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May 11, 2011

Richard Pfaff, Manager
Legislative Reference Bureau
City Hall, Room 307

Attention: Kathleen Brengosz
Fiscal Planning Specialist

Re: Guidance to the Flooding Study Task Force regarding implementation of a program to address inflow and infiltration

Dear Mr. Pfaff:

By letter dated April 1, 2011, Kathleen Brengosz, of your department, asked several questions that will assist the Flooding Study Task Force in its discussion of potential solutions to address inflow and infiltration ("I/I") issues in the sanitary sewers. Ms. Brengosz described a proposed city-wide program under discussion that would require property owners to disconnect clear water sources from the sanitary sewer, possibly including disconnection of down spouts and foundation drains, as well as repair, lining, or replacement of leaking sewer laterals.

As described, the proposed program would be implemented over a period of years, initially targeting neighborhoods that allow the greatest amount of clear water into the sanitary sewer system. Repairs would be ordered if inspections revealed excessive flows into the sanitary sewer system. Ms. Brengosz anticipates that property owners would be required to pay at least a portion of the cost of repairs and disconnection.

We understand that this is not a formal proposal but is intended for purposes of discussion by the task force. While Ms. Brengosz describes a potential city-wide I/I program, the Milwaukee Metropolitan Sewerage District's 2010-2020 Private Property Inflow and Infiltration Reduction Program ("MMSD Program"), which provides funding for eligible work to reduce I/I from private property sources, encourages a targeted approach[1]. The MMSD Program Policy Statement, a copy of which is attached, states:

[1] The MMSD Program, approved by the MMSD Commissioners in March 2011, authorizes spending $156 million on private property I/I reduction efforts. However, MMSD's Executive Directors informed the members of the task force that the proposed State of Wisconsin Budget will have significant effects on the program's funding level, potentially reducing funding for the Program to $50 million.

> The District expects Municipalities to prioritize work areas, where feasible, to focus on areas with sewersheds within identified metersheds that do not comply with the District's rules on Peak Flow Rate Reduction (MMSD Rules § 3.201 et seq.), on areas with basement back-up issues, on areas with a history of municipal or District overflow activity, and other areas identified as sources of high I/I because of age and type of infrastructure. Municipalities which demonstrate they have no contiguous or discrete I/I problem areas may utilize funding for I/I work across the Municipality.

In addition, in adopting the MMSD Program Policy Statement, MMSD made the following "Legislative Findings as the rational basis for this Program[:]"

1. Basement backups are a significant public health and safety issue.

2. Under many circumstances, removing I/I from private property is the most direct means to reduce the risk of basement backups because it removes excess flow at the source.

3. In most circumstances, basement backups are caused by sewer surcharging that is very close to the affected property. Therefore, a) I/I reduction work in the combined sewer area will help reduce the risk of basement backups in the combined sewer area, and b) separating combined sewers is likely to have a minimal effect, if any, on basement backups in the separated sewer area. Most basement backups in 2008-2010 occurred in separated sewer areas.

4. Private property I/I work can result in lower capital and operating costs to the District and the 28 municipalities it serves, along with benefits including the availability of sewer backup insurance, lower disaster recovery costs, and preventing the devaluation of properties.

5. Disconnecting foundation drains is a very effective strategy for reducing inflow. Rehabilitation or replacement of laterals (including flood grouting) is also one of the most effective strategies for reducing infiltration, especially in older communities where deteriorated laterals can contribute very large quantities of clear water to the sanitary sewer system.

6. Private property I/I work reduces the risks of combined and sanitary sewer overflows to surface water during wet weather by

increasing the percentage of total flow that can be conveyed, stored and treated.

7. Deteriorated laterals are also a source of pollution to area surface and ground waters and pose public health issues other than basement backups.

8. Although privately owned, lateral sewers are a necessary part of the collection system. Although lateral replacement or rehabilitation may be a benefit to the private property owner, that benefit is incidental to the public benefits and public purpose described above.

