

**SORLING  
NORTHRUP**  
ATTORNEYS

September 21, 2012

Via E-mail: [phendrenlaw@aol.com](mailto:phendrenlaw@aol.com) & U.S. Mail

Mr. Paul Hendren  
Miller & Hendren, LLP  
30 E. Main, 2nd Floor  
P. O. Box 980  
Champaign, IL 61824-0980

**Re: Homer Water Project – Sunrise Coal, LLC**

Dear Paul:

We appreciate the opportunity to discuss the Sunrise water project with you on Thursday afternoon. To follow up that conversation, we provided to you today a supplemental memorandum prepared by our office discussing the Village's authority to extend water service to the Sunrise Coal Project. As we discussed, we believe the law is clear that Homer does have the legal authority to extend such water service and we will be anxious to see the Beckett firm's analysis, which you indicated may be to the contrary.

In anticipation of the possibility that Homer may wish to retain special counsel to advise Homer on the legal authority issue, and in response to your indication that you may be interested in receiving our recommendations on a qualified municipal law attorney for that purpose, we provided to you information on Stewart H. Diamond who is the general editor of the IICLE Illinois Municipal Law: Annexation, Zoning and Regulatory Authority. Mr. Diamond is a partner in the firm of Ancel, Glink, Diamond, Bush, DiCiani & Krafthefer, P.C., with his office located in Chicago. We have provided his contact information along with his bio.

Whether it is Mr. Diamond or another attorney, it is our hope the Village Board will be ready to act on the appointment of special counsel at the meeting on Wednesday, subject to Sunrise reimbursing the Village for such costs at an agreed upon level.

Again, we appreciate your willingness to talk to us yesterday and look forward to working with you on this project.

Reply To:

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P.O. Box 5131  
Springfield, IL 62705  
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Sincerely,

*R. Lee Allen*  
lp

R. Lee Allen

RLA/lp

Enclosure

cc: Sunrise Coal, LLC (via e-mail: [JSarver@SunriseCoal.com](mailto:JSarver@SunriseCoal.com))  
Jeffrey R. Jurgens  
Lisa H. Hartzler

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MEMORANDUM

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**TO:** PAUL HENDREN, HOMER VILLAGE ATTORNEY  
**FROM:** R. LEE ALLEN AND JEFF JURGENS  
**DATE:** SEPTEMBER 21, 2012  
**SUBJECT:** VILLAGE OF HOMER'S EXTENSION OF WATER SUPPLY TO SUNRISE COAL PROJECT

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**Lisa Harms Hartzler**  
Attorney  
lhartzler@sorlinglaw.com

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Sunrise Coal is planning a new underground coal mining operation in Vermilion County, Illinois. The Village of Homer may extend its water supply to the Sunrise Coal project.

**Questions:** What authority does the Village of Homer have to extend its water supply outside of its corporate limits?

**Summary Answer:** The Illinois Municipal Code authorizes, but does not require, a village to extend a water supply to areas outside of its municipal boundaries. Sunrise Coal must have a contract with the Village to ensure continuing service for the number of years needed and to provide for connection fees, any additional connections by third parties, and any recapture fee arrangements.

**Discussion:**

**Village Has Authority But No Duty to Extend Water Service**

**A. Statutory Authority**

There are two provisions in the Illinois Municipal Code giving authority to the Village of Homer (the "Village") to extend water service outside of its corporate limits. First, Division 149 of Article 11 directly addresses the extension of municipal water and sewer service outside corporate limits. Section 11-149-1 provides that "[t]he corporate authorities of a municipality may provide by ordinance for the extension and maintenance of municipal sewers and water mains, or both, in specified areas outside the corporate limits. Such service shall not be extended, however, unless a majority of the owners of record of the real property in the specified area petition the corporate authorities for the service." 65 ILCS 5/11-149-1. Section 11-149-2 permits corporate authorities to make rules and regulations as provided in Section 11-139-8.

That section authorizes a municipality to make, enact, and enforce all needful rules and regulations for the acquisition, construction, extension, improvement, management and maintenance of the system and for the care and protection of such a system in order to preserve the public health, comfort, and convenience and to render the water supply pure.

Division 129 of Article 11 also authorizes any municipality with a population under 500,000 to build or purchase, and to operate a water supply system either within or without the corporate limits and to extend that system. 65 ILCS 5/11-129-1. Section 11-129-9 provides that such a municipality “may construct or acquire a water-supply system to serve a particular locality within or without its corporate limits or to extend or improve an existing water-supply system for the purpose of serving a particular locality within or without the municipality not theretofore served by its existing system...” 65 ILCS 5/11-129-9. After adoption of an ordinance for a project under 11-129-9, the corporate authorities may make and enforce all needful rules and regulations. 65 ILCS 5/11-129-10.

