

# **PUBLIC INFORMATION RELEASE**

FROM THE OFFICE OF  
WASHINGTON COUNTY ATTORNEY DOUG JOHNSON

For immediate release – April 24, 2007

## **NO CHARGES FILED AGAINST STILLWATER MAYOR KENNETH HARYCKI**

Washington County Attorney Doug Johnson announced today that no charges will be filed concerning the complaint that Stillwater Mayor Kenneth Harycki had a conflict of interest involving a project called Fairway Villas proposed by Lynskey & Clark (LCC). A copy of the decision is attached.

For further information, please contact Doug Johnson or Susan Harris at the Washington County Attorney's Office, 651-430-6115.

April 24, 2007

Larry Hansen  
Stillwater City Administrator  
Stillwater City Hall  
Stillwater, MN 55082

RE: Complaint of Lynskey & Clark Co. concerning Mayor Kenneth Harycki

Dear Mr. Hansen;

In your position as the Stillwater City Manager, you asked me to investigate a written complaint submitted to David Magnuson, Stillwater City Attorney, alleging that Ken Harycki, both as mayor and council person, had violated the Stillwater City Charter due to a conflict of interest involving a project called Fairway Villas proposed by Lynskey & Clark (LCC). Mr. Magnuson recused himself from the matter because he felt he had a conflict of interest.

The specific complaint presented was:

On behalf of LCC, we allege that Mayor Harycki violated City Charter § 5.12, subd. 4 by failing to disclose potential conflicts of interest relating to Fairway Villas despite having a disqualifying conflict of interest. Moreover, we note that Mayor Harycki risks additional violations of City Charter § 5.12, subd. 4 if he continues to participate in discussions or votes regarding Fairway Villas.

The Stillwater City Charter has explicit standards concerning conflicts of interest that go beyond what state law requires. The Charter requires the city attorney to investigate any violation alleged in a written complaint. Since this office does not have investigators, I requested assistance from law enforcement; the Stillwater Police Department asked the Washington County Sheriff's Office to conduct the investigation since it would be a conflict for the Stillwater Police Department to do an investigation of its own mayor.

I have personally reviewed the complaint of LCC, the response submitted by the attorney for Mayor Harycki, and the reports from the Washington County Sheriff's Office resulting from its investigation and now submit my Findings of Fact, Summary of Law, Analysis, Decision and Comment.

#### FINDINGS OF FACT

Based upon the investigation conducted by the Washington County Sheriff's Office, the following events took place:

- Prior to December 2005 – Ken and Mary Harycki were the owners of real estate located in the city of Stillwater and Ken Harycki was a member of the Stillwater City Council. They continue to own the property.
- December 5, 2005 – Councilman Harycki contacted the owner of the land adjacent to his property and expressed interest in purchasing the property at 1902 Williams Street North, Stillwater, Minnesota consisting of approximately 7.5 acres. He was told to contact her attorney, but he did not make contact.
- December 15, 2005 – An offer was made to the landowner by Lynskey and Clark Companies (LCC) to purchase property at 1902 Williams Street North, Stillwater, Minnesota.
- February 9, 2006 – The landowner and LCC entered into a purchase agreement to purchase the property.
- February 28, 2006 – The landowner filed an application with the Washington County District Court to register the title of the property in a Torrens Registration Proceeding.
- May 8, 2006 – The first meeting between the LCC and Bill Turnblad, Stillwater Development Coordinator, was held to discuss the preliminary site plan. Turnblad tells LCC that the preliminary plan had too many homes on it. A second meeting was planned for to review adjusted site plans.
- June 2006 – The LCC started meeting with members of the City Council to get input from them on the development of the property. Invitations were given to Mayor Jay Kimble and council members David Junker and Ken Harycki.
- June 7, 2006 – The landowner, through her attorney, served Ken and Mary Harycki, as adjoining landowners, with a Summons and Petition to register the property. An issue developed over Councilman Harycki's use and occupation of a portion of the property containing .084 acres.
- July 11, 2006 – An Answer to the Registration Petition was filed on behalf of Councilman Harycki and his wife by their attorney.
- August 4, 2006 – At a meeting between the landowner and councilman Harycki, as well as their attorneys, the landowner received an offer to purchase the entire property from councilman Harycki and an earnest money check was made payable to the attorney for the landowner. Councilman Harycki was informed that the property was already under contract and that there were some contingencies that needed to be performed, the earliest of which was October 31, 2006. The parties agreed to leave their Purchase Agreement open for some period of time to determine whether the LCC Purchase Agreement would move forward

by meeting the contingencies. The check was never cashed and the Purchase Agreement was never signed.

