

Brownfield Redevelopment Authority
MINUTES
City Commission Room
Municipal Building 151 Martin Street, Birmingham, Michigan
Wednesday, August 7, 2019
9:00 a.m.

1. Chairperson Beth Gotthelf convened the meeting at 9:00 a.m., inviting all present for the discussion of the 2400 E. Lincoln case to briefly introduce themselves.

Members Present: Chairperson Beth Gotthelf
Vice Chairman Robert Runco (arrived at 9:04 a.m.)
Harry Awdey
Dani Torcolacci

Member Absent: Wendy Zabriskie

Administration: Joseph Valentine, City Manager
Jana Ecker, Planning Director
Mark Gerber, Finance Director
Jeffrey Haynes, Beier Howlett, Brownfield Attorney
Laura Eichenhorn, Transcriptionist

Also Present: Judith Miller, Attorney for 2400 E. Lincoln
Arthur Siegel, Attorney for 2400 E. Lincoln
David Cohen, Managing Member of 2400 E. Lincoln
Tom Wackerman, ASTI Environmental
Bob Borst, HM Environmental
Tony Anthony, AKT Peerless
Kirsten Hardy, AKT Peerless
Karen Pearman, 2400 E. Lincoln

2. Approval of minutes of the June 14, 2019 and June 19, 2019 meetings

Motion by Ms. Torcolacci

Seconded by Mr. Awdey to approve the June 14, 2019 minutes as presented.

Motion Carried, 3-0.

VOICE VOTE

Yeas: Gotthelf, Torcolacci, Awdey

Nays: None

The Authority decided to approve the June 19, 2019 minutes at the next Authority meeting, yet to be scheduled, since the June 19, 2019 minutes were not provided in the current meeting's agenda packet.

3. 2400 E. Lincoln – Brownfield Reimbursement

City Attorney Haynes explained documentation dated November 16, 2005 was located regarding the grant that 2400 E. Lincoln had made to the City in the amount of \$310,205. The documentation demonstrated that the developer advanced the City money to pay AKT Peerless, which was doing work on 2400 E. Lincoln for both the developer and the City.

When the City received reimbursement from the State for that amount, the City was to pay the developer back. To date the City has paid the developer 90% of the granted amount, with a payment for 10% of the granted amount still outstanding.

City Attorney Haynes stated that while this documentation provided a basis for repaying the remaining \$31,020.50, or 10% of the original amount, the documentation made no provision for interest since it was intended that the amount would be repaid by the City immediately upon its receipt of funds from the State.

City Attorney Haynes said this payment would have to be made and approved of by the City Commission as part of any settlement with the developer, and that the Authority could recommend the City do so. He also said that "undocumented loan" in the last paragraph of the suggested resolution should be corrected to read "advances".

Chairperson Gotthelf stated the Authority should separate the motions for recommending the Commission repay the remainder of the advance and the Authority's own ultimate determination as to eligible Brownfield reimbursements.

City Attorney Haynes concurred with Chairperson Gotthelf.

Motion by Mr. Runco

Seconded by Mr. Awdey to recommend the City Commission pay 2400 E. Lincoln the 10% remainder on the \$310,205 advance, without interest, which totals \$31,020.50.

Motion Carried, 4-0.

VOICE VOTE

Yeas: Runco, Awdey, Gotthelf, Torcolacci

Nays: None

Mr. Siegel stated that since the Authority's June 19, 2019 meeting documentation was located indicating that J.P. Morgan Chase, as the developer's lender at the time of the 2400 E. Lincoln project, had a financial interest in these proceedings. He said that as a result of conversations between the developer's team, City Attorney Haynes, and the lender's counsel, it was determined that the developer would hold the interest to this cash flow. Mr. Siegel also explained that the developer's team provided City Attorney Haynes with a document indemnifying the City and the Authority against any other third party attempting to seek payment from the City in regards to 2400 E. Lincoln.