Before answering Ms. Brengosz's questions we wish to address the City's authority to require property owners to disconnect downspouts and foundation drains in both the separated and combined sewer areas and to repair, line, or replace leaking sewer laterals.

A. Connection in Areas Served by Separated Sewers

The State and City plumbing codes prohibit connection of stormwater or clearwater piping, including foundation drains and downspouts, to the separated sanitary sewer. Wis. Admin Code §§ Comm 82.30(11)(g) and Comm 82.36(4)(b)1; MCO § 225-5-4. However, under MMSD rules, foundation drains connected to the sanitary sewer before 1954 are grandfathered and may remain connected unless a governmental unit requires disconnection to reduce inflow. MMSD Rule 3-108(3).

Although pre-1954 connections to the sanitary sewer have been grandfathered, it is our opinion that, based on MMSD's "Legislative Findings" quoted above, the City could adopt an ordinance requiring property owners to disconnect foundation drains from the separated sanitary sewer. In *Village of Menomonee Falls v. Michelson*, the court held that a property owner's constitutional right to due process was not violated when the village enforced an ordinance requiring her to disconnect her foundation drain from the sanitary sewer. 104 Wis. 2d 137, 311 N.W.2d 658 (Ct. App. 1981).

Michelson claimed that an earlier ordinance required homeowners to connect foundation drains to the sanitary sewer system. The court, finding nothing in the record showing that the village had previously required such connections, nonetheless held that even if there had been a requirement, the owner's due process rights were not violated because a property owner has no vested right to have a drain connection to the sanitary sewer. *Id.* at 143. The court held that the right "to connect with a municipal sewer is in the nature of a license only...and may be revoked for cause at any time." *Id.* at 144 (citing 11 McQuillin, *The Law of Municipal Corporations*, § 31.31, at 241 (3rd ed. 1977)). In finding such cause, the court held:

> The ordinance involved in the present case is a valid exercise of the Village's police powers and is consistent with the Village's contractual and legal obligations. As the Village points out, when a large amount of clear water is permitted to flow into sanitary sewers, as during a rainstorm, the sewers may overflow and sewage may back up into basements. Further, the influx of clear water into sanitary sewers may reduce the ability of sewage treatment plants to dispose of sewage.

Michelson, 104 Wis. 2d at 144 (citation omitted).

B. Connections in Areas Served by Combined Sewers

Pursuant to Comm 82.36(4)(b)(2), the State plumbing code permits connection of foundation drains and downspouts with the combined sewer:

> (b) *Segregation of wastewater.* 1. Except as provided in subd. 2., stormwater or clearwater piping may not connect to a sanitary drain system.
>
> 2. Where a combined sanitary-storm sewer system is available, stormwater, clearwater and sanitary wastewater may be combined in the building sewer.

While the City and MMSD encourage owners to voluntarily disconnect downspouts from the combined sewers, the City plumbing code provides that property owners are required to connect downspouts to the storm sewer or combined sewer unless certain discharge requirements are met. *See* MCO § 225-4-2-a. *See also* MMSD Rule 3.107(2)(b) ("If a roof drain was connected to a combined sewer before the construction of a storm sewer that serves the property, then the roof drain may remain connected to the combined sewer, unless a governmental unit requires disconnection).

The State plumbing code, pursuant to Wis. Stat. § 145.13, provides that chapter 82 of the plumbing code is "uniform in application and a municipality may not enact an ordinance for the design, construction, installation, supervision, maintenance and inspection of plumbing which is more stringent than [chapter 82], except as specifically permitted by rule." Comm 82.03(2). Accordingly, it is our opinion that absent a change in the plumbing code requiring disconnection of stormwater and clearwater piping from the combined sewers, the City lacks authority to enact an ordinance prohibiting such connections to the combined sewers.

