

MEMORANDUM

To: Lance Heisler, Chair, Charter Commission
Ben Martig, City Administrator

VIA EMAIL ONLY

From: Christopher M. Hood and Robert T. Scott

Date: September 25, 2017

Re: Charter Commission Opinion and Role

The following memorandum has been requested by the City Administrator to be provided to the Northfield Charter Commission addressing the July 28, 2017 memorandum from Scott Olney, Secretary of the Northfield Charter Commission (“Commission”), which adopted an opinion of the Commission (“Commission’s opinion”) that the Northfield City Council (“Council”) violated the Northfield City Charter (“Charter”) when it passed Council Resolution No. 2016-053 (approving a development agreement with and several forms of financial assistance to Big Ten Residential, LLC (“Big Ten”)). This memorandum further addresses the Commission’s role and legal authority to issue such opinions and applies basic principles of constitutional and municipal governance to address the issue of enforcement of the Charter and issuance of binding opinions that the Commission has raised in its opinion.

This memorandum does not address the substance of the Commission’s opinion as most if not all of the arguments presented in the Commission’s opinion were previously addressed by the Council and by the City’s appointed bond counsel¹ throughout the process leading up to passage of Resolution No. 2016-053, and to duplicate these services now would be wasteful of time and taxpayer dollars, but it remains in the Council’s discretion to direct legal counsel otherwise.

The Council has been previously advised of the issues presented herein through an attorney/client privileged memorandum. This memorandum is being provided as a courtesy to the Commission and is not being provided to give substantive legal advice to the Commission given that a potential conflict of interest could arise between the interests of the Council and Commission depending how the Commission intends to proceed related to the issues presented herein. The Commission should seek its own independent legal counsel to advise it on the issues presented herein before proceeding further with these issues. The Commission has legal authority to retain its own legal counsel.²

¹ See e.g. Memorandum from Attorney Stephen Bubul, Re: Legal Questions Regarding Business Subsidies, May 10, 2016, attached hereto as [Appendix A](#).

² [Minn. Stat. § 410.06](#). The members of such commission shall receive no compensation, but the commission may employ an attorney and other personnel to assist in framing such charter, and any amendment or revision thereof,

Introduction

Charter commissions derive the entirety of their authority from state statute, just as is the case for cities themselves in Minnesota. State statutes assign a narrow role and limited authority to charter commissions to serve as a sort of “standing constitutional convention” to study the charter and suggest and/or consider potential changes to the text of the charter itself.³ The legislative power of the City to regulate and provide for the general welfare is reserved exclusively to the City Council, whose members are elected by the voters and are thus directly accountable to them in a way members of the Commission, who are appointed by the chief district judge, are not.

The Commission’s opinion reflects a fundamental misunderstanding of its limited role and statutory authority in three primary ways, each of which is summarized below and further analyzed in the remainder of this memorandum.

First, by convening to scrutinize and second guess a legislative action of the Council memorialized in the Commission opinion, the Commission has acted beyond the scope of its statutory authority, which is limited to studying the Charter and suggesting and/or considering potential changes thereto. There is no statutory authority or case law for a charter commission to meet to consider or take any action with respect to legislative actions previously taken by a city council, unless consideration of such actions is incidental to the charter commission’s development or consideration of amendments to the charter.

Second, the Commission’s opinion represents an unauthorized attempt to interfere with the Council’s legislative authority. By attempting to substitute its own judgment of whether the challenged assistance to Big Ten served the public interest for the Council’s, the Commission is attempting to exercise legislative functions reserved to the Council in the Charter. Moreover, the Commission’s suggestion that it may claim the power to issue opinions interpreting the Charter that would “bind” the Council would, if acted upon, undermine the Council’s authority and the accountability of its elected members to their constituents.

