

Legal Memorandum

To: Common Council
Cc: Teri Lehrke – City Clerk and Wayne Delagrave – Finance Director
From: Stephen F. Matty – City Attorney 
Date: February 25, 2010
Re: Resolution allowing IS Department to donate sixteen (16) computers and three (3) printers to the Boys and Girls Clubs of La Crosse

This memorandum concludes that the above legislation should not be adopted at this time because: (1) the donation fails to follow the City of La Crosse's procedures for disposal of surplus equipment; (2) no analysis has been completed on whether the donation complies with the Public Purpose Doctrine; and (3) the donation will begin to establish a precedent of arbitrariness and favoritism.

Facts

The Legal Department was asked to prepare the above legislation for introduction to the Common Council by three separate requesters from within the City, including, a department head, a council member and the mayor. Each time, the Legal Department provided the same legal opinion to each requester that the legislation failed to comply with City procedures for disposal of surplus equipment, that it needed to be reviewed for compliance with the public purpose doctrine, and it constituted an arbitrary act which could establish unwelcome precedents that do not belong in City government. Notwithstanding, the Mayor decided to draft the legislation and informed the City Clerk that it had to be introduced for consideration by the Common Council. Upon learning of the Mayor's actions, the Legal Department met with the Mayor on the subject matter and advised that, in the minimum, there needs to be an analysis and possible rewriting of the resolution to comply with the public purpose doctrine. The Mayor then instructed the Legal Department to take no further action on the legislation.

Analysis

The Mayor's legislation violates the Council's procedure for disposal of surplus equipment.

On September 14, 2006, the Common Council adopted Resolution No. 2006-09-046, which requires surplus computer equipment be sold by internet auction and that the funds generated from such sales be placed into the General Fund or Utility Income, as appropriate. Indeed, the Council found that the internet auctions were so successful for disposing of surplus computer equipment, that it adopted Resolution No. 2008-08-030 on August 14, 2008, which required that all surplus, old, retired and discarded equipment be sold by internet auction, as well.

The current legislation introduced by the Mayor ignores the Council's previous resolutions and directives for disposal of surplus equipment. The Mayor's current legislation is completely devoid of any rationale on why the Council's previous resolutions and directives should be circumvented.

It is questionable whether the Mayor's legislation complies with the Public Purpose Doctrine.

The Legal Department advised that prior to introduction of the above-mentioned legislation, an analysis of the public purpose doctrine is required to ensure compliance with Wisconsin law. Since no analysis has occurred and the Legal Department has been directed not to provide any such analysis, it is questionable whether the legislation complies with state law. A failure to comply with state law could result in a conviction of Wis. Stat. § 946.12, Misconduct in Public Office. A conviction under § 946.12 is considered a Class I felony subject to penalties of three and one-half years in prison, a fine of \$10,000, or both. See § 939.50(3)(i).

The primary controlling case on the public purpose doctrine is ***Hopper v. City of Madison***. This case provides guidance on how to analyze this issue. "Although not established by any specific clause in the state constitution, the public purpose doctrine is a well-established constitutional tent." ***Hopper***, 79 Wis.2d 120, 128, 256 N.W.2d 139 (1977). "Public funds may be expended for only public purposes." ***Id.*** "An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin." ***Id.*** "This rule applies to the expenditure of public funds by municipalities." ***Id.*** "What constitutes public purpose is in the first instance a question for the legislature to determine ... This court, however, is not bound by the legislature's enactment or declarations regarding its purpose, for it is the court's constitutional burden to examine the challenged legislation and assess its realistic operation." ***Id.*** "To sustain a public purpose, the benefit to the public must be direct and not merely indirect or remote." ***Id.*** at 129.

“Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.” *Id.* at 130. “Factors which may be considered include [1] the course or usage of the government, [2] the objects for which taxes have been customarily levied, [3] the objects which have been considered necessary for the support and proper use of government, [4] the extent to which the expenditure results in competition with private enterprise, [5] the presence or absence of a general economic benefit, [6] the number of citizens benefited, and [7] the necessity and infeasibility of private performance.” *Id.*

In this case, it is not dispositive whether the City donates computers or gives a third-party organization money to purchase computers. In either case, both the money and the equipment were raised through the City’s power of taxation. Here, it should be noted that this memorandum does not necessarily conclude that the public purpose doctrine is violated, but merely that sufficient resources need to be allocated to make the determination and amend the legislation, if necessary, in order to avoid potential liability for the City.

The donation of surplus equipment could result in arbitrary decision-making and favoritism.

The Council established a procedure for the disposal of surplus equipment by sending it to internet auction where any individual or organization could bid and purchase the equipment. This procedure ensured that everyone had a fair opportunity to purchase the surplus equipment and that there was compliance with the public purpose doctrine by allowing sale proceeds to return to the City to decrease the tax burden. The current legislation begs the question whether the City should change its disposal procedure. For example, should surplus equipment be sold or donated to the first party that is able to “bend the ear” of the Mayor, Council Member, or Department Head? Is it a better policy that all parties should have a fair opportunity to purchase or receive the property regardless of lobbying efforts? On what basis is it determined that one organization is better suited for a sale or donation than a similarly-situated organization? A failure to address these issues could lead to arbitrary action, future abuse and favoritism, all of which the City should avoid in order to increase and maintain the public’s confidence in its municipal institutions.

Conclusion

For the reasons stated above, simply adopting the above resolution without further consideration could create future liability for the City. While such liability may be a small risk in this particular circumstance, the Council’s actions could establish precedents that Council resolutions and directives are

not followed; the public purpose doctrine analysis is neither performed nor complied with; and abuses of favoritism and arbitrariness could occur involving more profound issues in the future. The City should take steps to avoid these undesired results.

To that end, it is recommended that the resolution be amended to provide for a reasonable minimum price for each piece of equipment and that an attempt to sell the surplus equipment at internet auction be made. If the minimum price is not obtained, then the Council would be able to donate the equipment as it sees fit. In this manner, the Council ensures that the City still complies with prior resolutions and directives and that the equipment continues to generate funds for the City and decreases the tax burden for its citizens and taxpayers. In the event the Council wishes to simply make the donation, then it should repeal or amend the legislation requiring that said equipment be sent to internet auction.
