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May 24, 2001

Mike Connelly, City Attorney
City of Spokane
808 West Spokane Falls Blvd.
Spokane, Washington 99201-3326

Re: Fee Dispute

Dear Mike:

I am responding to your letter dated April 2, 2001, which appears to outline your understanding of tasks performed in 2000 by Hendricks & Lewis ("H&L") for the City of Spokane, pursuant to a written contract dated June 1, 2000. Your summary suggests a relatively modest undertaking of relatively little complexity, urgency or consequences, for which relatively modest fees would be appropriate. However, that is not my perspective; and because I realize that neither you nor John were involved last year, I thought it might be helpful for me to respond in some detail. For clarity, I'll attempt to address to each of your points:

1. You begin with the observation that we reviewed "several boxes of documents." I, of course, don't know the basis for that statement or what you mean by "several," but it sounds as though you think that we simply reviewed "several" boxes of well-organized files such as those that exist now. Unfortunately, it wasn't that way at all.

When Spokane retained us, there were no organized RPS files; only a very incomplete collection of boxes that, as I understood it, had been collected by the City Attorney's office in response to media requests. There was also substantial mistrust in both the executive and legislative branches about the ability and reliability of the City Attorney's office to collect and organize whatever documents could be found. Consequently, at my suggestion, a depository was created on the sixth floor, to which only the City Manager—initially—had a key. At the outset, a substantial potpourri of files and boxes were assembled—obviously incomplete and duplicative. By the end of August, another lawyer and I had reviewed most of those documents, except for the HUD files—some several times for a variety of purposes—and inquired about and located additional files, loose correspondence and documents, which we also reviewed. Initially, the only discernable organization of those files was by source, careful analysis of which suggested a surprising lack of completeness from file to file. From September through December 2000, we continued our review, constantly becoming aware of and obtaining copies of additional

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documents. Throughout this entire period we also looked for documents we thought might exist but which were never located.

In addition to the many boxes and binders of files (confidential and otherwise) that were subsequently consolidated, culled for duplicates and chronologically organized by law clerks, we asked for (and frequently obtained from other sources), and helped organize and reviewed, *inter alia*, the following material:

- City Council hearing transcripts which we put together from several sources;
- City Council resolutions and ordinances (including their legislative history);
- Additional correspondence relating to RPS;
- The complete *CLEAN* record, which we ultimately obtained from Steve Eugster;
- Bond transcript, which we obtained from Roy Koegen;
- City Charter;
- PDA organic documents, minutes, contracts, correspondence and opinion of counsel;
- Perkins Coie files, which they provided;
- RPS news accounts;
- RPS-related opinions and letters from Perkins Coie and the City Attorney's office to the City Council and/or City Manager;
- HUD files;
- Sales and property tax data, which came from a variety of sources;
- Various other RPS-related litigation and Council hearings; and
- The documents produced by Walker Parking and the PDA.

With respect to many of these documents such as ordinances, resolutions and RPS contracts, there were multiple versions which had to be reviewed carefully for changes and for consistency with related, but disorganized and sometimes hard to locate correspondence, memoranda and meeting minutes and/or notes. Many of the more valuable documents came directly to us—over time—from a variety of sources other than the City Attorney's office.

In summary, we reviewed rooms of documents, not "several boxes."

2. Your next category was "legal research and writing involving several briefs and a few affidavits," which also suggests a relatively modest output. Here is what actually happened. In the Superior Court phase of the mandamus case, we filed:

- An answer;
- Almost 100 pages of legal briefing;
- Eight affidavits totaling 28 pages and voluminous attachments.

In addition, we reviewed:

- Over 400 pages of pleadings, motions, legal memoranda, and numerous affidavits, with attachments, filed by other counsel; and
- Hearing transcripts.

In the Supreme Court phase, in addition to exhibits, we filed almost 300 pages of motions, briefs, responses, replies and oppositions, and reviewed almost 450 pages of such materials filed by other parties. We filed nine motions and the opposition filed three motions. In addition, we filed other required documents such as designation of Clerk's Papers, and reviewed all of the declarations and exhibits associated with such pleadings and motions.

