place the cost of replacement of private water laterals on property owners? If not, what authority is needed?

Yes, the cost to replace the customer-side lateral is the responsibility of the property owner. As we explained in the January 29, 2016 opinion, the customer is responsible for maintaining, including repair and eventual replacement, the customer-side lateral at the customer's expense.

There has been public discussion whether customer-side lead lateral replacements could be funded through the special assessment process, which while still at private property owner expense, would allow the customer to pay the costs over multiple tax years. For the reasons explained below, it is not at all clear that the replacement work can be funded through the general special assessment statute, Wis. Stat. § 66.0703. Alternatively, a good faith argument can be made that Wis. Stat. §§ 66.0911 and 281.45 provide independent authority for the City to procure the replacement of customer-side lead laterals and impose the costs as a special assessment.

> A special assessment, to be valid, must be levied pursuant to and in strict compliance with the statutory powers of the municipality. "The power of a municipality to levy an assessment against a private owner is one which exists by right of statute, and the restrictions of the statute must be met if the assessment is to be deemed valid."

Dewey v. Demos, 48 Wis. 2d 161, 167, 179 N.W.2d 897 (1970) (citation omitted).

A. Cost Recovery through General Special Assessment Process

It is not clear that the general special assessment statute for "municipal work or improvements," Wis. Stat. § 66.0703, authorizes the City to perform the replacement of customer-side lead laterals and to assess the property for the replacement costs. There is no Wisconsin case law directly on point. However, it is generally accepted that "private property cannot be improved at the expense of abutting property owners, even if done for the purpose of permitting the public to use it." 70C Am. Jur. 2d, Special or Local Assessments, § 23. "Generally, speaking, the term 'public improvements,' as applied to

municipal corporations in the legal context, means improvements *upon the property of the municipality* which serve to further the operation of the municipal government and the interests and welfare of the public." 13 McQuillin, *The Law of Municipal Corporations*, § 37:1, (3d ed. 2007, updated July 2015) (emphasis added).

Nonetheless, it could be argued that replacement of lead laterals incidental to water main and utility-side lateral replacements does constitute "municipal work or improvements" under § 66.0703. We have found a League of Wisconsin Municipalities Legal Opinion, in which the League attorney opined that, in addition to Wis. Stat § 66.0911, a municipality could also follow the special assessment procedure set forth in § 66.60 (now § 66.0703) to construct and charge the property for water lateral construction. *Special Assessments* #631 (May 7, 1987) ("League Opinion"). The League Opinion did not specify that that conclusion applied to construction of customer-side laterals on private property as opposed to utility-side laterals and provided no analysis that would support that interpretation. In any case, though an argument can be made, it is not at all clear that the § 66.0703 special assessment procedure applies to the replacement of customer-side laterals where a municipality, such as Milwaukee, does not own or maintain the customer-side lateral.

B. Cost Recovery through Special Assessments under §§ 66.0911 and 281.45

In the event that a property owner does not comply with an ordinance requiring lead lateral replacement, the City has a good faith argument that Wis. Stat. §§ 66.0911 and 281.45 authorize the City to contract for the work and impose a special assessment for the replacement work.

The City clearly has the statutory authority to impose a special assessment for: (a) *construction* of a lateral from the house to the lot line (Wis. Stat. § 66.0911); and (b) *connection* of the customer-side lateral to the main (Wis. Stat. § 281.45). While it is not entirely clear that these statutes authorize the City to procure *replacement* of the customer-side lateral and to impose a special assessment to recover the cost, a good faith argument can be made that the City has that authority.

Wis. Stat. § 66.0911 provides, in pertinent part:

> **Laterals and service pipes.** If the governing body by resolution requires water, heat, sewer and gas laterals or service pipes to be constructed from the lot line or near the lot line to the main or *from the lot line to the building to be serviced*, or both, it may provide that when the work is done...under a city, village or town contract, a record of the cost of constructing the laterals or service pipes shall be kept and the cost, or the average current cost of laying the

> laterals or service pipes, shall be charged and be a lien against the lot or parcel served. (italics added)

In *Dewey*, the court held that the charge authorized by § 66.0911 (then § 66.625) is a special assessment although it is not denominated as such. 48 Wis. 2d at 168; *see also* League Opinion (§ 66.625, now § 66.0911, is an independent method of assessing costs for utility lateral construction).

