

**IN RELEASING THE ATTACHED MEMORANDUM, THE HOUSING AND REDEVELOPMENT AUTHORITY IN AND FOR THE CITY OF RAMSEY EXPRESSLY PRESERVES AND DOES NOT WAIVE THE RIGHT TO DESIGNATE FUTURE COMMUNICATIONS WITH LEGAL COUNSEL AS PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE AND TO DEEM CERTAIN INFORMATION TO BE CLASSIFIED AS PROTECTED, NON-PUBLIC DATA PURSUANT TO MINNESOTA STATUTE SECTION 13.02 SUBD. 13 AND CONFIDENTIAL PURSUANT TO MINNESOTA STATUTE SECTION 13.02 SUBD. 3 TO THE EXTENT A CIVIL LEGAL ACTION EXISTS.**



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March 19, 2013

**CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

Housing and Redevelopment Authority of the City of Ramsey  
c/o Mr. Kurt Ulrich, Executive Director  
7550 Sunwood Drive NW  
Ramsey, MN 55303

RE: Review of Purchase of Services Agreement, dated April 1, 2011, between the Housing and Redevelopment Authority of the City of Ramsey and Landform Professional Services, LLC

This letter is written in response to a request from the Housing and Redevelopment Authority of the City of Ramsey ("HRA") for a review and opinion regarding a Purchase of Services Agreement, dated April 1, 2011, ("Agreement") between the HRA and Landform Professional Services, LLC ("Landform"). Prior to the HRA's request for review of the Agreement, concern had been raised that Landform may have violated the Agreement, particularly Section X of the Agreement entitled "Compliance With Laws" as it relates to Minnesota Statutes Chapter 82 and requirements concerning licensed real estate brokers. The initial question that the HRA posed for review involved whether or not the non-broker prohibition contained in Section X of the Agreement is enforceable as it relates to other sections of the Agreement. Additional follow-up issues were also requested to be addressed, if possible, following the initial review of the Agreement on its face.

In undertaking the review in support of this opinion, I have reviewed the following six documents:

1. A Purchase of Services Agreement, dated April 21, 2010 between the HRA and Landform; and
2. A Purchase of Services Agreement, dated April 1, 2011 between the HRA and Landform ("Agreement"); and
3. An untitled, undated and unsigned memorandum purportedly delivered to the HRA board and other parties; and
4. A memorandum prepared by John M. Huberty and addressed to William A. Erhart, dated January 1, 2013; and
5. A letter sent by Rob Shainess of Capstone Law to Kurt Ulrich, HRA Executive Director, dated January 31, 2013; and

6. A memorandum prepared by Thomas L. Bray of Briggs and Morgan, P.A. to the HRA, dated February 9, 2013 ("Bray Memorandum").

The above referenced documents form the basis for the limited review that was requested by the HRA regarding the Agreement. In conducting the review and providing this opinion, it is assumed that the HRA has had access to all of the above referenced documents. Further, it is also assumed that the summary of these documents provided in the Bray Memorandum sufficiently summarizes the background and assertions set forth in each of the individual documents. As such, no further summarization or analysis of these documents is provided in this opinion.

A. INTERACTION OF SECTION X WITH CONTRADICTORY PROVISIONS OF THE AGREEMENT.

Section X of the Agreement provides as follows:

**X. COMPLIANCE WITH LAWS.** In providing all services pursuant to this Agreement, the Contractor shall abide by all statutes, ordinances, rules and regulations pertaining to or regulating the provision of such services, including those now in effect and hereafter 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 are real estate brokers or salespersons as defined by Chapter 82 of Minnesota Statutes. Therefore, Landform will not be entitled to any compensation for work which requires a license under said Chapter 82.

The initial question that needs to be addressed regarding Section X of the Agreement is whether or not this section overrides any other contradictory provisions contained in the Agreement. The Agreement includes a Schedule A addendum entitled "Contractor's Proposal" which sets forth various services that are contemplated to be performed by Landform pursuant to the Agreement. On its face, the Agreement, including the Contractor's Proposal addendum, would suggest the providing of services for which a broker's license may potentially be required. The definition of the activities that constitute a real estate broker and for which a license is required is contained in Minnesota Statutes Section 82.55, subd. 19, which provides in part as follows:

Subd. 19. Real estate broker; broker. "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.