- August 21, 2006 – Councilman Harycki mailed proof of his financial accounts and his ability to pay for the property pursuant to the terms of the Purchase Agreement to the landowner’s attorney.
- October 5, 2006 – The attorney for Councilman Harycki sent a letter to the attorney for the landowner stating that they had retained a surveyor and inquired as to who was to prepare the deed to settle the registration proceeding issues.
- November 7, 2006 – Ken Harycki was elected mayor of Stillwater.
- November 9, 2006 – The attorney for Mayor-elect Mr. Harycki contacted the attorney for the landowner to inquire of the status of the offer between the landowner and LCC as the October 31 deadline had passed. She was informed that the purchase agreement was still pending. The attorney for Mayor-elect Harycki withdrew their offer to purchase property.
- November 15, 2006 – The attorney for the landowner returned the earnest money to the attorney for Mayor-elect Harycki.
- November 17, 2006 – The attorney for LCC sent a letter to Mayor-elect Harycki informing him that it would be improper for him to participate in any decision by the City related to the development. Mayor-elect Harycki did not respond.
- November 21, 2006 – A new attorney for Mayor-elect Harycki sent a letter to Mayor-elect Harycki stating his opinion that based on a conversation between the two that Mayor-elect Harycki had no conflict of interest with regard to the LCC project. The opinion is based on state law and does not reference the Stillwater City Charter.
- November 21, 2006 – At a regularly scheduled Stillwater City Council meeting, LCC presented its concept plan for the development of the site. The meeting minutes stated, “Councilmember Harycki said neighbors are concerned about the proposed change in zoning to RB; most neighbors are not in favor of multi-family in this area, he said.”
- November 22, 2006 – Mayor-elect Harycki and the landowner entered into a Confidential Settlement Agreement. The parties later differ as to whether the agreement was for all the dealings that they had or only for the registration process.
- December 2, 2006 – Mayor-elect Harycki and the landowner entered into a Stipulation for Dismissal regarding the land registration proceeding.

- December 5, 2006 – The landowner signed a deed as it related to the settlement of the land registration proceeding.
- December 15, 2006 – The attorney for the landowner contacted Mayor-elect Harycki's first attorney informing her that she felt she had an ethical obligation to disclose information about the offer of Mayor-elect Harycki to purchase the property.
- December 18, 2006 – The first attorney sent a letter to the landowner's attorney stating that the offer to purchase the property was part of the land registration proceeding. This was the first indication that the landowner's attorney had that the purchase and the registration were related. The offer to purchase was never tendered to the attorney for the landowner as a settlement proposal for the registration proceeding, either verbally or in writing, by Mayor-elect Harycki or his attorneys.
- December 28, 2006 – The LCC held a neighborhood meeting at the Stillwater Public Library for those interested in looking at the LCC proposals for the property. Notice of the meeting was sent to affected neighbors using a city mailing list. The meeting was described as heated with a number of people voicing opposition to the plan. Mayor-elect Harycki was present and informed the group that if they wanted to be heard they should attend the Historical Preservation Commission meeting on January 3, 2007.
- December 30, 2006 – The property was inspected by Historical Preservation Commission representatives accompanied by a representative of the LCC. Mayor-elect Harycki, who was not invited, asked to join the tour and was allowed to do so. Both representatives stated that Mayor-elect Harycki did nothing to try to influence their report and recommendation.
- January 2, 2007 - Mayor-elect Harycki takes office as the mayor of Stillwater
- January 3, 2007 – The Historical Preservation Commission held a public hearing, at the request by the LCC, to determine if authorization for the demolition of the building on the property should be given. No comments from the public were received and the hearing was then closed. Mayor Harycki was present as the city council liaison to the commission. The minutes of the meeting state, "Mr. Harycki spoke of the house across from the Post Office that was saved from demolition and encouraged members to visit the property."
- January 7, 2007 – Fliers were delivered to residents in the area of the property telling residents that the development of the property would lead to an increase in traffic. The last line of the flier states, "For more information call Mayor Ken Harycki 351-7497 or city hall 430-8800."

