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MEMORANDUM

TO: The Housing and Redevelopment Authority in and for the City of Ramsey, Minnesota, Attention: Mr. Kurt Ulrich, Executive Director
FROM: Thomas L. Bray **TLB**
DATE: February 9, 2013
RE: Purchase of Services Agreements between the Housing and Redevelopment Authority in and for the City of Ramsey, Minnesota (the "HRA") and Landform Professional Services, LLC

I. THE DOCUMENTS

This Memorandum summarizes and advises the HRA regarding legal issues identified in the three documents listed below The three documents in question are:

1. An untitled, undated and unsigned memorandum anonymously delivered to various members of the HRA board and other parties (the "Unattributed Memorandum"). The Unattributed Memorandum consists of 9 pages, but pages 7 through 9 appear to be a portion of an earlier draft rather than a part of the body of the memorandum;
2. The memorandum dated January 1, 2013, prepared by John M. Huberty and addressed to William A. Erhart (the "Huberty Memorandum");
3. A letter dated January 31, 2013 sent by Rob Shainess of Capstone Law to the HRA's executive director, Kurt Ulrich (the "Shainess Letter").

II. SUMMARY OF THE THREE DOCUMENTS

1. The Unattributed Memorandum.

It appears the author of the Unattributed Memorandum did not have access to either the April, 2010 Purchase of Services Agreement or the March, 2011 Purchase of Services Agreement between the HRA and Landform and who also did not have knowledge of the actions Landform actually undertook pursuant to those Agreements. The Unattributed Memorandum assumes that Landform and/or Mr. Lazan performed services for the HRA which included services for which a real estate broker's license would be required under Minnesota Statutes Chapter 82.

The "Law and Discussion" Section of the Unattributed Memorandum cites and discusses the relevant Statutes and case law that define when a real estate broker's license is required under Minnesota law; cites Minnesota Statutes Section 82.85 for the proposition that "No person shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts for which a license is required under this chapter [Chapter 82] without alleging and proving that the person was a duly licensed real estate broker, sales person, or closing agent at the time the alleged cause of action arose." And, in the "carryover" portion of the memorandum, accurately cites Minnesota Statutes Section 82.83 for the proposition that any person who violates any provisions of Minnesota Statutes Chapter 82 is guilty of a gross misdemeanor. We have not checked each of the case citations in this Section, but I generally agree with the Unattributed Memorandum's statement of the law. I do not, however, agree with all of its conclusions.

The Unattributed Memorandum concludes that the Purchase and Services Agreements between the HRA and Landform are unenforceable and Landform is not entitled to compensation for any of its services provided pursuant to the Agreements. As discussed with respect to the Huberty Memorandum and the Shainess letter below, this conclusion appears to be overly broad. The Purchase and Services Agreements contemplate Landform providing numerous different services to the HRA. Only some of these services are services for which a real estate broker's license is required under Minnesota Statute Chapter 82. Based on the express language of Minnesota Statutes Section 82.85, it would appear that Landform may not have access to Minnesota courts to collect compensation due under the Purchase and Services Agreements for the performance of any of the acts for which a real estate broker's license is required, but the author of the Unattributed Memorandum does not offer any support for the conclusion that Landform cannot enforce the contract and collect compensation for the other Landform services provided.

The Unattributed Memorandum closes with a very brief discussion of ". . . whether the City of Ramsey¹ should pay it [the compensation contemplated in the Purchase and Services

¹ The Unattributed Memorandum and the Huberty Memorandum make various references to the City of Ramsey which appear to be based upon the author's failure to recognize that the City of Ramsey and the Housing and

Agreements] anyway.” The author of the Unattributed Memorandum first argues that the City should not voluntarily pay Landform the 2% “Incentive Compensation” provided for in the Purchase of Services Agreements because to do so would violate public policy. The author of the Unattributed Memorandum does not cite any legal authority for the proposition that the HRA is prohibited from paying Landform because to do so would violate public policy, and we were unable to find any Minnesota case law directly addressing this issue. We did find one case that is slightly analogous that appears to stand for the proposition that if the HRA received a benefit from any “broker services” Landform may have provided, that a taxpayer suit to bar the HRA from paying Landform would not be successful. The facts of the reported case are, however, so different from the issues before the HRA that I do believe a Court would find the case dispositive.