We also researched and wrote about both procedural and substantive legal issues, and certain factual issues; at both the trial and appellate levels, including, *inter alia*:

- The requirements of the mandamus statute
- Legal requirements for an enforceable loan;
- The difference between a Writ of Mandamus and an Alternate Writ of Mandamus;
- Factual and legal analysis of whether the duties at issue were discretionary or ministerial;
- Analysis of the City Charter, particularly regarding the appropriations requirement;
- Analysis of "insolvency" references in the bond transcript and in the legal opinion of counsel, and their relationship to the actual language of both proposed Ordinances and the final version of Ordinance C 31823;

- Significant separation of powers issues;
- Public Development Authority law;
- Article VIII; Section 7 of the Washington Constitution;
- Analysis of the actual record before the Washington Supreme Court in the *CLEAN* case, and the extent to which we would be able to make an as-applied, as opposed to a facial, challenge;
- Whether a sufficient record had been established regarding the adequacy of Developers' remedy at law;
- Whether all proper parties were before the Court;
- Whether the constitutional prohibition against impairment of contract applied;
- Assessment of the grounds for asserting various "contract" and other defenses to Developers' assertion of a clear underlying right to the Writ;
- Application of other procedural rules, such as CR 19 and CR 56;
- The inherent authority and other sources of municipal power to enter into specific types of contracts (e.g., such as issues raised in the *Chemical Bank* cases);
- 63-20 financing requirements;
- *Ultra vires* acts;
- Disqualifying opposing counsel as trial counsel;
- Standing;
- Fraud;
- City and state requirements for issuance of a City warrant;
- Legal research into general obligation bonds and other financing mechanisms;
- Requirement for transfers of property between public entities;

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- Right to Stay of Mandamus pending appeal;
- Right to appeal without bond;
- Whether those subject to the Writ can be compelled to commit unlawful acts;
- Whether the private Developers who do not have a contract with either the PDA or the City of Spokane have a clear, enforceable legal claim to compel the "loan" of City funds to the PDA under a third-party beneficiary rationale or any other basis;
- Whether it is a denial of the due process clause of the Washington and United States Constitutions to order City Officials to make a loan to a third party without any opportunity to present the City's substantive defenses to that loan request;
- Whether Ordinance C 31823 is an enforceable loan agreement and, if so, what are the terms of the loan;
- The appropriate standards of review for various issues on appeal;
- The Court's ability to take cognizance of legislative facts or judicially notice certain facts;
- Construction of appellate procedural rules regarding filing additional evidence;
- Constitutional aspects of the exclusion of evidence;
- Equitable grounds for supplementing the record;
- Various theories of estoppel, including but not limited to judicial estoppel;

3. According to your third category, we "attend[ed] a few hearings and meetings."
In fact, in the mandamus case we participated in:

- Five hearings before Judge Donohue, three telephonic hearings before the Supreme Court Commissioner, and one Supreme Court argument;
- Eight City Council meetings, most of which were in executive session;
- Numerous meetings in person and telephonically with the City Manager and various City Council Members; and

- Numerous meetings and telephone conferences with counsel for the PDA, the Foundation and the Developers.

4. Your summary of our work in the *Spokane v. Walker Parking* case was that we “put together a complaint and discovery requests.” In fact, in that case we “put together” a 26-page Complaint with 20 exhibits, a 28-page Amended Complaint and a 35-page Second Amended Complaint. We also:

