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MEMORANDUM

TO: Nome City Council

FROM: Patrick W. Munson
Boyd, Chandler & Falconer, LLP

RE: Vehicle Repair Contract

DATE: July 1, 2014

The City requested an opinion on whether it may award a contract to a vehicle repair shop that may be operating in violation of the Nome Zoning Code. For the reasons outlined below, we believe the City can award the contract despite the potential violation.

BACKGROUND

The City solicited bids to perform maintenance on its light duty and emergency services vehicle fleet. Two responsive bids were received. After a Notice of Intent to Award the contract to the low bidder, Trinity Sails, was distributed, another person filed an objection that was treated as a protest challenging the low bidder's qualifications. Ms. Bahnke reviewed the low bidder's qualifications and determined that Trinity Sails was qualified.¹ She recommended that the Council award the contract to Trinity Sails.

At the June 25, 2014 City Council meeting, it was suggested that Trinity Sails' garage/repair shop is located in a General Use District (GUD). We assume that is accurate. The matrix of permitted uses (NCO 18.110.010) states that "Vehicle and equipment repair facilities" are "not allowed" in the GUD, suggesting Trinity Sails' repair shop violates the zoning code. However, the owner of the property, Mr. Wesley Perkins, and others have suggested that the property may be "grandfathered" out of that zoning restriction because it was operating prior to the adoption of the City zoning code in 2008. The owner states that he currently leases it to Rolland Throwbridge (of Trinity Sails) for use as a commercial repair shop and garage.

¹ We have not been asked to review that determination and have not done so.

ANALYSIS

The only issue currently before the Council is whether to award the contract to Trinity Sails as recommended by the City Manager. There is no formal zoning complaint. Even if there was, the zoning investigation would be entirely separate from the contract award process. Trinity Sails was determined to be the low bidder and qualified to perform the contract. Neither the RFP soliciting bids nor the City's Code required compliance with zoning ordinances as a condition for bidding or for receiving the contract. Whether Trinity Sails is in compliance with City zoning laws is not relevant to whether it is qualified to perform the contract or whether the City can legally award the contract to Trinity Sails. The City may award the contract to Trinity Sails whether or not a violation exists.

It is not necessary at this time to determine whether the property is in fact violating zoning ordinances. We have not made any such determination. We also do not recommend the City attempt to do so in the context of determining whether to award the vehicle service contract. The contract award decision is not the correct forum for determining whether a zoning violation exists. Rather, zoning enforcement is an entirely separate administrative process that requires the City or an aggrieved person to initiate an enforcement action against the person believed to be violating Code.

If the City initiates the zoning enforcement process (as set forth in NCO 18.10.110), then it would more fully investigate the current and historical usage of the property to determine (a) whether the existing use violates the zoning code at all, and if so, (b) whether the property is nevertheless entitled to "grandfather" protection as a legal non-conforming use. NCO 18.130.020(a).² This will require significant investigation to assemble a detailed time line and a comparison of current and past uses. The City would need to compile an administrative record, provide an opportunity for the property owner and tenant to be heard, and generally provide due process. The process occurring right now consists of word of mouth and informal discussions. No enforcement action based on this kind of process would be supportable.

If the City launches a formal investigation and determines that a violation exists, Trinity Sails would be cited for a violation pursuant to NCO 18.10.110(a). The City may even order the garage to cease operations. But it cannot do either without providing full and complete due process, which is not occurring in the context of a resolution to approve a contract.

² We do not offer any opinion on the answers to those questions because they are extremely fact intensive and beyond the scope of what is necessary to determine whether to award the contract as recommended by the City Manager.

Therefore, the contract award process should proceed without regard to any potential zoning violation. Investigating the zoning violation will take time and resources and may result in an enforcement action (or it may not). Yet the outcome need not have any impact on the City's contract with Trinity Sails. At worst, the investigation may reveal a violation for which Trinity will be cited, or the City could ultimately require it to cease operation or move to a different location.³ However, those hypothetical scenarios should not be the basis for refusing to award a contract to an otherwise preferable applicant. Rather, the contract award process should proceed as normal, and the zoning investigation/enforcement process, if initiated, may proceed independently as well. Should a worst case scenario occur (*e.g.*, Trinity is ordered to cease operating), the City will have other options and decisions at that time, which will be based on a complete process as required by Code.

³ Note also that awarding the contract to Trinity Sails does not preclude the City from enforcing its zoning code against the company. In other words, the City would not be approving the use or waiving its zoning requirements if it awards the contract now; it would simply be awarding the contract despite the *possibility* of a violation. If the Council chooses to award the contract to Trinity Sails, we recommend adding a statement to the resolution memorializing the fact that the award does not constitute a decision as to the existence of any zoning violation, nor a waiver if the City's right to enforce the same.