Third, by asserting the power to issue opinions interpreting the Charter that would “bind” the Council, the Commission is claiming for itself judicial powers that are reserved to the courts. Under constitutional separation of powers principles central to our system of

and the reasonable compensation and the cost of printing such charter, or any amendment or revision thereof, when so directed by the commission, shall be paid by such city. The amount of reasonable and necessary charter commission expenses that shall be so paid by the city shall not exceed in any one year the sum of \$10,000 for a first class city and \$1,500 for any other city; but the council may authorize such additional charter commission expenses as it deems necessary. Other statutory and charter provisions requiring budgeting of, or limiting, expenditures do not apply to charter commission expenses. The council may levy a tax in excess of charter tax limitations to pay such expenses.

³ See League of Minnesota Cities Publications, Handbook for Minnesota Cities, Chapter 4, The Home Rule Charter City, at 9—10 (available at <http://www.lmc.org/media/document/1/thehomerulechartercity.pdf?inline=true>.)

governance, laws, including municipal charter provisions, are only ever “enforced” upon individuals or entities by the courts. If an aggrieved party believes another party, including a city, has acted contrary to applicable law, including a charter provision, the party’s remedy is to bring a legal action in a court of competent jurisdiction to either stop the challenged action or seek redress for any harm caused by such action. If the court, after providing all parties due process, agrees that the city acted illegally, the court will enter judgment providing a remedy to the challenging party, thereby enforcing the law. The Commission may not exempt itself from our adversarial judicial processes and appoint itself the judge of any dispute arising from application of the Charter. Neither may the Commission interfere with the Council’s right to obtain legal opinions and interpretations of the Charter (or any other law) from legal counsel of the Council’s choosing in order to inform the Council of applicable legal requirements to better ensure that the Council’s actions comply therewith.

In short, while some current and former Commissioners may disagree with the Council’s legislative actions with respect to Resolution No. 2016-053, such policy disagreement does not mean the City violated the law. Any party that believes that the City did violate the Charter or other law when it adopted Resolution No. 2016-053 and caused harm to such party is free to exercise their legal rights in a court of competent jurisdiction.

The Commission should seriously consider obtaining legal counsel regarding the issues raised in this memorandum before pursuing changes as contemplated here to the Charter (which serves as the City’s constitution) or otherwise attempting to assume powers reserved to the City’s legislative body or the judiciary because of a single philosophical disagreement over a legislative policy enacted by the Council.

Analysis

1. The Commission lacks statutory authority to issue opinions interpreting the Charter.

Minnesota cities are all political subdivisions of the state, and derive all their powers from the state; they have no “inherent powers” independent from those conferred upon them by the state.⁴ The legislature has empowered any city in the state to adopt a home rule charter “for its own government,”⁵ and has provided for the formation of charter commissions to develop such charters and perform limited functions after the initial adoption thereof, as follows:

- Remove members for failure to attend four consecutive meetings, without excuse.⁶

⁴ *Mangold Midwest Co. v. Vill. of Richfield*, 274 Minn. 347, 357, 143 N.W.2d 813, 820 (1966).

⁵ [Minn. Stat. § 410.04](#).

⁶ [Minn. Stat. § 410.05](#), subd. 2 (“(w)hen any member has failed to perform the duties of office and has failed to attend four consecutive meetings without being excused by the commission, the secretary of the charter commission shall file a certificate with the court setting forth those facts and the district court shall thereupon make its order of removal and the chief judge shall fill the vacancy created thereby.”)

- Meet at least once during each calendar year.⁷
- Suggest appointments to the charter commission.⁸
- Propose amendments to such charter.⁹
- File an annual report of its activities with the chief judge.¹⁰
- Recommend that the city council enact a charter amendment by ordinance.¹¹
- Meet to consider the proposals set forth in a petition signed by at least ten percent of the number of voters of the municipality, or upon resolution approved by a majority of the governing body of the city requesting the commission to convene.¹²
- Employ an attorney and other personnel to assist in framing such charter, and any amendment or revision thereof, and the reasonable compensation and the cost of printing such charter, or any amendment or revision thereof, up to a maximum of \$10,000 for a first class city and \$1,500 for any other city in any one year.¹³

None of these specific statutorily defined powers or duties encompasses any authority to exert legislative functions or otherwise review and consider specific legislative actions undertaken for the general welfare by the city council. Because charter commissions, like cities, lack inherent powers, the Commission may only act in its official capacity in furtherance of one of the specific statutory powers or responsibilities enumerated above. Therefore, by formally adopting the Commission's opinion questioning the legality of the Council's decision to adopt Resolution No. 2016-053, the Commission has acted beyond the scope of its legal authority.