- January 8, 2007 – The Stillwater Planning Commission conducted a public hearing regarding the LCC application for amendment of the Stillwater Comprehensive Plan, amendment of the zoning ordinance providing for the rezoning of the property, and approval of the preliminary plat. Mayor Harycki attended the meeting and said nothing while the minutes reflect “MARY HARYCKI, 2004 Hazel Court, urged the Commission to do what is right for this are(a) and consider the Comprehensive Plan and the nature of the neighborhood. Less is better, she suggested.”
- January 25, 2007 – The attorney for LCC files a complaint with Stillwater City Attorney David Magnuson alleging that Mayor Harycki violated Stillwater City Charter § 5.12, subd. 4, by failing to disclose potential conflicts of interest relating to Fairway Villas despite having a disqualifying conflict of interest.
- February 21, 2007 – The attorney for Mayor Harycki responds in writing to the complaint of LCC. A copy of the letter is attached.
- April 3, 2007 – The Stillwater City Council met to vote on the LCC request for an amendment of the Stillwater Comprehensive Plan, amendment of the zoning ordinance providing for the rezoning of the property, and approval of the preliminary plat. Mayor Harycki recused himself, went into the audience and spoke against the proposal. The three requests passed with three in favor and one against.
- April 17, 2007 – The City Council voted on the second reading of the ordinance amending the zoning ordinance providing for the rezoning of the property. Mayor Harycki abstained from voting and it passed with four votes in favor and none in opposition.

### **SUMMARY OF LAW**

The complaint filed by LCC alleged a violation of the Stillwater City Charter because Councilman and later Mayor Harycki had a conflict of interest with regard to property that adjoined his property as a result of his elected positions within Stillwater city government. The Stillwater City Charter §5.12 addresses the issue of what is a conflict of interest and its purpose clause sets forth the reasons for it:

The proper operation of democratic government requires that public officials be independent, impartial and responsible to the people; that governmental decisions and policy be made in the proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government. In recognition of these goals, there is hereby established a code of ethics for all public officials whether elected or appointed. The purpose of the code of ethics section is to direct disclosure of city officials of private interests in matters affecting the city and to establish ethical standards of

conduct for all such officials be setting forth those types of activities that are incompatible with the best interests of the city.

The charter defines a conflict of interest as “any intentional treatment by an official of a matter in which the official has an interest, clearly separate from that of the general public.” Code §5.12 subd. 2.

“Interest” is defined as “having a private financial interest separate from that of the general public.” Code §5.12 subd. 3.

“Official” is defined as “any person who has been elected, appointed or hired to a position having supervisory and decision-making authority in the City of Stillwater including, but not limited to, any of the following:

- (a) Member of a city board or commission;
  - (b) Holder of a city elective office;
  - (c) The department head of each city department;
  - (d) The city coordinator or administrator;
  - (e) The city attorney and all members of their firm;
  - (f) Any other person designated by the city council from time to time.
- Code §5.12 subd. 2.”

The charter states that no official may “[e]xcept as otherwise authorized by law, knowingly enter into a discussion of or vote upon matter in which he or she may have an interest, or in any manner influence a vote or decision of any other official on the matter.” Code §5.12 subd. 4 (5).

A violation is a gross misdemeanor punishable by a fine of up to \$3,000.00 or up to one year in jail. Code §5.12 subd. 8.

If a person is convicted of the gross misdemeanor the person forfeits their office. Code §5.12 subd. 6 (c).

## **ANALYSIS**

The purpose of my review of this matter is to determine if there was a conflict of interest by Ken Harycki either as a councilmember or mayor regarding the property that he wanted to purchase and his opposition to its development by another buyer. The analysis requires two steps.

The first part of my analyses of this case was to determine if Mayor Harycki had a conflict of interest when dealing either as a council person or mayor with the project. There were a number of things that brought me to the conclusion that he did have a conflict of interest as defined by the city charter.

First, the property of Mr. and Mrs. Harycki adjoins the LCC property. Any change in that property has the possibility of affecting the value of adjoining property.

This fits the definition of “having a private financial interest separate from that of the general public.” Code §5.12 subd. 3.

Second, Mayor Harycki showed a financial interest in the property before LCC made an offer to purchase the property. On December 5, 2005, ten days before LCC made its offer, Mayor Harycki expressed an interest in buying the property to the landowner. At this time he took no further action, but again, this fits the definition of “having a private financial interest separate from that of the general public.” Code §5.12 subd. 3.