The City can, however, implement a targeted inspection-driven mandatory disconnection program as proposed by MMSD[2]. For example, where testing and inspections

[2] Note that the MMSD Program does not list downspout disconnections as work eligible for funding.

demonstrate that connections of foundation drains and downspouts to the combined sewer result in excessive I/I, the City can require that those sources of clear water be disconnected from the combined sewer. *See* Comm 82.22(2)(b) ("When a hazard to life, health or property exists or is created by an existing system, that system shall be repaired or replaced."). In addition, MCO § 225-02 provides that certain plumbing code sections, including Comm 82.30(11)(g)'s prohibition against connection of storm drain piping or clear water drain piping to a sanitary sewer lateral, shall apply retroactively if *upon inspection* a condition is identified that tends to create a potential health hazard. In such case, the plumbing system, or any part thereof, shall be repaired, renovated, replaced, or removed in conformity with the State code. MCO § 225-02.

C. Sewer Lateral Rehabilitation and Replacement

The City has authority to order property owners to repair or replace defective or leaking sewer laterals. *See* City Charter § 12-15; Comm 82.22(2)(b), *supra*. In addition MCO § 275-55-2, the plumbing subchapter of the City's building code, provides in pertinent part, "Every . . . sewer line shall be so installed and maintained as to function properly and shall be kept free from obstructions, leaks and defects to prevent structural deterioration or health hazards."

Pursuant to City Charter § 12-15 the property owner is responsible for maintenance of the sewer lateral as well as the cost of necessary repairs. Charter § 12-15-1 provides, in pertinent part:

> 1. MAINTENANCE. It shall be the duty of the abutting land owner to maintain in a reasonable state of repair all sewer laterals, including storm, sanitary and combined house sewers leading from the property to the main sewer. Where any lateral located within, under or on any street, alley or public way is either out of repair or has caused damage to the surface or substructure of the street in any way, the commissioner of public works shall order the abutting land owner to make the necessary repairs. If the owner refuses to comply with the order, or if the owner cannot be determined or found, the commissioner shall make the repairs, assess the cost against the property abutting the lateral and notify the owner of the charges by certified letter.

We recently opined that the City could continue a project to line a short length of lateral at the main/lateral junction, such work to be performed in the public right-of-way. *See* City Attorney Opinion dated January 22, 2010. That opinion did not address Charter § 12-15 because the City was not lining the laterals in order to repair individual defective laterals but rather as part of a comprehensive effort to line all the lateral segments, regardless of their condition, in certain problem areas to reduce I/I. If the City adopts an inspection or test-based targeted program, such as proposed by MMSD, it may be

advisable to amend this Charter section to permit the City to pay all or a portion of the lateral repair or replacement costs when ordering work pursuant to such program. [3]

D. Questions Posed

To assist the task force in its discussion, Ms. Brengosz's letter asks the following questions:

1. *Is it allowable for the City to mandate repairs [and disconnection of clear water sources] on private property at the property owner's expense if the program's implementation schedule is so extended that as a practical matter some property owners may not have to comply with the mandate for 100 years or more?*

Answering Question 1, a City ordinance requiring property owners to disconnect foundation drains and downspouts from the separated sanitary sewer at the property owner's expense would not violate the equal protection clause of either the United States Constitution or the Wisconsin Constitution notwithstanding the fact that limited resources would likely require the ordinance to be enforced over several years. The fact that the City may not have resources to inspect and enforce the ordinance against every property would not, by itself, constitute illegal selective enforcement.

In *Michelson*, discussed above, the court rejected Michelson's argument that the village was engaging in selective enforcement in violation of the equal protection clause because she claimed it was enforcing the ordinance against only about fifty percent of the properties that had a drain connection in violation of the ordinance. 104 Wis. 2d at 145. The court reasoned:

> The equal protection clause of the Fourteenth Amendment is violated if an ordinance is administered "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights." . . . Nevertheless, evidence that a municipality has enforced an ordinance in one instance and not in others would not in itself establish a violation of the equal protection clause. . . There must be a showing of an intentional, systematic and arbitrary discrimination.

Id. at 145 (citations omitted).

