

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

DATE: May 31, 2007

MEMORANDUM

TO: **Mayor Dave Cieslewicz**
Board of Water Commissioners

FROM: Michael P. May, City Attorney

SUBJECT: **Recommendation to Resolve Conflicts Between Sec. 66.0805, Wis. Stats., and Chapter 13, MGO, City Water Utility**

I was asked to prepare a memorandum on certain legal issues with the current City ordinance for the Water Utility, and to recommend needed changes. I understand this will be an agenda item for the Board of Water Commissioners at its meeting on June 19, 2007. I will be at that meeting, but must leave in time to attend the Common Council meeting at 6:30 p.m.

There are conflicts between state statutes governing utility commissions and the Madison ordinances. In addition, some of the City's practices with respect to utility operations are not strictly in compliance with state law.

These issues have come up in several contexts. This memorandum addresses the issue in the context of the Water Utility and its Board of Water Commissioners. The same issues may arise with respect to other utility commissions.

Sec. 66.0805, Wis. Stats.

This is the statute that governs the operation of utility commissions. The statute is designed to give a certain level of independence to utility commissions, to separate them from the political influences of the common council (note that the purpose is to provide for "non-partisan management" of utilities). Several sections of the statute will be set out below, and a copy of the statute is attached to this memo.

Of primary importance is that the utilization of a utility commission as described in the statute is optional with the City. The Common Council may, if it so desires, abolish a utility commission and transfer the control of the utility to a committee of the Common Council, the Board of Public Works, or some other specially established board or commission. Sec. 66.0805(6), Wis. Stats. Thus, although utility commissions do enjoy certain levels of independence, they ultimately are responsible to the overall policies of the City as established by the Common Council. It is for this reason that I often refer to such commissions as "quasi-independent."

Nonetheless, the Wisconsin Supreme Court made clear in the case of *Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 280 N.W.2d 166 (1979), that once a municipality opts to utilize a commission under the procedure set out in 66.0805(1), Wis. Stats., the municipality must follow those procedures and create the quasi-independent commission envisioned in the statute. The court explicitly rejected the City of Clintonville's claim that it had created a "hybrid" commission. 90 Wis.2d at 465. As will be noted below, it appears that this "hybrid" is exactly what Madison may have intended in chapter 13, MGO.

Some of the relevant provisions of the statute provide as follows:

66.0805 Management of municipal public utility by commission.

- (1) Except as provided in sub. (6), the governing body of a city shall, and the governing body of a village or town may, provide for the nonpartisan management of a municipal public utility by creating a commission under this section. The board of commissioners, under the general control and supervision of the governing body, shall be responsible for the entire management of and shall supervise the operation of the utility. The governing body shall exercise general control and supervision of the commission by enacting ordinances governing the commission's operation. . . .

* * *

- (3) The commission shall choose a president and a secretary from its membership. The commission may appoint and establish the compensation of a manager. The commission may command the services of the city, village, or town engineer and may employ and fix the compensation of subordinates as necessary. . . .

* * *

- (6) In a 2nd, 3rd or 4th class city, a village or a town, the council or board may provide for the operation of a public utility or utilities by the board of public works or by another officer or officers, in lieu of the commission provided for in this section.

In *Schroeder v. City of Clintonville*, supra, the utility commission had granted a 10% wage increase to the utility employees. The common council voted to rescind the increase and grant a 6% wage increase, the same as had been granted to other city employees. The employees sued the city after their claim was denied.

The Supreme Court ruled that the authority to set the wages for the utility employees rested in the utility commission. The Court first found that the authority given to the commission to fix the compensation of employees was a specific statute, which governed over any general authority that the common council normally had over employees' salaries, or over boards and commissions. The Supreme Court then quoted with approval from prior opinions of the Attorney General that "it was the legislature's intent that the 'operation of the municipal utility be carried on divorced from the direct supervision of the council.'" 90 Wis. 2d at 463.

Finally, the court rejected *Clintonville's* assertion that it had created some sort of hybrid or de facto form of mixed management that had stripped the commission of its statutory authority. 90 Wis. 2d at 465.

It should be noted that, among other authorities on the power of utility commissions are the following: the Attorney General has opined that a utility commission might retain its own attorney, 23 OAG 256 (1934); the statutory change giving utility commissions "entire charge and management" was considered to have subsumed the utility commission's authority to enter into contracts on behalf of the city set forth in the prior statutes, L. 1921, C. 396; utility commissions are not separate corporations or quasi-municipal bodies, but departments of the City which are granted some independence by law, *Roberts v. City of Madison*, 250 Wis. 317, 325, 27 N.W.2d 233 (1947), 65 OAG 243 (1976).

