

MEMORANDUM

To: William A. Erhart
From: John M. Huberty
Subject: Contract between Landform and City of Ramsey
Date: January 1, 2013

I. Introduction.

This memorandum discusses three main issues: (1) Did the parties contract around the requirement of a realtor's license in Chapter 82 of the Minnesota Statutes through a provision in the Landform contract stating that no one from Landform, or its consultants, are real estate brokers or salespersons as defined by § 82.55, subd. 19(a)? (2) In the event issues number 1 is answered in the negative, and Ramsey terminates the contract under Section X thereof, are there any estoppel or other equitable legal rules that Landform could rely on in seeking relief? (3) Are the conclusions reached in the memorandum previously provided on issue number 1 correct? In evaluating these issues, this memorandum will not reexamine in any detail the legal research presented in the previous memorandum so long as the conclusions presented are well-founded and supported by existing case law.

II. Facts.

The facts are as stated in the previous memorandum. In addition, specific terms of the contract in the March 22, 2010 letter that are relevant to the analysis presented herein include the following:

Under Article II.:

"Initiate introductory meetings of the new Project with potential key users and development partners. Advance and negotiate various team accepted disposition strategies."

Under Article III.B.1.:

"... meeting with... perspective [sic] users...."

Under Article III.D.2 and 3:

"Project Marketing Strategy-Develop an overall marketing strategy, and appropriate sub-strategies, necessary to bring the Project to several markets. This will include the coordination of third party consultants to develop marketing collateral (print, electronic, etc.) necessary to present the Project to potential purchasers in the community, at trade shows, and/or industry events."

"Marketing Package Preparation-Prepare and maintain comprehensive Project site marketing packages... for owner's use in disposition strategy."

Under Article III.E.2, 3 and 4:

“Property Interest Solicitation-... disseminate marketing package(s) on behalf of Owner to targeted groups. Establish communications and as appropriate facilitate introduction of Owner to potential candidates for the various development options with the intent for deal establishment.... Landform shall be the exclusive development manager and will be responsible for all potential development deals within the 140 acre Project.”

“Development Options-Assist Owner in advancing the following development scenarios:

- a. Property Sale or Lease-Assist in finalizing an agreement for the sale or lease of the Project land.”

Article IV.B.1 and 2:

“Landform shall solicit the interest of various prospective end-users, to include individual entities, corporations, developers, and/or development partners.... Landform will... assist in the evaluation, consideration, negotiations, and deal structuring on any disposition of land within the development area.”

Under 2 the contract clearly sets forth an incentive structure that pays Landform a commission on the sale of land, including upon the closing of any sales.

Though is it not present in the copy of the Landform contract reviewed, the previous memorandum indicates that an early termination fee of \$60,000 is due and payable should the City terminate the contract prior to March of 2013. No specific date is provided, so it is unknown whether this means prior to March 1, 2013, or March 31, 2013.

Landform’s compensation under the contract is broken down into three categories: Administrative Compensation, Incentive Compensation, and Additional Compensation.

The first category is for services provided during the period from April 1, 2010 to March 31, 2011, totals \$180,000, and has already been paid. The third category is for services that appear to be unrelated to the marketing and sale of land in the COR, but rather is for actual development-related services, e.g., planning, civil engineering, design, for which the City must employ Landform, or require the end-user to employ Landform, presumably through a contractual provision included in the land sale agreement with the end-user.

The second category, Incentive Compensation, appears to be for the marketing and sale of property in the COR. Specifically, the contract states that Landform is to receive Incentive Compensation for any sales/projects that have been declared prior to

termination, i.e., those on the "Hot List" as defined on page 16, paragraph 7, a-f of the March 22, 2010 letter appended to and made part of the Purchase of Services Agreement (i.e., the contract).

Finally, the parties appear to have contemplated that Landform's real estate promotion activities may be construed as activities requiring a broker's license under Chapter 82 of the Minnesota Statutes. Paragraph X on page 2 of the Purchase of Services Agreement states that Landform, its team members, employees, and consultants are "real estate brokers or salespersons" under Chapter 82. This paragraph also states that "Landform will not be entitled to any compensation for work which requires a license under said Chapter 82."

