

**HOUSING AND REDEVELOPMENT AUTHORITY
CITY OF RAMSEY
ANOKA COUNTY
STATE OF MINNESOTA**

The Housing and Redevelopment Authority conducted a regular meeting on Tuesday, April 9, 2013, at the Ramsey Municipal Center, 7550 Sunwood Drive NW, Ramsey, Minnesota.

Members Present: Chairperson Randy Backous
 Commissioner David Elvig
 Commissioner Mark Kuzma
 Commissioner John LeTourneau
 Commissioner Chris Riley
 Commissioner Sarah Strommen
 Commissioner Jason Tossey

Members Absent: None

Also Present: HRA Executive Director Kurtis G. Ulrich
 Deputy Executive Director Timothy Gladhill
 Finance Director Diana Lund
 Public Works Superintendent Grant Riemer
 City Engineer Bruce Westby
 Assistant to the City Administrator Patrick Brama
 City Attorney William Goodrich
 HRA Attorney Tom Bray

1. CALL TO ORDER

Chairperson Backous called the regular meeting of the Housing and Redevelopment Authority to order at 7:39 p.m.

2. CITIZEN INPUT

There was none.

3. APPROVAL OF AGENDA

Motion by Commissioner LeTourneau, seconded by Commissioner Kuzma, to approve the agenda as submitted.

Motion carried. Voting Yes: Chairperson Backous, Commissioners LeTourneau, Kuzma, Elvig, Riley, Strommen, and Tossey. Voting No: None.

4. APPROVAL OF MINUTES

Motion by Commissioner Riley, seconded by Commissioner Tossey, to approve the following minutes:

HRA Work Session Meeting Minutes dated March 19, 2013
HRA Regular Meeting Minutes dated March 26, 2013

Motion carried. Voting Yes: Chairperson Backous, Commissioners Riley, Tossey, Elvig, Kuzma, LeTourneau, and Strommen. Voting No: None.

5. HRA BUSINESS

5.01: Purchase of Services Agreement Between the Housing and Redevelopment Authority in and for the City of Ramsey (The “HRA”) and Landform Professional Services, LLC

HRA Executive Director Ulrich presented the staff report relating to the termination of the Landform contract, letter received raising issue with payment of fees to Landform, and recommendation to discuss the options as outlined by HRA Attorney Bray and give direction to staff in how to move forward. It was noted the HRA currently has additional contracts with Landform that do not impact the development manager’s contract. HRA Executive Director Ulrich noted the contract includes payment of incentive fees for HRA entered development for period of 15 months following termination date of March 31, 2013.

HRA Attorney Bray stated this issue precipitated the HRA receiving two memos (unattributed memorandum and John Huberty memorandum) that raised issue of enforceability with the Purchase of Services Agreement. He summarized the points made in the memorandum. The unattributed memorandum does not discuss the facts but starts with the assumption that Landform is performing brokerage services. It reviews State Statutes requiring brokerage to be paid for those services, that without a brokerage license you are not licensed to receive compensation, and concludes that Landform is not entitled to any compensation under the Purchase of Services Agreement. The Huberty memorandum goes through the contract on a detailed basis and identifies tasks that appear to involve brokerage fees but recognizes the Purchase of Services Agreement covers a broad range of services and not all are brokerage services. The Huberty memorandum concludes that the appropriate remedy is not to withhold all payment from Landform but to withhold the incentive compensation component. HRA Attorney Bray stated he expects that conclusion was reached because that component looks much like the compensation arrangement one sees in a brokerage contract. But, there is nothing to lead one to think all services for compensation related to brokerage work.

HRA Attorney Bray indicated the HRA was provided copies of those memorandums as well as Landform and Landform’s attorney. The HRA requested a response to the arguments made and Landform’s attorney sent a letter with three responses. Those responses indicate there is provision in the Purchase of Services Agreement recognizing Landform does not have a Minnesota brokerage license and not to receive compensation for brokerage services. HRA Attorney Bray noted the question is if that clause is sufficient to diffuse that issue. He stated there is no case law on that point but he does not think a court would find that language to be

sufficient because it would be far too easy for someone to create a package contract that calls for brokerage and other services. HRA Attorney Bray stated he disagrees with the Landform attorney on that point. The second point the Landform attorney seeks to make is that there is distinguish between soliciting development proposals and purchasers of land. He advised that the definition of brokerage services under Minnesota law is very broad, indicating any negotiation for sale of land, and these development proposals do involve the sale of land. HRA Attorney Bray felt it was fair to say the services Landform provided under the Purchase of Services Agreement exceeded brokerage services but a component was a brokerage service. There is no case law directly on point, but he does not see that argument as being persuasive to a court.