2. The Commission may not infringe on the Council's legislative authority.

The Charter confers the legislative power of the City on the Council.¹⁴ The Minnesota Supreme Court has held that a charter commission has no authority to interfere with or take away the legislative and administrative discretion of a city council.¹⁵ Similarly, the Supreme Court has held that charter amendments may only properly concern "local municipal functions", and may not attempt to legislate for the general welfare.¹⁶ As the Commission's authority is limited to proposing or considering amendments to the Charter, and the Charter assigns the City's

⁷ *Id.*, subd. 4.

⁸ *Id.*, subd. 3 ("(a) city council, a charter commission, or the petitioners requesting the appointment of a charter commission may submit to the court the names of eligible nominees which the district court may consider in making appointments to the charter commission.")

⁹ [Minn. Stat. § 410.12](#), subd. 1 (and shall do so upon the petition of voters equal in number to five percent of the total votes cast at the last previous state general election in the city).

¹⁰ [Minn. Stat. § 410.05](#), subd. 2.

¹¹ [Minn. Stat. § 410.12](#), subd. 7.

¹² [Minn. Stat. § 410.05](#), subd. 4.

¹³ [Minn. Stat. § 410.06](#) (the council may authorize such additional charter commission expenses as it deems necessary).

¹⁴ Charter § 3.1 (" . . . (t)he council shall exercise the legislative power of the city and determine all matters of policy.") *See also* City Code § 1-2 ("(a)ll provisions shall be liberally construed so that the intent of the *city council* may be effectuated) (emphasis added).

¹⁵ *Anderson v. City of Two Harbors*, 244 Minn. 496, 501, 70 N.W.2d 414, 418 (Minn. 1955).

¹⁶ *Vasseur v. City of Minneapolis*, 887 N.W.2d 467, 473 (Minn. 2016) (*citing* Minn. Stat. § 410.07).

legislative power to the Council, the Commission lacks authority to consider legislative matters concerning the general welfare.

Making determinations of whether a given policy or action serves a public purpose lies at the heart of a city council's legislative responsibility.¹⁷ As the League of Minnesota Cities (LMC) explains, "(c)ouncilmembers are elected or appointed to govern by and for these interests (i.e. promoting public health, general welfare, security, prosperity, contentment), acting as specialists on what best serves the local population."¹⁸ LMC recommends that city councils "document, in writing, reasonable findings of the council in its determination of a valid (public purpose)."¹⁹ Reviewing courts recognize this central responsibility of elected policymakers to determine how best to act in the public interest and afford deference to their legislative findings of fact.²⁰

When the Council approved the assistance for Big Ten in Resolution No. 2016-053, it followed LMC's advice and made specific findings that the primary objective of such assistance was to accomplish the public purposes and goals of completing the hotel redevelopment on vacant or underused property in downtown, thereby fulfilling the City's goals when it created the TIF District in 2005, and increasing the tax base and employment opportunities in the City.²¹ The Council further established specific and enforceable goals for capital investment on the property, timely completion of the redevelopment project, continuation of commercial operations on the property, and jobs to be created, all to ensure such public purposes are achieved.²²

In contrast to courts' deferential approach to elected officials' legislative findings of public purpose, the Commission's opinion takes the opposite approach and asserts that the Council's findings were wrong without explanation. The Commission's opinion ignores the Council's findings and states, in conclusory fashion, that the "only objective" of the assistance to Big Ten is to benefit Big Ten.²³ In adopting this opinion, and by suggesting it may assert the power to bind the Council with similar opinions in the future (presumably intending to undo final actions taken by the duly elected governing body of the City), the Commission is improperly seeking to substitute its own judgment of whether the assistance served a public

¹⁷ *City of Pipestone v. Madsen*, 287 Minn. 357, 364—65, 178 N.W.2d 594, 599 (1970) ("... the initial responsibility for determining what is a public purpose", in relation to expenditure of public money by the state or a municipal subdivision thereof, "rests with the legislature (whose) findings with respect thereto are entitled to great weight.")

