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Opns St Comp, No. 2024-1

NY CONSTITUTION, ART. VIII, § 1, ART. VII, § 8(1); LOCAL FINANCE LAW, §§ 10, 11; PUBLIC HEALTH LAW, § 1114; MUNICIPAL HOME RULE LAW, § 10; GENERAL CITY LAW, §§ 19, 20; TOWN LAW, § 198; VILLAGE LAW, § 11-1112.

We are in receipt of the City of Troy’s (“City”) resolution no. 2024-127, adopted by the City Council on September 5, 2024, seeking an advisory opinion from our Office “declaring that the City of Troy may lawfully issue general obligation bonds to fund replacement of all public and privately owned lead water service lines in the City without violating Section 1 of Article 8, the Gift and Loan Clause, of the New York State Constitution, and that the Gift and Loan Clause does not prevent municipalities from using public funds to replace privately owned lead water service lines on private and public properties to remediate this public health emergency.”

Based upon conversations with City and State Environmental Facilities Corporation (“EFC”) officials and a review of public records, we understand the City is slated to receive \$12.8 million in funding derived from the federal Infrastructure Investment and Jobs Act (commonly and in this letter referred to as the “Bipartisan Infrastructure Law”, or “BIL”),<sup>1</sup> provided through EFC in the form of financing and grants.<sup>2</sup> The funding package will be comprised of a \$3.9 million interest-free loan and an \$8.9 million grant, which the City will use to complete full lead line replacements (both publicly and privately-owned portions of lead service lines) pursuant to its lead service line replacement program.<sup>3</sup> To receive the financing and to evidence the indebtedness of the City, the City seeks to enter into a project financing agreement with EFC, which would require the City to deliver to EFC an obligation (a note/bond), under which the City would pledge its full faith and credit to repay EFC the principal amount of the loan.

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<sup>1</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117–58 (November 15, 2021). As discussed in more detail below, the BIL has made federal funds available through New York State’s Drinking Water State Revolving Fund program, administered by the EFC, to pay for lead service line replacement projects or associated activity directly connected to the identification, planning, design, and replacement of lead service lines.

<sup>2</sup> Press Release, U.S. Senator, Chuck Schumer (May 20, 2024), [https://www.schumer.senate.gov/newsroom/press-releases/standing-at-an-active-lead-replacement-site-in-troy-schumer-nearly-13-million-from-his-bipartisan-infrastructure-law\\_largest-lead-pipe-removal-grant-in-troys-history-schumer-launches-push-to-keep-pumping-more-investment-in-capital-region-to-accelerate-lead-pipe-removal-to-ensure-children-and-families-have-the-safe-clean-drinking-water-they-deserve](https://www.schumer.senate.gov/newsroom/press-releases/standing-at-an-active-lead-replacement-site-in-troy-schumer-nearly-13-million-from-his-bipartisan-infrastructure-law_largest-lead-pipe-removal-grant-in-troys-history-schumer-launches-push-to-keep-pumping-more-investment-in-capital-region-to-accelerate-lead-pipe-removal-to-ensure-children-and-families-have-the-safe-clean-drinking-water-they-deserve).

<sup>3</sup> Erica Bouska, ‘*Serious problem*’: Troy City Council passes multiple resolutions regarding lead pipes, The Record (Troy, New York), August 27, 2024, <https://www.troyrecord.com/2024/08/27/serious-problem-troy-city-council-passes-multiple-resolutions-regarding-lead-pipes/>.

Additionally, Governor Hochul has recently announced that the State will award nearly \$90 million in State grants to communities across the State, including \$3,846,900 to the City of Troy, to improve their drinking water infrastructure by identifying and replacing lead service lines.<sup>4</sup> The \$3,846,900 granted to the City is the precise amount required for the City to repay the amount borrowed from EFC under its project financing agreement.

Given the proposed project financing agreement with EFC, which would require the City to commit its full faith and credit to repay the principal of the interest-free loan from EFC, questions have arisen regarding whether the City's issuance of notes and/or bonds to EFC under this program would violate the State Constitution's prohibition of gifts and loans of public money.

At the outset, we must emphasize that our Office cannot issue a legal opinion with respect to the validity and enforceability of any note(s) or bond(s) issued by the City in connection with this financing from EFC. Indeed, such an opinion is the function and responsibility of the City's bond counsel. Moreover, our opinion and underlying analysis expressed in this letter relate solely to the City's currently proposed participation in the financing and funding mechanism available through EFC; different standards and considerations may apply to other municipalities and other funding options based on applicable law, respective charters and administrative codes, and the specifics of alternative financing structures.

