

APPROVED

OCT 21 2009

REPORT OF GENERAL MANAGER

NO. 09-272

DATE October 21, 2009

BOARD OF RECREATION and PARK COMMISSIONERS

C.D. 15

BOARD OF RECREATION AND PARK COMMISSIONERS

SUBJECT: EAST WILMINGTON GREENBELT COMMUNITY CENTER – TERMINATION OF TWO REAL PROPERTY DONATION AGREEMENTS WITH UNION PACIFIC RAILROAD COMPANY AND REOPENING OF ESCROW FOR THE CENTER’S EXPANSION

R. Adams	_____	J. Kolb	_____
H. Fujita	_____	F. Mok	_____
S. Huntley	_____	K. Regan	_____
V. Israel	_____	*M. Shull	<u>RAH</u>

[Signature]
General Manager

Approved _____

Disapproved _____

Withdrawn _____

RECOMMENDATION:

That the Board:

1. Authorize staff to give notice to Union Pacific Railroad Company (UP) and the Escrow Holder, which is Chicago Title Company, that the City is electing to terminate Donation Agreements Nos. 1794-76 and 2504-65 and the related escrow concerning the acquisition of property owned by UP, Assessor Parcel Numbers (APN) 7425-011-803 and 7425-011-804;
2. Authorize staff to request the assistance of other City entities, including the City Attorney, the City's negotiator, and the Bureau of Engineering, in drafting, renegotiating and executing successor Donation Agreements and Escrow Instructions;
3. Authorize staff to request the assistance of the State and other City entities in gaining approval for a two-tier Remedial Action Plan with Phase I, involving initial soil remediation, to be implemented upon the close of escrow and to reflect the City’s intent to leave the site fenced and temporarily closed to public use and Phase II, involving the completion of this remediation plus groundwater treatment/monitoring, to be implemented upon receipt of full project funding; and,

REPORT OF GENERAL MANAGER

PG. 2 NO. 090272

4. Authorize staff to work with the "L. A. for Kids" Steering Committee to secure an extension of the grant deadlines from the Proposition 40 State administrators and also to consider whether continued project delays warrant a request to rescind the Proposition K grant award.

SUMMARY:

Background:

Four years ago, the City began negotiating with UP to acquire property having the address of 845 North Sanford Avenue, totaling 2.43 acres. The APNs are 7425-011-803 and 7425-011-804. The new East Wilmington Greenbelt Community Center, across Sanford from the UP site, is too small for sports fields or an outdoor play area. The City can provide them by acquiring and developing the UP site.

As specified in the Proposition 40 Urban Park grant, the proposed recreational development includes both a ball field and a soccer field. Also planned are sports-field lighting, bleachers, picnic tables, landscaping and a small parking lot within a secure, fenced setting. While not specified in the grant, the Department may in the future wish to add a small, modular restroom so that the public does not have to cross Sanford and use the restrooms in the Community Center.

On August 9, 2006, the Board gave preliminary approval to enter into negotiations with UP (Report No. 06-223). On June 4, 2008, the Board President and Secretary were authorized to execute a Purchase and Sale Agreement (Report No. 08-164, Resolution No. 10237). The purchase price had been \$1.2 million but in partial recognition of the need for environmental cleanup, UP agreed to sell the two parcels to the City for \$100.

The City project team had recommended the Board's approval based on recent communication with UP; however, the team soon found that an impasse developed regarding liability, indemnification, further environmental testing and information on the past use and present condition of the site. Staff presented this impasse to the Board on June 18, 2008 (Report No. 08-189) and on July 9, 2008, in a follow-up, Informational Report. On July 23, 2008, the Board considered the acquisition in closed session in accordance with Government Code Section 54956.8. On August 20, 2008, the Board rescinded its approval, given UP's unwillingness to modify any terms of the transaction (Report No. 08-229).

