

BIRMINGHAM CITY COMMISSION MINUTES
JULY 1, 2019
WORKSHOP
MUNICIPAL BUILDING, 151 MARTIN
7:00 P.M.

I. CALL TO ORDER AND PLEDGE OF ALLEGIANCE

Mayor Patty Bordman called the meeting to order at 7:02 p.m.

II. ROLL CALL

ROLL CALL:	Present:	Mayor Bordman Mayor Pro Tem Boutros Commissioner DeWeese Commissioner Harris Commissioner Hoff Commissioner Sherman
	Absent:	Commissioner Nickita

Administration: City Manager Valentine, Assistant City Manager Gunter, City Attorney Currier, Communications Director Byrnes, Police Commander Grewe, City Clerk Mynsberge

Also Present: Joe Fazio, Attorney with Miller Canfield, and Zara Brogland, Jones Lang Lasalle

III. BUSINESS

City Manager Valentine made opening comments and stated the purpose of this meeting was to consider a few items that were carryovers from the meeting on June 24, 2019 concerning the Construction Agreement. There were also requests for clarity on the indemnity language and for reformatting of the Guaranteed Maximum Price of the N. Old Woodward Parking Deck project.

City Manager Valentine presented facts about the N. Old Woodward parking deck project that address some myths being circulated in the City.

Myth: The City is asking voters to spend up to \$67 million on the project
The City's parking system cannot support the debt obligations of the bonds.
The City would give away 3 acres of public land for private use.
Additional parking would be taken up by proposed development.

Fact: The total project cost is \$60.1M including cost of issuance of the bonds.
The City Ballot question is for an amount not to exceed \$57.4 million.
The amount of bond issuance would be \$50.1M after the existing City reserves are applied from the parking system.
City Administration has established a model that supports the debt obligations and continues to grow the system with regard to reserves.
The Michigan Constitution does not allow the City to give away property for private uses.
The new parking structure would provide an additional 414 parking spaces above what is available today.

City Manager Valentine responded that "Responding to questions from Commissioner Hoff, City Manager Valentine explained it is a 30-year bond issuance; the few years of interest-only payments during construction are included. He went on to say that when the bonds get to the ending cycle, the administration would look to refinance the bonds taking advantage of better rates just like other bonds in past years.

07-168-19 CONSTRUCTION AGREEMENT BETWEEN OWNER (CITY) AND DEVELOPER (WOODWARD BATES PARTNERS, LLC)

Attorney Joe Fazio, specialist in P3 (public private partnerships), of Miller Canfield Law firm provided clarity requested at the June 24, 2019 Commission Meeting.

Mr. Fazio pointed out two (2) changes made to document 2.25. The first is a revision in the third to last line; that the developer's indemnity obligation extended to third party claims that would be made against the City or the City's indemnified parties (Commission, Administration, employees, volunteers, etc.).

The second change was a typo in the Notice Provision in Section 11.8 in identifying the owner; corrected "Owner of Birmingham" to "City of Birmingham".

Commissioner Sherman, in reference to Section 6.5.2.2. believes that the new language added here was in response to his question.

- Mr. Fazio agreed that it was new language clarifying that savings realized from the contract cannot be used against allowance line items.

Commissioner Harris asked how we could reconcile the favorable language in Section 6.5.2.2 with the last sentence of Section 6.3 allowing the developer to offset expenses which come in under budget with cost overruns.

- Mr. Fazio responded that his AIA colleagues advised him that the reference to line items is part of the underlying budget. While allowances are a part of the aggregate cost, it is understood that line items, not marked as allowances, do not go in the same bucket for the purpose of computations of cost savings.

Commission Harris expressed concern that Section 6.3 would compromise the City's rights under this new provision.

Mr. Fazio pointed out that he added language in the AIA form Section 12.3 to say the City's right to use plans and specifications for the deck are a transferrable, irrevocable, and exclusive license for the benefit of the City.

Commissioner DeWeese asked for the legal definition of a non-material modification as used in the suggested resolution.

- Mr. Fazio responded that it depends on the context. An example of non-material modifications would be minor extensions of times, minor corrections in the contract, things that do not change the substance of the transaction, economics of the transactions, or the performance deadline dates.

Mr. Fazio explained the City bears the burden of cost overruns related to change orders because the definition of a change order is a change in the design and scope of the project, initiated and approved by the City.