Wis. Stat. § 281.45 separately provides that a municipality may, by ordinance, require buildings used for human habitation to be connected with a water main[2] and, if the owner fails to comply after written notice, the municipality may impose a penalty or cause the connection to be made and assess the costs to the property as a special assessment.

A good faith argument can be made that these authorities apply to replacement of laterals and not just to installation or initial construction. In an unpublished, *per curiam* decision, the court of appeals recently interpreted § 66.0911 to authorize a municipality to require an owner to repair a sewer lateral. *Flores v. City of Waukesha*, No. 2015AP1185 (Wis. Ct. App. March 2, 2016) (unpublished, *per curiam* decision). The court held and reasoned as follows:

> Under Wis. Stat. § 66.0911, if a municipality requires a property owner to connect a building on its property to the main, it also may require the owner to be responsible for the cost of connecting or servicing the lateral..."[C]onnection of the [lateral]" reasonably contemplates reestablishing service between the property owner's building and the main after making necessary repairs.

Id. at ¶ 12. Using the court's logic, the same could be said of lateral connections to reestablish service after necessary *replacements*, particularly in conjunction with water main replacements. Because the *Flores* court issued a *per curiam* decision, the City cannot cite this unpublished decision to a court, even for persuasive effect. Nonetheless, the decision demonstrates that a good faith argument can be made that §§ 66.0911 and 281.45 provide authority for the City to recover the cost of mandatory lead lateral replacement through a special assessment against the property.

We do need to point out that there are significant liability risks associated with the City procuring the replacement of customer-side laterals on private property. The laterals are, and will remain, private property and are located on private property. If the policy makers wish to make this option available to property owners in lieu of forfeiture, then we recommend, at a minimum, requiring the owners to execute hold harmless agreements

---

[2] The City has adopted such an ordinance, MCO § 225-22.

and temporary easements for construction purposes to mitigate the potential liability risk to the City.

III. Would using utility funds to replace lead water services on private property be acceptable under PSC rules? Can City funds be used for this purpose?

A. Utility Funds

Any proposal to use ratepayer funds would require approval of the PSC.[3] In 2000, the PSC rejected the City of Madison Water Utility's ("MWU") application to partially fund customer-side lead lateral replacements with a surcharge on all ratepayers, both retail and wholesale. *Application of the City of Madison, Dane County, as a Water Public Utility, for Authority to Increase Water Rates*, Final Decision, Docket 3280-WR-106, 2000 Wisc. PUC LEXIS 47, 205 PUR4th 461 (Wis. PSC October 18, 2000) ("Madison Rate Case").

MWU exceeded the lead action levels set forth in the Lead and Copper Rule and therefore was required to gain compliance through either chemical treatment or replacement of all lead laterals. 2000 Wisc. PUC LEXIS at *3-4. The City of Madison enacted an ordinance requiring the replacement of all customer-side lead laterals and providing for a 50 percent reimbursement of the replacement costs up to $1,000. *Id.* at *5. The lead laterals were concentrated primarily in one part of the MWU service area: the Capitol/Isthmus. *Id.* at *3. MWU applied to the PSC for a rate increase in the form of a 5.5 cent surcharge per hundred cubic feet on all water sales, including retail and wholesale, to fund the replacement of both the customer-side and utility-side lead laterals. *Id.* at *5.

The PSC denied the application, determining that such ratepayer funding would constitute unreasonable and discriminatory rate practices in violation of Wis. Stat. § 196.37[4]. The PSC reasoned as follows:

> ...the Commission believes that it would be unreasonable and unjustly discriminatory if public program dollars generated through utility rates were to be authorized as a subsidy to furnish a direct benefit to an exclusive group of private property owners.

---

[3] We understand that the question's use of "utility funds" refers to revenues from water rates and not other utility revenue such as grants, loans, or lease revenues, e.g. We cannot rule out the possibility of using utility revenues obtained from sources other than rates. For example, it is our understanding that Madison ultimately funded its program with utility revenues from water antenna leases.

[4] The PSC decision was vacated by the Dane County Circuit Court but upheld by the Court of Appeals in *City of Madison v. PSC*, 2002 WI App 102, 253 Wis. 2d 846, 644 N.W.2d 293 (Wis. Ct. App. Feb. 28, 2002) (unpublished).

