

**CITY OF MADISON, WISCONSIN**

<hr/> <b>REPORT OF: OFFICE OF CITY ATTORNEY</b>  <b>TITLE: AMENDING SEC. 4.18, MGO RE: ORDINANCE ON STREET PARKING PAYMENT</b>  <b>AUTHOR: Michael P. May City Attorney</b>  <b>DATED: December 7, 2005</b>  <b>ID No. 02554</b> <hr/>	<table border="0" style="width: 100%;"> <tr> <td style="width: 50%;">PRESENTED</td> <td style="width: 50%; text-align: right;"><u>December 13, 2005</u></td> </tr> <tr> <td>REFERRED</td> <td>_____</td> </tr> <tr> <td>REREFERRED</td> <td>_____</td> </tr> <tr> <td>REPORTED BACK</td> <td>_____</td> </tr> <tr> <td>ADOPTED _____</td> <td>POF _____</td> </tr> <tr> <td>RULES SUSPENDED</td> <td>_____</td> </tr> <tr> <td>ID NUMBER</td> <td style="text-align: right;"><u>02554</u></td> </tr> </table>	PRESENTED	<u>December 13, 2005</u>	REFERRED	_____	REREFERRED	_____	REPORTED BACK	_____	ADOPTED _____	POF _____	RULES SUSPENDED	_____	ID NUMBER	<u>02554</u>
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TO THE MAYOR AND COMMON COUNCIL:

This ordinance accomplishes two things: First, it brings the existing payment in lieu of taxes (PILOT) for the Parking Utility in line with current practice. Second, it establishes an occupancy fee for on-street metered parking stalls, pursuant to a budget amendment that was previously approved by the Common Council

**PILOT PAYMENT**

The language in Sec. 4.18, MGO, was out of date. The Parking Utility has been making a PILOT payment to the general fund for several years based on the combined City and school tax rate, less the state school tax credit. The change in this ordinance is to reflect that fact. It is made retroactive to January 1, 2005, to reflect the payments as actually made in 2005.

We do not see a problem with the PILOT being based on a combined tax rate. In a similar situation, state statutes governing PSC regulated utilities provide for a PILOT based upon the combined municipal and school tax rate. Sec. 66.0811(2), Stats., and Wis. Adm. Code Ch. PSC 109.

**OCCUPANCY FEE / OTHER PAYMENTS**

For reasons explained in greater detail in our memo of November 14, 2005 (copy attached), we do not believe that the City could justify imposing a PILOT payment on parking stalls placed in the municipal right-of-way. In addition, due to existing bond covenants and the nature of the public right-of-way, we do not believe that a simple transfer of funds held by the Parking Utility to the general fund, or a rental fee on public right-of-way, would be allowed.

However, we do believe the City could establish a payment by the Parking Utility in the nature of a fee for occupancy of the right-of-way and for other municipal services that have not otherwise been covered by payments. Bond counsel has indicated such a fee, as an operational expense, would be allowed. We are informed that other municipalities have such a fee.

Thus, the nature of the additional fee imposed is that of an occupancy fee, and a fee for some other services such as snow plowing or street cleaning, that assist the Parking Utility in obtaining the revenue from the on-street metered parking stalls.

Such a fee is allowed so long as it is reasonably related to the operational costs.

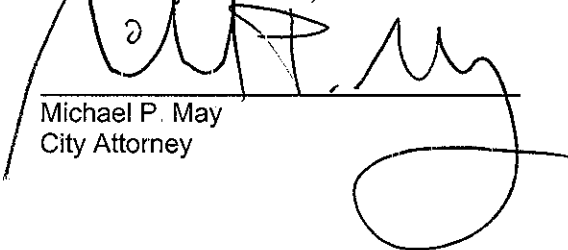
There are many ways to attempt to calculate what would be a reasonable occupancy fee. To the extent you wish the fee to mimic a PILOT payment, calculations previously made by Comptroller Dean Brassler (memorandum of November 11, 2005) suggested a payment in the range of \$90,000 to \$300,000. A calculation based on the administrative fee charged for use of the streets under Sec. 10.056(7), MGO, could result in a payment of a maximum of \$173,000 per year.

Attempting to calculate any of these PILOT fees or a rental value or other occupancy fee is also limited by the fact that the Parking Utility does not generate revenue from or control the parking stalls for 24 hours a day, 7 days a week, as would be the case with a parking facility or a real rental fee. This fact suggests that the higher figures quoted above are beyond the high range of reasonableness. However, we cannot determine with any confidence whether those estimates should be discounted by 75%, 50%, 20%, or some other number, in order to make the figures more accurately reflect a fair payment for occupancy of the street right-of-way.