¹⁸ League of Minnesota Cities Publications, "Public Purpose Expenditures" at 2, available at <http://www.lmc.org/media/document/1/publicpurposeexpenditures.pdf?inline=true>.

¹⁹ *Id.*

²⁰ *Minnesota State Bd. of Health by Lawson v. City of Brainerd*, 308 Minn. 24, 32, 241 N.W.2d 624, 629 (1976) ("it is not this court's function, at least in the absence of overwhelming evidence to the contrary, to second-guess the scientific accuracy of a legislative determination of fact.") See also *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982) ("it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties.")

²¹ Resolution No. 2016-053, ¶ 1.10 (referencing that certain Contract for Private Development By and Between City of Northfield and Big Ten Residential, LLC, dated May 17, 2016 ("Big Ten Development Agreement"), ¶ 7.7(a)(2)—(3)).

²² Big Ten Development Agreement, ¶ 7.7(b).

²³ Commission's opinion, ¶¶ I.A and II.A.

purpose, for the Council's. In doing so, the Commission's opinion violates the Charter's assignment of the legislative functions to the Council.

3. The Commission may not infringe on the courts' judicial authority.

A duly enacted charter provision is a law that, generally speaking, must be followed by the City the same as any federal or state constitutional provision, statute, or regulation,²⁴ (the exception being that sometimes local laws, including charter provisions, are preempted by state or federal law).²⁵ As is the case for any law, any person or entity, in an effort to understand and comply with such law, may retain legal counsel of its choosing to interpret the law and provide legal advice with respect thereto. In other words, any party, either on its own or with the assistance and advice of legal counsel, may *interpret* the law in order to act consistently therewith.

Under basic separation of powers principles enshrined in the state's constitution, the power to *enforce* the law resides in the judiciary:

**ARTICLE III
DISTRIBUTION OF THE POWERS OF GOVERNMENT**

Section 1. **Division of powers.** The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.²⁶

Nowhere does the Charter provide the Commission the authority to interpret, enforce or effectuate the Charter;²⁷ and nor could it, as the power to enforce the law rests with the courts. "Judicial power' is the power that adjudicates upon the rights of persons or property, and to that end declares, construes, and applies the law."²⁸ The Commission may not assert for itself the judicial power to "declare, construe and apply the law" and bind the Council or any other party by any interpretation

²⁴ *City of Bloomington v. Munson*, 300 Minn. 195, 200, 221 N.W.2d 787, 791 (1974) ("home rule charters are considered a part of the body of law governing the conduct of municipal affairs") (citation omitted).

²⁵ *State ex rel. Town of Lowell v. City of Crookston*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (Minn.1958) ("the power conferred upon cities to frame and adopt home rule charters is limited by the provisions that such charter shall always be in harmony with and subject to the constitution and laws of the state") (quotations omitted).

²⁶ Minn. Const. art. III, § 1.

²⁷ The Charter does, however, confer upon *the Council* the authority to "make such regulations as may be necessary to carry out and make effective the provisions of this Charter." Charter § 15.11.