- Put together 142 pages of discovery requests, consisting of: Plaintiff’s Request for Production of Documents to Walker Parking Consultants/Engineers, Inc.; Plaintiff’s Interrogatories to Walker; Plaintiff’s Request for Production of Documents to the Spokane Downtown Foundation; Plaintiff’s Interrogatories to the Spokane Downtown Foundation; Plaintiff’s Request for Production of Documents to Citizens Realty Co., Lincoln Investment Company and River Park Square L.L.C., and RPS II, L.L.C.; Plaintiff’s Interrogatories to Citizens Realty Co., Lincoln Investment Company and River Park Square L.L.C. and RPS II, L.L.C.; Plaintiff’s Request for Production of Documents to R.W. Robideaux & Company; and Plaintiff’s Interrogatories to R.W. Robideaux & Company;
- Attended three hearings before Judge Murphy in the *Walker Parking* case;
- Filed and responded to various motions and supporting memorandum and affidavits;
- Reviewed the interrogatory answers and documents produced by Walker Parking;
- Engaged in significant efforts to obtain answers to the City’s discovery requests to the other parties; and
- Created and began employment of a comprehensive and effective document management system, which we forwarded to Laurie;
- Researched and wrote about the following legal issues, *inter alia* in addition to those issues that were incorporated from the mandamus proceeding:
 - Engineering professional malpractice;
 - Negligent misrepresentation;
 - Rescission of any alleged contract entered into by the City;
 - Evidentiary standards applicable to various types of misrepresentation, such as negligent or innocent, and any differences between proof of a defense, versus an affirmative claim;
 - Fiduciary duty of partners in public/private partnerships;

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- Requirements for imposition of a constructive trust;
- Requirements and benefits of a conspiracy claim;
- Various issues raised by the securities action threatened by the Trustee for the bond holders;
- Elements of quantum meruit;
- Requirements for accounting; and
- Requirements for declaratory judgments.

5. In addition to the foregoing, we:

- Established a reporting protocol within the City and defined litigation strategy and tactics within the Special Counsel's mandate;
- Successfully defended the City Council against an independent action filed by the Trustee for the bondholders;
- Carefully reviewed and analyzed the administrative claims of the Developers, Robideaux and Walker;
- Advised the Mayor, City Manager and City Council on a variety of RPS-related issues;
- Responded to media inquiries;
- Drafted a Council resolution escrowing the City's parking meter fund and handled a variety of related issues;
- Undertook numerous garage related research and information gathering projects;
- Interviewed dozens of people with knowledge of various aspects of the controversy;
- Responded to claims advanced by the City's bond counsel, with Milt Rowland's support, that the mandamus litigation was contrary to the City's interests;
- Provided the City Manager with a comprehensive report totaling 15 pages and 24 exhibits;
- Reviewed Roy's response to our report to the City Manager, an opinion letter Milt Rowland obtained from Chapman and Cutler, and the securities claims of the Bank's counsel;

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- Completed extensive legal research on many of the securities issues raised by Roy and Milt, the Chapman and Cutler letter and the Bank's threatened securities claim against the City;
- Helped establish protocols for interviews of past and present City personnel;
- Generally inquired into and collected data and documents on a wide variety of issues about which we reported to the City Manager;
- Prepared, obtained City Council approval for and presented a series of comprehensive written settlement proposals to opposing counsel;
- Met with opposing counsel about those proposals;
- Reviewed and responded to various issues and counter proposals of opposing counsel.
- After substantial research, proposed a list of mediators; and
- Reviewed and participated in numerous conferences and telephone conferences discussing various "reissue" approaches of Roy Koegen and Steve Eugster, and a garage acquisition proposal by a Seattle broker.

All of these additional tasks were well within the legal services that H&L was expected to provide under the written contract dated June 1, 2000:

PERFORMANCE. The Contractor shall provide the City with the legal services, including statements of opinion and legal services in managing litigation, as may from time to time be required by the City Manager, related to actual and potential disputes among and between persons interested in the Riverpark Square Parking Garage (the Garage) and the City of Spokane. Contractor is authorized to utilize attorneys and legal staff who are part of their firm to perform such work in their stead, under their supervision and control.

6. Your statement about the minimal work that was required for the Consolidated Reply Brief is also inaccurate in this case.