As to specific language in the Agreement, the services contemplated by Article II, Article III.E.2, 3 and 4 and Article IV.B.1 of the Contractor's Proposal to the Agreement describes services for

which a broker license would appear to be required pursuant to Minnesota Statutes Section 82.55, subd. 19(a). These referenced sections of the Contractor's Proposal to the Agreement, when read in conjunction with the limiting language set forth in Section X of the Agreement, lead to the conclusion that there is an irreconcilable conflict between such provisions in the Agreement. Unfortunately, while Section X of the Agreement clearly requires compliance by Landform with all statutes and specifically, that no compensation will be provided for any work that requires a license under Minnesota Statutes Chapter 82, the other incorporated sections of the Contractor's Proposal to the Agreement as referenced above, contemplate the performance of services that appear to require a broker's license.

B. DOES LANDFORM'S ACTUAL PERFORMANCE OF THE AGREEMENT LEAD TO THE CONCLUSION THAT LANDFORM VIOLATED ARTICLE X OF THE AGREEMENT?

In reaching the initial conclusion set forth in part A of this memorandum, it appears that the HRA further desired that some form of review and investigation be conducted to determine whether or not Landform has actually violated Article X of the Agreement such that the Agreement would be terminable, or other action could be taken pursuant to the Agreement. While such a full scale investigation would appear to be beyond the scope of my understanding of my engagement for the HRA, and would likely require an extensive number of additional hours of review for this matter, including the conducting of interviews with numerous parties, the auditing of actual work performed and payments made pursuant to the Agreement, an attempt was made to discuss the performance of the Agreement with various parties involved in this matter.

Pursuant to request by Mr. Darren Lazan of Landform to Executive Director Kurt Ulrich to provide input to me regarding my review of this matter, I did contact legal counsel for Mr. Lazan, attorney Rob Shainess, pursuant to a telephone conversation and the exchange of emails and written correspondence. Unfortunately, Mr. Shainess declined to address the single question that I posed to him as follows: "Pursuant to the Agreement between the Ramsey HRA and Landform, what were the general activities your client took in fulfilling the Agreement and communicating with potential developers?" I also discussed this matter with HRA attorney Tom Bray and HRA Executive Director Ulrich. Based on these limited conversations and a plain reading of the Agreement, it is my conclusion that at least to some degree, some type of brokerage services likely were required of or were performed by Landform in its performance under the Agreement.

Unfortunately, as most parties will understand, this matter involves a rather difficult situation that results in potential confusion for both the HRA and Landform. The Agreement, with its apparently irreconcilable provisions, leads to my conclusion that neither party has clearly positive arguments to prevail over the other should this matter result in litigation.<sup>1</sup> As briefly

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<sup>1</sup> Notwithstanding this conclusion, there appears to be limited consequence to the HRA for contracting with someone who did not have a real estate broker license. Minnesota Statutes Chapter 82 essentially provides only a penalty against the person who should have had the

noted above, numerous factual arguments or disputes would likely result as to what Landform actually did in performance of its services under the Agreement. While it is my conclusion that some brokerage type services likely had to have been performed by Landform in fulfilling the plain language of the Agreement, absent extensive testimony and auditing of worked performed and invoices received from Landform, one can reach no absolute conclusion as to the extent of the performance of such brokerage-type services by Landform.

It is also clear from the Agreement that Landform was to provide a broad range of services which did not require a license to the HRA in furtherance of the Agreement's development objectives. For example, the services contemplated to be performed by Landform in Article III, Sections A – C of the Contractor's Proposal to the Agreement would not appear to require a license. Based upon the limited information available to me regarding Landform's actual performance under the Agreement, it also appears fair to state, notwithstanding Article X of the Agreement, that any brokerage-type services constituted a smaller portion of the services provided by Landform in the performance of its duties under the Agreement. The Agreement clearly provides that Landform would be compensated for this broad range of services, not including those that contemplate a broker's license pursuant to Minnesota Statutes Chapter 82. In light of the very limited investigative review that was conducted by me concerning this matter, I can make no definitive conclusions as to what should or should not be withheld from any additional payments to Landform under the Agreement.

Upon consideration of the Agreement in its entirety, it is my opinion that if the HRA alleged a breach by Landform, or failed to pay Landform pursuant to the Agreement terms based solely on the argument that Landform was required to have a real estate broker license to perform purported services, that the HRA would not be successful in doing so.<sup>2</sup> The inclusion of the broker license language in Section X in the Agreement leads to the conclusion that the HRA and Landform were aware of the concern as to whether Landform needed a license. I also believe that a court would not be very sympathetic to the HRA if the HRA now attempted at this late hour to argue a breach of the Agreement to avoid payment under the Agreement, which otherwise appears to have been performed as promised.

