

City Council

Additional Handouts for

October 2, 2013

10/2/2013 11:26 AM

AGENDA ITEM 6B

- (A) Resolution #2013-45 Authorizing The Drafting And Execution Of A Contract With Cotting Consulting
- (B) City Attorney Tim Fenner's elaboration on the potential application of section 946.13(1)(a) of the Wisconsin State statutes
- (C) City Attorney Tim Fenner's May 2006 "Perry Letter" regarding involvement an elected official also employed by a firm doing business with the City of Waterloo.
- (D) Email thread cover portions of the communications on this topic.
- (E) Memorandum of Understanding adopted by Council action in effect with Madison Audubon Society.



(A)

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RESOLUTION #2013-45

AUTHORIZING THE DRAFTING AND EXECUTION OF A CONTRACT WITH COTTING CONSULTING, WATERLOO TO PROVIDE SERVICES ALLOWING FOR THE START-UP AND FOR THE PROGRAMMING OF THE WATERLOO REGIONAL TRAILHEAD FACILITY FOR TWELVE MONTHS AND AUTHORIZING THE DELAY OF IMPLEMENTATION OF AN INTERN AGREEMENT WITH THE MADISON AUDUBON SOCIETY FOR TWELVE MONTHS

Whereas, the Waterloo Regional Trailhead (WRT) Implementation Team voted affirmatively at its September 30, 2013 meeting to recommend to the Council that it enter into an agreement with Cotting Consulting, Waterloo, Wisconsin to provide services allowing for the start-up and for the programming of the Waterloo Regional Trailhead Facility for twelve months; and,

Whereas, Laura Cotting, principal for Cotting Consulting, has submitted a communication to the Clerk/Treasurer's office proposing a contract to serve as an Independent Contractor providing services of those described in the Madison Audubon (MAS) Memorandum of Understanding, with the following details and differences:

1. Remuneration for a sum of \$14,000 plus mileage to meetings required by the position (monthly commutes to Watertown, Jefferson, or Madison to attend GHA and occasional MAS meetings).
- 2) Mileage not to exceed \$500 for the duration of the contract, mileage submitted in accordance with municipal policy.
- 3) No benefits of any kind including a housing benefit figured into the Madison Audubon Society Internship agreement.
- 4) Contract to begin October 15, 2013 (work on Phase 2 plans, timelines, preliminary WRT bookings, organizing the November ribbon cutting ceremony, managing the WRT Facebook page, etc), and end October 15, 2014 (2014 intern starts 1st pay period, the two week overlap is for training).
- 5) Payments disbursed in the normal municipal pay cycle.

Therefore Be It Resolved, by the Common Council of the City of Waterloo, Wisconsin, that it agrees with the Waterloo Regional Trailhead Implementation Team recommendation and authorizes the drafting and execution of a contract with Cotting Consulting, Waterloo to provide services allowing for the start-up and for the programming of the Waterloo Regional Trailhead facility for twelve months, directing the Clerk/Treasurer in consultation with the City Attorney to draft a contract and authorizing the Mayor to sign said contract.

Therefore Be It Further Resolved, by the Common Council of the City of Waterloo, Wisconsin that it directs the Clerk/Treasurer to negotiate a revised agreement with Madison Audubon Society for consideration by the Council at a future meeting.

PASSED AND ADOPTED this 3rd day of October 2013.

City of Waterloo

Signed: _____
Robert H. Thompson, Mayor

Attest:

Morton J. Hansen, Clerk/Treasurer

SPONSOR(S) – Waterloo Regional Trailhead Implementation Team, appointed by Mayor Thompson

FISCAL IMPACT – Privately donated dollars would fund Waterloo Regional Trailhead staffing requirements

(B)

City Hall

From: Timothy D. Fenner [TFenner@axley.com]
Sent: Tuesday, October 01, 2013 4:26 PM
To: 'City Hall'
Cc: Andrea V. Roth
Subject: RE: Mayor's request for Attorney's opinion: Alderperson seeking to enter into a service contract with City to operate Waterloo Regional Trailhead

Mo:

I think I need to elaborate on the potential application of section 946.13 (1)(a) Stats. to the instant matter. That section prohibits a public officer from negotiating, bidding for, or entering into a contract in which he or she has a private pecuniary interest if, at the same time, he or she has a role to play in an official capacity in the making of that contract. Any public officer who violates the statute is guilty of a Class I felony..... not a misdemeanor. It is a felony. The statute imposes strict liability as a means to enforce a prescribed standard of conduct:

“Section 946.13 is directed not at corruption but conduct presenting an opportunity for corruption. Because the public officer's judgment may be impaired when the officer transacts government business in which he or she has a personal economic interest, the statute attempts to prevent public officers from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with the danger that they will advance a private interest rather than a public good.” See State v Stoehr 134 W. second 66, 79 – 80 (1986).