²⁸ *In re Hunstiger*, 130 Minn. 474, 477, 153 N.W. 869, 870 (1915), rehearing denied 130 Minn. 538, 153 N.W. 1095. See also *LeRoy v. Special Independent School Dist. No. 1 of Minneapolis*, 1969, 285 Minn. 236, 172 N.W.2d 764 (recognized test of whether a function is judicial is whether it is one that courts have historically been accustomed to perform); *McCrea v. Roberts*, 89 Md. 238, 43 Atl. 39, 44 L.R.A. 485 (1899); *Moynihan's Appeal*, 75 Conn. 358, 53 Atl. 903 (1903) (where the power to be exercised is the determination of facts and the application of law to those facts, such power is judicial).

it may make of the Charter (or any other law), as that power is constitutionally reserved to the courts.

The answer to the question raised in the Commission's opinion of "how to enforce the Charter" is the same today as when the Charter was first adopted: any aggrieved party who believes the City has acted contrary to a Charter provision may bring a legal action in a court of competent jurisdiction to either stop the challenged action or seek redress for any harm caused by such action. As it happens, a timely illustration of "charter enforcement" occurred just recently in Minneapolis, when a district judge in Hennepin County ordered the Mayor of Minneapolis to show cause why she had not submitted her proposed budget by a deadline imposed in Minneapolis' charter.²⁹ This example demonstrates how a city's charter is enforced: if a city or city actor acts inconsistently with the city's charter, an action may be brought in an appropriate court and the court will provide a remedy.

Conclusion

For the reasons discussed above, the Commission acted beyond the scope of its legal authority when it adopted its opinion questioning the legality of Resolution No. 2016-053. The Commission's opinion therefore is of no legal effect.

CMH-RTS/kp

²⁹ Adam Belz, *Hodges' budget delay to court?*, MINNEAPOLIS STAR TRIBUNE, August 23, 2017, B1 (available at <http://www.startribune.com/judge-mayor-betsy-hodges-must-produce-budget-or-explain-why-she-cant/441426163/>).

APPENDIX A



C H A R T E R E D

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MEMORANDUM

TO: Ben Martig, City Administrator, City of Northfield
FROM: Stephen Bubul, Kennedy & Graven, Chartered
DATE: May 10, 2016
RE: Legal Questions Regarding Business Subsidies

In preparation for the May 17, 2016 council meeting, you asked me to briefly address three legal questions arising from the “Term Sheet” for the proposed hotel and related commercial development in the City of Northfield (the “City”). To briefly re-cap, the Term Sheet proposes three types of City assistance to the hotel developer (the “Developer”):

- (1) Sale of the City’s “sliver lot” and Lot 5, for \$1.00 (effectively contributing the fair market value of that land);
- (2) reimbursing the Developer’s cost of acquiring Lots 4 and 6, through a tax increment “pay as you go note” paid with new increment from the hotel and from any commercial development on Lots 4 and 5; and
- (3) a cash contribution applied to costs of the parking plaza under the hotel (proposed to be paid with pooled increment from another TIF district, but the contribution could be paid from any other legally available City funds).

The Term Sheet also includes an EDA loan, but I understand that your questions relate just to the direct City assistance.

1. What is the legal authority for the City to sell land at a discount, in light of the City Charter?

The City has clear authority under more than one statute, or under the City Charter, to sell land to a developer at a discount in order to carry out redevelopment. The authority includes:

- a. Minnesota Statutes, Sections 469.124 to 469.134 (the “Municipal Development District Act”)* under which the City may create “development districts.” Within such districts, the City is expressly authorized to acquire property and to “negotiate the sale or lease of property for private development if the development is consistent with the development program for the district.” Section 469.126, subd. 2(10). The statute does not specify the price at which the property must be sold; rather, it gives the city the discretion to negotiate terms that will facilitate the development.

In upholding city financing of a parking ramp that was leased to a private developer under a prior version of this statute, the Minnesota Supreme Court observed that such inducements to stimulate commercial redevelopment are routinely permitted by courts, including a city's sale of land "at substantially less than its cost of acquisition or its market value." *R.E. Short Co. v. City of Minneapolis*, 269 N.W. 2d 331, 334 (Minn. 1978).

The City parcels to be sold to the Developer are within the City's Master Development District, and the discount sale furthers the development program for that district.