City Attorney Haynes advised the Authority mention in their resolution the indemnification from the developer to the City and the Authority, a release by J. P. Morgan Chase for its claims to the

reimbursement agreement, a release from the developer to the City and the Authority the \$31,020.50 grant advance, and a final judgment to be entered upon resolution of all relevant matters.

City Attorney Haynes reported that Finance Director Mark Gerber determined that the City's administrative costs for this Plan have come to around \$170,000 of the \$180,000 claimable amount as set forth in the Plan. The developer has paid about \$50,000 of that amount. As a result, the first tax captures from 2400 E. Lincoln will pay the City around \$120,000. In addition, Finance Director Gerber has determined that the 2019-2020 tax capture from 2400 E. Lincoln will be about \$180,000.

City Attorney Haynes explained that if the Authority approves the recommended amounts, the reimbursements would be paid to the developer over the course of the next seven to nine years.

City Manager Valentine said the Authority's resolution should include each mandatory condition part of the reimbursement process.

Mr. Siegel explained that the developer incurred a \$39,600.01 cost in preparing a Baseline Environment Assessment (BEA) before June 27, 2005, when the Brownfield Plan went into effect. He explained that while Section 3(a)(3) seems to indicate that expenses incurred before the Plan's effective date are ineligible unless explicitly mentioned within the Plan, Section 3(e) states that any eligible work conducted by the developer prior to the Plan's effective date "shall be considered to have been conducted by the BBRA and the owner shall be considered to have performed such eligible activity on behalf of the BBRA", and Section 5(d) states that "the BBRA may use funds retained under Section 5 to pay the costs of eligible activities for which reimbursement is available under this agreement that occurred before the effective date of the Plan only after the reimbursements described in Section 4 occur."

Section 4 addresses reimbursement-eligible expenses incurred by the developer after the effective date of the Plan.

Pursuant to this language, Mr. Siegel stated it was the developer's position that the City's administrative expenses should be paid first, the developer's eligible expenses incurred after the Plan's effective date should be paid second, and that any eligible expenses incurred before the Plan's effective date should be paid third.

Mr. Siegel also noted that BEA expenses are elsewhere mentioned as eligible expenses in the Agreement documentation.

Mr. Siegel said the developer would cease their request for any additional interest beyond the \$206,128.39 if the BBRA approved Mr. Wackerman's recommendation of a \$1,052,999.11 reimbursement, Mr. Wackerman's recommendation of a \$206,128.39 interest payment, and a payment of the \$39,600.01 for pre-plan eligible expenses.

Mr. Siegel stated he was also aware of some reticence on the part of the City Commission to reimburse the remaining \$31,020.50 of the grant. He asked the Authority to resolve that amount as a BBRA reimbursement-eligible expense if the Commission does not approve its reimbursement. Mr. Siegel argued that the \$31,020.50 was part of eligible remedial expenses for

2400 E. Lincoln.

In reply to Chairperson Gotthelf, Mr. Siegel explained the \$310,205 was a grant to the City, from the State, to cover part of the remediation expenses for 2400 E. Lincoln. Because the City did not want to advance the \$310,205 before receiving the grant from the State, however, the developer advanced the \$310,205 instead. When the State released 90% of the grant amount to the City, the City immediately repaid the developer for that amount. The State released the 10% remainder of the grant to the City in 2009, which the City did not repay to the developer.

Mr. Siegel stated that the entirety of the grant monies was spent on the 2400 E. Lincoln and the surrounding property which included the City of Birmingham dump.

Ms. Miller clarified that the developer's offer to end pursuit of interest payments above and beyond the \$206,128.39 remained contingent on the \$31,020.50 being repaid by the City to the developer.

Doron Yitzchaki, attorney for J.P. Morgan Chase, explained that during 2400 E. Lincoln's 2009-2010 bankruptcy, 2400 E. Lincoln's bankruptcy trustee provided Chase a Bill of Sale for all of 2400 E. Lincoln's rights, which included future payments, in April 2010.