Indemnity Clause

Mr. Fazio responded to a question raised while the document was being circulated, which was the collectability of WPB as the developing party for purposes of the indemnification obligations that are built into the four corners of the development agreement. He went on to say that a layered approach was created to assure the City would be indemnified in all cases where it is appropriate for that indemnification to occur, with the exception of the City causing the injury or giving rise to the liability. In that context, Mr. Bojee has agreed to guarantee the indemnity obligations of WBP to the extent that the other mechanisms for indemnity do not occur. The indemnity obligation would be capped at \$10 million. In the event of a claim by the City and WBP does not make good on it, Walbridge does not make good on it, or insurance does not cover the damages, the City would have a claim against Mr. Bojee personally. It is unsecured, but Mr. Bojee's financial statements were examined at the beginning of the project.

Mayor Bordman expressed concern with the stability of Mr. Bojee providing backing for his personal guarantee. Mr. Fazio agreed that things with Mr. Bojee could change possibly leaving the City without the guarantee.

Commissioner Sherman requested more time to review the guarantee, and asked for a redlined copy of the agreement between owner and developer from the first presentation until now.

Commissioner Harris observed that the developer, Walbridge, and insurance obligations indemnify the City, and asked if it is industry practice to obtain an individual guarantee protecting the municipality in your experience. Mr. Fazio responded that it is not.

Mayor Bordman noted the Commission needs to read the indemnity agreement with care in order to know the true protections to the City.

Commissioner Harris agreed with taking the necessary time to read the guarantee, and he takes heed of the fact that having the developer be the sole indemnity is a problem. The fact that Walbridge is an additional indemnitee to the City provides great comfort. At the same time, the commissioners will take additional time to review and be sure that the guarantee provides the protection that the City is entitled.

Mayor Bordman asked what the insurance limits are. Mr. Fazio said he would have to refer to the document to confirm the limits. He further explained that the deal was structured such that the insurance maintained by Walbridge is the primary. On page 39 of the AIA form there is a description of insurance provided by the development team. It includes builders risk, property insurance, boiler protection, and appropriate waivers to subrogation. The CGL is \$2 million combined single limit per occurrence and \$2 million general aggregate.

Mayor Bordman presented research on crane accidents from 2011 to 2015 and stated she feels that \$10 million may not be sufficient.

Mr. Fazio reviewed insurance coverage:

- First line of defense is Walbridge's insurance.
- Next line of defense is Walbridge itself because it is a company obligated to provide protections and indemnity to the City.

- WBP is an obligor, in the agreement between owner and developer backed by insurance obtained by Walbridge (workers compensation insurance and general liability at \$3 million annual exposure) and are obligated to builders risk and property insurance.
- Section 9.4 is a waiver of subrogation
- Professional liability insurance

City Manager Valentine mentioned that in review of the construction agreement, the revised format for the Guaranteed Maximum Price (GMP) is included as requested at the last meeting.

Zara Brogland, Jones Lang LaSalle (JLL), said JLL has been reviewing and validating numbers in the proposal and the formulated GMP. In the last GMP review meeting, the developer proposed three (3) viable options that could potentially save money for the City. The third option was to eliminate the underground parking in Building 2 resulting in an additional \$211,000 savings on top of what was originally proposed. In the newly formatted GMP, per City request, the partners included full allowances for other costs the City might face. The total GMP of \$57,644,355, includes \$1.6 million in allowances and a \$360,000 payment and performance bond. With the new format, each cost was clarified line by line.

Commissioner Sherman wants clarification on the GMP listed as \$57,644,355, should it be \$57,344,355. Because of the three items that Commissioner Hoff was talking about are City expenses that do not have anything to do with the developer directly. They are the City's cost if incurred and should not be a part of the GMP. He previously requested a breakdown of the design build fee and WPB administrative cost. He recognizes that he has a description in the documents before him, but not the cost.

Ms. Brogland explained that the breakdown comes to 5% for the design build fee totaling \$2,687,000 and 3% for WPB administrative cost fees totaling \$1,690,000, derived from total construction cost plus indirect cost.

Commissioner DeWeese expressed that some citizens are asking why the developers are overseeing the development, based on the overlap of the people. He wants to be sure there is no conflict of interest.

Mayor Bordman stated that the next item for discussion is the RFP for owner representative who will oversee everything on the City's behalf. The owner representative adds another layer of protection for the City.

Ms. Brogland expressed that per contract the owner's representative will have full visibility of all the numbers represented in the GMP.

City Manager Valentine said the genesis of Commissioner DeWeese's question was why the developers are serving both roles. The answer is that it was designed that way with the development of the RFP. The development of the RFP stipulated this would be a design build arrangement and that is why this relationship exists.

Commissioner DeWeese feels that public needs clarification as to why the City decided on that direction. He felt that normally a design build arrangement leads to less cost, but it also has some other risks. He noted the Library is a good example of where we have done something similar, and using it as an example would help increase public understanding.