Sections 13.01 to 13.02, Madison General Ordinances

An examination of Secs. 13.01 and 13.02, MGO, shows some conflicts with the general state law set out above. Among those are the following:

1. Although the ordinance refers to Sec. 66.0805(2), it does not explicitly state that the commission is one created under Sec. 66.0805.
2. The ordinance does not explicitly state that members of the commission are elected by the Common Council.
3. The language with respect to the authority of the Board and the Common Council in 13.01(2), relies on outdated language in the ordinance, and fails to accurately track the current statute.
4. Sec. 13.02(1) provides that the Utility general manager is appointed by the Board of Water Commissioners "subject to approval of the Mayor and Common Council and the position filled according to Sec. 3.38(6)(f) of these ordinances".

Particularly with respect to the last provision, the Madison General Ordinances appear to be attempting to create some in-between or "hybrid" position with respect to the Water Utility Commission's authority. Some of these same conflicts or inconsistencies exist in the Utility Manager's contract.

Recommendation

There are a number of potential resolutions of these discrepancies. I recommend that the City take the following course:

As noted above, there is no requirement that a Madison use a quasi-independent utility commission at all. The City could use sub. (6) of the statute to provide for "the operation of a public utility or utilities by the board of public works or by another officer or officers, in lieu of the commission provided for in this section." The City should do so, and reconstitute a new "Water Board" with essentially the same powers it has today under City ordinances.

Under this scenario, the City would modify its ordinances to say it was not creating a commission under Sec. 66.0805(1), Wis. Stats., but rather was exercising its optional powers and creating a new set of officers called the "Water Board" and giving them specified powers. Then the City could in its ordinance give the Water Board essentially the same levels of authority that it currently has, but in a manner that does not run afoul of the statutes, and avoids the possibility of messy litigation at a later point.

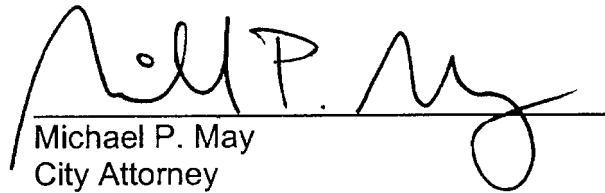
I think this option will both bring the City in line with state law and preserve most of the existing practice as to how the City operates. This could be a model for addressing similar issues I have seen in other ordinances.

While other options, such as strict compliance with the State statute, or use of a charter ordinance, are possible, they would require significant changes in the City's operation or additional legal risks, or both. In addition, I do not recommend using this process to make any significant changes in the relationship between the Water Utility, its Board, and the Common Council. While such policy choices may be worth examining, I recommend that the first step is simply to bring the ordinance and state law into alignment.

I have attached a draft ordinance that makes the changes recommended above, and also increases the size of the Water Board to 7 voting members, plus the Public Health Director as a non-voting member.

Attachments

- A. Sec. 66.0805, Wis. Stats.
- B. Sec. 13.01 to 13.02, MGO.
- C. Draft of Proposed Revisions to Sec. 13.01 to 13.02, MGO



Michael P. May
City Attorney

CC: All Alders
David Denig-Chakroff
Janet Piraino

MPM:pah
Attachments

66.0805. Management of municipal public utility by commission

(1) Except as provided in sub. (6), the governing body of a city shall, and the governing body of a village or town may, provide for the nonpartisan management of a municipal public utility by creating a commission under this section. The board of commissioners, under the general control and supervision of the governing body, shall be responsible for the entire management of and shall supervise the operation of the utility. The governing body shall exercise general control and supervision of the commission by enacting ordinances governing the commission's operation. The board shall consist of 3, 5 or 7 commissioners.

(2) The commissioners shall be elected by the governing body for a term, beginning on the first day of October, of as many years as there are commissioners, except that the terms of the commissioners first elected shall expire successively one each year on each succeeding first day of October.

(3) The commission shall choose a president and a secretary from its membership. The commission may appoint and establish the compensation of a manager. The commission may command the services of the city, village or

town engineer and may employ and fix the compensation of subordinates as necessary. The commission may make rules for its proceedings and for the government of the department. The commission shall keep books of account, in the manner and form prescribed by the department of transportation or public service commission, which shall be open to the public.