The foregoing is an opinion issued by the Wisconsin Supreme Court. In issuing the opinion, the court noted that the statute is based on the common law rule that an agent may not serve two masters and that an agent may not engage in self dealing. The court also quoted in the legislative history of the statute:

“The object of (946.13) is to prevent a public officer... from having a private pecuniary interest which may influence him to exercise discretionary powers in his official capacity and manner inconsistent the interest of the public.’ Id

In the year 2002, the Wisconsin Court of Appeals issued a decision involving a town board supervisor who was ultimately hired by the town to act as its park manager, when the then current manager walked off the job. Following this departure, the town received letters of interest from persons desiring to fill the position, and one such letter was from the town board supervisor. He participated in an interviewing process; and also set forth a specific proposal to provide the services. An interviewing committee of the town recommended to the town board that it accept the supervisor's contract proposal. The town board approved of the proposal in concept, but directed that a contract be worked out with the supervisor. The Supervisor in question was present at that meeting, did not participate in any discussion and did not vote on the motion. The supervisor shortly resigned thereafter; and he was subsequently presented with the contract which he signed. The contract was then formally approved by the town board. He was to receive a salary of approximately \$21,000 per year. Shortly thereafter, the supervisor was charged with a felony. The supervisor argued that the statute was not applicable because he had resigned as supervisor before the contract was executed. The court rejected this argument and indicated that the statute applies to not only the execution of the contract, but the prior phases of negotiating and bidding. When these latter activities were occurring, the supervisor was still a town board supervisor. The Court of Appeals noted: “We also keep in mind that the statute is not directed at corruption per se, but conduct raising an opportunity where corruption can occur.” See State v Venema 257 Wis 2d 491, 501 (Wi App 2002).

There is no question but that the statute is facially applicable to the instant situation. The individual is a city Council member; and also, the owner of the business that would provide the outside services. Having noted that the statute is applicable, there is an exception. Section 946.13 (2) Stats provides that the statute does not apply to: “Contracts in which any single public officer is privately interested that do not involve receipts and disbursements by the political

subdivision aggregating more than \$15,000 in any year. " This exemption would suggest that so long as the compensation stays below the \$15,000 threshold amount, no felony charge can be brought against the individual.

Although the foregoing analysis deals with the potential application of the criminal statute, there is another aspect arising in the present circumstance. That is the ethical aspect that has been discussed in the e-mail exchanges. Previously, the city has encountered an ethical situation involving Mr. Perry. There is a significant difference between the Perry circumstance and what is being proposed at this time. A reading of the opinion involving Mr. Perry clearly indicates that: "... upon election to the Common Council, Mr. Perry no longer works on any Waterloo specific projects; and that his employer, ..., has assigned him to different projects involving other municipalities. " That fact seems to be missing in the instant case. Rather, it appears that the individual in question will in fact be working on a project in which the city has a direct and substantial interest. In the Perry situation, we outlined standards of conduct that could be followed, that would address the ethical concerns raised under section 19.59 Stats. Presumably in the instant circumstance, similar standards of conduct could be followed such that the matter falls outside of the application of the statute. However, the Perry situation also involved the concern about the "appearance" of impropriety or conflict. The fact that Mr. Perry would not work on any city projects, certainly went a long way in dispelling any such appearance. That cannot be said in the instant case. This is troublesome.

In summary, the criminal statute is potentially applicable to the circumstance described. However, the application of that statute can be avoided if the compensation is less than \$15,000 per year. The statute setting forth the ethical standards, can be satisfied by following many of the recommendations set forth in the Perry letter. What cannot be satisfied, however, is the appearance of "impropriety." This is the distinguishing factor, and it is most troublesome to me.

At the end of the day, only the Common Council can make the decision.

Timothy D. Fenner

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From: City Hall [<mailto:cityhall@waterloowi.us>]
Sent: Tuesday, October 01, 2013 3:22 PM
To: Timothy D. Fenner
Cc: Bob Thompson Traveling; City of Waterloo, Mayor
Subject: Mayor's request for Attorney's opinion: Alderperson seeking to enter into a service contract with City to operate Waterloo Regional Trailhead

Tim:

As a follow up to our phone call:

1. Below is my update last night to the Council members.
2. Mayor Thompson is asking for a brief opinion from you on the matter of the City entering into a contractual agreement with Cotting Consulting, a small consulting firm owned by Alderperson Laura Cotting, for the purposes of providing services get the Waterloo Regional Trailhead facility up and running; create facility programming for the public

and get the facility to the point where by an intern can step in approximately one-year's time to continue operations of the facility. Alder Cotting states that she intends to continue serving during the time the contract.

