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March 21, 2008

Al Roder
City of Northfield
801 Washington Street
Northfield, MN 55057

Re: Charter Commission Resolution of March 18, 2008

Dear Al:

I have reviewed the charter commission resolution dated March 18, 2008, regarding the engineering contract issues raised by Dave Maroney. I am working at home due to illness and do not have available to me my office file, research materials, nor the Everett report on this matter. Due to the Easter weekend and spring break next week, I will not be in my office for some time. However, I believe it is important for me to respond to the charter commission resolution promptly, therefore I will respond now, from home, without much legal citation or reference to other records.

1. CHARTER COMMISSION'S FINDING OF CHARTER VIOLATION

The charter commission may say what it wants, but it has no legal authority to find violations or enforce compliance with the charter. It is the mayor and council and the city administrator who are charged with enforcing the laws of the city (see Charter Section 7.3, Subd. 9, and Code Sec. 2-161 (a), (c) and (h)).

It is clear that the city administrator, with cooperation from the public works director, has responded to every request for information from the citizen who raised these issues. I have responded to many questions regarding this matter. And Mr. Everett, under authority granted by the council, has investigated and reported on the matter. No violation of law has been found.

I submit that the questions raised and the findings made by the charter commission, while obviously intelligently written, do not produce any new basis in fact or law for further investigation or for a conclusion that a prohibited conflict of interest has occurred. I will address only some of the flaws in the charter commission's argument.

2. THE CITY ENGINEER IS NOT AN OFFICER OF THE CITY

Charter Section 15.3 prohibits an “officer” of the city, “who is authorized to take part in any manner in making or amending a sale, lease or contract” on behalf of the city, from having a personal financial interest in that sale, lease or contract. This charter provision is based almost verbatim on Minnesota Statute Section 471.87. The charter commission states, “[u]nder our city code, the city engineer is listed as a city officer.” This is incorrect.

First, under the *charter*, the city administrator, the finance director, and the city clerk are established as “officers” of the city (see Charter Section 7.5). Elected officials are also referred to in the charter as “officers” of the city. Charter Section 7.5 states that the council may establish and abolish other officers of the city by ordinance. However, the city’s code of ordinances does not currently establish any other officers of the city.

Perhaps the charter commission’s statement that the city engineer is a “city officer” is based on Code Sec. 2-121, a part of the city’s ethics ordinance which defines the term “public *officials*” for purposes of the ethics ordinance. If so, that conclusion is incorrect.

While the terms “officer” and “official” are sometimes used broadly and sometimes interchangeably, the term “officer” is generally held to refer to an office of some permanence and high responsibility within the organization (such as council member, city administrator, finance director and city clerk—positions which are likely to continue somewhat permanently and which have specific and important duties under the law or other authority which established them). “Officials,” on the other hand, is a broader term often used to mean elected and appointed persons and employees who represent the city in any significant way, *including* persons whose positions within the organization are more subject to change from time to time and who do not have the highest level of authority or responsibility.

The definition of “public officials” in Code Sec. 2-121 is obviously a broad term which expressly includes many subordinate positions in addition to the officers of the city which are established by the charter. The ordinance includes not only the city administrator, finance director and city clerk, but members of permanently established advisory boards and commissions, the hospital board, the public works director/city engineer, community development director, city planner, water superintendent, wastewater superintendent, street superintendent, parks and recreation director, police chief, fire chief, library director, liquor store manager and hospital administrator. Clearly these are not all “officers” of the city within the meaning of Charter Sections 7.5 and 15.3.

Again, nowhere in the charter or city code is the city engineer established as an “officer” of the city. In addition, Code Sec. 2-121, as it applies to the city engineer, expressly applies to *employees* of the city, and a consulting engineer is *not* an employee of the city.

Even if a consulting city engineer were to be considered an officer of the city, he or she is not authorized to take part in making a contract on behalf of the city—it is the city council that has that authority.

The charter commission’s question about the *amendment* of the city’s contract with Bolton & Menk while Mark Kasma was consulting city engineer is answered under the same analysis as the foregoing with regard to the initial contract—a consulting city engineer is not an “officer of the city” authorized to take part in making or amending a contract on behalf of the city and therefore there is no violation of Charter Section 15.3.