City Manager Valentine confirmed the Commission does not need to take action on the agreement tonight. These documents are all part of the contingency process that still has to occur so not taking action tonight will not delay the project. The contingencies that exist still must be met for the project to move forward.

Commissioner Hoff referred to two exhibits that were not provided:

- Exhibit D – Escrow Agreement, and
- Exhibit E – Owners Standard Application and Certificate for Payment.

City Manager Valentine explained the exhibits are dependent on actions that must still occur during the contingency period, which runs through August 2nd and could be extended to whatever the commission is comfortable without jeopardizing the pricing established with the GMP.

Mayor Bordman explained that there are differences in what happens with a contract. What the commission is looking at now still has to have further refinement. When it comes back, the commission will not enter into a final agreement; but accept the form of the agreement. No action would take place until contingencies are met.

07-169 -19 RELEASE OF OWNER’S REPRESENTATIVE REQUEST FOR PROPOSALS (RFP) FOR PROFESSIONAL SERVICES TO OVERSEE DEMOLITION OF EXISTING NORTH OLD WOODWARD PARKING STRUCTURE, CONSTRUCTION OF NEW PARKING STRUCTURE, AND EXTENSION OF BATES STREET

Assistant City Manager Gunter presented an overview of the scope of work for the owner’s representative.

Mayor Bordman noted that within the request for proposals, the City included language stating that the person/firm selected will not be contracted unless the City goes forward with the project.

Commissioner Hoff asked who would be the City contact to receive the monthly list of requirements from the Owner’s Representative. Ms. Gunter replied that it is yet to be determined but she envisions that it would be a combination of both she and City Manager Valentine going through the documents with assistance from the Engineering Department.

Ms. Gunter, responding to Commissioner Hoff, explained that in the RFP attachments there is information that gives bidders insight as to who the development team is. She noted she expects the bidders to do some research.

City Manager Valentine clarified that Attachment E, not included in this packet, would be a draft of the construction agreement to date between the owner and developer, which would clarify the identity of the developer.

Commissioner DeWeese felt that before issuing an RFP, the Commission needs to approve an agreement between the owner and developer.

David Bloom, 59 Stanley Blvd., referencing the 3% fee in the developer’s proposal to manage the development, felt that it is highly unusual and inappropriate for the developers to pay themselves \$1.7 million dollars to manage themselves. Therefore, if an owner’s representative is retained to

do that work and make sure that the developers are doing what they need to do; then that is the route that the City should take and not duplicate services.

The Commission clarified:

- The fees for the owner’s representative would be paid from the automobile parking system, which qualifies as an eligible expense for reimbursement through the bond.
- There will be no cost at all until the project is approved and actually commences.

MOTION: Motion by Commissioner Hoff, and seconded by Mayor Pro Tem Boutros: To authorize the release of the Owner’s Representative Request For Proposals (RFP) for professional services to oversee the demolition of the existing North Old Woodward Parking structure located at 333 N. Old Woodward, construction of a new parking structure with expanded capacity at the same site, and the extension of Bates Street from Willits to N. Old Woodward.

Commissioner DeWeese stated that he would be supporting the motion because whatever happens in any other forum, the City needs to protect itself and have oversight. Even the people who object to this project, if the project proceeds, will find it in the interest of the greater public good to have an owner’s representative.

VOTE: Yeas, 6
 Nays, 0

**07-170 -19 REVIEW OF PRELIMINARY DRAFT GROUND LEASE FOR SITE #2
FOR THE BIRMINGHAM N.O.W. PROJECT**

Mayor Bordman announced there would be no action taken on this document tonight.

City Manager Valentine gave an overview of this piece of the Birmingham N.O.W. Project.

Mayor Bordman emphasized it is not the City that is engaged with RH. WBP have found a tenant for the building they will build. The City is not engaged with RH with respect to any aspect of the lease that would be put together with WBP.

Mr. Fazio presented the preliminary working draft of the ground lease for Building 2. Economics are not included nor does it have critical time periods stated. He further gave an overview of a ground lease and the unique attributes of a ground lease.

Mr. Fazio confirmed the lease ties to the zoning requirement today and to any future zoning changes

Commissioner DeWeese asked if the zoning is tied into the zoning for the adjacent non-public property.

- City Manager Valentine confirmed Commissioner DeWeese’s understanding
- Section 6.1, Page 20 of the Ground Lease articulates that the uses available at that location are those permitted under the D4 Overlay Zoning District, which is the adjacent property.

Commissioner Hoff asked who will be the developer of Building 2. Mr. Fazio explained the tenant in the ground lease will be a standalone legal entity as it will be for Buildings 4 and 5. The entity for Building 2 is identified as WBP #2, LLC.