If the author of the Unattributed Memorandum then cites the City of Ramsey’s Charter as further support for the proposition that the HRA should not voluntarily pay Landform. The reliance on the City Charter is suspect because of the separate legal identity of the HRA. Furthermore, the language cited from the City Charter presumably is intended to deal with the use of “net” proceeds from the sale of property and, in my view, is somewhat off point.

2. Huberty Memorandum.

It appears that Mr. Huberty had access to a copy of the Purchase of Services Agreement executed in 2010 but not a copy of the 2011 Purchase of Services Agreement. The Huberty Memorandum cites various provisions of the “Contractor’s Proposal,” as defined in and attached to the 2010 Purchase of Services Agreement as evidence that the Purchase of Services Agreement contemplated Landform’s providing brokerage services to the HRA. At least with respect to the Sections cited by Mr. Huberty, the “Contractor’s Proposal” attached to the 2010 Purchase of Services Agreement is identical to the Contractor’s Proposal attached to the 2011 Purchase of Services Agreement, so the assertions made by Mr. Huberty in his memorandum regarding the March 22, 2010 Contractor’s Proposal are equally attributable to the Contractor’s Proposal attached to the 2011 Purchase of Services Agreement.

Section II of the Huberty Memorandum cites seven specific sections of the Contractor’s Proposal as evidencing the parties intent that Landform provide services which, under Minnesota Statutes, Section 82.55 subd. 19(a) would require a Minnesota real estate broker’s license. I agree with Mr. Huberty’s analysis with respect to four of the seven cited Sections. I believe the language Mr. Huberty quotes from Article II, Article III.E.2, 3 and 4 and from Article IV.B.1 and 2 of the Purchase of Services Agreement describes services for which a brokerage license would be required under Minnesota Statutes Chapter 82.55 subd. 19(a).

What is missing from the Huberty Memorandum (and from the Unattributed Memorandum) is a discussion of the Landform actually performed on behalf of the HRA. In

Redevelopment Authority in and for the City of Ramsey are separate legal entities and that it is the HRA and not the City that has contracted with Landform pursuant to the Purchase of Services Agreements.

trying to determine the meaning of the cited language in Article II, Article III.E.2, 3 and 4 and from Article IV.B.1 and 2 of the Purchase of Services Agreement it would be helpful to know what Landform thought that language meant, as evidenced by Landform's subsequent actions

The Huberty Memorandum also points out the language in Section X of each of the Purchase of Services Agreements which states:

In providing all services pursuant to this Agreement, the Contractor's share shall abide by all statutes, ordinances, rules and regulations pertaining to or regulating the provision of such services, including those now in effect and hereinafter adopted. Any violation of said statutes, ordinances, rules or regulations shall constitute a material breach of this Agreement and shall entitle the HRA to terminate this Agreement immediately upon delivery of written notice of termination to the Contractor. SPECIFICALLY, neither Landform, its team members, employees nor consultants or real estate brokers or salespersons as defined in Chapter 82 of Minnesota Statutes, therefore, Landform will not be entitled to any compensation for work which requires a license under said Chapter 82.

In my opinion, there is an inherent, irreconcilable conflict between the language of Article X of the Purchase Services Agreements which state that the Contractor will abide by all statutes and the provisions of the Contractor's Proposals which appear to clearly contemplate Landform's delivery of certain services for which a Minnesota real estate broker's license is required.

The Huberty Memorandum provides a detailed description of the compensation mechanisms contemplated in the Purchase of Services Agreements and differs from the Unattributed Memorandum in that the Huberty Memorandum recognizes that Landform provided numerous services to the HRA pursuant to the Purchase of Services Agreement for which no brokerage license is required under Minnesota state law and that Landform should be entitled to enforce the Purchase of Services Agreement and receive compensation for all of those other services.