First of all, as you will observe from a review of the mandamus case file and our billing statements for June, July and August 2000, with one exception, relatively little legal research was done on the main substantive issues, prior to filing the City's opening brief to the Supreme

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Court, because the bulk of our time during that period was devoted to 1) obtaining and sustaining the stay of execution against Hank, who I believe was prepared to go to jail, and Jim, who undoubtedly wasn't but had little ability to carry out the writ without Hank's cooperation; 2) settlement efforts; and 3) *Spokane v. Walker Parking*. The one issue that was extensively briefed and researched—for the first time—was case support for the proposition that Section 9 is too indefinite and incomplete to constitute an enforceable agreement, which I continue to think is one of the City's strongest arguments. Other than that, the opening brief—which cites 29 cases in 20 pages of legal argument—was largely an outline of the City's principal arguments which, at that point, we had neither the time, resources nor pages to fully develop. We recognized that we might be criticized for "sandbagging," but, as a practical matter, had little other choice.

Subsequently, when we received the Opposition Briefs of the Bank and the Developers, we had to confront a number of issues:

- A truncated briefing schedule;
- Two extensive and coordinated briefs of 45 and 48 pages in length;
- Legal issues we had never briefed;
- A large number of other legal issues upon which we had previously touched only lightly;
- Limited opportunity to review carefully the transcript of the mandamus hearing;
- An incomplete *CLEAN* record; and
- An apparent 25 page limitation on our Reply Brief with no assurance of additional pages.

Under those circumstances, I think we were both fortunate and effective. One major break was that Defendants effectively conceded the City's "no contract" argument. Another was that the Supreme Court permitted a 50-page Reply Brief. Nevertheless, during the last part of the reply period we had to work exceedingly hard to reduce the brief to 50 pages, and do so in a way that it could be readily reduced to 25 pages, if that became necessary.

As you will observe, the legal argument in the Reply Brief was twice as long and far more sophisticated than the legal argument in the opening brief, had twice as much legal citation, and addressed several issues for essentially the first time:

- The standard of review raised by the Bank and Developers;
- The "clear underlying claim" analysis which goes hand in hand with the "no contract" argument;

- The Section (5)(c) “flow of funds” changes which we discovered during that period and which I continue to think is very strong;
- Establishing from the record that there were numerous, specific contested issues of fact;
- The argument that the mandamus order was an unconstitutional abrogation of the legislative power of the City Council;
- The Respondents’ arguments about the significance of the legal opinions by Jim and Roy; and
- The Respondents’ *Mission Springs* argument.

For all these reasons, your observation about the time I devoted to the Consolidated Reply Brief is accurate except that I worked far more hours—in excess of 12 each day—than I recorded during that period, evoking unsolicited expressions of concern for my health from Milt Rowland, who chastised me, for neglecting my family and urged me to cut back and take off weekends at least.

7. Your final observation—about the time we spent preparing for and presenting the City’s oral argument to the Supreme Court in December—is baffling. The City was billed \$14,422.50 for my time and \$35,593.00 for the combined H&L time. Costs and disbursements were \$4,378.92. You assert that the total bill, \$39,971.92, was “at least ten times what we would expect under the circumstances.” I, of course, don’t know who was meant by “we” (presumably not Mr. Miggins and the Council majority who hired us), or whether you really meant what you said. Here, however, is my perspective:

a. If the Supreme Court had enforced the Writ, the City, for the year 2000, would have been out approximately \$2,000,000 plus maybe some or all of the fees and costs of the Developers and the Bank. Setting aside the issues raised by a likely bond default, for the year 2001 and thereafter, the cost of subsidizing the ground rent and operating costs of the garage, plus paying for the costs of the PDA and Foundation and preserving the garage will undoubtedly exceed \$2,000,000 each year for more than 20 years. Consequently, it seemed to me that significantly more than \$40,000,000 was at stake, although you and/or Laurie might have presented the City Council with other figures, which might be more accurate than my estimates.

b. The City had already invested over \$500,000 in the RPS dispute.

c. For at least for Hank Miggins, who I was defending, the issues were serious and highly personal.

d. Substantial civic, municipal and legal issues were at stake and the elected and appointed officer holders to whom I reported expected our most comprehensive and very best efforts.

e. Literally dozens of discrete issues, including motions to expand the record, were before the nine member Court that had decided the *CLEAN* case; and it was not at all apparent what issues they would raise. I was especially concerned about avoiding answers in oral argument that might prejudice the City in the next round or in a different forum.