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license. The main enforcement mechanism is a ban of the person who should have had the license from bringing a cause of action for unpaid compensation if in fact the person should have had a license.

<sup>2</sup> One other provision of the Agreement, the "Compensation Carryover" terms set forth in Article IV.B.7. of the Contractor's Proposal to the Agreement (among other terms set forth in Article IV.B. as to Incentive Based Development Compensation, many of which appear convoluted and difficult to apply) requires a brief comment. Article IV.B.7. appears similar to an agreement to protect a broker upon termination of a services agreement. Determining how to enforce this Agreement language appears problematic on its face; thus, as is noted in part C of my letter, I reiterate my practical suggestion to attempt to negotiate a clear resolution and termination of the Agreement.

**C. CONCLUSIONS AND PRACTICAL SUGGESTIONS.**

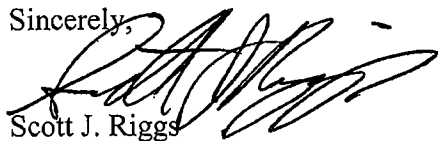
As the discussion above notes and the various memos submitted to the HRA suggest, the interpretation of the Agreement between the HRA and Landform is not easily discerned without additional extensive factual inquiry and auditing of work performed and invoiced by Landform pursuant to the Agreement. Notwithstanding this difficulty, it is reasonable to conclude that the performance of brokerage-type services by Landform likely occurred during its fulfillment of the Agreement. To what extent such brokerage services were performed by Landform and received by the HRA likely would be the subject of significant dispute should the parties to this matter not undertake significant efforts to amicably resolve and finalize the Agreement. Various arguments can be made by both the HRA and Landform as to how the Agreement should be interpreted and how the Agreement possibly could be worked-out and resolved positively for both sides. Keeping these thoughts in mind, my basic conclusions and suggestions regarding this matter are as follows:

- The language of Article X of the Agreement likely does not overcome the irreconcilable language contained in Landform's proposal (the Contractor's Proposal addendum to the Agreement) or somehow override the broad extensive services that Landform did provide under the Agreement.
- It is likely that at least to some degree, some type of brokerage services were required of or were performed by Landform in its performance under the Agreement such that a license was required under Minnesota Statutes Chapter 82.
- Despite reaching a conclusion that likely some form of brokerage services were provided by Landform under the Agreement, the broad spectrum of services that the Agreement overall required Landform to perform are due and payable to Landform, subject to some possible reduction for the brokerage services, if and only if an appropriate review and audit of such payments and performed services can be made, or the HRA and Landform come to some negotiated agreement regarding such services. The HRA would likely face limited success in withholding payments from Landform as to brokerage services (or any other services contemplated under the Agreement), absent clear evidence as to the extent of Landform's performance of brokerage services or some negotiated determination between the HRA and Landform as to the extent of such brokerage services.
- Absent additional information, the HRA should honor the majority of the Agreement payment obligations notwithstanding the possibility that Landform may have performed services or should have had a real estate broker license to perform some of its duties under the Agreement.
- In the event that the HRA desires to explore possible grounds to withhold some portion of payment due to Landform based on the performance by Landform of brokerage-type services under the Agreement, additional review of this matter and the activities of Landform is most likely necessary. Notwithstanding the potential need for additional review and information, the best and most expedient means for determining the extent of

any potential payment adjustment or the extent of any brokerage services performed by Landform under the Agreement likely could be better addressed pursuant to a negotiated settlement and a final work-out of the Agreement between the HRA and Landform. Ultimately, this is the most practical advice that I can provide to the HRA regarding this matter. Conducting extensive fact findings, audits, additional legal review and opinions, or review as to the Agreement or Landform's performance under the Agreement only leads to further expenditures by the HRA regarding this matter and a continued relationship between the HRA and Landform.

As initially noted in this memorandum, the conclusions and opinions set forth above are the result of my review of the above-noted documents, brief discussions with some of the involved parties, and the limited facts available as to the actual performance of the Agreement. In light of my conclusions concerning this matter, I would strongly encourage the HRA to attempt to enter into a work-out type agreement with Landform to fully resolve and clearly define all outstanding obligations and payments due between the parties and to reach a final termination of the Agreement.

Sincerely,



Scott J. Riggs  
Kennedy and Graven, Chartered