

MEMORANDUM

TO: Mayor and City Council

FROM: William D. Wells
City Attorney

DATE: July 16, 2010

RE: Maritime Park Referendum

At the City Council meeting on June 24, 2010, Mayor Wiggins requested the City Attorney's Office to prepare a memorandum for Council, containing information and commentary regarding the current referendum effort of several citizens. The purpose of this memorandum is to respond to that request, based upon information that is currently known and available.

FACTUAL BACKGROUND

On August 14, 2009, authorized representatives of the Community Maritime Park Associates, Inc. and the Maritime Park Development Partners, LLC executed a development agreement pertaining to the Community Maritime Park Project. Although not a party to that development agreement, the City Council approved the development agreement on April 23, 2009, and the City Manager executed the City's consent on April 23, 2009. The City's consent was provided for the purpose of formally acknowledging that the development agreement and companion sublease agreement between the CMPA and the MPDP did conform to the objectives of the Master Development Agreement and Master Lease Agreement of 2006, which was executed between the City and the CMPA. Section 4.09 of the 2009 Development Agreement specified that the City would not be deemed to be "in privity of contract with the Developer or any Contractor or provider of services with respect to the construction of any part of the Site Preparation Project or the Public Improvements." However, since the City owned the property upon which the public improvements would be built and would ultimately own the public improvements themselves, the developer (MPDP) and the CMPA contractually afforded the City, "the right to timely approve or reject any (i) amendments to this Agreement, (ii) the Management Agreement and Amendment(s), (iii) contracts entered with any Contractor or Design-Build Contractor, and (iv) land pricing determination(s)." Therefore, the City was conferred "the right to timely [emphasis supplied] approve or reject" a design-build contract between the CMPA and whomever it selected as the design-builder.

On May 13, 2010, the City Council approved a design-build contract between the CMPA and "Magi Construction, LLC, whose members are Maritime Park Development Partners, LLC, and Hoar Construction, LLC." Immediately following Council's approval of the Design-Build

Contract, the parties to the contract went forward and executed it. It is significant to note that in the Committee of the Whole memorandum accompanying the contract, it was noted that there were two reasons why the City was being called upon to grant approval to the contract. First, the memorandum notes that the City has the right to approve the contract pursuant to Section 4.09 of the 2009 Development Agreement. In addition, the memorandum states, "Further, a step in the closing checklist for the issuance of tax credits is proof of existence of a construction contract for Maritime Park." In short, a valid construction contract was necessary to provide to the lenders in order to secure the funding for New Markets Tax Credits.

Prior to the granting of approval for the design-build agreement, in December 2009, the City had previously issued and sold redevelopment revenue bonds in the total amount of \$45,640,000.00 (\$6,715,000.00 in traditional municipal bonds and \$38,925,000.00 in Build America Bonds with federal government participation and the direct payment of interest for the life of the bonds). Subsequent to the approval and execution of the Design-Build Contract, the City made a \$40,000,000.00 loan through the enormously complicated New Markets Tax Credits Financing Program in order to leverage the net amount of \$51,000,000.00 currently available to the CMPA for developing the Maritime Park Project.

As part of the New Markets Tax Credits financing transaction, the City was obligated to provide the investors with a great deal of detailed information pertaining to the intended project itself, the financing of it, and the payment schedule necessary to satisfy the investors. The information provided to the investors consisted of detailed plans for the construction of the park and its various components including the multi-use stadium, the estimated costs of the various components including the stadium, and the sources of income to the CMPA when the park was completed, specifically including the \$250,000.00 annual payment and the \$175,000.00 annual payment for several years resulting from the operation of the multi-use stadium for the benefit of the Pensacola Pelicans baseball team.

All of the funds currently in the hands of the CMPA for the purpose of developing the Maritime Park Project are subject to the use, timing and other restrictions of the New Markets Tax Credits federal law. The funds must be expended only for purposes allowed by that statute, within 24 months of receiving the funds. That was the commitment made by the City to the purchasers of the bonds and additionally made to the tax credit investors when the proceeds of the bond sale were leveraged through them.