(4)(a) The governing body of the city, village or town may provide that departmental expenditures be audited by the commission, and if approved by the president and secretary of the commission, be paid by the city, village or town clerk and treasurer as provided by s. 66.0607; that the utility receipts be paid to a bonded cashier appointed by the commission, to be turned over to the city, village or town treasurer at least once a month; and that the commission have designated general powers in the construction, extension, improvement and operation of the utility. Actual construction work shall be under the immediate supervision of the board of public works or corresponding authority.

(b) If water mains have been installed or extended in a municipality and the cost of installation or extension has been in some instances assessed against the abutting owners and in other instances paid by the municipality or a utility, the governing body of the municipality may provide that all persons who paid the assessment against any lot or parcel of land may be reimbursed the amount of the assessment regardless of when such assessment was made or paid. Reimbursement may be made from such funds or earnings of the municipal utility or from such funds of the municipality as the governing body determines.

(5) Two or more public utilities acquired as a single enterprise may be operated under this section as a single enterprise.

(6) In a 2nd, 3rd or 4th class city, a village or a town, the council or board may provide for the operation of a public utility or utilities by the board of public works or by another officer or officers, in lieu of the commission provided for in this section.

CHAPTER 13

PUBLIC WATER SUPPLY SYSTEM

(Title Am. by Ord. 6665, Adopted 6-26-79; Am. by Ord. 12,357, Adopted 3-16-99)

Section

- 13.01 Board of Water Commissioners.
- 13.02 Appointment of General Manager; Duties.
- 13.03 Duties of General Manager.
- 13.04 Outdoor Water Usage Restrictions. (Cr. by Ord. 5569, 8-13-76)
- 13.05 Contracts for Lease of Water.
- 13.06 Access to Premises.
- 13.07 Service Connections.
- 13.08 Laying of Mains and Service Pipes When Streets are Paved.
- 13.09 Expense of Laying Service Pipes.
- 13.10 No Claims to be Allowed Against City for Interruption of Water Supply or Consequential Damage.
- 13.11 Opening of Fire Hydrants.
- 13.12 Collection of Water Utility Charges.
- 13.13 General Tax for Benefit of Water Utility.
- 13.14 Surplus Revenues.
- 13.15 Cross Connection Control. (Am. by Ord. 12,344, 3-2-99)
- 13.16 Fixing The Area in Which Water Service is to be Extended Beyond the Municipal Limits.
- 13.17 Adoption by Reference (Cr. by Ord. 12,357, Adopted 3-16-99)
- 13.18 Lead Water Service Line Replacement (Cr. by Ord. 12,544, 2-18-00)
- 13.19 Water Main Assessment Procedure. (R. & Recr. by Ord. 4902, 2-25-75)
- 13.20 Tampering with Water Meters Prohibited. (Cr. by Ord. 7848, 11-5-82)
- 13.21 Well Abandonment. (Cr. by Ord. 10,136, 11-14-90; Am. by Ord. 12,345, 3-2-99)
- 13.22 Wellhead Protection. (Cr. by Ord. 13,106, 7-23-02)
- 13.23 Penalty.

13.01 BOARD OF WATER COMMISSIONERS.

- (1) Board of Water Commissioners. There shall be a board of five (5) water commissioners, whose duty shall be the management and operation of the City Water Utility. One (1) commissioner shall be a member of the Common Council. Pursuant to Sec. 66.0805(2), Wis. Stats., commissioners shall be appointed on a staggered basis for a term each of five (5) years. In case of vacancy the Common Council may at any regular or special meeting elect a member for the unexpired term. In addition, the Director Public Health under Sec. 7.02, M.G.O., or his or her designee shall serve as an ex-officio, non-voting member of the Board in order to provide advice and information to the Board on health issues related to the Water Utility. The Director of Public Health shall not vote, may not make motions, and shall not be counted as a member in determining quorum or majorities. (Am. by Ord. 10,239, 4-12-91; ORD-06-00098, 8-2-06)
- (2) Meeting and Organization of the Board. The commissioners on an annual basis shall choose from among their number a president, vice president and secretary. The Board of Water Commissioners may make rules for its own proceedings and for the government of the Utility. The Board shall keep books of account in the manner and form prescribed by the Public Service Commission which shall be open to the public. The Board shall have the general management and supervision of the City Water Utility and all matters connected therewith and shall have the general power and authority to make rules and regulations for the management of said Utility as it shall from time to time find necessary for the safe, economical and efficient management and protection of the water utility. The Board shall issue an annual report which shall be made available to the Common Council.
(Sec. 13.01 Am. by Ord. 6665, Adopted 6-26-79)