> The Commission generally sustains the policy that where benefits accrue to the public at large from a municipal program elected by local government that all associated funding needs should properly be the responsibility of that unit of local government. In this case it would be inappropriate for a funding mechanism to be hidden in a public utility rate, *especially where the proceeds go to aiding a select few and are not generally available to widely qualifying customers of the public utility.* The City passed the ordinance requiring property owners to replace their lead laterals. It therefore is the appropriate body with the necessary authority to provide any subsidy to assure the success of the replacement program...

Id. at *8-9 (emphasis added). The PSC also emphasized the fact that the lead laterals, installed before 1927, were fully depreciated and could be in need of replacement soon anyway. *Id.* at *9.

> In Madison, as in most if not all other Wisconsin municipalities, it is the property owner who is responsible for the repair and ultimate replacement of the customer portion of the lateral. It is reasonable to assume that the owners of the properties in the Isthmus/Capitol area knew or should have known of the lead lateral liability and of the potential need for lateral replacement on their properties.

Id. at *10.

The Madison Rate Case would seem to foreclose the possibility of using ratepayer funds to pay for a customer-side lead lateral replacement program. Nonetheless, if City policy makers so desire, it may be appropriate to initiate a discussion with PSC staff regarding development of a proposal to fund a lead lateral replacement program with utility rates with the ultimate goal of petitioning the Commission to distinguish Milwaukee's situation from the facts in the Madison Rate Case or to revisit the Madison ruling.

The number of Milwaukee customers with lead laterals is far greater than the "exclusive group of private property owners" who would have benefited in the Madison Rate Case. In Madison, there were 9,000 customer-side lead laterals. *Id.* at *4. In Milwaukee, approximately 70,000 properties, or 44% of the retail customer properties, have lead laterals; arguably justifying a retail area or service area-wide solution.

Further, several factors may justify revisiting the Commission's decision. The concern over lead laterals, both statewide and nationally, is now even greater, particularly with the EPA's attention to the evolving science on the negative effects of partial lateral replacement. This heightened concern has occurred at the same time that the PSC has

required MWW to perform significant levels of main replacements and the availability of utility rate funding could prevent delays in replacement of water mains connected to lead laterals.

We are also aware of a recent decision in which the PSC, through a delegated decision issued by the Administrator of the Water, Compliance and Consumer Affairs, approved utility financing of the cost of customer-side water lateral installations and private well abandonments. *Application of the City of Pewaukee Water Utility, Waukesha County, Wisconsin, to Construct a New Water Pumping Station and Associated Facilities*, Certificate of Authority and Order, Docket 4625-CW-115 (Wis. P.S.C., January 17, 2013). The utility identified 85 customers whose private wells would be significantly impacted by groundwater drawdown from operation of a new public well. The PSC approved the utility's proposal to procure, at the utility's expense, the installment of the customer-side lateral and the abandonment of the customer's private well, at an estimated cost of $5,000 per customer. Citing the "unique circumstances in this case," the PSC permitted the utility to recover its costs, budgeted at $425,000 through rates. *Id.* at 4. While the decision was not made by the full Commission and could be limited to the facts in the case, it does also show that the Commission has been able to reconcile private infrastructure subsidies with the prohibitions on discriminatory rates.

Alternatively, there may be ways to work within the confines of the Madison Rate Case and craft a proposal that would not violate the proscription against discriminatory rates. For example, MWW could explore creating a sub-classification of residential retail customers: one with lead laterals and one with copper laterals. MWW could then propose to apply a surcharge on customers in the lead lateral sub-class only to pay for lateral replacements during main replacement projects.

While we cannot predict how the PSC would view such a proposal, it could potentially serve as a way to avoid a discriminatory rate practice finding. Unlike the MWU proposal, the above proposal would be funded solely by the customers who would receive the benefit of the program.

B. <u>City Funds</u>

The use of City taxpayer dollars to fund or finance, in whole or in part, the costs of replacing customer-side lead laterals must comply with the public purpose doctrine, which requires that public funds be used only for public purposes. *Town of Beloit v. County of Rock*, 2003 WI 8, ¶ 27, 259 Wis. 2d 37, 657 N.W.2d 344. Because the City's primary objective in funding customer-side lead lateral replacements would be the preservation of public health through timely and coordinated replacement of the entire lead lateral at the same time that the water main is replaced, it is our opinion that the public purpose doctrine would not likely preclude the use of City taxpayer funds to fund replacement of customer-side lead laterals.

