



# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

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TO: Rapid City Common Council

CC: Mayor Hanks, Finance Officer Pauline Sumption,  
Public Works Director Robert Ellis

FROM: Jason E. Green, City Attorney *JEG*

DATE: August 2, 2010 *8-2-10*

RE: McCarthy sewer backup claim

I have reviewed the materials on the sewer backup claim from McCarthy Properties, LLC (McCarthy). It is my opinion that there was a procedural irregularity in processing the second payment to McCarthy which was approved by the Council on July 6, 2010. A brief summary of the facts and the rationale for my opinion follow, along with options for moving forward.

### Facts

McCarthy Properties owns property and a building located at 601 12<sup>th</sup> Street. On March 7, 2007, there was a sewer backup in the basement of the building. A1 Steam Brothers (A1) was called and did work at the property to clean the basement. Subsequently, A1 and McCarthy could not agree on the amount of compensation due to A1 for the work it did. Nonetheless, McCarthy submitted a claim for reimbursement of the expenses it incurred as a result of the sewer backup. The City Council approved payment to McCarthy on June 18, 2007 in the amount of \$20,466.00 in accordance with the adopted policy.

Nearly two years later, McCarthy returned \$18,887.98 to the City along with a letter that indicates he has been fully reimbursed for expenses, with the exception of the A1 bill. Mr. McCarthy further stated that he had not heard from A1 for more than a year and considered the matter closed.

However, on June 21, 2010, Assistant Finance Officer Pauline Sumption received a letter from attorney Jim Olson, on behalf of McCarthy requesting that the \$18,887.98 be paid to McCarthy. Mr. Olson stated that a lawsuit filed by A1 against McCarthy had been mediated and settled for a total payment to A1 of \$21,080.00. Therefore, Mr. Olson requested that the amount

McCarthy had returned to the City to be returned to his client. The payment was processed and included on the July 6, 2010 bill list without further action by the Council.

### Opinion

It is my opinion that the payment by the City on June 18, 2007 settled the claim by McCarthy against the City for the March 7, 2007 sewer backup. The fact that McCarthy subsequently returned a portion of the funds to the City does not change the legal effect of the payment in resolving the claim. The subsequent letter from McCarthy's attorney was (and should have been treated as) a new claim against the City arising out of the same facts. Under the policy, it should have been presented to the Council for approval because the amount requested exceeded \$5,000.00. Therefore, I believe the payment was not approved as required by the adopted policy.

An additional note is worth mentioning here. I have not found any indication of intentional evasion of the requirements of the adopted policy. It appears that the former Finance Officer genuinely, but mistakenly, believed that the Council's action on June 18, 2007 to approve the payment of the claim up to the total authorized by the policy (\$3.00 per square foot) was a valid basis for the processing the payment request without further action by the Council. Rather than an attempt to "sneak one through", it is my view that this situation would be better described as an effort to provide efficient customer service to a claimant.

### Options

At this point, I believe the Council has a couple of options to address the situation. First, the Council could ratify the payment by voting to "acknowledge the report from the Finance Officer on the procedural error and ratify the payment under the adopted policy." This action would have the effect of legitimizing the payment to McCarthy, while acknowledging there was a procedural error that led to the placement of the item on the bill list without the necessary prior approval of the Council. Another option would be for the Council to request that McCarthy return the payment to the City and request that the claim be placed on the next Public Works agenda for approval. Third, the Council could consider litigation against McCarthy to recover money paid in error. I believe discussion in executive session would be appropriate and necessary if the Council would like to pursue this option. I recommend the first option – acknowledging the report on the procedural error and ratification of the payment under the adopted policy.

Please let me know if you have any additional questions.