- b. *Minnesota Statutes, Section 469.185*, under which any city may convey land "for a nominal consideration to encourage and promote industry and provide employment for citizens." The statute does not define "industry," but the ordinary meaning of the word includes businesses that provide products or services (which covers future users of the two City parcels). Moreover, the Term Sheet includes job creation goals, which is another one of the permissible purposes under Section 469.185. In my view, this statute would authorize the conveyance of City parcels even absent the Municipal Development District Act.
- c. *City Charter, Section 9.1*, which provides in relevant part that "the council may contribute city funds to any entity to promote the health, safety, and welfare of the city, if the gift does not have as its primary objective the benefit of a private interest."

This language is not a prohibition on providing financial assistance to a private party in the context of redevelopment and economic development. In fact, it is the opposite—it provides *independent* authority to assist private parties—separate from the two statutes cited above. It says the city may contribute city funds to *any entity*, to promote the *health, safety and welfare of the city*. This is even broader authority than under the Municipal Development District Act and Section 469.185, and gives the council wide discretion to determine what will promote the welfare of the city. Contributing land is the equivalent of contributing funds: the result would be the same if the developer paid a purchase price and the City contributed those proceeds back to the developer. So the Charter provides authority for the City to sell land at a discount as described in the Term Sheet, even if there were no *statutory* authority for that action.

The only limitation imposed by the Charter is that the gift may not have as its *primary objective* the benefit of a private interest. However, that language is a constitutional limitation that would apply even if those words didn't appear in the charter. Any public funds given to a private party must serve a public purpose, and a gift to a private party, primarily intended just to benefit a private party, would not serve any public purpose. *R.E. Short Company, et. al. v. City of Minneapolis, et. al.*, 269 N.W.2d 331, 336 (Minn. 1978). It is well-settled law that when the city's primary objective is to accomplish a public purpose such as redevelopment, job creation, and the like, the mere fact that a private party receives some benefit does not deprive the activity of its public nature. *Short*, 269 NW2d at 337; *see also City of Minneapolis v. Wurtele, et. al.*, 291 N.W.2d 386 (Minn. 1980). In other words, the last clause in Section 9.1 of the Charter simply echoes the public purpose doctrine that courts have long imposed on transactions of this nature.

Here, it is clear that the City's primary objective is to complete the redevelopment of this once-blighted site, get this land into productive, tax-paying use, and create jobs. Any benefit the Developer receives is tailored to make the project financially feasible—the City is providing funds only to the extent needed to fill the financial gap. The Developer could make the same (or better) rate of return by building a hotel on a “greenfield” site; the goal of the land write-down is to make this development feasible at a site that serves a broader public interest. Whether that is a wise goal is a policy question for the Council to decide, but I do not believe that the City Charter *prohibits* the Council from pursuing it.

Moreover, if the City were challenged on its determination that the City's primary objective in contributing land to the Developer is to serve the public purposes mentioned above, the courts would apply an extremely narrow scope of review to that decision. Courts will “overrule a legislative determination that a particular expenditure is made for a public purpose only if that determination is manifestly arbitrary and capricious.” *Short*, 269 N.W.2d at 337. The burden of proving such arbitrary and capricious action rests on the party contesting the city action. *Sabes v. City of Minneapolis*, 120 N.W.2d 871, 875 (Minn. 1963). In my view, the City would prevail in any such challenge of the proposed contribution of City parcels to the Developer.

2. What is the City's legal authority to provide “business subsidies” generally?

As noted above, the authority that the City most often relies on to promote private development is Sections 469.124 to 469.134, known as the “Municipal Development District Act.” In most (but not all) cases, the funds for that effort are provided by tax increments, under Sections 469.174 to 469.179 (the “TIF Act”). The TIF Act expressly authorizes a city to use tax increment to “finance or otherwise pay the capital and administration costs of a development district pursuant to sections 469.124 to 469.133.” Section 469.176, subd. 4. In other words, the Municipal Development District Act provides the underlying authority to take actions and incur costs, and the TIF Act provides the authority to finance those costs with tax increment.