Understanding these caveats, it is our opinion that the City may participate in this federal financial assistance program and project financing agreement with EFC without running afoul of the State Constitution's ban on gifts and loans of public funds.

## **I. The Public Health Threat Arising from the City's Lead Service Lines**

The City, through its Department of Public Utilities, provides water to over 50,000 City residents, along with industrial and commercial customers within the City, through over 13,000 service connections.<sup>5</sup> Recent water quality testing conducted by the City has found dangerous lead levels in a critical number of samples from homes in the City.<sup>6</sup> According to the United States Environmental Protection Agency (EPA), in homes with lead pipes that connect the home to the municipal water supply (also known as lead services lines), these pipes are typically the most significant source of lead in the water.<sup>7</sup> Lead service lines and lead plumbing are more likely to be

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<sup>4</sup> Press Release, Governor Kathy Hochul, Governor Hochul Announces Nearly \$90 Million to Replace Lead Service Lines and Protect Drinking Water Across New York (Sep. 27, 2024), <https://www.governor.ny.gov/news/governor-hochul-announces-nearly-90-million-replace-lead-service-lines-and-protect-drinking>.

<sup>5</sup> City of Troy, *Annual Drinking Water Quality Report for 2023*, p. 3, <https://www.troyny.gov/ArchiveCenter/ViewFile/Item/1331>.

<sup>6</sup> See U.S. Environmental Protection Agency, *Understanding the Lead and Copper Rule*, (Sep. 2020), [https://www.epa.gov/sites/default/files/2019-10/documents/lcr101\\_factsheet\\_10.9.19.final\\_2.pdf](https://www.epa.gov/sites/default/files/2019-10/documents/lcr101_factsheet_10.9.19.final_2.pdf); see also, City of Troy, *Annual Drinking Water Quality Reports for 2021-2023*, <https://www.troyny.gov/Archive.aspx?AMID=43>. Public water systems compare sample results from homes to EPA's action level of 0.015 mg/L (15 ppb). According to an EPA Fact sheet, if 10 percent of the samples from these homes have water concentrations that are greater than the action level, then the system must perform actions such as public education and lead service line replacement.

<sup>7</sup> U.S. Environmental Protection Agency, *How can lead get into my drinking water?*, <https://www.epa.gov/lead/how-can-lead-get-my-drinking-water#:~:text=Answer%3A%20Lead%20can%20enter%20drinking,pipes%2C%20faucets%2C%20and%20fixtures>.

found in homes built before 1986.<sup>8</sup> Like most older cities, many homes in Troy that were built before the 1940s have a lead water service line.<sup>9</sup>

It is scientifically established that high levels of lead in the human body can cause serious health problems, especially in pregnant women and children six years old and younger.<sup>10</sup> The EPA and the Centers for Disease Control and Prevention have proclaimed that there is no known safe level of lead in a child's blood.<sup>11</sup> Studies have shown that young children, infants, and fetuses are particularly vulnerable to lead, as the physical and behavioral effects of lead occur at lower exposure levels in children than in adults.<sup>12</sup> In children, even low levels of lead exposure have been linked to nervous system damage, behavioral and learning disabilities, slowed growth, hearing problems, and impaired formation and function of blood cells.<sup>13</sup> It has also been proven that lead is harmful to adults, with lead exposure potentially leading to cardiovascular effects, decreased kidney function, and reproductive problems.<sup>14</sup> Because lead is a toxic, persistent metal, that can bioaccumulate in the body over time and be harmful to human health even at low exposure levels, the EPA has set the maximum acceptable contaminant level goal for lead in drinking water at zero.<sup>15</sup>

Faced with this significant public health problem, the City has embarked on a program to replace all lead service lines in the City.<sup>16</sup> We understand that this effort includes replacing not only the publicly-owned portions of lead service lines, but also the portion of the service lines that connect to individual homes located on private property.<sup>17</sup> It is our further understanding that the City has already undertaken lead service line replacement projects, including those portions of service lines on private property, primarily relying on federal funds received under the American Rescue Plan Act ("ARPA").<sup>18</sup> A recent news report indicates that the City will likely spend the \$2 million of ARPA funds and other grants earmarked for its lead pipe replacement by the end of the

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<sup>8</sup> It was not until 1986, when Congress amended the Safe Drinking Water Act (SDWA), that a federal prohibition was implemented for the use of any pipe or fixture in the installation or repair of public water systems or residential plumbing providing drinking water that was not "lead free." See, SDWA, § 1417.