3. Attached is the 2006 Perry document which has been my lead document when supplying interested parties with background information related to ethics and legal matters on this topic.

4. Attached is an email thread attempting to capture the Cotting/Hansen questions & answers.

I will next amend Thursday's Council agenda to allow for the body to meet in closed session on the Monday night recommendation. Thank you.

Mo Hansen
Clerk/Treasurer
City of Waterloo
136 North Monroe Street
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From: City Hall [<mailto:cityhall@waterloowi.us>]

Sent: Monday, September 30, 2013 7:51 PM

To: Angie Stinnett; bspringr@charter.net; City of Waterloo, Mayor; cottingel@gmail.com; Dale Van Holten (dvdutchvh1@gmail.com); jeni@highenergydj.com; Lindsay Reynolds ; Waterloo Clerk/Treas Office; Ziaja, Matt

Cc: ashtre@charter.net; eseidl@mckaynursery.com; Jill Taylor (jataylor811@gmail.com);

mleisses@kunkelengineering.com; richardj@co.jefferson.wi.us; tbergan@mckaynursery.com; Tim Schultz

Subject: FW: City of Waterloo Meeting Notice & Agenda - Waterloo Regional Trailhead Implementation Team, September 30, 2013

Mayor & Council:

Tuesday morning I will amend the Council agenda to reflect the recommendation of the Waterloo Regional Trailhead Implementation Team below. It voted 3-1 with one additional member voting yes by verbal proxy and a 2nd member abstaining and not included in the discussion. In summary the recommendation is to delay entering into an agreement with Madison Audubon Society for one year and instead hiring Cotting Consulting.

The recommendation is summarized from the night's agenda details.

Recommending to the Parks Commission and City Council the hiring of Cotting Consulting to a contract similar in job description to that of the Madison Audubon Society Memorandum Of Understanding with details and difference listed below. See Cotting Notes #1 Below... [Agenda Note: The implementation team may choose to convene to closed session. The statutory exception for the closed session is Wis. Statute 19.85(1)(e) "Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business whenever competitive or bargaining reasons requires a closed session." Upon conclusion of the closed session the body will reconvene in open session.] See Thompson Notes #2 Below

Notes # 1 -----

FROM ALDERPERSON COTTING VIA EMAIL 9/26/2013

As a result of the communications and resources you shared with me in these e-mail correspondences, here is my plan:

I propose an independent contract similar in job description to that of the MAS MOU, with the following details and differences:

- 1) remuneration for a sum of \$14,000 plus mileage to meetings required by the position (monthly commutes to Watertown, Jefferson, or Madison to attend GHA and occasional MAS meetings),
- 2) mileage not to exceed \$500 total for duration of contract, mileage submitted in accordance with municipal policy
- 3) No benefits. Taxes and other withholding my responsibility.
- 4) Contract to begin the second pay period in October (work on Phase 2 plans, timelines, preliminary WRT bookings, organizing the November ribbon cutting ceremony, managing the WRT Facebook page, etc), and end second pay period in September (2014 intern starts 1st pay period, the two week overlap is for training)
- 5) Payments disbursed in the normal municipal pay cycle.

Draft contract will be part of the Agenda for the September 30th WRT Implementation Team meeting. I will abstain from voting on it, will leave the room while it is discussed. Mo, I request you be present for that meeting. If passed by the Team, they may recommend the contract be on the agenda for the October 3rd Council meeting. At that meeting, I will abstain from voting on the contract, will leave the room while it is discussed. I do request discussion be conducted in closed session.

Contract will be paid for out of funds dedicated to the WRT facility, consequently I will abstain from voting on the WRT budget as it pertains to the contract. However, I believe I can vote on the WRT budget as it pertains to capitol expenditures or other contracts not related to my contract.

Notes #2 -----

FROM MAYOR THOMPSON VIA EMAIL 9/26/2013

The implementation team should be made aware of the developments and discussions up to this point so they may make an informed decision. I'm not sure why the meeting needs to be a closed session but if it legally acceptable, I have no problem with. This would also apply to any subsequent Council meeting where this would be discussed/acted on.

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