

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0094/1dn
PG:cjs:rs

May 5, 2011

Senator Olsen:

The drafting instructions for this substitute amendment requested the inclusion of LRBa0549/1. That amendment is based on a request for a provision which would allow the Milwaukee Common Council to “have full authority to negotiate” a lease entered into as of January 1, 2011, between a noninstrumentality charter school and the board of MPS. Because this provision would apply to an existing contract, one could argue that it is an unconstitutional impairment of contract.

The federal and Wisconsin constitutions both provide that the legislature may not pass a law “impairing the obligation of contracts” (article I, section 10, of the U.S. Constitution and article I, section 12, of the Wisconsin Constitution). However, this prohibition is not absolute. The courts have held that a state may impair an existing contract in the exercise of its police powers for the general public welfare. Wisconsin courts would likely use the following analysis to determine whether the legislature may impair an existing contract for the general public welfare:

- a. Does the legislation substantially impair an existing contract?
- b. If the impairment is substantial, is there a significant and legitimate public purpose for the legislation?
- c. Even if there is a significant and legitimate public purpose, is the legislation a reasonable and necessary means of achieving that public purpose?

One way to avoid a constitutional challenge would be to permit the common council to be a party to and negotiate the terms of any such lease between a noninstrumentality charter school and the board when the lease is extended, modified, or renewed. Please let me know if you would like me to modify the substitute amendment in this way.

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