With this perspective, I asked two other lawyers to help me prepare for the argument. One task was to prepare a set of all of the difficult questions that I might be asked and the answers to those questions, and organize them in a comprehensive and logical way. We then reviewed and revised the questions and answers as part of my preparation for an argument which I assumed the Court would actively direct. We also prepared exhibits that would be used during argument and provided in reduced form to each justice after the argument.

My colleague who had been most responsible for preparation of the exhibits and knew them well assisted at the hearing by keeping track of the particular exhibit that was most relevant to each issue raised by a Justice or addressed by me. For that particular task, which included ensuring that the exhibits were ready to travel and were properly displayed, the City was charged for two hours of a work day that exceeded eight hours. The task of the other lawyer—who had been most responsible for preparing and editing the questions and answers—was comparable, except that he was to compare the Court's questions and my answers with the questions and answers we had prepared during the previous few days and flag any issues that should be addressed on rebuttal. The City was also charged for two of his eight hours. At the time, I did not—and still don't—think it would have been useful or appropriate to have asked Milt Rowland—who was the only lawyer from your office that was there—to be responsible for either of those tasks. I expected him to devote all of his time to taking notes from which he would prepare recommendations for rebuttal. I'm sorry if that offends someone or seems excessive, but I think that assistance of the two H&L attorneys, for which the City was charged a total of four hours, was eminently reasonable under the circumstances.

8. Your letter does not address:

- The deep hole from which the case began;
- The uniqueness of the proceeding;
- The extreme time pressures under which we worked;

- The difficulties presented by a written legal opinion dated March 13, 2000 to the City Council from James Sloane and Milt Rowland that effectively concluded that the City could not lawfully avoid making the requested loans;
- The limited assistance that was available from the City Attorney's office;
- The pressures of contending successfully in three essentially simultaneous cases with respected—and with two exceptions well financed—legal counsel representing the 1) Developers, 2) the Trustee for the Bondholders, 3) Robideaux, 4) Walker Parking, 5) The PDA; and 6) the Foundation;
- Our success in obtaining a stay of execution and the tenacity that required;
- Our success in securing an extended argument before the Supreme Court within seven months of the beginning of the case;
- The internal hostility we faced on the City Council, within the City Attorney's office, and from its bond counsel and various City employees;
- The fact that every brief we filed, argument we made and bill we submitted was carefully scrutinized and the subject of critical comment by some or all of the foregoing;
- The unanimous Supreme Court decision for the City in *RPS v. Miggins*;
- The fact that we formulated and obtained unanimous City Council approval for a series of written settlement offers—a feat that hasn't been achieved since we were replaced;
- The detailed and thoroughly documented, written analysis of the Garage dispute that was delivered to the City Manager and City Council in October 2000;
- Our total success in *U.S. Bank Trust Nat'l Assoc. v. City of Spokane and Spokane City Council*;
- Our various successes before Judge Murphy in *Spokane v. Walker Parking*, or the fact that little meaningful discovery has occurred since we were replaced;
- Our success in assembling a comprehensive set of data from which it can be established that the likely construction costs of the entire RPS redevelopment was probably in the range of \$45-\$55 million, rather than the much higher amount claimed by the Developers; and

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- Our success in assembling data from which it can be established that on balance, the RPS remodel contributed little or nothing to the City's sales and real estate tax revenue from RPS and the surrounding properties.