HRA Attorney Bray stated the third argument by Landform's attorney is that the Purchase of Services Agreement contemplated a team approach including members of the HRA and City staff and that under Minnesota law, a member of a municipality does not need a brokerage license and can engage in negotiations and sales activities on behalf of HRA without violation of the Statute. HRA Attorney Bray stated the question is how engaged was City staff and Landform employees, in particular Development Manager Lazan.

HRA Attorney Bray advised the Landform attorney says there is nothing wrong with the incentive compensation structure, and that if someone is being compensated based on a percentage of land or development cost, it may look like typical brokerage compensation but there is no reason it couldn't be used to pay for non-brokerage services. HRA Attorney Bray stated he thinks the ultimate question is what did Landform do and based on his impressions in several transactions, Development Manager Lazan was the primary point of contact with the prospective developer, possibly constituting brokerage services.

HRA Attorney Bray stated where he differs from the two memorandums, is to think there is an open question. If you assume brokerage services were provided and Landform is not entitled to recover some component of the compensation provided, the question is how do we calculate that portion. The unattributed memorandum concludes the HRA should pay no compensation but he believed that was too broad. The Huberty memorandum concludes the HRA should not pay any incentive compensation but he believed that was also too broad. On the other hand, there is no precise basis on which to advise the HRA what portion is fairly contributed to the brokerage services that Landform should not be entitled to recover.

HRA Attorney Bray explained that one approach is to say if the HRA had, in the beginning, tried to set out a compensation mechanism for brokerage service, what would it have done. Typically, brokerage fees are 7% of land costs and sometimes are higher for raw land. He felt 7% was a reasonable "rule of thumb" for typical compensation for brokerage services. HRA Attorney Bray asked what would then be a fair part of compensation to withhold. He stated if it is determined that a portion of the services Landform provided are brokerage services and not entitled to recover, a question is whether the HRA can elect to pay those amounts anyway or would it be violation of the law. HRA Attorney Bray advised there is not much in terms of case law, noting Chapter 82 does not say you cannot have a contract with someone without a brokerage license, or it is void, but says a person cannot bring action in Minnesota Court to collect compensation if they do not have a required license. However, the parties could agree to

pay. He indicated there was a case in St. Paul where the city had paid a contractor and the court later decided it was a non-enforceable contract. Suit had been brought against the councilmembers and the court said the City got the benefit of those services so there was no liability to councilmembers for making that payment. HRA Attorney Bray concluded the HRA could choose to pay this without violation of the law, notwithstanding Chapter 82.

Chairperson Backous asked about the City's Charter.

HRA Attorney Bray stated the Charter governs the City, not the HRA. He noted the provision in the memorandum that dealt with the Charter said proceeds of land are to be used to pay down debt associated with acquisition of the land. However, the Charter provision does not imply 100% of the proceeds should go to pay down debt since there are costs associated with a sale so he thinks that Charter provision is addressing net proceeds.

HRA Attorney Bray presented his legal opinion and offered the following four options:

1. Pay in full per the contract;
2. Determine if Landform would be willing to meet and attempt to negotiate a mutually acceptable resolution or would be willing to jointly engage a mediator or arbitrator to assist in resolving the issue;
3. Notify Landform that the HRA intends to withhold some portion of the amounts owing and if Landform objects, commence a declaratory judgment action seeking an adjudication of the parties rights; or
4. Pay what the HRA deems it owes, withhold the balance.

HRA Attorney Bray advised that with Option 4, Landform may sue and the HRA's position would be if Landform does not have a brokerage license, it is not entitled to take that action.

Chairperson Backous noted Landform implied it was taking a "team approach" and that a City employee does not need a brokerage license. He asked whether State law addresses that distinction.

HRA Attorney Bray advised there is a distinction in Statute that City employees do not need a brokerage license.

HRA Executive Director Ulrich presented staff's recommendation and support for Option 2, Determine if Landform would be willing to meet and attempt to negotiate a mutually acceptable resolution or would be willing to jointly engage a mediator or arbitrator to assist in resolving the issue. He indicated Option 2 would be the best alternative to achieve a smooth and productive transition and a clean resolution to mutual obligations under the contract.

Chairperson Backous clarified that the HRA did not enter into an illegal contract or make illegal payments to Landform. He asked the HRA to not debate each detail but, rather, to focus on which Option it supported.

Commissioner Kuzma asked for further explanation of Option 3, Notify Landform that the HRA intends to withhold some portion of the amounts owing and if Landform objects, commence a declaratory judgment action seeking an adjudication of the parties' rights.