The Councilmember for the Fifteenth District strongly supports the acquisition. On September 2, 2008, pursuant to Charter Section 245, the Councilmember introduced a motion for Council to assert jurisdiction over the Board's rescission and then to veto it. The motion to assert jurisdiction was adopted on September 9, 2008, and the matter was referred to the Arts, Parks, Health and Aging Committee. Council vetoed the Board's rescission on September 23, 2008 (Council File No. 08-2276).

REPORT OF GENERAL MANAGER

PG. 3 NO. 09-272

This action reinstated the Board's adoption of the Resolution approving the acquisition. Attempts to negotiate with UP continued. The City project team simplified the design for site development so that even with the acquisition delays, the construction schedule met grant deadlines. The team also planned for a "design/build" contract in place of the customary "bid/award" project delivery method. On October 3, 2008, the Board approved staff's recommendation that the acquisition proceed with the new strategy (Report No. 08-276).

Transaction Status and City's Election to Terminate:

Transaction terms are in two executed Donation Agreements, which superseded the Purchase and Sale Agreement. Donation Agreement No. 2504-65 (City Contract No. 115263) involves a segment 25-feet wide along the northern border of the property; the segment has two underground petroleum pipelines and above-ground equipment that UP leases to another firm. UP will retain an easement over this segment and continue receiving revenue from the third-party use. The other Donation Agreement, No. 1794-76 (City Contract No. 115262), concerns the rest of the adjacent UP site. Escrow opened on March 31, 2009.

Escrow is supposed to close within 240 days or by November 25, 2009; however, Article 5, Sections 4-6 of both Agreements permits the City to terminate them without penalty within 210 days of opening escrow. This is the "feasibility review period". The City may determine that it is not feasible to comply with terms in the Agreements involving environmental remediation and funding or other development issues. If it exercises the option to terminate, the City must deliver written notice to UP by October 26, 2009 (Section 12.9 of both Agreements).

If the City does not exercise the option by the 210-day deadline, the City is obligated to fulfill all the terms of the Agreements by the closing date of escrow or seek UP's permission to extend the date. Given the difficulty the project team has encountered in prior negotiations, it seems best to protect the City's interests by giving notice to UP disapproving of matters set forth in the City's feasibility review. The notice would state to UP and the Escrow Holder that the City has elected to terminate the Agreements. Staff also seeks Board authorization to negotiate successor Agreements with new, extended deadlines. In the meantime, there are the following issues to resolve.

Issue: Project Funding Shortfall and Grant Requirements/Deadlines

The available project funding is as follows: \$3 million in the Proposition 40 Urban Park program, \$150,000 each in discretionary Proposition 40 Per Capita and Roberti-Z' Berg-Harris (RZH) grants, \$1 million from the fifth competitive cycle under Proposition K and \$1,067,530 from the Capital Improvement Expenditure Program (Council File No. 07-2877-S3). These sources total \$5,367,530. The Project Manager from the Bureau of Engineering estimates that remediation and development costs will be nearly \$7,310,000. The sum includes \$2.5 million for soil and \$1 million for groundwater cleanup. The project shortfall is at least \$1.9 million and will increase if costs for environmental remediation exceed the estimates.

REPORT OF GENERAL MANAGER

PG. 4

NO. 09-272

Even with adequate funding, there are timing issues because of continuing delays with site acquisition. Based on the most recent completion schedule, the project will not meet the current Proposition 40 Urban Park grant deadline of June 30, 2010. The deadline requires that the recreation project be completed, open to the public and all accounting documentation submitted to the State by March 31, 2010. Even without further delays, the earliest date for completing construction will be mid-August 2012. This time line requires a 2½ year extension of the Urban Park deadline. An extension of 1½ years is needed for the Proposition 40 Per Capita and RZH grants.

Proposition 40 State administrators advised the Department that they cannot approve a multi-year extension but must act on a year-to-year basis. An initial extension would have to be requested and approved in the fiscal year that the grant is scheduled to liquidate, which for the Urban Park grant, began July 2009. A similar request will be needed during the fiscal year beginning July 2010 for the Per Capita and RZH grants. Discussions with the State on grant policy will continue.