It is not clear why there is more than one enabling statute for a village to extend its water supply since they provide essentially the same thing. The court in *Continental Illinois National Bank & Trust Co. of Chicago v. Village of Park Forest*, 4 Ill.App.3d 811, 818 (3<sup>rd</sup> Dist. 1972) indicated that prior to the passage of Section 11-149-1, a municipality had no authority to extend sewer facilities beyond its corporate boundary unless its water facilities were also serving the area. That section was added to the Municipal Code in 1963. Section 11-129-9 was added to Division 129 in 1978. One authority has suggested that the various provisions in the Municipal Code should be viewed simply as offering alternatives for municipalities to choose among. IICLE, *Illinois Municipal Law: Annexation, Zoning, and Regulatory Authority*, Ch. 6, “Utility Systems,” § 6.11 (2012). Section 1-9-1 of the Municipal Code supports this interpretation. It provides that the provisions are cumulative in effect and if any provision is inconsistent with another, “it shall be considered as an alternative or additional power and not as a limitation upon any other power granted to or possessed by municipalities.” 65 ILCS 5/1-9-1.

As a result, either of these Divisions in the Municipal Code provides authority for the Village to extend its water supply to the Sunrise Coal project. Division 149 requires a petition signed by the majority of property owners in the affected area to request the Village for service, while Division 129 appears to require only an ordinance. Because Sunrise Coal is the only land owner requesting an extension of service, the petition requirement is not an obstacle. Either Division could be appropriate.

Finally, there appear to be only two ways taxpayers or residents can limit a municipality’s ability to decide on an extension of water service. The first is the petition requirement under Section 11-149-9, which prevents a municipality from extending water or sewer service under that section beyond its corporate limits if such service is not desired by a majority of those owning real estate in the specified area. *Continental Illinois*, 4 Ill.App.3d at 816. This petition requirement, however, does not give Village residents rights to block an extension where no bond referendum is involved. As the court stated in *Continental Illinois*, with regard to a sewer extension authorized under Section 11-149-9, “We see nothing in the Act which would give

individuals or groups of taxpayers a power to limit the exercise of municipal legislative discretion in expanding sewer facilities in compliance with the Act.” *Id.* A municipality fully complies with 11-149-9 when it enacts an ordinance and obtains the proper number of petitions from landowners. *Id.* at 816-17. The second limiting power of taxpayers is the procedure for financing a project with revenue bonds, which may require voter approval (see Financing section below).

## **B. No Duty**

Case law is clear that the Municipal Code empowers a municipality to extend water service outside its corporate limits but, absent a contractual arrangement, does not require it to do so. The authority is discretionary. *Exchange National Bank of Chicago v. Behrel*, 9 Ill.App.3d 338 (1<sup>st</sup> Dist. 1972). Further, without a contract obligating it to provide water service, a municipality may discontinue that service, even after providing it for many years. *Gage v. Village of Wilmette*, 315 Ill. 328, 331 (1924); *Rehm v. City of Batavia*, 5 Ill.App.2d 442 (2<sup>nd</sup> Dist. 1955); *Flex-O-Glass, Inc. v. City of Dixon*, 307 Ill.App.3d 945, 950 (2<sup>nd</sup> Dist. 1999) (no duty to provide service exists even though city provided water to plaintiff industry for many years without a contract and plaintiff had significantly improved the property in reliance on continued service).

One limitation on a municipality’s discretion to provide water service, however, is that a municipality must act in a uniform and fair manner when making utility service decisions for similarly situated persons and it may not act in a discriminatory manner, even toward non-residents. *Schroeder v. City of Grayville*, 166 Ill.App.3d 814 (5<sup>th</sup> Dist. 1988); *Flex-O-Glass*, 307 Ill.App.3d at 951. Thus, where a municipality is providing water service to non-residents who are similarly situated to another non-resident, a municipality may not refuse to provide or continue service to that similarly situated person. *But see, Srail v. Village of Lisle*, 2008 WL 4876865 at \*5-6 (N.D. Ill.) (no discrimination against subdivision where cost of extending service was ten times cost of service to another subdivision and residents were not willing to pay for it).

In this situation, Sunrise Coal must negotiate a contract with the Village to obtain and assure water service for a certain term of years, options to extend the term, and the ability to assign the right to water to a new owner of the business or the real estate. Without a contractual arrangement, the Village may refuse to supply or discontinue service to the property. It should be noted that while the decision to extend water service to a non-resident is a legislative act, when a municipality sells water service, it does so in a proprietary capacity, not as a governmental act, so a contract is enforceable against subsequent administrations. *Village of Niles v. City of Chicago*, 82 Ill.App.3d 60, 68 (1<sup>st</sup> Dist. 1980); *LaSalle National Bank v. City of Warrenville*, 105 Ill.App.3d 643, 646 (2<sup>nd</sup> Dist. 1982).

## **Conclusion**

The Illinois Municipal Code clearly authorizes the Village to extend its water supply system to areas outside of its municipal boundaries. The Village is not required to extend its service. Sunrise Coal must have a contract with the Village to ensure continuing service for the number of years needed and to provide for connection fees, any additional connections by third parties, and any recapture fee arrangements.

LHH:dw