"Selective enforcement which occurs over a period of time does not, by itself, constitute a constitutional violation unless there is no intention to follow it up by general

[3] We understand that the City and MMSD will implement a voluntary private property I/I reduction demonstration project in 2011 using MMSD funds and MMSD contractors.

enforcement against others." *Carpenter v. Commissioner of Public Works*, 115 Wis. 2d 211, 219, 339 N.W.2d 608 (Ct. App. 1983) (*citing Michelson*, 104 Wis. 2d at 146). "It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found." *Michelson*, 104 Wis. 2d at 146 (citation omitted).

Further, an inspection-driven mandatory disconnection and lateral repair program applying to both the separated and combined sewer areas would not violate the equal protection clause, provided there is a rational basis for targeting certain areas rather than others. The fact that a classification scheme results in some inequity does not provide a sufficient basis for invalidating it. *Metropolitan Assocs. v. City of Milwaukee, 2011 WI 20,* ¶ 62. Equal protection "does not deny a [municipality] the power to treat persons within its jurisdiction differently..." *Nankin v. Village of Shorewood*, 2001 WI 92, ¶ 12, 245, Wis. 2d 86, 630 N.W.2d 141. Unless a suspect class or fundamental interest is involved, courts will sustain a classification if any rational basis exists to support it. *Metropolitan Assocs,* at ¶ *60, n. 20.* Any doubts must be resolved in favor of the reasonableness of the classification. *Id.* at ¶ 61 (citation omitted).

The Wisconsin Supreme Court has specified five factors as relevant to the determination whether a classification is reasonable for purposes of equal protection:

(1) All classifications must be based upon substantial distinctions which make one class really different from another;

(2) The classification adopted must be germane to the purpose of the law;

(3) The classification must not be based upon existing circumstances only [it must not be so constituted as to preclude addition to the numbers included within the class];

(4) To whatever class a law may apply it must apply equally to each member thereof; and

(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Metropolitan Assocs., at ¶ 64.

In exercising its police power, a municipality need not attempt to remedy or eliminate an entire problem; "reform may take one step at a time, addressing itself to the phase of the

problem which seems most acute to the legislative mind." *Vaden v. City of Maywood*, 809 F.2d 361, 365 (7th Cir. 1987) (quoting *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); *see also Greater Chicago Combine and Center, Inc. v. City of Chicago*, 431 F.3d 1065, 1072 (7th Cir. 2005) ("a city's decision to address a problem gradually is rational.").

Accordingly, if the City can identify a rational basis for targeting certain areas as part of a clear water disconnection and lateral repair program, then such a targeted effort will not violate the equal protection clause. Relevant criteria for classifying targeted areas could include, for example, whether MMSD has identified the area as belonging to a "poorly performing" sewershed under objective metering tests.

2. *Does the use of public funds to pay for all or a portion of mandated repairs on private property or the use of City forces to do the work alter the enforceability of the program?*

a. Equal Protection

Answering question 2, the use of public funds to pay all or a portion of mandated disconnection or lateral repair work would not change the equal protection analysis provided in response to question 1. Courts employ the same analysis regardless of whether the classification confers a benefit or imposes an obligation. *See* City Attorney Opinion dated August 6, 1975, at p. 5.

b. Public Purpose

The use of public funds to pay for all or a portion of disconnection and lateral repair work on private property must be consistent 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. It is our opinion that the public purpose doctrine would not likely preclude the use of public funds for private property I/I reduction efforts.

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 ¶ 21. "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.*, at ¶ 28 (citation omitted). Accordingly, "the public purpose doctrine has been broadly interpreted" and liberally applied. *Id.*, at ¶¶ 29, 33.

The threshold issue is whether the appropriation is related to public necessity, convenience, or welfare. *Hopper v. City of Madison*, 79 Wis. 2d 120, 129-30, 256 N.W.2d 139 (1977). As the Wisconsin Supreme Court explained in *Town of Beloit*:

> 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...