Commissioner Hoff also noticed it is a Delaware Liability Company, and asked why. Mr. Fazio responded that the financing that is necessary for the project would require that they comply with certain lending parameters and those financing sources require that the borrowing entities be Delaware limited liability companies.

Commissioner DeWeese asked what happens if this entity, with 51% control, ceases to exist. Mr. Fazio explained it would be a default on the ground lease. The entity has an obligation to maintain their legal existence.

Responding to Commissioner DeWeese, Mr. Fazio indicated:

- There are options to modify the terms.
- In a ground lease, the tenant is responsible for all costs and operations, which includes insuring, paying taxes, and maintaining the property.

Commissioner Hoff asked if the partners in WBP, Project #2, LLC are the same as the WBP.

- Mr. Fazio referred to the definition of key persons on page 4. They are Mr. Bojee of the Bojee Group, Mr. Ricolta of Walbridge, Mr. Saroki of Saroki Architecture, and Mr. ~~Robinson~~ Robertson of ~~Robinson~~ Robertson¹ Brothers; that is the development team awarded the entire project. Therefore, the four entities and their affiliates will be the venture partners of every entity that does this project until complete.

Mayor Bordman, in reference to Section 3.1B, asked what the guidelines are for establishing rent. Mr. Fazio replied that it begins with fair market value of the property. The City has established in other ground lease transactions a non-binding protocol for lease/rent payments. He also stated that under the Constitution of the State of Michigan, it is not permissible to give away property. Therefore, fair market value must be used.

City Manager Valentine expressed that a more in-depth approach was taken in assessing this property and is ongoing. The analysis is close to completion. Ms. Broglund explained how the initial analysis was done based on 100-year leases in other comparable markets and calculations received from the developer to establish fair value, which is standard in real estate transactions.

Mayor Bordman requested that Section 4.5 and Section 6.1 are cross-referenced. She also asked if the sub-tenant at some point vacates the building, is there a provision for the tenant to pursue a different tenant. Mr. Fazio explained that it is the responsibility of the developer.

Mayor Bordman noted that it is good for other retail with a private owner receiving income, but this Commission has a City to run and an unoccupied five-story building is not to the City's benefit and believes that this aspect of the ground lease should be negotiated to reflect an obligation by the tenant to keep full occupancy.

¹ As Corrected on June 22, 2019.

Commissioner Sherman questioned why there is a requirement by the City to notify the tenant of late payment in order to charge late payment fees and believes that the requirement should be removed. Mr. Fazio agreed

Commissioner Harris asked if the form is generally amenable to the tenant, and is the status of the tenant's attempt to obtain leasehold financing known. Mr. Fazio confirmed the tenant is amenable, and that it is premature for the tenant to obtain financing until a deal is made on the economics of the lease.

Mayor Bordman asked, in reference to Section 26.4A, what interest does the City have in the leased premises. Mr. Fazio explained that the City's interest is as fee owner of the land. The clause limits the City's liability to contract damages.

Mayor Bordman called for public comment on the proposed ground lease presented.

David Bloom understood that the lease rates would be negotiated on a piecemeal basis. Mayor Bordman corrected his understanding by stating that the City does not negotiate with the tenants. The City and Developer would enter into ground lease for Building #2.

Mr. Bloom continued to state that the intent of this project was to have one developer develop the whole area. He believes that the citizenry should know ahead of time what that lease looks like. Once the City is doing something with the developer, it is not easy to say that it is going to do four or five with another developer. Mr. Bloom thinks it is beneficial and in the City's and maybe even the developer's interest to have this whole deal negotiated beforehand with what the lease would look like. Because he would hate to see the City negotiate on Building #2 and then later start talking about Buildings #4 and #5 and now are at a disadvantage because the developer is already in #2. One of the reasons there is a parking shortage in town is because we have offices in town that did not include new parking. He went further to say, that if the RH venture does not work and a new tenant is needed, an office may be the easiest tenant to occupy the space. If offices goes into the building, the City would be doing something detrimental to the parking system. He would like to see a SLUP or something that would prohibit or limit office use if this venture does not work. Residential might be preferable. In addition, in reference to the myths illustrated earlier, there was a rate of \$417,000/year as a flat rate proposed by developers that the City decided to go with. There was no other information that could be found as to what the rate would be for this. What we have now is that the upcoming election was rushed. Voters are voting and they do not know what they are approving.

Mayor Bordman advised Mr. Bloom that the voters are voting on a parking structure and the extension of Bates Street only.

IV. ADJOURN

Mayor Bordman adjourned the meeting at 9:29 p.m.

J. Cherylynn Mynsberge, City Clerk