<sup>9</sup> City of Troy, *Lead Service Line Replacement Program*, <https://www.troyny.gov/1508/Lead-Service-Line-Replacement-Program>.

<sup>10</sup> Briana Supardi, *Lead levels detected in Troy water sample 10x higher than EPA action level*, CBS 6 News (WRGB Albany), <https://cbs6albany.com/news/local/troy-discovers-elevated-lead-levels-in-drinking-water-service-lines-replacement-pipes>.

<sup>11</sup> U.S. Environmental Protection Agency, *Basic Information about Lead in Drinking Water*, <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#getinto>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> City of Troy, Ordinance 18-2023, Ordinance Amending Rules and Regulations of the City of Troy Department of Public Utilities (March 3, 2023).

<sup>17</sup> *Id.*; see also, City of Troy, *Lead Service Line Replacement Program*, <https://www.troyny.gov/1508/Lead-Service-Line-Replacement-Program>. In Troy, the portion of the water service line between the water main and the curb stop is owned by the City, while the customer owns the portion from the curb stop into the building.

<sup>18</sup> ARPA, Pub. L. No. 117-2 (March 11, 2021). The City also received a \$500,000 grant from the NYS Department of Health ("DOH") to conduct full LSL replacements at no cost to property owners.

year, by which time the City seeks to be on track for the replacement of a total of 300 service lines.<sup>19</sup>

## II. The Federal and State Funding Mechanism

The City's question to us now arises in the context of additional funding being made available to the City under the BIL. As discussed in more detail below, the BIL has made federal funds available through New York State's Drinking Water State Revolving Fund ("DWSRF") program, administered by the EFC, to pay for lead service line replacement projects or associated activity directly connected to the identification, planning, design, and replacement of lead service lines.<sup>20</sup> Accordingly, a summary of the federal/state program and funding source is warranted.

### A. The Safe Drinking Water Act ("SDWA") and DWSRF Loan Program

The SDWA, enacted in 1974, is the key federal law aimed at protecting public water supplies from harmful contaminants.<sup>21</sup> Under the SDWA, the EPA regulates, administers programs, prescribes standards and treatment requirements for public water supplies, and finances drinking water infrastructure projects to promote water system compliance. Since 1986, the SDWA has prohibited the use of any pipes, plumbing fittings or fixtures in the installation or repair of public water systems or plumbing in residences that are not "lead-free."<sup>22</sup> The SDWA requires public water systems to comply with federal drinking water regulations promulgated by EPA. Through these regulations, the EPA has set standards to control the levels of 100 contaminants in drinking water, including lead. To help communities meet these federal mandates and to meet the SDWA's public health objectives, Congress amended the SDWA in 1996 to establish a Drinking Water State Revolving Fund ("DWSRF" or "SRF") program.<sup>23</sup>

Under the SRF, EPA makes grants to states to capitalize revolving funds administered by the states, which use the money to make below-market-rate loans and grants to public water systems for infrastructure and other drinking water projects. The SRF is thus a state-administered program providing financial assistance for infrastructure projects aimed at promoting compliance with federal drinking water regulations to safeguard public health and the environment. The SDWA directs states to provide funding priority to infrastructure projects that are necessary to achieve or maintain compliance with SDWA requirements, protect public health, and assist systems with economic need.<sup>24</sup>

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<sup>19</sup> Erica Bouska, *'Serious problem': Troy City Council passes multiple resolutions regarding lead pipes*, The Record (Troy, New York), August 27, 2024, <https://www.troyrecord.com/2024/08/27/serious-problem-troy-city-council-passes-multiple-resolutions-regarding-lead-pipes/>.

<sup>20</sup> NYS DOH and EFC, Final Amendment No. 2 to the Drinking Water State Revolving Fund Federal Fiscal Year 2024 Intended Use Plan (March 2024), [https://www.health.ny.gov/environmental/water/drinking/iup/docs/amendment\\_2\\_bil-lslr\\_ffy2024.pdf](https://www.health.ny.gov/environmental/water/drinking/iup/docs/amendment_2_bil-lslr_ffy2024.pdf).

<sup>21</sup> 42 U.S.C. § 300f et seq.

<sup>22</sup> SDWA, § 1417.