9. In addition to the foregoing, you should be aware of the following points:

a. My hourly rate in 2000 was \$275. I agreed to charge Spokane \$225 per hour because Hank Miggins and Steve Eugster each asked me to reduce my rate as much as I could, and Milt Rowland told me that Spokane had never paid more than \$200 per hour for litigation counsel. Perhaps when he made that statement he didn't know, or had forgotten, or didn't think it was relevant that the City had already paid Harry Schneider \$350 per hour for the same services for which I was hired and that Roy Koegen charged something similar.

b. To keep up with the demands of this case, I essentially devoted all of my billable time and much of the rest of our office to it.

c. For this case, we also brought in an additional lawyer, an additional word processor, an additional paralegal and additional document clerks.

d. Through much of the summer and fall, this case required legal secretarial and word-processing services until midnight or thereafter and on Saturday and Sunday, and we did not pass through those after-hours charges to the City.

e. The combined impact of the reduced fees, our concentration on Spokane issues, extra costs that weren't passed through, and the City's failure to pay H&L for December fees and reimburse our costs and disbursements has caused significant financial hardship to H&L, which has been exacerbated by John's refusal to reimburse for costs and pay for services that he requested in 2001.

f. The sudden and unexpected *de facto* curtailment of the City contract with Hendricks & Lewis—for which we were not prepared because of statements John had made to me and others in November and December—has been problematic, as have media reports attributed to the Mayor's office that Hendricks & Lewis seriously overcharged the City and either has or will be reported to the Washington Bar Association.

10. I realize that during his successful mayoral campaign against John Talbott, who was part of the Council majority that hired me, John Powers complained about the high legal costs that he attributed to John Talbott. I also recognize that by trashing me, John will please Council Members Greene, Holmes and Higgins as well as prior Council Members Barnes, and Geraghty, and perhaps the Cowles' interests and Spokane attorneys who object to employment of Seattle counsel. That also helps facilitate the transition from me to Laurie, who supported John's

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political campaign. To a certain extent that's "just politics" which can be expected. However, before he asked me to come to Spokane, in January, John had seen our October and November bills; observed my Supreme Court argument about which he was complimentary; talked with me several times—once for more than an hour; received a copy of my October report which he subsequently said he had read, a set of my settlement files which I assumed he read and, according to him, a detailed assessment of my legal work from Laurie. He also had our December bill before he asked me back to Spokane, in February and earnestly pressed me to continue as part of his team. Consequently, I think it was entirely irresponsible to cavalierly announce in March—after a unanimous Supreme Court decision for the City—that none of our fees would be paid because they were unreasonable and that the matter would be referred to mandatory arbitration (there is no such thing) before the Washington Bar Association. The same goes for your statement in April that you and John have no obligation to either a) identify the subsections of RPC 1.5 that you believe justify your refusal to pay our fees and costs; or b) identify the line items in our bill that you think are unreasonable. In this situation, which is covered by a written fee contract with a large municipal government that was followed consistently for seven months, your "wrong foot" argument isn't persuasive.

11. For a variety of reasons, I have not pressed for payment these past few months, hoping instead that we would be paid under our contract, without litigation, for the services we provided and reimbursed for our costs and disbursements; and that we would have the opportunity to meaningfully apply the wealth of information and knowledge we developed in 2000.

At this point, the latter seems remote, although we haven't been terminated. With regard to the former, your substantive position is totally unclear because your characterization of our services in 2000 is so inconsistent with objective reality that it sounds like you are describing the work and effort of Milt Rowland—for whom the characterization would be largely accurate—rather than that of H&L. If we arbitrate, it will have to be before a mutually agreeable arbitrator pursuant to a fee shifting provision and discovery that we agree upon before the proceeding begins. If it becomes necessary, we will litigate.

At your earliest convenience, please get in touch with me. This account is seriously overdue and relations between Hendricks & Lewis and the Powers administration are not improving. I would like to avoid necessary deterioration of the latter, even though we have fundamentally different views about the wisdom of Laurie's strategy, which I expressed in February.

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By separate cover we will provide you with copies of correspondence between this office and the Powers administration.

Sincerely,

HENDRICKS & LEWIS

A handwritten signature in cursive script that reads "Yale Lewis".

O. Yale Lewis, Jr.

Sent by facsimile
and U.S. Mail