"[T]he public purpose doctrine has been broadly interpreted" and liberally applied. *Id.* at ¶ 30. A reviewing court must determine whether any public purpose "can be conceived" to reasonably justify the expenditure, giving great weight to the legislature's declarations. *Id.* at ¶ 28. "A court will conclude that there is no public purpose only if it is 'clear and palpable' that there can be no benefit to the public." *Id.* (citations omitted).

In *Town of Beloit*, the Wisconsin Supreme Court declared:

> In determining whether a public purpose exists, courts have considered whether the subject matter or commodity of the expenditure is one of "public necessity, convenience or welfare," as well as the difficulty private individuals have in providing the benefit for themselves...Courts also look to see if the benefit to the public is direct or remote...Additionally, provided that the primary purpose of the expenditure is designed for a public purpose, any direct or incidental private benefit does not destroy the public purpose and render the expenditure unconstitutional...

Id. at ¶ 29 (citations omitted).

Property owners would derive a benefit from replacement of their portion of the lead lateral in coordination with replacement of the main and the utility-side lateral. However, that private benefit would not necessarily eliminate the public purpose, provided that the private benefits are incidental to the public purpose of preserving the public health. *Hopper v. City of Madison*, 79 Wis. 2d 120, 256 N.W.2d 139 (1977).

Similarly, the fact that the dangers posed by lead laterals exist on private land does not eliminate the public purpose involved in countering these dangers to protect the public health and safety. In a 1981 opinion, the Wisconsin Attorney General concluded that state grants to municipalities for the costs to drill wells and fence cave-ins on private property as a result of mine closings had as their primary objective the promotion of public health and safety, respectively, and were therefore consistent with the public purpose doctrine. 70 Wis. Op. Att'y Gen. 48 (1981). The Attorney General opined that the primary reason for the well-drilling grants "would be to assure a pure water supply to the municipality's citizens." *Id.* at 50 (citing *State ex rel. La Follette v. Reuter*, 33 Wis. 2d 394, 147 N.W.2d 304 (1967) ("The primary reason in constructing [water] pollution abatement facilities is to protect the health of all citizens of the state whose need for pure water is essential to life itself.")). Noting that the private benefits were incidental, the Attorney General reasoned: "The fact that these problems [contamination of water supplies and mine shaft cave-ins caused by mine closings] have manifested themselves on private land does not abrogate the underlying public scope of the problem and public purpose in providing a remedy for them." 70 Wis. Op. Att'y Gen. at 51.

There are, however, some factors that may render public subsidy of customer-side lateral replacement costs vulnerable to challenge under the public purpose doctrine. Repair and replacement of the customer-side lateral has always been the responsibility of the property owner. Customer-side laterals are commonly in need of repair or replacement and property owners, not the City or MWW, are responsible for those costs. Roughly 55% of the properties within the City have copper laterals; those owners would continue to bear the cost of repairing and replacing their customer-side laterals.

Therefore, if the City wishes to expend public funds, it may wish to explore development of a funding program that would take into account the property owner's income level. *Town of Beloit*, at ¶ 29 (courts have considered "the difficulty private individuals have in providing the benefit for themselves."). For example, the City's deferred special assessment ordinance, MCO § 115-44, authorizes the City Treasurer to pay all or any part of special assessments placed upon the current or next tax roll against property owned and inhabited by indigent persons who meet certain eligibility requirements.

Finally, if the City wishes to expend City funds, the ordinance creating any customer-side lateral replacement program should contain a record of legislative findings concerning the public health dangers posed by lead laterals when impacted by water main or other street construction as well as declarations that the City's objective in funding the customer-side lead lateral replacements is to preserve the public health by eliminating a potential source of lead from the customer's tap in a timely and coordinated manner.