In the Term Sheet, the City proposes to use tax increment for only two activities—land acquisition (Developer's acquisition of the bank parcels); and parking (if the City decides to use pooled funds for that purpose). Both of those activities are well within the scope of the Municipal Development District Act and the TIF Act. The previous section explained the City's authority to acquire and sell property; and because the city could directly acquire the bank parcels and convey them to the Developer at a discount, it can accomplish the same thing (and avoid the costs and potential liabilities of getting in the chain of title) by simply reimbursing the Developer for its acquisition of those parcels.

Likewise, under the Municipal Development District Act, it is clear that the City could build and lease or sell a parking facility to the Developer. *See*, 469.126, subd. 2 (“the city may acquire, construct, reconstruct, improve, alter, extend, operate, maintain, or promote developments aimed at improving the physical facilities, quality of life, and quality of transportation”); *see also* the *Short* case discussed above, 269 N.W.2d 331. Reimbursing the Developer for costs of a parking structure constructed by the Developer is a functionally equivalent activity.

Further, if there were any doubt about the City's authority to pay costs of a parking structure owned by a private party, they are resolved by Minnesota Statutes, Section 469.176, subd. 4l. This statute prohibits use of tax increment for certain facilities, but expressly adds that such prohibition "does not apply to a privately owned facility for conference purposes or a parking structure, *whether it is public or privately owned* or whether it is ancillary to [one of the prohibited uses]." (emphasis added) In other words, the TIF Act expressly authorizes use of tax increment to pay the costs of a private parking structure.

More generally, the TIF Act presumes that a city will use tax increments to assist in private development. One of the findings a city council must make when creating a TIF district is

that the tax increment financing plan will afford maximum opportunity, consistent with the sound needs of the municipality as a whole, for the development or redevelopment of the project by private enterprise. Minnesota Statutes, Section 469.175, subd. 3(b).

In other words, the very purpose of the TIF Act is to accomplish public goals—development and redevelopment—in partnership with private enterprise. Put another way: if the Municipal Development District Act did not authorize cities to provide assistance to private developers, then the TIF Act cross-references to this statute would be pointless.

Finally, all business subsidies provided by the City are also governed by Minnesota Statutes, Sections 116J.993 to 116J.995 (the "Business Subsidy Act"). This statute defines a "business subsidy" to mean any "state or local government agency grant, contribution of personal property, real property, infrastructure, the principal amount of a loan at rates below those commercially available to the recipient, any reduction or deferral of any tax or any fee, any guarantee of any payment under any loan, lease, or other obligation, or any preferential use of government facilities given to a business."

There are two significant lessons from this statute. First, it does not actually *authorize* any particular form of subsidy, but it certainly presumes that cities have abundant authority to make such subsidies. The purpose of the statute is to provide a uniform set of rules that apply whenever a city provides a subsidy, regardless of the form. Consistent with the statute, the City has long had in place a policy that lays out the circumstance under which it will grant subsidies. *See* City Council Resolution 2003-12, adopted April 21, 2003. The Term Sheet complies in all respects with the City's existing policy, and the City will comply with all the requirements under the Business Subsidy Act (public hearing, subsidy agreement, job and wage goals, reports).

Second, the statute expressly states that each "business subsidy must meet a public purpose which may include, but may not be limited to, increasing the tax base." Section 116J.994, subd. 1. Job growth or retention is by definition a legitimate public purpose, but a city may determine that it has some other objective as long as it can articulate "measurable, specific and tangible goals." Section 116J.994, subds. 3 and 4.

In a sense, this statute codifies the "public purpose doctrine" developed by courts, providing more specificity in how the purpose is described and measured. The Business Subsidy Act simply

confirms that business subsidies are a long-standing legitimate method of promoting public goals through assistance to private parties.