<sup>23</sup> SDWA, § 1452; 42 U.S.C. § 300j-12; *See*, Congressional Research Service, Report 46471, Federally Supported Projects and Programs for Wastewater, Drinking Water, and Water Supply Infrastructure (August 1, 2024) p. 39, <https://crsreports.congress.gov/product/pdf/R/R46471>.

<sup>24</sup> *See*, Congressional Research Service, Report 46471, Federally Supported Projects and Programs for Wastewater, Drinking Water, and Water Supply Infrastructure (August 1, 2024) p. 40, <https://crsreports.congress.gov/product/pdf/R/R46471>.

## B. New York Administration of BIL Funds

The BIL, signed into law by President Biden on November 15, 2021, supplemented the preexisting SRF program with \$15 billion in federal funding over five years to be used for lead service line identification and replacement projects. The BIL appropriated funds through the DWSRF for lead service line replacement projects. In other words, DWSRF programs in each state have been designated by Congress as the delivery mechanism for these federal infrastructure funds. As a condition for receiving these funds, states, including New York State, must commit to full lead service line replacements, which expressly includes the replacement of privately owned portions of lead service lines.<sup>25</sup>

In New York, BIL lead service line replacement program funds are jointly administered by the State Department of Health (DOH) and EFC to finance lead service line replacement projects or associated activity directly connected to the identification, planning, design, and replacement of lead service lines.<sup>26</sup> Any project funded under this appropriation involving the replacement of a lead service line must replace the entire lead service line, specifically including private lead service lines, unless a portion of the service line has already been replaced or is concurrently being replaced with another funding source.<sup>27</sup>

EFC carries out the State's DWSRF revolving loan program by entering into financing agreements with municipalities to fund their drinking water infrastructure projects. Based upon conversations with EFC and City officials, in Troy's case, under its financing agreement with EFC, the City would receive funding from the BIL (through the DWSRF) in the form of a financing and grant funding package, which includes \$8.9 million in grants and \$3.9 million in interest-free financing. To receive the financing and to evidence the indebtedness of the City, the financing agreement would require the City to deliver to EFC an obligation (a note/bond), the terms of which require the City to pledge its full faith and credit to repay EFC the principal amount of \$3.9 million.

## III. Discussion

It is our opinion that the City's participation in the project financing agreement under the auspices of the federal and state program administered by EFC would not run afoul of the State Constitution's gift and loan prohibition. Specifically, under the facts presented, we view the City's action to remediate the public health threat created by lead service lines present in the City's public water system to be explicitly authorized under state law and to constitute a proper public purpose

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<sup>25</sup> See, SDWA, 42 U.S.C. § 300j-19b; *see also*, U.S. Environmental Protection Agency, Memorandum concerning Implementing Lead Service Line Replacement Projects Funded by the Drinking Water State Revolving Fund, (May 1, 2024), <https://www.epa.gov/system/files/documents/2024-05/implementing-lead-service-line-replacement-projects-funded-by-the-drinking-water-state-revolving-fund-05-01-2024.pdf>.

<sup>26</sup> NYS DOH and EFC, Final Amendment No. 2 to the Drinking Water State Revolving Fund Federal Fiscal Year 2024 Intended Use Plan (March 2024), [https://www.health.ny.gov/environmental/water/drinking/iup/docs/amendment\\_2\\_bil-lslr\\_ffy2024.pdf](https://www.health.ny.gov/environmental/water/drinking/iup/docs/amendment_2_bil-lslr_ffy2024.pdf).

<sup>27</sup> See, SDWA, 42 U.S.C. § 300j-19b; *see also*, U.S. Environmental Protection Agency, Memorandum concerning Implementing Lead Service Line Replacement Projects Funded by the Drinking Water State Revolving Fund, (May 1, 2024), <https://www.epa.gov/system/files/documents/2024-05/implementing-lead-service-line-replacement-projects-funded-by-the-drinking-water-state-revolving-fund-05-01-2024.pdf>.

with only an incidental private benefit and, therefore, not in violation of article VIII, §1 of the State Constitution.

Article VIII, § 1 of the New York State Constitution prohibits municipalities from gifting or loaning public funds or its credit for private purposes as follows:

No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of, any private corporation or association; nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, except that two or more such units may join together pursuant to law in providing any municipal facility, service, activity or undertaking which each of such units has the power to provide separately.

Article VIII, § 1 is the local analogue to Article VII, § 8 (1) of the State Constitution, which prohibits, in general terms, the gifting or loaning of the State's money or credit for private purposes.