HRA Attorney Bray explained it is a unique situation because unlike a typical dispute, the Statute says the party seeking to recover compensation is not entitled to maintain an action. The Statute is set up to give the HRA a "shield" but not a "sword." Nonetheless, if there is a dispute, there is always an option to go into court and ask for declaratory judgment, saying "we have a dispute and please resolve it." HRA Attorney Bray explained that in order for the HRA to avail itself of that approach, there would first have to be a dispute. If the HRA said that in their view, the fair allocation of compensation is \$200,000 and it intends to withhold that amount and Landform agreed, the HRA would not be entitled to go into court (i.e., no dispute). However, if the HRA decided to withhold and Landform disputed it, then it can go into court for resolution of the dispute.

Commissioner Elvig asked if the HRA has received its intellectual properties.

HRA Executive Director Ulrich advised the HRA is current on Landform's monthly billings and had asked for and received indication from Development Manager Lazan that the City would get the intellectual property; however, that had not yet been received. HRA Executive Director Ulrich stated it is staff's intention to put a specific date on the request because the intellectual properties were expected to be received by now. In addition, Development Manager Lazan indicated at the last meeting that it would be no problem to provide that critical information to carry forward the projects.

Commissioner Elvig stated that is an important factor since it was the intent to move the projects forward without "skipping a beat." He indicated if the intellectual properties are not provided, he would support moving forward with declaratory judgment. If received, he would support Option 2, Determine if Landform would be willing to meet and attempt to negotiate a mutually acceptable resolution or would be willing to jointly engage a mediator or arbitrator to assist in resolving the issue.

Commissioner Strommen stated support for staff's recommendation to provide Landform with a specific request and timeline to provide the intellectual properties, noting it is currently past the end contract date and a reasonable request. She suggested moving forward with that action and then if the intellectual properties are not received, the HRA can decide a course of action. If the information is received, she supported Option 2, Determine if Landform would be willing to meet and attempt to negotiate a mutually acceptable resolution or would be willing to jointly engage a mediator or arbitrator to assist in resolving the issue, as the most prudent option in terms of being responsible to public dollars and respectful of HRA's relationship with Landform.

Commissioner LeTourneau stated his appreciation for staff's analysis of this complex matter. He stated he favors finding a resolution that is mutually agreed upon. Commissioner LeTourneau indicated there is need to recover some things so the HRA is able to drive projects forward. He stated he would lend support to Option 2, Determine if Landform would be willing to meet and

attempt to negotiate a mutually acceptable resolution or would be willing to jointly engage a mediator or arbitrator to assist in resolving the issue.

Commissioner Riley stated the HRA is discussing topic but not the dollar amount. He asked what had been paid to Landform, how much is still owed, and how much in incentive fees has been paid.

Finance Director Lund indicated since 2009, Landform has been paid a total of \$1.454 million for all contracts and \$374,240 of incentive fees. Landform is yet to be paid incentive fees in the amount of \$80,000 for Flaherty & Collins; \$51,441 for McDonalds; and, \$53,725 (Armstrong) and \$57,913 (Ramsey) for the two SuperAmerica sites.

HRA Attorney Bray pointed out there is also a 15-month carry over where incentive fee would apply.

Chairperson Backous stated those incentive fees would be based on capitalized cost of projects on HRA land so it is almost impossible to define.

Commissioner Riley asked whether the HRA has paid \$1.454 million, incentives of \$375,000, plus unknown amounts.

HRA Executive Director Ulrich stated the \$1.454 million is all-inclusive with incentives, engineering contracts, platting, stormwater management, soil analysis, and engineering contracts with Landform.

Commissioner Tossey stated one option was to determine what the brokerage fee would have been at 7%. He asked if an option is to withhold 7% from the incentive fee.

HRA Attorney Bray stated that option is a way to back out what contribution is attributed to brokerage activities.

Commissioner Kuzma stated as part of negotiation, maybe the 15-month term could be cut back in lieu of other payments.

Chairperson Backous asked the HRA to focus on the options presented by staff.

Motion by Commissioner Strommen, seconded by Commissioner LeTourneau, to direct staff to follow Option 2, Determine if Landform would be willing to meet and attempt to negotiate a mutually acceptable resolution or would be willing to jointly engage a mediator or arbitrator to assist in resolving the issue.