3. What is the legal authority for the City to use pooled TIF from the Downtown TIF District?

The City is contemplating using money from the Downtown Tax Increment Financing District (the “Downtown TIF District”) within the Master Development District (the “Master Development District”) to fund the cash contribution described in the Term Sheet.

The Downtown TIF District is a redevelopment district created in 1986, but under the law in effect in 1986, funds from that district could be expended at any location within the related “project” (often referred to as “pooling”). The “project” for the Downtown TIF District was originally Development District No. 4, created at the same time under the Municipal Development District Act. However, in 1991 the City consolidated Development District No. 4 into a larger Master Development District that now includes both the Downtown TIF District and the Riverfront TIF District. In 2005, the City further modified the TIF Plan for the Downtown TIF District, in part to clarify that tax increment from that district could be spent throughout the Master Development District (which is the “project” for purposes of the TIF Act; see Minnesota Statutes, Section 469.174, subd 8). Therefore, the City is authorized to spend funds from the Downtown TIF District for any costs of the Master Development District, including any costs within the Riverfront TIF District.

The City was entitled to collect increment from the Downtown TIF District for 25 years after the date of first receipt. Minnesota Statutes, Section 273.75, subd. 1 (1986) (now codified at Section 469.176, subd. 1b). The City first received increment in 1988, and collected the last increment as of December 31, 2013. After the last collection in 2013, the Downtown TIF District was considered “de-certified.”

However, even though a TIF District has been de-certified, nothing in the TIF Act limits a city’s ability to spend the balance of tax increment funds remaining after de-certification, as long as the expenditures are authorized in the TIF plan. That is, the “duration of a TIF district” actually refers only to the duration of *collection* of increment—there is no time limit on spending.

One caveat is that the Office of the State Auditor has interpreted the statute to mean that a TIF plan may not be modified after the date of decertification of that TIF District. The result is that any expenditures after de-certification must be authorized in the TIF plan as modified through the end of the last year of collection.

In this case, the City was aware that it would have a balance of funds in the account for the Downtown TIF District after decertification, and accordingly modified the TIF plan on December 10, 2013 (the “2013 TIF Plan Modification”). Today, the City remains authorized to make expenditures from the Downtown TIF District account for any activities that are within the Master Development District, and are consistent with the 2013 TIF Plan Modification.

The 2013 TIF Plan Modification authorizes a broad range of future costs related to development and redevelopment needs throughout the Master Development District. The relevant language is found in Section B. of the “Tax Increment Financial Plan” (the second portion of the 2013 TIF Plan Modification document).

In the 2013 modification of this section, the City stated its determination “that tax increment financing is necessary to accomplish redevelopment of a portion of the Project.” (As noted above, the term “Project” means the Master Development District.) The expected uses of tax increment are described in two ways. First is a table of “Sources” and “Uses,” intended to describe the various types of activities that might be financed in the future. The “Uses” column includes *Parking-Transportation System Imp. Cannon River Corridor, Downtown Parking Improvements, and Other Improvements Consistent With the Program*. Following the first table is a summary budget of tax increment expenditures, which includes the category *Other Public/Qualifying Improvements*.

It is clear from the above that the intent of the 2013 TIF Modification was to give the Council maximum flexibility in financing any improvements needed to further redevelopment of the Master Development District. The authorized expenditures are not limited to the specific categories listed in the “Uses” column; rather, those are illustrations of the projects that might be considered for financing. This is clear from the fact that even the detailed “Uses” column includes the broad category of *Other Improvements Consistent With the Program*.

Moreover, parking is expressly mentioned in two of the items in the “Uses” column, which would by themselves authorize the assistance described in the Term Sheet. The hotel parking is reasonably part of parking improvements in the Cannon River corridor, and it also constitutes downtown parking improvements. But in our view, it is also clear that Council need not rely on those specific references, as they were merely examples of the types of activities that might be financed with pooled increment from the Downtown TIF District.

If you or Council members have additional questions about the matters in this memo, please let me know. I will also be available at the May 17 council meeting to address any questions.