III. Legal Analysis.

The starting point for any legal analysis must be the relevant statutory provisions.¹ Chapter 82 of the Minnesota Statutes requires that real estate brokers be licensed. Section 82.55, subd. 19 defines "real estate broker" thusly:

"Real estate broker" or "broker" means any person who:

(a) for another and for commission, fee, or other valuable consideration or with the intention or expectation of receiving the same directly or indirectly lists, sells, exchanges, buys or rents, manages, or offers or attempts to negotiate a sale, option, exchange, purchase or rental of an interest or estate in real estate, or advertises or holds out as engaged in these activities;

(f) for another and for commission, fee, or other valuable consideration or with the intention or expectation of receiving the same, promotes the sale of real estate by advertising it in a publication issued primarily for this purpose, if the person:

- (1) negotiates on behalf of any party to a transaction;
- (2) disseminates any information regarding the property to any party or potential party to a transaction subsequent to the publication of the advertisement, except that in response to an initial inquiry from a potential purchaser, the person may forward additional written information regarding

¹ The case law and related analysis set forth in the previous memorandum appears to be well researched and the conclusions derived therefrom well founded. In light of the fact that the statute itself, without the aid of illuminating case law, appears to clearly define Landform's activities relating to promoting the sale of property in the COR as those that require a broker's license, additional case law research on this specific issue will not be performed unless requested.

the property which has been prepared prior to the publication by the seller or broker or a representative of either;

(3) counsels, advises, or offers suggestions to the seller or a representative of the seller with regard to the marketing, offer, sale, or lease of the real estate, whether prior to or subsequent to the publication of the advertisement;

(4) counsels, advises, or offers suggestions to a potential buyer or a representative of the seller with regard to the purchase or rental of any advertised real estate; or

(5) engages in any other activity otherwise subject to licensure under this chapter;

Accordingly, under subsection (a), one who (1) manages, offers, or attempts to negotiate a sale, (2) of an interest in real estate, (3) in exchange for compensation, is a real estate broker. Further, simply holding oneself out as engaged in such activities qualifies one as a real estate broker.

Under subsection (f), one who promotes a sale of realty by advertising it in a publication primarily meant for promoting real estate, and who also satisfies one or more of the five listed criteria, is a real estate broker.

Section 82.56 sets forth numerous exceptions to the definition of real estate broker, none of which would appear to cover Landform or its principals.

Importantly, § 82.85 prohibits a party who is required to be licensed as a real estate broker from bringing any civil action in the state courts for recovery of compensation due for real estate brokerage services unless the party proves they are licensed. Subdivision 1 thereof specifically states:

Subdivision 1. Compensation actions; proof of license. 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 without alleging and proving that the person was a duly licensed real estate broker, salesperson, or closing agent at the time the alleged cause of action arose.

This provision therefore prohibits a civil action in the courts of Minnesota for the recovery of compensation due for only those activities for which a broker's license is required. Activities for which a broker's license is not required, e.g., civil engineering, planning, surveying, consulting, etc., would still be actionable. This is contrary to the opinion expressed in the previous memorandum, which states that "Landform is not entitled to compensation for any of Lazan's services," since as further explained below not all of the services provided by Landform fall under the definition of a real estate broker.

The Landform contract breaks down Landform's compensation into three categories: Administrative Compensation, Incentive Compensation, and Additional Compensation. Not all of the services rendered within these three categories fall under the definition of "real estate broker" services. For example, the Administrative Compensation covers several items, e.g., "Planning and Engineering," including "Preliminary Engineering," "Plan Review and Approval," as well as "Development Feasibility," including "Site Use Evaluation," "Pro Forma Development," etc. Accordingly, payments for such services would still be required, though it appears that all of this compensation was paid when due during the one-year "Development Management Services (Administrative Compensation)" period that ran from April 1, 2010 to March 31, 2011. Accordingly, this compensation would not be at issue in any potential civil action, nor would the City of Ramsey be able to recover it if it were at issue as it does not fall under real estate broker services for which a license is required.

Similarly, the category of Additional Compensation, which is for non-broker services like land surveying, civil engineering, planning, and landscape architecture, would appear to fall outside of those services for which a broker's license is required, and therefore any compensation due for the provision of such services would be recoverable in a civil action.

The Incentive Compensation, which forms the great bulk of the anticipated compensation under the agreement, however, is clearly anticipated as payment for services that are covered under Minn. Stat. § 82.55, subd. 19 defining "real estate broker" and "broker," and therefore would not be recoverable because neither Landform nor any of its principals possess a broker's license.

One final form of compensation required under the contract is the potential \$60,000 early termination fee, payable in the event the contract is terminated prior to March 2013. This early termination fee is not included in the copy of the contract provided, and which is the subject of this memorandum. Rather, the existence of this provision is indicated in the previous memorandum, which defines early termination as termination prior to "March of 2013." No specific date is provided, so it is unknown whether this means prior to March 1, 2013, or March 31, 2013. In any event, should the contract be terminated prior to this date, Landform would be due the \$60,000 payment unless the contract has been validly terminated under paragraph X due to Landform's failure to comply with the law, e.g., the license requirement in Chapter 82, because as set forth above, those portions of the contract requiring compensation for non-broker related activities are legally valid.