3. CONSULTING ENGINEER/AUTHORITY TO ACT AS PUBLIC OFFICIAL

The charter commission states “[t]he City Attorney argues that Kasma did not have authority to act as a public official; therefore, apparently none of his acts emanated from his public office.” The commission then quotes from an email I wrote on November 1, 2007. Nowhere in that quote did I say the consulting engineer had no authority to act on behalf of the city in his capacity as consulting city engineer. Obviously he did, to the extent allowed by his contract with the city. What I said was that the consulting engineer was not “authorized, as an officer of the city” to take part in making the contract with himself. I said it was the city council that had the authority to make that contract on behalf of the city.

If a consulting professional lacks the authority to make or amend a contract with the city, on behalf of *him or herself*, pertaining to his or her own services, because of conflict of interest provisions of law, then the city may never retain the services of a consultant without violating conflict of interest provisions. This would be an absurd result.

4. OVERSIGHT OF 5TH STREET PROJECT

The charter commission states, erroneously:

“Unlike the City Attorney, Everett does not argue that Kasma lacked authority to act as City Engineer. Instead, Everett argues that Kasma was not an officer of the city, and thus, the City Code and state statutes do not apply.”

First, I did not argue that Mark Kasma lacked authority to act as city engineer. Second, I agreed and continue to agree with Mr. Everett that the consulting city engineer was not an officer of the city.

The charter commission further disputes Mr. Everett’s conclusion that Mr. Kasma was, in its words, “walled-off” from the 5th street project. The charter commission focuses on the provision of the city’s contract with Mr. Kasma that he consult with the city administrator or his designee before expending state aid funds, apparently assuming that apart from the

use of state aid funds there would be no oversight of the consulting engineer by city staff. This is a false assumption.

Without having the contract in front of me, and assuming there is no other provision in the contract about oversight of the consulting engineer by city staff, I am informed that the specific provision about expenditure of state aid funds was included in the contract because of specific requirements of state law. However, it is not necessary to express in a contract every legal constraint on the parties to that contract. Even if *nothing* else was said in this particular contract about the expenditure of any other funds on behalf of the city, *no* employee of or consultant to the city has authority to spend *any* city funds for a purpose not authorized by the city. A consultant has a fiduciary obligation to act in the best interests of the city. And virtually every city contract is closely managed by city staff, especially one where the consultant's services are rendered in such close association with city staff as are engineering services.

More to the point of oversight of the 5th street project, given that Bolton & Menk had previously been retained as project engineer for that project, and to be doubly cautious, the city engaged an independent professional engineer to function as "city engineer" in overseeing the project. It is irrelevant if Brian Hilgardner and Mark Kasma had any continuing communications about the 5th street project after Mr. Hilgardner took over as project engineer and Mr. Kasma took over as consulting city engineer on other projects, since *this* project was reviewed and overseen not by Mr. Kasma but by an independent professional engineer on the city's behalf.

The charter commission questions how Peer Review "can address a conflict of interest matter, since the purpose of a Peer Review is to look at the quality of the work." The answer is that any potential conflict of interest in a situation such as this is a concern based on the possibility that a consulting city engineer might review the work of a project engineer from his own firm less stringently than he would review the work of an outside engineer. Providing for independent review removed this concern. It *was* the quality of the work which was of concern to the city, not the potential conflict of interest in and of itself, which in any event was removed by retaining an independent professional engineer to oversee the project.

5. SELECTION OF BOLTON & MENK AS CONSULTING CITY ENGINEER

The charter commission questions the criteria on which Bolton & Menk was selected as consulting city engineer and whether conflict of interest was one of the selection criteria. City staff can point to many criteria on which they recommended Bolton & Menk to the council, including the city's long history of using the firm's services and being familiar and satisfied with its work. Remember that the city may retain professional services without any bid or RFP process whatsoever, which may be a reasonable course if the city is familiar with the work of a particular professional. Yet I believe Bolton & Menk was selected following an RFP process and after thorough consideration of competing firms, including Mr. Maroney's.

6. CONCLUSION

In my opinion, the city has released all facts and documents with regard to this matter as requested by anyone with any interest in it, has investigated and authorized investigation of the facts and legal issues surrounding the matter in a responsible manner, and has no obligation to respond further to the charter commission on these issues. If the charter commission issues additional findings or arguments, I request direction from the council whether it wishes me to continue the debate, which is costly and which is beginning to seem futile, as the persons who raise questions on these matters never seem to accept the answers they receive from any source, in spite of all the good faith efforts which have been made to respond to their concerns. Of course, if the State Auditor has any concerns which have not been addressed by the city, the city should stand ready to respond to the Auditor.

I await further direction from the council. Please share this letter with the mayor and council. You may also share it with the State Auditor and with the public as may be requested.

Thank you.

Very truly yours,

/s/ Maren L. Swanson

Maren L. Swanson