Based on all of these calculations, our office suggests that a reasonable fee for occupancy of the streets by the Parking Utility, based on the current number of metered on-street stalls, is in the range of \$50,000 to \$150,000

A number of municipalities simply use a percentage of revenues received to represent the payment of such an occupancy fee and payment for other services received. We understand that setting the fee at 10% of gross revenues, as is done in this ordinance, will generate approximately \$130,000 in 2006. Such a fee is within the range of reasonableness outlined above

Respectfully submitted,



Michael P. May  
City Attorney

MPM:pah

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: November 14, 2005

**MEMORANDUM**

**TO:** Ald. Ken Golden  
Mayor David Cieslewicz  
Comptroller Dean Brassler

**FROM:** Michael P. May, City Attorney  
Anne Zellhoefer, Assistant City Attorney

**RE: PARKING UTILITY SYSTEM PILOT PAYMENTS OR OTHER  
TRANSFERS TO THE GENERAL FUND**

This office was asked whether the City could exact a payment in lieu of taxes (PILOT) against the Parking Utility for use of the streets where parking meters exist. This memorandum presents a general discussion of PILOT exactions, other transfers from the Parking Utility to the general fund, and a specific discussion of ordinances, laws and bond covenants applicable to the use of Parking Utility revenues. We conclude with recommendations as to how the City should treat such transfers, both for consideration in the 2006 Budget and beyond.

**PILOT**

The City assesses PILOT against properties operated by the City's enterprise agencies, the City's utilities and some private tax-exempt entities, such as the Fluno Center. The assumption is that owners of these tax exempt properties should make a payment to the City for City services, such as police and fire protection, trash removal, etc. The City also receives a payment for municipal services from the State of Wisconsin for State facilities. These negotiated payments are based on the value of the State facilities, the value of property in the City, and the City's revenue. The mode of calculating the City's Parking Utility PILOT is described in Dean Brassler's memo to you dated November 4, 2005 (copy attached). In addition to reflecting City services that are provided to these properties, a PILOT reflects the fact that these tax-exempt entities occupy property that otherwise would be taxable by the City were the property owned by a private, taxable entity.

## **RELEVANT CITY ORDINANCES REGARDING PARKING UTILITY FUNDS**

Section 4.18, MGO, authorizes the City to exact a PILOT against the Parking Utility. It reads, in its entirety, as follows:

### **Payment Of Tax Equivalent On City Owned Parking Lots**

On or before March 1 of each calendar year, there shall be paid into the general taxes which would be levied on the land and improvements included within the parking area based on the assessed valuations as determined by the City Assessor on May 1, and the mill rate as adopted by the Common Council in December.

In addition, Sec. 3.51(4)(a), MGO, provides that the Transit and Parking Commission "shall not commingle the funds or use the assets of one utility to further the interest of another utility".

In fact, for a number of years, the PILOT has been calculated not at the City's mill rate, but at the combined City and School District mill rate. This practice is clearly contrary to City ordinances, and greatly increases the PILOT payable from the Parking Utility to the general fund. There is nothing inherently incorrect about establishing a pilot at some rate other than the City's mill rate.<sup>1</sup> However, it is clear that the City should either reduce the PILOT paid by the Parking Utility to match the level set in its ordinance, or modify its ordinance to match the level of PILOT actually paid by the Parking Utility. We suggest that the ordinance be modified to reflect the practice of the City in its budgeting.

## **BOND COVENANTS**

In 1995 the City issued Parking System Revenue Bonds, which mature in 2015. As long as these bonds are outstanding, the City is obligated to abide by the bond covenants and certain federal and state laws governing tax-exempt revenue bonds. Section 66.0829, Wis. Stats., provides that any revenue derived from a parking facility financed by a revenue bond may be used only to pay the principal and interest of that bond, and that after the principal and interest on that bond have been paid in full the revenue derived from a parking facility may be used for any purpose. Payment of the bonds is not backed by the City's general obligation pledge, but is secured by revenue of the entire Parking System, meaning the street meters, off street ramps and lots, and all the real and personal property of the System. The bond covenants provide that the gross revenues of the Parking System shall be deposited into a discrete Revenue Fund and applied only to pay debt service on the bonds, to pay for the operation and

<sup>1</sup> Although not strictly applicable to an entity like the Parking Utility, we note that under sec. 66.0811(2), Stats., a PILOT based on the combined municipal and school rates may be assessed against utilities (such as the water utility) regulated by the Public Service Commission of Wisconsin. See also Wis. Adm. Code Ch. PSC 109.

maintenance of the Parking System, to support a renewal and replacement account, to create a depreciation account, and, if any funds are remaining, to be deposited in a surplus account. The bond resolution is silent as to a PILOT, although Sec. 66.0829, Wis. Stats., permits a municipality to assess a payment in lieu of taxes against the cost of operating and maintaining a parking system.