Mr. Yitzchaki stated that J.P. Morgan Chase and 2400 E. Lincoln have reached a fully-executed global resolution regarding J.P. Morgan Chase's claims to any reimbursements that will result from these proceedings. Part of that resolution includes a release of the BBRA and the City of Birmingham by Chase, and a copy of a Bill of Sale demonstrating that Chase transferred their rights regarding 2400 E. Lincoln to the developer. Those two documents are in escrow with Mr. Yitzchaki pending the Authority's approval of 2400 E. Lincoln's requested reimbursement amounts, and entry of a judgment by Judge Alexander of Oakland County. Once those two conditions are met, Mr. Yitzchaki stated he would release the documents currently in escrow to City Attorney Haynes. Mr. Yitzchaki requested that the BBRA approve 2400 E. Lincoln's requested amounts expediently, stating that time was of the essence for Chase.

In reply to Chairperson Gotthelf, Mr. Yitzchaki explained that if this process does not proceed quickly, Chase will have to intervene as a party in the current Oakland County Court case related to this matter. He said that if that were to occur the case would become vastly more complex, resulting in scheduling orders not being met and further discovery. The resolution made between 2400 E. Lincoln and Chase allows Chase to avoid the further costs that would be entailed in getting involved in the litigation. He said if the process is not complete by September 1, 2019 Mr. Yitzchaki would have to decide whether to try to reach a new agreement with 2400 E. Lincoln or whether to intervene in the litigation on behalf of Chase.

Mr. Wackerman reviewed his findings for the Authority.

Ms. Torcolacci said she would be comfortable authorizing payment for \$206,128.39 and \$1,052,999.11 and a decision on the part of the Authority not to pay the \$39,600.01. She said it was reasonable to consider the \$39,600.01 a pre-plan expense.

Mr. Runco said he would be comfortable authorizing payment solely for the \$1,052,999.11, with the understanding that the Authority requested the City Commission also pay the \$31,020.50

separately from the Authority's proceedings.

Mr. Awdey said he disagreed with authorizing payment for the \$206,128.39, and agreed with authorizing payment for the \$39,600.01.

Chairperson Gotthelf noted that payment for the \$39,600.01 in pre-plan expenses on the part of the City is discretionary according to the Plan and a cost the developer would have expected to incur. She said that because the payment is discretionary, and because the City may have proceeded differently with the project had it known the development it agreed to would not end up being built, she was in favor of not authorizing payment for the \$39,600.01.

Mr. Siegel noted that page 15 of the Plan, regarding interest, reads "interest shall begin to accrue after completion of the developer's expenditures," which was May 2006. The passage continues that "the developer shall provide the Authority with the final total, and the amount of interest payable shall be calculated on the outstanding principal balance." Mr. Siegel asserted that while payment for the pre-plan expenses may be discretionary, payment of the interest is mandatory according to the language of the Plan.

Mr. Awdey said Chairperson Gotthelf's comments regarding the \$39,600.01 were persuasive, and that he no longer thought payment for that amount should be authorized.

In reply to Chairperson Gotthelf, Finance Director Gerber confirmed that interest is accurately calculated at \$206,128.39, according to the Plan's provisions.

City Attorney Haynes clarified that, according to the first paragraph on page 15 of the Plan, interest accrued based on eligible expenses. The payment of interest was not set out in the Plan as being contingent on the completion of the project. He said it was his view that the \$206,128.39 in interest meets all the requirements for reimbursement under the Brownfield Plan.

City Manager Valentine asked that the Authority consider an amendment to the suggested resolution language, under Item Three, that would read "And be it further resolved that the following conditions must be satisfied prior to any distributions occurring:

1. Indemnification be provided from 2400 E. Lincoln to the BBRA and the City to the satisfaction of the BBRA;
2. A release on the grant advance in a form acceptable to the City Attorney;
3. A release from J.P. Morgan Chase's claims to the BBRA in a form acceptable to the City Attorney; and,
4. Entry of a judgment to resolve the litigation in the case in the Oakland County Circuit Court before Judge Alexander."