2003 WI 8, ¶ 29.

Based on MMSD's Legislative Findings, *supra*, it appears that there is a strong argument that public funds for private property disconnection and repair work would further the "public necessity, convenience, or welfare" by reducing the risk of basement backups. This conclusion is strengthened if it is determined that a comprehensive effort to reduce private property I/I within "poorly performing" sewersheds is not feasible without public funding.

In addition, an argument can be made that private property I/I reduction will provide public fiscal benefits through improving the value of housing stock in the affected areas. *Town of Beloit*, 2008 WI 8, ¶ 49 (combination of goals of creating jobs, promoting orderly growth, enhancing the tax base, and preserving and conserving environmentally sensitive lands is a legitimate public purpose); *Libertarian Party of Wisconsin v. State*, 199 Wis. 2d 790, 546, N.W.2d 424 (1996) (holding that creating jobs and enhancing the tax base, among other reasons, provided a public purpose in the expenditure of public funds to build Miller Park).

The fact that a targeted program may benefit only a small number of residents or that these residents would derive a benefit would not necessarily eliminate the public purpose, provided that the private benefits to the individual homeowners are incidental to the public purpose of reducing basement backups within the targeted sewershed. As the court held in *Hopper*:

> If an appropriation is designed in its principle parts to promote a public purpose so that its accomplishment is a reasonable probability, private benefits which are necessary and reasonable to the main purpose are permissible.
>
> * * *
>
> Although the number of beneficiaries is a pertinent factor in determining whether an appropriation has a public purpose, this court has stated many times "the fact the (appropriation) may benefit certain individuals or one

> particular class of people, more immediately than other individuals or classes does not necessarily deprive the (appropriation) of its public purpose."

79 Wis. 2d at 129, 134-35 (citations omitted) (finding public purpose for municipal appropriation to organization to provide information and grievance services to tenants). *See also* State *ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 214, 170 N.W.2d 790 (1969) (holding that appropriation to a private university was not made primarily to benefit the institution to promote and maintain public health and therefore was for a public purpose). *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 208 N.W.2d 780 (1973) (finding a public purpose in legislation providing for financing authority for construction of low and moderate income housing).

c. Liability

While not affecting the enforceability of the program, use of City funds or City forces on a private property I/I reduction program may expose the City to liability for which it would not otherwise be subject to. The use of hold harmless agreements, at a minimum, is advisable.

3. *If inflow and infiltration exist city wide, does targeting neighborhoods with the highest level of inflow and infiltration, as opposed to the highest incidence of flooding, represent a violation of equal protection?*

Answering Question 3, we do not know the extent to which I/I occurs city-wide or the degree to which some sewersheds experience excessive I/I in comparison to other parts of the City. Nonetheless, so long as there is a rational basis for doing so, targeting a sewershed based on excessive I/I as opposed to flooding incidents would not violate the equal protection clause. As long as there is a reasonable basis for selecting excessive I/I as the determining factor, it does not matter that another party may find a different classification to be more reasonable. *Kahn v. McCormack*, 99 Wis. 2d 382 (1980).

4. *What are the implications if the City implements this program for a short period of time and then discontinues it before repairs have been made on all properties?*

Answering question 4, based upon MMSD's "Legislative Findings" a targeted, inspection-driven foundation drain and downspout disconnection and lateral repair and replacement program appears reasonably related to the City's police power to further the public health, safety, and welfare; so too does a general ordinance requiring property owners to disconnect foundation drains from the sanitary sewer area. The fact that the City may discontinue the program or repeal the ordinance before requiring disconnection

and repair/replacement work on all properties does not affect the determination whether there is a rational basis for these efforts in the first place.

As for liability implications, the City would not take on greater liability by terminating a program before all potential target areas are addressed. The design, planning, and implementation of sewer systems are discretionary acts for which the municipality enjoys immunity in the event of future basement backups. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 60, 277 Wis. 2d 635, 691 N.W.2d 658.

We trust that this analysis answers your questions. Please contact the undersigned if you have any further questions.

Very truly yours,

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