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney

THOMAS D. MILLER
Assistant City Attorney

c: Common Council President, Michael J. Murphy
Alderman James A. Bohl, Jr.
James R. Owczarski, City Clerk

TDM:tdm
Encl.
1048-2016-150:226801

GRANT F. LANGLEY
City Attorney

VINCENT D. MOSCHELLA
MIRIAM R. HORWITZ
ADAM B. STEPHENS
Deputy City Attorneys

Milwaukee City Hall Suite 800 • 200 East Wells Street • Milwaukee, Wisconsin 53202-3551
Telephone: 414.286.2601 • TDD: 414.286.2025 • Fax: 414.286.8550

STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOUREN
JOHN J. HEINEN
SUSAN E. LAPPEN
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
KURT A. BEHLING
GREGG C. HAGOPIAN
ELLEN H. TANGEN
JAY A. UNORA
KATHRYN Z. BLOCK
KEVIN P. SULLIVAN
THOMAS D. MILLER
JARELY M. RUIZ
ROBIN A. PEDERSON
JEREMY R. MCKENZIE
MARY L. SCHANNING
PETER J. BLOCK
NICHOLAS P. DESIATO
JOANNA GIBELEV
JENNY YUAN
KAIL J. DECKER
ALLISON N. FLANAGAN
LA KEISHA W. BUTLER
PATRICK J. LEIGL
HEATHER H. HOUGH
ANDREA J. FOWLER
PATRICK J. MCCLAIN
NAOMI E. GEHLING
CALVIN V. FERMIN
BENJAMIN J. ROOVERS
Assistant City Attorneys

March 4, 2016

Alderman James A. Bohl, Jr.
City Hall, Room 205

Re: Proposal for Replacement of Customer-Side Lead Laterals

Dear Alderman Bohl:

By email dated January 29, 2016, you asked our office to analyze the legality of a proposal to use City employees to replace privately-owned, customer-side lead laterals. The customer side-lateral is the section of water service piping located on private property. As we explained in the enclosed opinion dated January 29, 2016, the property owner/customer owns and is responsible for maintaining the customer-side lateral.

Under the proposal, the City, through the Department of Public Works (DPW) or Milwaukee Water Works (MWW), would hire two to four crews of trained, licensed plumbers to replace customer-side lead laterals. The City would then offer to replace the laterals for the cost of materials used on the job. We conclude that the proposal would not be legal without changes in state law.

Wis. Stat. § 145.06(1)(b) prohibits a public utility from performing plumbing unless the work falls under one of the exceptions in § 145.06(4). A "public utility" is separately defined, in pertinent part, as "every...city that may own, operate, manage or control...any part of a plant or equipment...for the production of...water...either directly or indirectly to or for the public." Wis. Stat. § 196.01(5)(a). Therefore, the prohibition on plumbing work applies to City employees, whether they work in DPW or MWW.

Wis. Stat § 145.06(4)(f), provides the following exception to this general prohibition:

> This section shall not apply to:....
>
> (f) Installation, repair or *replacement of water service piping, from the property line to the meter*...when such installation, repair or replacement is accomplished by employees of a public municipal water utility, providing such utility regularly has engaged in such installation, repair or replacement for at least 5 years prior to January 1, 1964. (emphasis added).

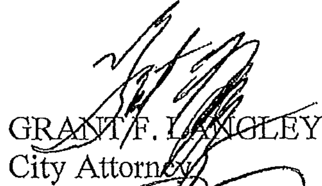
Consistent with previous City Attorney opinions applying this statute, it is our understanding that MWW did not regularly engage in such "installation, repair or replacement" on customer-side laterals as of January 1, 1959. Therefore, the exception in (4)(f) does not apply and City or utility forces could not be used to perform replacement of customer-side lead laterals.

Separately, Wis. Stat. § 66.0901(11) prohibits a political subdivision from using its own workforce "to perform a [water] construction project for which a private person is financially responsible." This relatively recent legislation, which was adopted in the 2011-13 state budget, likely serves as a separate bar precluding City employees, whether working in DPW or MWW, from performing replacement of customer-side lead laterals.

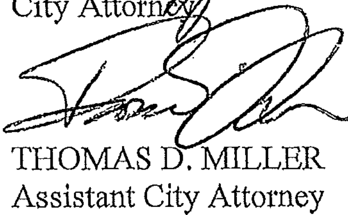
We are preparing a legal opinion to MWW which addresses the City's and MWW's authority to require replacement of customer-side lead laterals as well as the legality of using City or utility funds to pay for the replacement work. We will provide you with a copy of that opinion upon completion.

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,



GRANT F. LANGLEY
City Attorney



THOMAS D. MILLER
Assistant City Attorney

c: James R. Owczarski, City Clerk
Enc.
TDM:tdm
1033-2016-235:226312