



## MEMORANDUM

DATE: November 4, 2016

TO: Water Commission

FROM: Dan Duchniak, General Manager  
Brian Running, City Attorney

RE: Recommend Approval of language modification to Ordinance 3.02 – Water Utility Commission

In a discussion with City Attorney Running and the Mayor, concerns were raised over the ability of the water commission to execute service agreements for the water utility operations on behalf of the City.

This has been the practice of the water utility since its inception. In fact, in the past 5 years, the water utility commission has entered into over 200 service contracts in order to properly run and manage the Utility without incidence.

In order to provide clarification to this past practice and ensure the contracts are binding, the City attorney has recommended adding the following changes be made to Ordinance 3.02:

(11) POWERS. (Am. #41-06) The Commission, under the direction of the Common Council, may construct, extend, improve, operate and maintain the public utility subject to the powers and jurisdiction fixed by law and the ordinances of the City, and the rules of the Public Service Commission. It may select and recommend purchase of sites, and make, prepare and adopt plans, designs, and specifications for buildings, machinery, apparatus and the laying of mains and appliances required for the proper functioning of the utility. ***The Commission may execute contracts on behalf of the City for the provision of services in furtherance of the Commission's duties under this section and Wis. Stats. §66.0805, and such contracts shall be binding upon the City.***

A copy of the City Attorney's memo is also provided.

Upon Commission recommendation, this will be passed to the Ordinance and License Committee of the Common Council and then to the Common Council for its approval.

**Recommended Motion:** Move to recommend approval by the Common Council of language modification to Ordinance 3.02 – Water Utility Commission.



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November 4, 2016

### Memorandum

To: Water Utility Commission, Ordinance & License Committee, Common Council  
Copy: Dan Duchniak, Kevin Lahner, Honorable Shawn Reilly  
Date: November 4, 2016  
Re: Amendment of Municipal Code §3.02(11)

The City's Water Utility Commission was created under authority of Wis. Stats. §66.0805:

#### **66.0805 Management of municipal public utility by commission.**

(1) Except as provided in sub. (6), the governing body of a city shall... 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.

As you can see, a utility commission is not an entity separate from the City, but it is intended to operate independently, to be responsible for the “entire management” of and “supervise the operation of the utility.” The direction and control of the Common Council is limited to the enacting of ordinances governing the Commission’s operation. Therefore, the Water Utility is different from other City departments in that it is a quasi-independent authority by statute, and is not intended to be under the direct supervision of the Common Council.

Our Municipal Code §3.02 is the ordinance governing the Commission’s operation, as required by the state statute. Subsection (11) of §3.02 further specifies the powers that the Water Utility Commission has:

(11) POWERS. The Commission, under the direction of the Common Council, may construct, extend, improve, operate and maintain the public utility subject to the powers and jurisdiction fixed by law and the ordinances of the City, and the rules of the Public Service Commission. It may select and recommend purchase of sites, and make, prepare and adopt plans, designs, and specifications for buildings, machinery, apparatus and the laying of mains and appliances required for the proper functioning of the utility.

Neither Wis. Stats. §66.0805 nor subsection (11) expressly gives the Water Utility Commission the power to enter into contracts on its own, although having the power of the entire management and supervision of the operation implies that the Commission can do so. We have not had issues here as a result of the lack of express authority, but the issue has been raised in other jurisdictions. It’s advisable to avoid it ever being an issue here.

To make it clear that the Water Utility Commission has authority to bind the City to contracts for the operation of the utility, WMC §3.02(11) can be amended by adding explicit language, as follows:

(11) POWERS. The Commission, under the direction of the Common Council, may construct, extend, improve, operate and maintain the public utility subject to the powers and jurisdiction fixed by law and the ordinances of the City, and the rules of the Public Service Commission. It may select and recommend purchase of sites, and make, prepare and adopt plans, designs, and specifications for buildings, machinery, apparatus and the laying of mains and appliances required for the proper functioning of the utility. The Commission may execute contracts on behalf of the City for the provision of services in furtherance of the Commission’s duties under this section and Wis. Stats. §66.0805, and such contracts shall be binding upon the City.

The Commission would be given the explicit authority to execute contracts that will be binding on the City, but limited only to service contracts, and only those service contracts that are

directly related to its authority given by statute and ordinance. The Commission cannot enter into construction contracts on its own, and it cannot enter into contracts that are not related to the operation and management of the utility, as stated in §66.0805 and §3.02(11). Examples of contracts that the Commission can execute are engineering consultant services, legal consultant services, grass cutting on utility grounds, etc. Construction contracts would not be included, and would still be bid and executed according to Wis. Stats. §62.15.

In short, this amendment would make our City Code expressly conform to the way the Water Utility has always conducted its business, and will eliminate any potential questions about the validity of contracts entered into by the Water Utility Commission.

Please contact me if you have any questions or comments.

– BER