If sufficient grant extensions are approved but because of lack of funds, the recreational project is not completed by the new deadline, all expended Urban Park funds will have to be returned to the State. Therefore, staff requests that the Board consider an acquisition-only project, with the Department temporarily “land banking” and securing the site. Doing so means that the Department will forfeit the \$3 million in Urban Park funds. By contrast, the \$300,000 in Per Capita and RZH funds will not be forfeited. Either the project scope can be modified or the funds reallocated to another project.

As for the Proposition K award of \$1 million, the funds cannot be used for acquisition but only for site development. With the funding shortfall and other uncertainties, it is possible that the grant should be rescinded some time before 2011 with any funds already spent to be reimbursed. The City could reapply for funding in a future competitive cycle.

Acquiring the UP site, phasing in environmental remediation and delaying recreational development will resolve issues related to the current funding shortfall and grant deadlines. The Community Center can be expanded and developed onto the newly acquired property as funding becomes available. However, UP may be unwilling to accommodate a plan that would change terms in the Donation Agreements on environmental remediation. These current Donation Agreements specify that before closing escrow, the City must have approval from UP and public regulators for all required environmental remediation and must demonstrate the ability to fund this work. In the past, UP has insisted on these and other terms intended to guarantee, after escrow closes, that they do not have any future liability for the site.

Issue: Environmental Remediation

The UP site is a brownfield. The former railroad right-of-way once had an electrical substation, two oil wells and three above-ground, petroleum storage tanks. Two functioning, underground pipelines remain along the northern border, which is the reason UP wants an easement (Donation Agreement

REPORT OF GENERAL MANAGER

PG. 5 NO. 09-272

2504-65). Previous Board Reports noted that environmental studies of the rest of the site have disclosed significant soil contamination, including widespread, high concentrations of arsenic and moderate amounts of lead, heavy hydrocarbons and PCBs. Remediation of the metals will require some disposal at a hazardous landfill, but the site's size and the estimated remediation costs have caused City geotechnical staff to propose an in-place plan called "fixation and capping". The plan involves excavating the upper six feet of soil, removing from the site the most contaminated portion of this soil and treating the rest with a cement-like substance that will harden and permanently bind the metals in place. Then the site is capped with a two-foot replacement layer of clean soil.

City geotechnical and environmental staff have received preliminary, informal approval of this plan from the State Department of Toxic Substances Control (DTSC). The plan is expected to cost \$2.5 million and does not include groundwater cleanup. Other work such as drainage improvements, final grading and installation of a retaining wall will become part of site development and be included in those costs.

A groundwater assessment was completed after October 2008, when staff last reported to the Board on the project. The groundwater is contaminated with gasoline-related hydrocarbons such as benzene. Off-site sources are possible. One source is suggested by the fact that contaminants were found in the southwestern part of the UP site near a privately owned, vehicle storage/scrap yard. The highest concentrations were found near the functioning, underground pipelines at the northern end of the site. If the City pursues the acquisition, UP should be asked to require their lessee, before the close of escrow, to conduct pressure and other tests to assess the physical integrity of the pipelines. Given staff's past experience, UP is unlikely to grant the request.

DTSC may require more groundwater sampling plus a feasibility and then a pilot study of proposed remedial methods. DTSC and City staffs are drafting an action plan that includes five years of groundwater monitoring, which seems an adequate period given the City's current data. City staff estimates that total costs of this groundwater plan may be \$1 million.

Soil remediation must precede site development. Groundwater remediation and monitoring can begin before site development and co-exist with it and with public use of the site. Staff can use recessed wells and piping and locate a small, fenced treatment unit to one side. The current estimate of \$3.5 million for implementing soil and groundwater plans could increase 20-25% if the DTSC requires additional study or tasks. The agency may do so since the storage/scrap yard has encroached onto the UP site, preventing its complete environmental characterization. The added costs could range from \$700,000 to \$900,000.