On June 18, 2010, former Councilmen Jack Nobles and Marty Donovan provided to the City Clerk a petition signed and notarized by ten apparent City residents. The petition requested the City Clerk to provide the petitioners' committee with the appropriate form for their use in gathering signatures for a referendum pursuant to the City's Charter. Their petition states that they are seeking "reconsideration of the Pensacola City Council's approval, on May 13, 2010, of the Design Build Contract between the Community Maritime Park Associates, Inc. (CMPA) and Magi Construction, LLC for construction of the Community Maritime Park site improvements and public improvements." The City Clerk provided Mr. Donovan with a blank form for referendum use on June 21, 2010. Under the provisions of the 2010 Charter, the petitioners'

committee has until the close of business on August 20, 2010, to accumulate the required number of valid signatures on a completed petition form.

The current state of facts is that the City is unaware of how the petitioners' committee has completed the blank form issued by the Clerk's Office and whether the proper number of valid signatures will be obtained by the deadline mandated by the Charter.

REFERENDUM PROCEDURES OF THE 2010 CHARTER

The referendum and initiative provisions of the 2010 Charter are not a model of clarity, consistency or completeness. They do, however, substantially broaden the referendum opportunities from the referendum provisions of the prior Charter.

Section 7.03 of the Charter provides that within 60 days following the effective date of "a measure passed by the City Council" the voters will have the power to require reconsideration of "any measure passed by City Council." The only "measures" that cannot be the subject of referendum are "measures that extend to providing an annual budget, levying taxes, or setting salaries of City Officers or Employees."

Within the 60 day period following the passage of a measure, the process is triggered when ten electors file with the City Clerk an affidavit stating that they will constitute a petitioners' committee and be responsible for circulating the petition and filing it in proper form. The affidavit requires that they provide their names and addresses and "identify the measure sought to be reconsidered." When the petitioners' committee has filed such an affidavit, the City Clerk must issue an appropriate petition form for the use of the committee. Section 7.04.

The filing deadline for referendum petitions is "within sixty (60) days of the commencement date of the initiative or referendum proceedings." The City Attorney's Office has interpreted "the commencement date" to mean the date that the committee was provided with the form by the Clerk, producing a deadline of August 20, 2010 in this instance. If the committee produces a completed, executed petition form containing an apparent ten percent of the total number of registered electors of the City, the City Clerk is required to submit the petitions to the Supervisor of Elections within three business days of receiving them from the petitioners' committee. Section 7.05. The Supervisor of Elections is expected to make a good faith effort to verify the signatures within ten days of his receipt of the petitions. Section 7.06.

Section 7.07 of the Charter provides that when all of the above steps have been completed, the issue then comes to the City Council itself. It states, "When an initiative or referendum petition has been finally determined sufficient, the City Council shall promptly consider the proposed initiative or reconsider the referred ordinance or measure." This is the point in time that a determination of sufficiency is required to be made, but the Charter does not identify who makes it. The Supervisor of Elections has determined that the proper number of valid elector signatures have been set forth on the petitions but neither the City Clerk nor the Supervisor of Elections have made any determination regarding the sufficiency of the petitions itself. Since the City Manager's Office and the City Attorney's Office have no information

regarding how the petitioners' committee has filled in the blank form provided by the Clerk or how they have characterized the action they wish to be taken as they go about gathering signatures, it is not possible to provide any commentary on the sufficiency of the petition at this point in time. In addition, it would be premature for the Council to attempt to speculate or resolve this issue at the present time because the Charter provides that that determination should be made only after the previous steps referenced have been taken and completed. Therefore, the approximate timeframe that the City Council will be called upon to determine the sufficiency of the petitions will be approximately September 7, 2010, 13 days plus holidays following the August 20 deadline for turning them in.

Speculating and assuming that the petitioners' committee successfully obtains approximately 3,400 valid elector signatures on a petition that Council determines is accurate and sufficient to identify a measure to be reconsidered, and that this occurs within the timeframe provided by the Charter, the issue for consideration by Council at that time will be whether to reconsider the measure that it took in approving the Design Build Contract on May 13, 2010, or whether to submit the issue for a voter referendum.