In 2011, the Court of Appeals rendered a seminal decision on the Constitutional gift and loan clause in the case of Bordeleau v. State of New York, 18 NY3d 305 (2011). Although Bordeleau involved a challenge to a State budgetary appropriation, the Court of Appeals held that “the same standard and analysis applies regardless of whether the challenge was brought under the article VIII, § 1 or article VII, § 8(1) Constitutional provision against gifts and loans of public funds” (Id., at 318). More specifically, the Court concluded that the standard established for municipalities in the 1971 case of Murphy v. Erie County, 28 NY2d 80 (1971) was controlling for the State appropriations at issue, rather than the standard articulated in the 1921 case of People v. Westchester County Natl. Bank of Peekskill, N.Y., 231 NY 465 (1921). Bordeleau, 18 NY3d 305, 318.

In its decision, the Bordeleau court analyzed two categories of state budgetary appropriations under the gift and loan prohibition. Germane to the instant question, the second category of appropriations examined by the Bordeleau court was comprised of appropriations made to state agencies to fund agreements with not-for-profit corporations for the purpose of marketing and promoting New York agricultural products. Id., 312.<sup>28</sup> As to this second category, the Court held that the Murphy analysis for municipal gift and loan challenges was the applicable standard for challenges brought under either article VIII, § 1 or article VII, § 8(1) of the Constitution. In so doing, the Court reaffirmed Murphy and established that the universal standard

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<sup>28</sup> The first category pertains to appropriations made by the State to public benefit corporations who in turn provide grants and loans to private entities. The Court held that these appropriations to entities legally independent and separate from the State are not subject to the article VII, § 8(1) prohibition against gifting or loaning state money in the first instance and, therefore, no further analysis under the Murphy standard is required (Id., at 316-317). While integral to an analysis of the appropriation made by the State to EFC, this category does not encompass expenditures by municipalities and is not relevant to the question posed by the City.

is that “an incidental private benefit will not invalidate a project which has for its primary object a public purpose” (Id., at 318 [internal quotation omitted]).

Notably, in determining whether the private benefit derived from a state enactment, in that case an appropriation, is incidental to a predominant public purpose, the Court of Appeals reiterated its long-standing holding that the challenger’s bar is high:

At the outset, we observe that plaintiffs’ ‘burden is a heavy one’. It is well established that ‘enactments of the Legislature—a coequal branch of government—enjoy a strong presumption of constitutionality’. In this case, plaintiffs’ burden is ‘exceedingly strong’ because they challenge public expenditures designed in the public interest. Indeed, we have recognized the need for deference involving ‘public funding programs essential to addressing the problems of modern life, unless such programs are ‘patently illegal’’. As such, unconstitutionality must be proven beyond a reasonable doubt (Id., at 313 [internal citations omitted]).<sup>29</sup>

Similarly, in regard to local enactments, the Court of Appeals has unambiguously held that this “exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well and only as a last resort should courts strike down legislation on the ground of unconstitutionality.” Lighthouse Shores, Inc. v. Town of Islip, 41 NY2d 7, 11–12 (1976). Indeed, the Court of Appeals held that when analyzing local enactments “[i]t is also presumed that the legislative body has investigated and found the existence of a situation showing or indicating the need for or desirability of the ordinance, and, if any state of facts known or to be assumed, justifies the disputed measure, this court’s power of inquiry ends. Thus, as to reasonableness, plaintiffs in order to succeed have the burden of showing that no reasonable basis at all existed for the challenged portions of the ordinance.” Id. (internal quotations omitted).

#### A. State Grant Funding May Eliminate Constitutional Question

Prior to delving into the constitutional questions presented, it is at least arguable that the provision of state grant funds to fully pay the principal incurred on the City’s debt obviates the need to conduct the Bordeleau analysis in the first instance.

As mentioned above, Governor Hochul has announced that the State will award \$3,846,900 to the City of Troy to improve its drinking water infrastructure by identifying and replacing lead service lines.<sup>30</sup> It is not coincidental that the grant is for the exact amount owed by the City to satisfy the principal on its bonds purchased by EFC, as the Governor has expressly stated that,

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<sup>29</sup> It is worth noting the related well settled principle that “when a court reviews such a decision, it must operate on the rule that it may not substitute its judgment for that of the body which made the decision. Judges, however much they might disagree with the wisdom of the act under review, are not free to invalidate it on that ground.” Schulz v. State, 216 AD3d 21, 26 (3d Dept. 2023).