Because of the overall funding shortfall and the fact the DTSC has not yet approved a formal, complete remediation plan, staff recommend first seeking approval for a modified plan. It would include securing the site and initially not providing for public use. The lesser remediation can be funded by the nearly \$900,000 remaining from the allocation from the Capital Improvement Expenditure Program.

REPORT OF GENERAL MANAGER

PG. 6 NO. 09-272

Status: Compliance with the California Environmental Quality Act (CEQA)

Department staff recently reviewed an expanded Initial Study of the proposed project. The Study includes both environmental remediation, including results of the recent studies, and recreational site development. Staff determined that there may be some significant impacts that could be reduced or eliminated through mitigation. Therefore, staff revised initial CEQA findings and prepared a Mitigated Negative Declaration (MND). The draft MND is ready for release to public agencies and others for the required 30-day period for public review and comment. Depending on the number and nature of the comments received, staff will need an additional four to six weeks to prepare responses and the final MND. It will support implementing the complete project if this is the City's course of action.

The MND is based on current negotiations with DTSC. Once they approve a Remedial Action Plan and a Voluntary Cleanup Agreement, staff may need to revise the MND. If any revisions resulting from newly required tasks add to the environmental impacts, the revised MND may need to be recirculated for another 30-day period. This review has to be completed before DTSC gives approval for the City to proceed with the Remedial Action Plan. At that time, staff will request that the Board adopt the final MND.

Issue: The Impact of Encroachments on Remediation and Site Development

The privately owned parcels extending from the southern border of the UP site to Anaheim Street are used as a vehicle repair business and a storage/scrap yard. Over the years, the firm has expanded its storage operation onto the UP site, completely occupying one lot of parcel 7425-011-804; vehicles are scattered on two other lots of the parcel. The main encroachments occupy approximately 6.6% of the parcel, and UP is aware of them. The City tried to include in the Donation Agreement for parcel APN 7425-011-804, a condition whereby UP would have the encroachments removed before the close of escrow. UP refused.

It is unknown if or how easily after the close of escrow the City could legally have the firm relocate the encroaching vehicles and scrap parts onto its own property. Resolving the situation could take months. There is also the potential contamination of this area, which was excluded from previous assessments because of lack of access. That situation could increase the current estimate of \$3.5 million for soil and groundwater remediation.

As for interfering with the conceptual plan for developing this area, staff conclude that the encroachments will affect, but not prevent, the construction of a Little League ball field. Until the area is cleared and if needed, cleaned up, the outfield must be shortened. The encroachments will also interfere with the installation of some sports-field lighting. These two features are required under the Proposition 40 Urban Park grant.

REPORT OF GENERAL MANAGER

PG. 7 NO. 09-272

The Assistant General Manager of Operations East and the Superintendent of Pacific Region concur with staff's recommendations.

FISCAL IMPACT STATEMENT:

The budget shortfall for the project, including current remediation costs and site development, is estimated at \$1,950,000. If DTSC requires work in addition to that already proposed in initial briefings, the shortfall could increase to \$2.8 million. The increased estimate includes some costs for cleaning up the area under encroachment but does not include the removal of the vehicles and scrap since staff has no basis for assessing these costs.

There is also uncertainty about obtaining a sufficient extension of the current deadline for the Proposition 40 Urban Park grant. Staff recommends that, at present, the City not use these funds because of being unable to meet the requirement to have a completed project, ready for public recreational use, by the current deadline. If this situation occurs, the City will have to repay whatever grant funds were spent. There is a similar project-completion requirement for the \$1 million in the Proposition K grant although program guidelines make the deadline more flexible.

This report was prepared by Joan Reitzel, Senior Management Analyst in Real Estate and Asset Management, Planning and Construction Division, with the assistance of project personnel from the Department's Grants Administration and from the Bureau of Engineering.