The Huberty Memorandum goes on, however, to assume that all of the so called "Incentive Compensation," as defined in the Purchase of Services Agreements, is compensation for services for which a brokerage license is required and, therefore, that the HRA should not pay any of the Incentive Compensation to Landform. While this conclusion is intuitively attractive because of similarities between the structure of the "Incentive Compensation" under the Purchase of Services Agreement and the terms under which licensed real estate brokers typically receive compensation under listing agreements in Minnesota, it is not clear to me that this assumption would withstand a more detailed analysis. It appears to me that a fairer conclusion is that the "Incentive Compensation" was intended to provide Landform with an "upside" for all of

the services they were providing under the Purchase of Services Agreement other than the separately billed services which were paid for through "Additional Compensation" as contemplated in Article IV.C of the Purchases of Services Agreements.

The Huberty Memorandum next discusses the \$60,000 early termination fee included in the Purchase of Services Agreements but concludes that the \$60,000 is only payable by the HRA to Landform if the HRA terminates the Purchase of Services Agreement as a matter of right pursuant to the early termination provision set forth in Article XV of the Purchase of Services Agreement and would not be due if the HRA terminates the Purchase of Services Agreement pursuant to Article X as a result of Landform's providing real estate brokerage services to the HRA without a real estate broker's license and thereby violating the second sentence of said Article X. While I agree with Mr. Huberty that this is the better reading of the Purchase of Services Agreement, I note that the language in the April 1, 2011 Contractor's Proposal attached to the 2011 Purchase of Services Agreement does not expressly limit the \$60,000 payment to terminations arising under Article XV of the Purchase of Services Agreement.

The Huberty Memorandum also concludes that if the HRA terminates the Purchase of Services Agreement pursuant to Article X, the HRA would be relieved of its obligations under Article IV.B.7 (compensation carryover) of the Contractor's Proposal. Again, while I agree with Mr. Huberty's reasoning, I think it is important to note that Article IV.B.7 states that the carryover compensation is due "upon termination of this agreement on or before March 31, 2013" without distinguishing whether the termination is: (i) pursuant to Article X of the Purchase of Services Agreement; (ii) pursuant to Article XV of the Purchase and Services Agreement; or (iii) pursuant to the expiration of the Purchase and Services Agreement according to its terms.

The Huberty Memorandum does not discuss whether and to what extent the HRA could, if it terminates the agreement, refuse to make Incentive Compensation payments that Landform had arguably earned under Section IV.B of the Contractor's Proposal, but which the HRA has not yet paid because of the provisions in Section IV.B which provide for payment over time. To me, the critical issue in answering that question is whether the Incentive Compensation was intended to compensate Landform solely for services for which a broker's license is required or was intended to compensate Landform for a broad basket of services which may have included some services for which a broker license is required under Minnesota statutes.

The Huberty Memorandum also makes a very brief reference to the proposition that the HRA may wish to sue to recover payments previously made to Landform. I do not believe that Minnesota Statutes Chapter 82 directly provides a cause of action, and I do not see a clear legal theory that the HRA could assert to recover past payments.

3. Shainess Letter.

The Shainess Letter responds to the Unattributed Memorandum and the Huberty Memorandum in four respects. First, it makes the assertion that because the Purchase of Services Agreements expressly state the Landform is not entitled to any compensation for work

for which a real estate broker's license is required, the compensation provided for in the Purchase of Services Agreements must not be compensation for brokers services. Mr. Shainess does not, however, address the inherent internal conflict within the Purchase of Services Agreements or between Article 10 of the Purchase of Services Agreements and the Sections of the Contractor's Proposal referenced in the Huberty Memorandum which appear to expressly provide for Landform's delivery of brokerage services to the HRA.

Mr. Shainess next argues that soliciting development proposals is materially different from soliciting purchasers of real estate and implies that Landform can solicit development proposals without a real estate broker's license and without violating Minnesota Statutes Chapter 82. That is an issue that the Minnesota Courts would ultimately have to resolve, but I do not find the argument persuasive. To the extent that the development proposals include the transfer of title to land, whether that transfer is for cash consideration or some other consideration, the development proposal is, in part a sale. Therefore, I believe that to the extent Landform solicited development proposals it was, in part, soliciting sales. To be clear, however, there is no Minnesota case law which expressly supports that conclusion.