<sup>30</sup> Press Release, Governor Kathy Hochul, Governor Hochul Announces Nearly \$90 Million to Replace Lead Service Lines and Protect Drinking Water Across New York (Sep. 27, 2024), <https://www.governor.ny.gov/news/governor-hochul-announces-nearly-90-million-replace-lead-service-lines-and-protect-drinking>.

“[t]he State funding awarded ...will be used by municipalities to help cover the costs of lead service line replacement projects that received financing through the federal Bipartisan Infrastructure Law (BIL) but whose costs were not fully covered by BIL grants. This funding comes in addition to the funding already allocated through the BIL and the State’s Water Infrastructure grant program.”<sup>31</sup>

In Kradjian v. City of Binghamton, 104 AD2d 16 (3d Dept. 1984), the Appellate Division, Third Department, analyzed whether the City of Binghamton’s participation in a federal program violated Article VIII, § 1. In sum, under that program, in order to “attract investments and create permanent job opportunities for low and moderate income persons,” Binghamton secured a loan from the Federal financing bank guaranteed by the Department of Housing and Urban Development (HUD) (Id., at 18). Binghamton then used the loan proceeds and other federal grant monies to purchase a hotel from private developers and then reconvey the hotel to private developers retaining a first mortgage to be repaid by the developers on terms equivalent to the city's obligation on the Federal loan (Id.). Under the federal program, Binghamton was required to furnish certain collateral and other security limited to future Federal HUD grants and proceeds from foreclosure sale of the property and, if necessary, certain other funds generated by Federal grant programs (Id.). Under the facts of that program, the Court found that the gift and loan prohibition was not implicated as, “the city is participating in a Federal program, created by Federal statute, administered by a Federal agency and funded by Federal sources” and that in light of the developers commitment to pay the City the exact amount of the federal loan, any effect on the public fisc was speculative (Id.).

Although factually distinguishable from Kradjian, here, the City will issue notes and/or bonds solely to EFC, evidencing the City’s obligation to repay its zero-interest financing from the federally-funded DWSRF (administered by EFC). To the extent that the City will use state grant funds, rather than local funds, to repay the principal amount of the loan from EFC, it can be argued that there is no actual or potential impact on the municipal fisc and, like in Kradjian with respect to the guaranteed payments by the developers to satisfy the mortgage/federal loan, the state grant functionally negates any pledge of the City’s credit. Under this analysis, it could be maintained that while a challenge could always be brought against the lawfulness of the State’s grant program, the City’s issuance of notes and/or bonds in connection with the financing from EFC would not be susceptible to Article VIII, § 1 challenge. Nevertheless, as technically the City would nevertheless be required to pledge its full faith and credit to obtain the financing from EFC, and this argument relies upon an extension of caselaw and the specifics of the state grant program, further discussion under the State Constitution is warranted.

#### B. State Law Authorizes the Issuance of the Bonds at Issue

Cities have broad power to regulate, manage, and control their local affairs and are granted all of the rights, privileges, and jurisdiction necessary for carrying such power into execution.<sup>32</sup> In furtherance of that general grant of authority, cities are empowered to “preserve and care for the safety, health...and general welfare of the inhabitants of the city and visitors thereto.”<sup>33</sup> In

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<sup>31</sup> *Id.* See also, NYS DOH, DWSRF-BIL Award Letter to City of Troy (March 29, 2024).

<sup>32</sup> General City Law, § 19.

<sup>33</sup> General City Law, § 20(13).



addition, the Municipal Home Rule Law provides that a city may adopt local laws relating to the safety, health, and well-being of persons therein.<sup>34</sup> Particularly, in accordance with their charters and administrative codes, cities are authorized to establish, construct, maintain and operate water supply systems.<sup>35</sup>

In this case, the City has adopted an ordinance amending the City’s rules and regulations<sup>36</sup> for the Department of Public Utilities, in accordance with the Environmental Protection Agency’s Lead and Copper Rule and the New York State Department of Health’s Lead Service Line Replacement Program (“LSLRP”), to authorize the replacement of all public and private lead service lines in the City in order to eliminate the health threat facing residents as a result of the high lead levels in the City’s drinking water.<sup>37</sup> The City indicates that they are currently facing a “public health emergency because thousands of lead water pipes [are] negatively impact[ing] the quality of the City’s water and threaten the health of all residents, particularly children.”<sup>38</sup> It is evident from this that the problem of lead in the City’s drinking water is of a magnitude that affects a significant portion of the community. As such, in order to “protect public health and safety,” the City wants to replace all lead service lines, both public and private.<sup>39</sup> On its face and particularly in conjunction with other governing statutes discussed below, the City was authorized by State law to enact this ordinance, which must be afforded substantial constitutional deference.