Section 7.07 of the Charter provides Council with a period of 45 days from the date that the petition has been finally determined sufficient, within which to either reconsider and reverse its decision or decide to submit it for vote of the electors. The Charter further provides that if the Council fails to act within 45 days, it will be deemed to have failed to repeal the measure on the 45th day. At that point, a referendum election must take place not less than 30 days nor more than 60 days from the date that the City Council acted or was deemed to have acted. If there is not a general election already scheduled within that timeframe, the Council must provide for a special election.

There is a provision for at least eight members of the petitioners' committee to request a withdrawal by filing a signed request with the City Clerk at any time prior to the 25th day preceding the day scheduled for a vote "of the City." If such a request is filed, the petition will have no further effect and all proceedings shall terminate.

COMMENTARY

If it is assumed that the City Council votes to reconsider and reverse the approval which was granted on May 13, 2010, to the Design-Build Contract between the CMPA and Magi Construction, LLC, or if it is assumed that the Council does not take that action and the matter goes to referendum election and a majority of the voters voting to reverse the Council's measure, the issue will arise regarding what effect all of these proceedings will have had. While the City Attorney's Office crystal ball is not a perfect one, and the opportunities for litigation involving many parties, requests for injunctions and demands for extraordinary sums of money will abound, there are several issues which appear to be quite clear at the present time. They are:

1. A successful referendum effort may have no legal effect whatsoever. This is because the City was not a party to the contract, and the opportunity to approve or disapprove the contract was not an unqualified right. The 2009 Development Agreement provided that the approval or

disapproval must have been “timely” provided. It is readily apparent that the parties intended this right to be exercised prior to their own date of execution of the contract and not subsequent to it. When the City Council voted prior to the parties’ execution of the Design-Build Contract to approve it, that decision was made in a timely fashion. However, it is obvious that a decision to disapprove the Design-Build Contract three or four months after the contract has been executed by the parties in reliance on the City’s approval is not the “timely” exercise of any right provided by any document. It is, in short, a legal nullity, a right that no longer exists, and it is likely that a court would so find.

2. To the extent that the referendum is intended to alter in any adverse manner the use of proceeds received by the City through the sale of the \$46,000,000.00 Redevelopment Revenue Bond issue or the subsequent New Markets Tax Credits transaction, it would place the City in breach of its many contractual commitments to the bond purchasers and tax credit investors, creating an enormous financial liability and utterly destroying the City’s future ability to secure municipal financing. Attached is a formal opinion letter recently received from Edwards Angell Palmer & Dodge, the City’s bond counsel and New Markets Tax Credits counsel, opining that the Series 2009 bonds are not immediately subject to being paid off nor may they be paid off or paid down with any of the \$51,000,000.00 received from the New Markets Tax Credits transaction, without breaching the agreements and creating millions of dollars of liability to the bondholders and tax credit investors.

3. The Florida Statutes which create and regulate Florida local governments’ ability to engage in redevelopment financing contain a provision that insulates redevelopment financing issued pursuant to that authority from the provisions of “any other law or charter relating to the authorization, issuance or sale of bonds.” F.S. §163.385(2) provides:

Bonds issued under this section do not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction, and are not subject to the provisions of any other law or charter relating to the authorization, issuance, or sale of bonds.

Therefore, if the Pensacola Charter provision setting forth a referendum process is the vehicle which seeks to stop the expenditure of the bonds for the purpose for which the funds were borrowed, this statute would seem to prohibit that result.

4. Article I, Section 10 of the Florida Constitution provides that, “No . . . law impairing the obligation of contracts shall be passed.” The purpose of this provision is to prohibit governments from passing laws impairing the obligation of contracts that were lawful, proper and valid when they were entered into by the affected parties. To the extent that this referendum effort uses the Charter as its authority to force the City to retroactively impair the contractual obligations of the CMPA and its developer, it would seem to be prohibited as an unconstitutional action on the part of the City government.

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It is not the purpose of this memorandum to advise the Council to prematurely take any action nor is it the purpose for the City Attorney's Office to provide a comprehensive legal position of the City at this point in time. Rather, the purpose is to present Council with all of the known facts to date, as well as an assessment of the process that the Charter provides for a referendum. However, it does appear that the objective of the petitioners, reversing the City's approval of the Design-Build Contract, is not an achievable objective, or, if it is, then it would carry with it an enormous financial liability to the City.

Attachment

cc: Alvin G. Coby, City Manager