13.02 APPOINTMENT OF GENERAL MANAGER; DUTIES.

- (1) The Water Utility General Manager shall be appointed by the Board of Water Commissioners subject to the approval of the Mayor and Common Council and the position filled according to Sec. 3.38(6)(f) of these ordinances. The General Manager shall hold her/his position pursuant to the terms of the employment contract provided for in such section. The Water Utility General Manager shall be the chief executive of the Water Utility and shall perform those duties generally described in this chapter.

(Sec. 13.02 Am. by Ord. 12,357, Adopted 3-16-99)

13.03 DUTIES OF GENERAL MANAGER.

- (1) General Duties. The General Manager shall have supervision of the Water Utility under the direction of the Board of Water Commissioners and shall have supervision and control over the buildings, grounds, and all matters connected therewith, and shall enforce all ordinances, rules and regulations of the Common Council and of the Board; and see that the conditions of all contracts relating to said Utility are faithfully complied with, and that all charges for the use of water are duly made, collected, and paid into the City Treasury. The General Manager shall be the appointing authority under the provisions of the civil service ordinance for the purpose of making appointments of employees in the Water Utility.
- (2) In Charge of New Construction and Installations. The General Manager shall supervise the installation of all new equipment, the construction of all new wells, reservoirs, treatment facilities, and pumping stations and have charge of all improvements to the Water Utility plant, including the installation, repair and reconstruction of all mains and service connections. The General Manager shall have supervision of work of this nature and, subject to such regulation as the Common Council or Board may adopt, shall have the authority to purchase materials and to employ the services and labor necessary for such work.
- (3) Maps and Records to be Kept. The General Manager shall direct the maintenance of maps and records of the water system.
- (4) Other Records to be Kept. The General Manager shall keep a record of all accounts and claims for or against the Water Utility and all meters and the location thereof and shall perform such other duties as the Board or the Common Council may prescribe.

(Sec. 13.03 Am. by Ord. 12,357, Adopted 3-16-99)

CITY OF MADISON, WISCONSIN

AN ORDINANCE _____

PRESENTED _____
REFERRED _____

Amending Sections 13.01, 13.02, and 13.03 of the Madison General Ordinances to restructure the Board of Water Commissioners in compliance with state statutes.

RULES SUSPENSION _____
PUBLIC HEARING _____

Drafted by: Michael May

Date: DRAFT May 25, 2007

SPONSORS: Mayor Cieslewicz

DRAFTER'S ANALYSIS: The City's existing ordinances governing the Water Utility, specifically the Board of Commissioners and the General Manager, are in conflict with state law on the issue. Sec. 66.0805 (1)-(5), Wis. Stats., requires that a utility commission established under it have certain powers. The City's ordinance creates something akin to the "hybrid" commission that was found improper by the Wisconsin Supreme Court in Schroeder v. City of Clintonville, 90 Wis. 2d 457 (1979).

However, sec. 66.0805(6), Wis. Stats., allows the City to opt out of the other requirements of sec. 66.0805, and establish government of the utility in another manner. This ordinance makes that election to opt out, and reconstitutes the Water Board with the shared governance with the Mayor and Common Council that appears to be the intent of the current ordinance.

This ordinance also increases the size of the Board from 6 to 8 members, including the Public Health Director as a non-voting member of the Board.

The Common Council of the City of Madison do hereby ordain as follows:

1. Section 13.01 entitled "Board of Water Commissioners" of the Madison General Ordinances is amended to read as follows:

"13.01 WATER UTILITY BOARD OF WATER COMMISSIONERS.

(1) Election. The City of Madison hereby elects, pursuant to sec. 66.0805(6), Wis. Stats., to provide for the operation of the Madison Water Utility by a board of officers other than the commission provided for in sec. 66.0805(1)-(3), Wis. Stats. In establishing this Board, the City also relies on its authority under sec. 62.11(5), Wis. Stats.