Bolstering the robust constitutional deference which inures to legislative enactments, as described above, the City intends to issue notes and/or bonds under the auspices of a federal financial assistance program administered by the State, namely the DWSRF. Pursuant to General Municipal Law § 99-h (2):

Any municipal corporation shall have power, either individually or jointly with one or more other municipal corporations, to apply for, accept and expend funds made available by the federal government either directly or through the state, pursuant to the provisions of any federal law, which is not inconsistent with the statutes or constitution of this state, in order to administer, conduct or participate with the federal government in programs relating to the general welfare of the inhabitants of such municipal corporation. Any such municipal corporation is authorized to appropriate and expend such sums as are required to administer, conduct or participate in any such programs and may perform any and all acts necessary to effectuate the purposes of any such programs.

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<sup>34</sup> Municipal Home Rule Law, §10(1)(ii)(a)(12).

<sup>35</sup> General City Law, § 20(2), (7).

<sup>36</sup> *See*, City of Troy Charter, § C-55(F), authorizing the City Council to establish a code of rules and regulations for the Department of Public Utilities, which is the City department responsible for the City’s public water system.

<sup>37</sup> City of Troy, Ordinance 18-2023, Ordinance Amending Rules and Regulations of the City of Troy Department of Public Utilities (March 3, 2023). *See also*, 40 CFR § 141.80; Public Health Law § 1114.

<sup>38</sup> City of Troy, Resolution no. 2024-127 (Sep. 5, 2024).

<sup>39</sup> *Id.* *See also*, City of Troy, Ordinance 18-2023, Ordinance Amending Rules and Regulations of the City of Troy Department of Public Utilities (March 3, 2023).

Therefore, under State law, the City may presumptively expend funds necessary for participation in the program unless in direct contravention of controlling State law or provisions of the State Constitution.

In regard to State law, Local Finance Law (“LFL”) §10.00 provides, in relevant part, that “a municipality, school district or district corporation shall have the power to contract indebtedness respectively for any municipal, school district or district corporation object or purpose set forth in paragraph a of section 11.00 of this title ... if it is authorized by law to expend money for or to accomplish such object or purpose.” In relation to lead pipe replacement, in 2023, section 11.00 of the LFL was amended to include subsection (a) (109), which adds a period of probable usefulness (“PPU”) of 30 years for lead service line replacement programs established by municipalities, school districts, or district corporations that inventory, design and replace publicly-owned and privately-owned lead service lines.<sup>40</sup> This subsection reads in full:

Lead service line replacement programs established by a municipality, school district or district corporation, including, but not limited to programs that inventory, design and replace publicly owned and privately owned lead service lines within an established water system, thirty years. As used in this subdivision, “lead service line” means a service line made in whole or in part of lead, which connects a water main to a building inlet. A lead service line may be owned by the water system, a property owner, or both. A lead gooseneck, pigtail, or connector shall be eligible for replacement regardless of the service line material to which a lead gooseneck, pigtail, or connector is attached. Gooseneck, pigtail, or connector means a short section of piping, typically not exceeding two feet, which can be bent and used for connections between rigid service piping. A galvanized iron or steel service line is considered a lead service line if it ever was or is currently downstream of any lead service line or service line of unknown material.

Notably, although enacted as part of the budget, this provision originated in a stand-alone bill.<sup>41</sup> The justification contained in the sponsor’s memorandum expressly states that the section was necessary for localities “to pursue the loan portion of the funding” under the Bipartisan Infrastructure Law and to “assist local governments and bond counsel in issuing obligations to meet this purpose.”<sup>42</sup> Therefore, not only is the issuance of municipal bonds in furtherance of participating in the federal program to replace lead pipes in private homes not inconsistent with generally applicable State law, but the same has been explicitly contemplated and approved in State legislation, albeit in the context of delineating an applicable PPU.

Additionally, issuing bonds to facilitate participation in the federal program is not inconsistent with general state statutes defining or limiting expenditures by cities. In general, cities are afforded the broad power to regulate, manage and control their local affairs and are granted all of the rights, privileges and jurisdiction necessary for carrying such power into execution.<sup>43</sup> In

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<sup>40</sup> Chapter 58 of the Laws of 2023 (creating a new LFL § 11.00 [109]).