Third, on August 4, 2006, Mayor Harycki made an offer to the landowner to purchase the property with an earnest money check payable to the attorney for the landowner. He was informed that the property was already subject to a purchase agreement, but some contingencies needed to be performed, the earliest of which was October 31, 2006. The parties agreed to leave the purchase agreement open to determine if the purchase by LCC would move forward. On August 21, 2006, Mayor Harycki mailed the landowner’s attorney proof of his financial accounts and his ability to pay for the property. These actions fit the definition of “having a private financial interest separate from that of the general public.” Code §5.12 subd. 3.

In his letter of February 21, 2007, the attorney for Mayor Harycki stated the reasons why he believed that the mayor did not have a conflict of interest. Since the letter is attached, I am not going to restate his points; the arguments made in the letter, however, are not persuasive for a number of reasons:

- Mayor Harycki indicated an interest in buying the property before the land registration proceeding was begun.
- Mayor Harycki offered to buy the entire 7.2 acre tract of land to settle a 120 foot boundary dispute consisting of 0.084 acres.
- After the boundary line dispute was apparently settled (October 5, 2006) the attorney for Mayor Harycki inquired about the status of the offer from LCC (November 9, 2006); only after being told that it was still on did she withdraw the offer.
- There is a disagreement between the lawyers for the parties as to whether the offer to purchase the property was subject to a confidentiality agreement so that the fact that Mayor Harycki made an offer on the property would never become public. No one has produced any document stating that the offer to purchase was to remain confidential. If the offer was to settle the boundary dispute, the question remains unanswered as to why it needed to be secret.

The second part of the analysis was to determine if Mayor Harycki violated the city charter by knowingly taking part in a discussion of or vote concerning the LCC project or in any manner influence a vote or decision of any other official. Washington County investigators interviewed 25 people including city council members, planning commission members and city staff. No one told the investigators that Mayor Harycki did anything to influence either their vote or decision.

When the LCC request for an amendment of the Stillwater Comprehensive Plan, amendment of the zoning ordinance providing for the rezoning of the property, and approval of the preliminary plat came before the Stillwater City Council at the April 3, 2007, city council meeting, Mayor Harycki recused himself from participating as mayor and went into the audience. He announced that he would participate as a private citizen and did speak on the matter when the council was taking comments from the public. He did not take part in the discussions the council held after the public participation was completed nor did he vote on the matter.

At the April 17, 2007, city council meeting, Mayor Harycki did not recuse himself when the LCC request for an amendment to the zoning ordinance came up for a second reading which the city charter requires. Instead he abstained from voting. I view this failure to follow the charter as a technical oversight. The city administrator informed me that second readings of ordinances are usually a formality; furthermore, his abstaining rather than recusal did not cause the ordinance to fail.

### **DECISION**

Based on the facts determined by the investigation and the applicable law, no criminal charges will be filed against Ken Harycki for any actions he may have taken or failed to take in his role as a council member and then mayor regarding the property at 1902 Williams Street North, Stillwater Minnesota.

Although Mayor Harycki did have a conflict of interest, justice dictates that prosecution proceed only when there is sufficient evidence to sustain a reasonable likelihood of prevailing at trial. In this case, there is no evidence which would sustain a reasonable likelihood of prevailing at trial. Mayor Harycki never voted on the issue of the development of the property nor was any evidence found that he attempted to influence either elected officials or employees of Stillwater as to how they should treat the issue.

The technical violation of abstaining from voting on the second reading of the rezoning ordinance rather than recusing himself does not justify criminal prosecution. It would be equivalent to the issuance of a speeding ticket for driving three miles over the speed limit.

### **COMMENT**

Since this case has tremendous political ramifications for the city of Stillwater, I will make two comments that normally would not be made when this office declines to prosecute a case.

First, there will be those who argue that Mayor Harycki should be charged with a gross misdemeanor and upon conviction should be removed from office. To those I say that the primary responsibility of every prosecutor is to see that justice is accomplished. The citizens of Stillwater chose their mayor last November; justice would not be served

by attempting to overturn the will of the people in this matter upon the facts presented here.

Second, there will be those who say that the complainants filed their complaint only to intimidate Mr. Harycki. They are as wrong as those who say Mr. Harycki should be removed from office. The complainants called the conflict of interest to Mr. Harycki's attention and when he did not respond, they took the only recourse available to them – they filed a complaint which was specific enough to justify an investigation.

Sincerely,

DOUG JOHNSON, COUNTY ATTORNEY  
WASHINGTON COUNTY, MINNESOTA

Doug Johnson  
County Attorney

DJ/tgs  
Enclosure