

GRANT F. LANGLEY
City Attorney

MIRIAM R. HORWITZ
ADAM B. STEPHENS
MARY L. SCHANNING
JAN A. SMOKOWICZ
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

SUSAN E. LAPPEN
PATRICIA A. FRICKER
HEIDI WICK SPOERL
GREGG C. HAGOPIAN
ELLEN H. TANGEN
JAY A. UNORA
KATHRYN Z. BLOCK
KEVIN P. SULLIVAN
THOMAS D. MILLER
ROBIN A. PEDERSON
JEREMY R. MCKENZIE
PETER J. BLOCK
JOANNA FRACZEK
JENNY YUAN
KAIL J. DECKER
ALLISON N. FLANAGAN
PATRICK J. LEIGL
HEATHER H. HOUGH
ANDREA J. FOWLER
PATRICK J. MCCLAIN
NAOMI E. GEHLING
CALVIN V. FERMIN
BENJAMIN J. ROOVERS
ELLENY B. CHRISTOPOULOS
RACHEL S. KENNEDY
TYRONE M. ST. JUNIOR
HANNAH R. JAHN
SAVEON D. GRENEILL
JULIE P. WILSON
GREGORY P. KRUSE
Assistant City Attorneys

October 12, 2018

James Owczarski
City Clerk
City Hall, Room 205

Re: Common Council File No. 171796

Dear Mr. Owczarski:

The above-referenced resolution directed the Commissioner of Public Works, the Superintendent of Water Works, and the City Attorney to study the feasibility of establishing a local manufacturer for items needed in the replacement of water infrastructure. The resolution, which was adopted on April 17, 2018, directed these entities to report their findings to the Common Council within 60 days of the adoption of this resolution. Please accept this correspondence as the City Attorney's portion of the report to the Common Council.

By email dated August 22, 2018, the Milwaukee Water Works ("MWW") Superintendent indicated that MWW had studied the feasibility of "developing a manufacturing facility for any of the commodities frequently purchased by MWW." The MWW Superintendent concluded that "[a]fter reviewing the quantities of materials purchased, we do not believe [MWW] purchase[s] the volume necessary to create any economy of scale that would justify having our own manufacturing facility. It would not be cost effective."

Given that MWW has concluded that the establishment of a manufacturing facility is not economically feasible, we have not conducted an in-depth legal analysis of any particular proposal to establish a manufacturing facility for production of commodities used by the water utility. Nonetheless, we have identified the following issues, at a minimum, that would require further analysis in the event that the policy makers wish to explore a particular project.

1. Authority for a Water Utility to Operate a Manufacturing Facility

Any proposal to have MWW establish a local manufacturing facility to supply certain commodities, such as copper piping, would require construction authority from the



Public Service Commission of Wisconsin (“PSC”), pursuant to Wis. Stat. § 196.49 and Wis. Admin. Code ch. PSC 184.

After an informal discussion with PSC staff, the MWW Superintendent has indicated her belief that an application for construction authority for such a facility would not be viewed favorably by the Commission. This should not be surprising given that the manufacturing of supply materials is not central to the mission of a water public utility and the commodities needed are available from the marketplace.

2. Statutory Authority for City-Owned Manufacturing Enterprise

There is no express authority for the City of Milwaukee to construct, own, and operate a manufacturing enterprise for items needed in the replacement of water infrastructure. In contrast, Wis. Stat. § 59.70 (24) authorizes a county board to manufacture agricultural lime, sell and distribute it at cost to farmers, and acquire property for such purposes.

Therefore, any authority for the City to establish a manufacturing enterprise must arise from the general police power to act for the public health, safety, and welfare delegated by the state under Wis. Stat. § 62.11(5). Under § 62.11(5), “the legislature has given cities all powers not denied them by other statutes or the constitution.” *MMAC v. City of Milwaukee*, 2011 WI App 45, ¶ 81, 332 Wis. 2d 459, 798 N.W.2d 287 (citations omitted).

While, the statutory police power is a very broad grant of power, the legislature can preempt any City undertaking to establish a manufacturing enterprise. *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 29, 342 Wis. 2d 444, 820 N.W.2d 404 (“[T]he legislature may, on issues of statewide concern, prohibit political subdivisions from enacting ordinances, or invalidate ordinances already promulgated.”). This is an important cautionary note given that the City could take on the presumably enormous expenditure to establish a manufacturing enterprise only to have the state withdraw the City’s power to take such action.

3. Public Purpose Doctrine

To be lawful, the expenditure of City funds to establish a manufacturing enterprise must be a public purpose. Under the public purpose doctrine, “public appropriations may not be used for other than public purposes.” *Town of Beloit v. County of Rock*, 2003 WI 8, ¶ 20, 259 Wis. 2d 37, 657 N.W.2d 344.

“[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).

In the absence of any proposed manufacturing facility project, we can only sketch out the possible public purpose analysis and cannot predict with any degree of certainty how a court would likely rule. Nonetheless, the public purpose test is a very low threshold to meet.

Conceptually, factors weighing in favor of a public purpose finding are not difficult to imagine. First, the City would be using the manufactured items for the ultimate purpose of replacing lead service lines, addressing a public health matter. Second, the establishment of a local manufacturer could potentially supply jobs to unemployed or underemployed residents of the City. However, because the employees would be City employees, a City-owned manufacturing facility could not require that the employees reside within the City of Milwaukee. Wis. Stat. § 66.0502.

On the other hand, commodities such as copper would appear to be readily available to water utilities from the private marketplace. Moreover, we are unaware of any Wisconsin case in which a municipality controlled the means of producing supply materials that are not otherwise produced by the municipality or available to the municipality through its governmental functions. For example, MMSD has long manufactured and sold “Milorganite” but that is a by-product of MMSD’s governmental function of water treatment and sewerage disposal.

A determination that MWW lacks sufficient demand to justify establishing a manufacturing facility may undercut a public purpose argument. However, if viable, sales to other buyers or to other Wisconsin municipalities and water utilities, through intergovernmental agreements under Wis. Stat. § 66.0301, could help support a public purpose argument.

In addition, Wis. Stat. § 59.70 (24) authorizes a county board to manufacture agricultural lime and sell and distribute it at cost to farmers and acquire property for such purposes. In *Heimerl v. Ozaukee County*, the court distinguished this statute (then § 59.08(18)) on the basis that the provision of agricultural lime to farmers was a “natural governmental function” and necessary to the health, safety, and welfare of the community as a whole. 256 Wis. 151, 157, 40 N.W.2d 564 (1949). It is not clear that a reviewing court would view manufactured copper piping in the same light.

4. Contracting and Regulatory Issues

Though there is no proposal beyond a concept to analyze, it is also worth noting that state bidding requirements of Wis. Stat. § 66.0901 would not permit the City to require its contractors to purchase materials directly from the City. The City could include in its specifications that the materials will be supplied by the City and therefore not included in the price paid by the City.

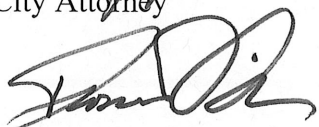
Finally, in establishing a manufacturing enterprise, the City would take on all of the regulatory compliance responsibilities borne by private manufacturers, such as environmental regulations, occupational safety and health regulations, and worker’s compensation and other potential liabilities.

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

1048-2018-1131:253588