These bond covenants require that the related funds identified in the bond be maintained at the level specified therein, as they may be changed from time to time. For example, bonds require a depreciation fund, a maintenance fund, and a replacement fund. The level of dollars which need to be maintained in any of these funds will vary depending on the state of the parking utility system.

In addition, bond counsel has advised the City that a PILOT made to the City is treated as an expense of the system, which is allowable and properly payable by the Parking Utility. However, bond counsel also has advised the City that even if the level of funds in the Parking Utility's surplus fund might appear available for transfer to the general fund under state statutes, the bond covenants contemplate a "closed system" such that those funds must be maintained and may be used solely for operation and maintenance of the Parking Utility system, until the bonds are paid off.

### **STATUTORY AUTHORITY FOR TRANSFER PAYMENT**

Because of the limitations in the bond covenants outlined above, the City is not in a position to ask for other transfers to the general fund from amounts in the surplus fund. Thus, although there might be some interesting legal issues involved in whether sec. 66.0829 or, if applicable, sec. 66.0811(2), Wis. Stats., might allow for some such transfers, such a debate is an academic one so long as the bond covenants remain in place.<sup>2</sup>

In either event, absent a determination made both by staff, TPC, and this Council as to the proper amounts to be maintained in the funds for the various purposes of the Parking Utility, it is difficult or impossible to determine if any amount could be transferred to the general fund.

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<sup>2</sup> Sec. 66.0811(2), Stats., provides in part that funds derived by a utility must be used to make payments:

"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 paid into the general fund."

Strictly speaking, this statute applies to utilities subject to Public Service Commission of Wisconsin jurisdiction. However, since the Parking Utility has issued revenue bonds under sec. 66.0621, Stats., it too may be subject to this statute due to the operation of sec. 66.0621(4)(f), Stats.

There are also some risks and important policy issues in simply establishing an amount to be transferred from the Parking Utility to the general fund. Because, as noted above, this debate is academic until the bonds are paid off, this memorandum will not further analyze such a potential transfer

### **STREET METERS AND PILOT PAYMENTS**

The lands underneath streets where parking meters exist are usually lands deemed held in trust by the City for the benefit of the public. Streets appear on plats or certified survey maps as dedicated lands. Unlike parking ramps or surface lots owned in fee by the City and operated by the Parking Utility, streets are not separate parcels or lots which can be accurately appraised or assessed. Street meters, unlike the Utility's ramps and surface lots, do not require the kind and extent of City services such as police and fire protection and trash removal which would justify the assessment of a PILOT. And, unlike parking ramps or parking lots which do consume space that might otherwise be occupied by taxpaying entities, streets are never likely to be occupied by taxpaying entities.

While there might be some method of creating an unusual formula to calculate an additional PILOT based upon street meters, our conclusion is that such a PILOT makes little rational sense, and might be subject to legal challenge. It would be much more straightforward and transparent to simply designate an increase in the general PILOT based upon some rational basis. For example, the Council might rationally determine that the existence of street parking spaces and the other services available to the Parking Utility require an increase in the PILOT based on a formula of some set dollar amount, or some set percentage of Parking Utility revenues. So long as such a formula was rational and reasonably related to the calculation of a PILOT, it has a much better chance of being upheld if challenged. Any such calculation ought to be codified in the ordinance related to PILOT, and not simply be a filler determined by the Council on an ad hoc basis at budget time.

### **CONCLUSION**

In order to get funds from the Parking Utility into the general fund for use by the City, the City would need to establish a rational basis for PILOT payments that are different than what occurs right now. The use of street parking stalls hardly seems to meet that test. The City might be able to revise the general PILOT payment in some amount.

Our opinion is that a more straightforward and transparent method would simply be to indicate that a certain amount or percentage of revenues will be added to the PILOT formula, and to be transferred by the Parking Utility to the general fund, on an annual basis. This amount again must be calculated based upon some rational formula.

November 14, 2005

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Any amendment to increase the PILOT in the 2006 budget should reflect these principles, and the Council should take steps immediately thereafter to reflect the principles and the formula in the ordinance regarding PILOT payments by the Parking Utility.

cc: All Alders  
David Dryer  
Bill Knobeloch