<sup>41</sup> N.Y.S. Session Laws 2023-24, Senate Bill No. S5001 Hinchey (February 21, 2023).

<sup>42</sup> *Id.*

<sup>43</sup> General City Law, § 19.

furtherance of that general grant of authority, cities are expressly empowered to preserve and care for the safety, health, and general welfare of the inhabitants of their city and visitors thereto.<sup>44</sup> In accordance with their charters and administrative codes, cities are authorized to establish, construct, maintain and operate water supply systems.<sup>45</sup>

Accordingly, not only is the City's proposed financing agreement with EFC not inconsistent with state statutes, but it is expressly contemplated and validated. Therefore, the question distills into whether the City's implementation of these statutes through the EFC financing agreement and the associated issuance of notes and/or bonds constitutes an unconstitutional gift and loan under the Murphy/Bordeleau test.

C. The City's Issuance of These Bonds is Not an Unconstitutional Gift or Loan Under the Murphy/Bordeleau Test

As discussed, the Court of Appeals has ruled that any challenge to a State or local law as violative of the gift and loan prohibition must overcome the highly deferential standard of demonstrating that the expenditure is patently illegal and prove beyond a reasonable doubt that the private benefit is not merely incidental in relation to the public benefit and thus unconstitutional. Although we cannot presume to dispositively resolve this issue in regard to the City's lead pipe replacement program, we note that under the Court of Appeals' exceedingly deferential standard, expenditures to support two privately owned football stadiums (Murphy, 28 NY2d 80 []); Schulz, 216 AD3d 21) and for grants to the New York State Apple Growers Association, New York Wine and Grape Foundation, and Long Island Wine Council (Bordeleau, 18 NY3d 305), have been held to be valid and serve predominantly public purposes.<sup>46</sup> In addition to the general deference attaching to state and local legislative enactments, promoting child safety and welfare has been judicially held to be a "legitimate and salutary governmental objective." Collis v. Town of Niskayuna, 178 A.D.2d 868, 869 (3d Dept., 1991)].

Under this precedent, and in light of the robust scientific evidence of the public health dangers of lead pipes, the overarching public purpose to remove lead from drinking water, the federal and state mandates, the federal program administered by the state, the fact that the City's program benefits a wide swathe of the community as a whole, the explicit state authorization for notes and/or bonds to be issued for such purpose, we believe that any challenger would face a daunting, if not insurmountable task in meeting their burden of proof beyond a reasonable doubt that private benefit is not incidental in the face of the primary public purpose served. Accordingly, we opine that the City of Troy's bond issuance is constitutional.

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<sup>44</sup> General City Law, § 20(13).

<sup>45</sup> General City Law, § 20(2), (7).

<sup>46</sup> See also, Yonkers Community Development Agency v Morris, 37 NY2d 478 (1975) (sale of urban renewal property obtained by condemnation to private corporation for substantially less than acquisition cost); Hotel Dorset Co. v Trust for Cultural Resources, 46 NY2d 358 (1978) (tax exemption to museum for property to be used in part for commercial purposes to produce income).

#### IV. Conclusion

We find that the City’s program and financing through EFC are authorized by State law and are constitutional. As stated above, this opinion solely pertains to the use of the proposed funding mechanism by the City and does not necessarily apply to other types of municipalities and alternate funding sources.<sup>47</sup> Given the public health crisis spurring the imperative to eradicate lead lines and the legal deference afforded state legislation, further legislation may be appropriate to eliminate potential statutory tension and categorically declare a legislative finding that the public benefit of these programs is deemed to eclipse any incidental private benefit.

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City of Troy

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<sup>47</sup> For example, on their face, the provisions of Town Law §198(3)(a) and Village Law §11-1112(1) could be read as requiring each individual property owner to pay for the expense of their individual lead service line repair. We note, however, that as discussed above, programs fully federally funded where the municipality serves merely as a pass through, or in which the municipality does not lend its full faith and credit, likely would not be subject to a gift and loan analysis in the first instance. See Kradjian v. Binghamton 104 AD2d 16, at 18 (where the municipality is “participating in a Federal program, created by Federal statute, administered by a Federal agency and funded by Federal sources” and the City is not required to guarantee a loan issued, there is no municipal gift or loan implicating the Constitution).