Mr. Shainess next points out that the Contractor's Proposal expressly contemplated the use of a development team; that one of the members of that team was Heidi Nelson, an employee of the City and that under Minnesota Statute Chapter 82, employees of the City do not require a brokerage license to provide brokerage services on behalf of the City. This argument has merit, but it does not entirely explain away why the Contractor's Proposal appears to provide for Landform's delivery of brokerage type services, and it does not attempt to address what actually occurred. In other words, were all brokerage services or services which potentially constitute brokerage services provided by Ms. Nelson and none of those services provided by Landform and/or Mr. Lazan?

Mr. Shainess states:

“Landform does not understand its role as serving as a principal negotiator concerning the sale of land. Historically, that role has been filled by the HRA's attorney, city staff and most often the HRA itself in public meetings or closed sessions.”

I do not know if the facts support that assertion. In the transactions that I have been involved in, I did not take a significant role in negotiating economic terms of the transactions. I have, however, primarily in the F&C transaction, played a role in negotiating legal provisions of the underlying documentation. I cannot speak to the question of whether and to what extent HRA staff filled the role of principal negotiator in the F&C transactions or any of the other transactions. I do not believe it is accurate to state that the HRA itself was a “principal negotiator.”

Mr. Shainess also points out, in the second Section of his legal analysis, that there is nothing improper about the methodology used to calculate “Incentive Compensation.” In this

respect, I agree with Mr. Shainess. While it is true that the methods used to compensate the Incentive Compensation are, in many respects, very similar to the methods used to compensate real estate brokers for the sale of real estate. That doesn't mean that anyone who is compensated in this manner is engaged in the sale of real estate. As indicated above, a fair reading of the Purchase and Sales Agreements make it clear that Landform was to provide a broad basket of services to the HRA and that all of these services, together, were intended to promote and cause development of the HRA's property. There is no reason why the HRA could not, if it so chose, agree to provide Incentive Compensation to Landform for all of these services including the many services for which a broker's license is not required under Minnesota Statutes Chapter 82.

II. CONCLUSION

I think this is a difficult issue. I think the Purchase and Sales Agreements do contemplate Landform providing certain services to the HRA which are services that Minnesota Statutes Chapter 82.55, subd. 19(a) indicates require a real estate brokerage license. It appears to me that the drafter's of the Purchase and Sales Agreements realized that this was, at a minimum, a close issue and attempted to address it with the language in Article X of the Purchase and Sales Agreement, but I do not see the language of Article X overcoming either the language in the Contractor's Proposal or the facts as to the actual services provided by Landform.

Landform may argue that even if the Purchase of Services Agreements contemplate Landform's providing brokerage services, the intent was that those services be provided at no compensation and that Landform only be compensated for the other services. We could not find any Minnesota case law addressing that argument, but to me it is unpersuasive. Otherwise, it would be far too easy for parties to circumvent the intention of Minnesota Statutes Chapter 82 by providing for "free" brokerage services and then compensation for other services for which a brokerage license is not required.

While I do believe that the Purchase of Services Agreements contemplated Landform's providing services for which a brokerage license is required and I do believe that Landform did provide some of those services, I do not agree with the conclusion of the Huberty Memo that all of the Incentive Compensation is, necessarily, attributable to those brokerage services. Therefore, while I believe that the HRA may have a grounds for withholding payment of some portion of Landforms compensation, I find no clear legal basis for advising the HRA as to the appropriate amount of compensation to withhold. Withholding all Incentive Compensation, may unfairly deny Landform Incentive Compensation they have earned for non-brokerage services. Although I have no legal basis for this conclusion, in my judgment it would be appropriate to withhold from Landform's Incentive Compensation and amount equal to the typical commission a commercial broker in Ramsey would earn on a sale of vacant land, assuming the land sold for its fair market value.