Further discussion: Chairperson Backous confirmed that the HRA is operating in good faith and current on all payments and Landform has provided services with the exception of intellectual property. Commissioner Strommen suggested that members of the HRA be part of the negotiating group. Chairperson Backous stated that negotiating these matters is most times delegated to the HRA Executive Director and/or City Attorney. Commissioner Strommen noted

that at other times an elected official has been part of the negotiation. Commissioner Riley supported inclusion of HRA Commissioners to participate in the negotiations. HRA Executive Director Ulrich explained that with the property on Rivlyn, the Chairperson and a Commissioner participated in negotiations. He suggested first determining whether Landform is willing to negotiate prior to making that appointment. If willing, staff will provide a recommendation on process.

Motion carried. Voting Yes: Chairperson Backous, Commissioners Strommen, LeTourneau, Elvig, Kuzma, Riley, and Tossey. Voting No: None.

5.02: FOR DISCUSSION ONLY: Receive Update and Consider Plan to Complete Stage I Improvements for COR TWO (Sunwood Retail Area) Located at the Southeast Intersection of Sunwood Drive and Armstrong Boulevard

Deputy Executive Director Gladhill reviewed the staff report relating to the Stage 1 Improvements for COR TWO (Sunwood Retail area). He displayed a map of the subject site and described the elements within the Stage 1 Improvements as being a common drive, common utilities (sewer and water), and stormwater. It was noted the estimated costs for these improvements is \$327,467.73, which would be recouped through land sales. If the HRA determines to construct these improvements, it would take two to three weeks to advertise for bids and award the contract. Deputy Executive Director Gladhill asked whether the HRA supported staff moving forward to prepare those bids, noting the contract did indicate the HRA would perform that work and allows McDonalds to postpone until the HRA completes the work, proceed to closing, or terminate the agreement.

Commissioner LeTourneau asked if the temporary ponds would be lower cost and allow needed planning and improvements to move forward with the right solution undertaken after land sales.

Deputy Executive Director Gladhill confirmed the two surface water ponds would be less expensive, \$400,000 down to \$327,000, and will also lower curbing costs.

Commissioner Elvig asked whether staff was looking for a go ahead to solicit bids.

Deputy Executive Director Gladhill indicated staff was looking for general consensus whether the HRA wants staff to get ready to go out for advertisement for bids, which would be acted on at the April 23, 2013 HRA meeting.

Commissioner Elvig supported moving forward with the improvements.

HRA Executive Director Ulrich advised staff supported moving ahead with the improvements by the HRA, the most prudent approach, as the HRA has a contract with McDonald's and strong interest remains with SuperAmerica. It was noted legal counsel has advised the HRA that the preferred scenario for the Stage 1 Improvement is for the HRA to complete said improvements, if the HRA is to honor the terms of the exiting contract with McDonald's, and to have the most control over the installation of the improvements to ensure their completion.

Commissioner Riley asked whether the project costs would be divided between the three purchasers.

Deputy Executive Director Gladhill confirmed the cost would be divided on a pro rata share to each of the three users.

HRA Executive Director Ulrich presented the cost breakdown, noting \$42,870 is the cost to McDonalds.

Commissioner Riley asked if that is in addition to the purchase price for McDonalds.

HRA Executive Director Ulrich stated that is correct and SuperAmerica would contribute \$89,000 towards the improvements for its two sites.

Commissioner Riley asked how the City will fund the improvements.

Deputy Executive Director Gladhill stated the process would not move forward to award of bid unless there was a signed purchase agreement. He indicated any funding gap would be identified at the next meeting.

The consensus of the HRA was to support moving ahead with HRA initiated improvements as recommended by staff and legal counsel.

6. DEVELOPMENT TEAM REPORT

HRA Executive Director Ulrich reported that SuperAmerica continues to express interest and indicated the Armstrong location is one of the top five corporate approved sites for 2013 construction. SuperAmerica is also interested in another Ramsey site for construction in 2014. HRA Executive Director indicated McDonalds is actively pursuing building plan approval and moving forward with closing. He reported that Solomon Group agreed to a letter of intent to solidify easements and rights-of-way needed with the re-plat. In addition, there has been some interest in the North Commons lots.

HRA Executive Director Ulrich reviewed outstanding Landform contracts, one being The COR Stormwater Management Plan, which is critical to record COR TWO plat. He noted there is still \$62,780 of approved Landform engineering contracts that are not yet completed.

7. COMMISSIONER INPUT

None.

8. ADJOURNMENT

Motion by Commissioner Tossey, seconded by Commissioner LeTourneau, to adjourn the regular meeting of the Housing and Redevelopment Authority.

Motion carried.

The regular meeting of the Housing and Redevelopment Authority adjourned at 8:35 p.m.

Respectfully submitted,

Kurtis G. Ulrich
HRA Executive Director

ATTEST:

Jo Ann M. Thieling
City Clerk

Drafted by Carla Wirth
TimeSaver Off Site Secretarial, Inc.