(2) Water Utility Board of Water Commissioners. There shall be a board is hereby created a Water Utility Board of five (5) water commissioners eight (8) members, whose duty shall be the management and operation of the City Water Utility. There shall be seven (7) voting members and one (1) non-voting ex-officio member. One (1) commissioner voting member shall be a member of the Common Council. Pursuant to Sec. 66.0805(2), Wis. Stats., commissioners The members shall be appointed by the Mayor and confirmed by the Common Council on a staggered basis for a term each of five (5) years. In case of vacancy, the Common Council may at any regular or special meeting elect confirm a member for the unexpired term. In addition, The Director of Public Health under Sec. 7.02, M.G.O., or his or her designee shall serve as an ex-officio, non-voting member of the Board in order to provide advice and information to the Board on health issues related to the Water Utility. The Director of Public Health shall not vote, may not make motions, and shall not be counted as a member in determining quorum or majorities. Upon passage of this ordinance, the existing commissioners of the Board of Water Commissioners shall immediately succeed to positions as members of the Water Utility Board and fill out their terms as if appointed to the remaining length of their terms.

Approved as to form:

- ~~(2)~~ (3) Meeting, and Organization and Duties of the Board. The ~~commissioners~~ Board on an annual basis shall choose from among their number a president, vice president and secretary. The Board ~~of Water Commissioners~~ may make rules for its own proceedings and for the government of the Utility. The Board shall keep books of account in the manner and form prescribed by the Public Service Commission which shall be open to the public. The Board shall have the ~~general~~ management and supervision of the City Water Utility and all matters connected therewith, subject to the general control and supervision of the Water Utility Board by the Mayor and Common Council. The Council shall exercise such supervision by enacting ordinances governing the Board's operation, and approving contracts for the Water Utility as it does for other departments, and The Board shall have the general power and authority to make rules and regulations for the management of said Utility as it shall from time to time find necessary for the safe, economical and efficient management and protection of the ~~w~~Water ~~u~~Utility. The Board shall issue an annual report which shall be made available to the Common Council.
- (4) Employees. Employees of the Water Utility shall be governed by the ordinances, rules and procedures established for other employees of the City of Madison, together with any rules established by the Water Utility Board.

2. Section 13.02 entitled "Appointment of General Manager, Duties" of the Madison General Ordinances is amended to read as follows:

"13.02 APPOINTMENT OF GENERAL MANAGER; DUTIES,

- (1) The Water Utility General Manager shall be appointed by the Mayor, in consultation with and subject to the approval of the Water Utility Board, ~~of Water Commissioners~~ and further subject to the approval of the ~~Mayor and Common Council,~~ and ~~the~~ position shall be filled according to Sec. ~~3.383.54~~(6)(f) of these ordinances. The General Manager shall hold her/his position pursuant to the terms of the employment contract provided for in such section. The Water Utility General Manager shall be the chief executive of the Water Utility and shall perform those duties generally described in this chapter and such other duties as may be delegated by the Board."

3. Section 13.03 entitled "Duties of General Manager" of the Madison General Ordinances is amended to read as follows:

"13.03 DUTIES OF GENERAL MANAGER.

- (1) General Duties. The General Manager shall have supervision of the Water Utility under the direction of the Water Utility Board ~~of Water Commissioners~~ and shall have supervision and control over the buildings, grounds, and all matters connected therewith, and shall enforce all ordinances, rules and regulations of the Common Council and of the Board; and see that the conditions of all contracts relating to said Utility are faithfully complied with, and that all charges for the use of water are duly made, collected, and paid into the City Treasury. The General Manager shall be the appointing authority under the provisions of the civil service ordinance for the purpose of making appointments of employees in the Water Utility. The General Manager shall be subject to the supervision of the Mayor and the Water Utility Board, as set forth in his/her employment contract.
- (2) In Charge of New Construction and Installations. The General Manager shall supervise the installation of all new equipment, the construction of all new wells, reservoirs, treatment facilities, and pumping stations and have charge of all improvements to the Water Utility plant, including the installation, repair and reconstruction of all mains and service connections. The General Manager shall have supervision of work of this nature and, subject to such regulation as the Common Council or Board may adopt, shall have the authority to purchase materials and to employ the services and labor necessary for such work.
- (3) Maps and Records to be Kept. The General Manager shall direct the maintenance of maps and records of the water system.
- (4) Other Records to be Kept. The General Manager shall keep a record of all accounts and claims for or against the Water Utility and all meters and the location thereof and shall perform such other duties as the Board or the Common Council may prescribe."