This begs the question of whether the City of Ramsey has the right to terminate the contract immediately by treating Landform's failure to comply with the Chapter 82 licensing requirement as a material breach of the contract. While it is clear that Landform's promotional activities, efforts to sell land in the COR, and assistance in

negotiating land sale contracts with potential buyers render it a "real estate broker" under Minn. Stat. § 82.55, subd. 19, the City of Ramsey's seeming agreement that it is not a "real estate broker" presents a potential issue should the City seek to turn around and rely on this status as presenting a material breach of the contract and thus valid cause to terminate the contract early without paying the \$60,000 early termination fee. The precise wording of the contract may not provide Landform any cover, however, because it simply states that Landform, its employees and consultants are not real estate brokers, rather than stating that the services contemplated under the contract are not services covered under § 82.55, subd. 19. In other words, affirming on the one hand that it and its employees and consultants are not real estates brokers is not the same thing as stating on the other hand that the services it will be providing under the contract are not those that require a real estate broker's license. Therefore, it does not seem that the parties contracted around the license requirement of Chapter 82, assuming for the sake of argument that parties have the legal right to do so.

In any event, the contract also unequivocally states that Landform is not entitled to any compensation for which a license is required under Chapter 82. This provision is obviously superfluous in that § 82.85 already bars a civil action to recover compensation owed for real estate broker services unless the party seeking compensation is licensed as a broker. The obvious implication of this is that the City of Ramsey is not obligated to pay Landform anything under the Incentive Compensation provisions of the contract, and may very well have a cause of action to recover any sums already paid under these provisions.

IV. Conclusions.

- A. Whether the parties contracted around the license requirement of Chapter 82.

The parties did not contract around this requirement. Indeed, the contract affirms the dictates of Chapter 82 by unequivocally stating that "Landform will not be entitled to any compensation for work which requires a license under said Chapter 82." Therefore, any services performed by Landform for which a real estate broker's license is required are not compensable, nor will Landform be able to maintain a law suit seeking to recover compensation for these services. Accordingly, the City of Ramsey is not obligated to make any payments to Landform under the Incentive Compensation provisions of the contract.

- B. Whether Landform has any viable equitable arguments, e.g., estoppel, to preclude the City of Ramsey from raising Landform's violation of Chapter 82 as a defense in a civil action by Landform to recover under the Incentive Compensation provisions of the contract.

It is highly unlikely that the contractual provision stating that Landform, its team members, employees, or consultants are not real estate brokers under Chapter 82 can be successfully employed to estop or otherwise preclude the City of Ramsey from utilizing Landform's violation as a defense to any claim brought to recover under the Incentive Compensation provisions of the contract. The statement in the contract that Landform is not a broker is just that, nothing more and nothing less. It does not mean, and the parties thus did not agree, that the services provided by Landform under the contract are not those that require a real estate broker's license. Further, the affirmation by the parties that no compensation will be owed for services that require a broker's license would clearly undercut any effort by Landform to raise equitable arguments against the City's reliance on Chapter 82 as a defense to any civil action.

- C. Whether the conclusions reached in the previous memorandum are correct.

Yes, to the extent the conclusion is that the City of Ramsey has no obligation to compensate Landform for its role and services provided in marketing and selling land in the COR pursuant to the Incentive Compensation provisions of the contract, the previous memorandum is correct. However, there are additional provisions in the contract, besides the Administrative Compensation, which has already been earned and paid, and the Incentive Compensation, which are valid and enforceable. These include the requirement under the Additional Compensation provisions that the City ensure that Landform be used by end-users for certain services, e.g., design, surveying, civil engineering, etc. So long as the contract is in force, Landform has a right to this work, and compensation for it, or the lost profits should it not receive the work.

V. Alternatives.

- A. The City of Ramsey could immediately terminate all payments to Landform due and owing under the Incentive Compensation provisions of the contract.
- B. The City of Ramsey could consider bringing an action against Landform to recover all sums already paid pursuant to these provisions. Factors weighing on its decision should include the total amount paid to date under these provisions, Landform's willingness to agree to an immediate termination of the contract and release of all potential claims against the city under the contract, including a waiver of the \$60,000 early termination fee, and the City's ability to collect any judgment it might obtain against Landform.

- C. If there is a \$60,000 termination penalty, the City of Ramsey could wait until March 2013 to avoid paying the same. There are arguments both for and against taking this action.