Mr. Yitzchaki communicated via Ms. Miller that paragraph I of the resolution incorrectly describes Chase's Bill of Sale and release as attached to the resolution. Those two documents, rather, will be delivered by Mr. Yitzchaki to City Attorney Haynes upon the Authority's approval of 2400 E. Lincoln's requested reimbursement amounts and entry of a judgment regarding the litigation by Judge Alexander of Oakland County.

Chairperson Gotthelf stated that the Authority should move paragraph I to Item Five in the resolution in order to address the concerns raised by Mr. Yitzchaki and Ms. Miller. She then

entered \$1,052,999.11 as the amount for Item One of the resolution language, and \$206,128.39 as the amount for Item Two of the resolution language.

Mr. Runco said he would rather address interest separate from the \$1,052,999.11 amount.

Chairperson Gotthelf said that the Authority would consider the \$206,128.39 amount and the \$31,020.50 amount after resolving the issue of the \$1,052,999.11 in response to Mr. Runco's request to do so.

Motion by Mr. Runco

Seconded by Ms. Torcolacci to 1. Approve the reimbursement request for eligible expenses in the amount of \$1,052,999.11. 2. The Brownfield Authority approves the request for interest in the amount of \$206,128.39. 3. The Brownfield Authority denies the request for reimbursement of pre-plan expenses because they are not eligible costs under the Brownfield plan. 4. The Brownfield Authority requests that city staff pay the Developer \$31,020.50 as the final repayment of the undocumented loan from the Developer to the City relating to the grant from the Department of Environmental Quality. And be it further resolved that the following conditions must be satisfied prior to any distributions occurring:

- 1. Indemnification be provided from 2400 E. Lincoln to the BBRA and the City to the satisfaction of the BBRA;**
- 2. A release on the grant advance in a form acceptable to the City Attorney;**
- 3. A release from J.P. Morgan Chase's claims to the BBRA in a form acceptable to the City Attorney;**
- 4. Entry of a judgment to resolve the litigation in the case in the Oakland County Circuit Court before Judge Alexander; and**
- 5. Chase Bank has sold and transferred to the Developer all of the Bank's rights and claims under the Reimbursement Agreement and the lawsuit, as evidenced by the bill of sale and release provided to the City.**

Motion to amend by Mr. Runco

Seconded by Mr. Awdey to deny the request for interest in the amount of \$206,128.39.

Mr. Runco said he would be inclined to deny any interest payment.

Mr. Awdey said he believed paying interest would be inappropriate given the length of time that has passed, the fact that the development was never completed, and that the documentation for the completion date is a fax machine cover page.

Ms. Torcolacci said the Brownfield Agreement required the Authority to pay interest. She said that while she also would have liked better documentation than a fax cover sheet, reimbursement-eligible work was completed, which also obligates a payment of reimbursement-eligible interest. She said she understood that different dates of completion would change the amounts slightly, but that the Authority's obligation to pay interest still stood.

Chairperson Gotthelf asked if the developer would like to take a break from the proceedings to privately discuss some of the Authority's concerns regarding interest.

The developer indicated they would appreciate a brief recess.

Chairperson Gotthelf called for a brief recess of the meeting at 10:54 a.m.

Chairperson Gotthelf reconvened the meeting at 11:15 a.m.

**Mr. Runco withdrew his proposed amendment to the motion.
Mr. Awdey withdrew his second of the proposed amendment.**

Motion to amend by Mr. Runco

Seconded by Mr. Awdey to approve the request for interest in the amount of \$181,000 and to approve the request for the \$31,020.50 grant repayment as a reimbursable remediation expense under the Brownfield Plan if the City Commission does not authorize the \$31,020.50 repayment.

Amendment Carried, 4-0.

VOICE VOTE

Yeas: Runco, Awdey, Gotthelf, Torcolacci

Nays: None

Motion Carried, 4-0.

VOICE VOTE

Yeas: Runco, Torcolacci, Awdey, Gotthelf

Nays: None

4. Open to the Public for Items not on the Agenda

There was no public in attendance.

5. Adjournment

There being no further business, the board passed a motion to adjourn at 11:20 a.m.

Respectfully submitted,

Laura Eichenhorn
Transcriptionist