

APPROVED
JUN 18 2008

REPORT OF GENERAL MANAGER

NO. 08-189

DATE June 18, 2008

BOARD OF RECREATION
and PARK COMMISSIONERS

C.D. 15

BOARD OF RECREATION AND PARK COMMISSIONERS

SUBJECT: EAST WILMINGTON GREENBELT COMMUNITY CENTER – DIRECTION TO STAFF ON WHETHER TO PROCEED WITH THE ACQUISITION FOR EXPANSION

R. Adams _____	J. Kolb _____
H. Fujita _____	F. Mok _____
S. Huntley _____	K. Regan _____
V. Israel _____	*M. Skull _____

with direction to staff - see attached (up file)

[Signature]
General Manager

Approved _____ Disapproved _____ Withdrawn _____

RECOMMENDATION:

That the Board direct staff with respect to continuing or ceasing activity intended to acquire, remediate and develop two adjacent parcels totaling 2.43 acres and owned by Union Pacific (UP) Railroad as described in Resolution No. 10237, adopted by the Board at its meeting of June 4, 2008 (Report No. 08-164).

SUMMARY:

On June 4, 2008, the Board gave final approval to acquire two vacant parcels (APNs 7425-011-803 and -804, UP folder 1794-76) in the community of Wilmington, across Sanford Avenue from the Department’s new community center. At the time of seeking this approval, Department and other City staff had concluded that a mutually acceptable Purchase and Sale Agreement (PSA) could soon be executed. Staff also thought that the City had estimated accurately the tasks and costs of the site’s environmental remediation, given the expectation that the final terms of the PSA would reflect a minimally acceptable, limited level of future liability for the site. Subsequent communications with UP’s real estate staff on certain terms of the PSA indicate that further disclosure to the Board is warranted with further direction sought concerning the acquisition. The issues and UP’s positions are outlined below. UP indicated on June 10, 2008, that these positions are final. They continue to agree to donate the two parcels, totaling 2.43 acres, for the nominal sum of \$100. For this reason, the most recent versions of the PSA have been titled a “Donation Agreement”.

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Environmental Remediation/Liability

Board Report No. 08-164 states that the City's Geotechnical Division had recommended a course of action for soil remediation that was estimated to cost \$2.5 million. The report also described the actions to be taken in response to discovering arsenic, lead and other contamination. The latest Donation Agreement states that in the past the site, besides being a railroad right-of-way, has had an electric substation, two oil wells and three above-ground, petroleum storage tanks. In the course of the Phase II assessments performed on behalf of the City, there were two samplings of groundwater close to the area of underground fuel pipes; these pipes extend along the northern border of the northernmost parcel. The samplings disclosed the presence of volatile organic compounds, including the carcinogen benzene. Accordingly, the City added a provision to the Donation Agreement indicating that UP was to bear liability connected to groundwater contamination. UP has refused.

There may be further groundwater contamination away from these two samplings, for instance, the presence of a contaminated groundwater plume. City geotechnical staff estimates that a complete groundwater study will cost approximately \$30,000. If required by regulatory agencies, the installation and monitoring of wells to obtain further data will cost approximately \$200,000 over an expected two-year period with the costs of groundwater remediation ranging from \$500,000 to \$1,000,000. This combined total of \$730,000 to \$1,230,000 is in addition to the \$2.5 million already identified and allocated for soil remediation. The City's current plan does not include any remediation of the area called the "pipeline segment" because at the time of estimating activity/costs, it was thought that UP would retain ownership of the segment and that it would be fenced off from the public. This is no longer the plan because of the difficulty in processing a "lot split".

UP is unwilling to accept any environmental or other liability for their property, including the pipeline segment. This refusal puts the City in a difficult position since UP has not provided documentation that might relate to the site's past or current legal status or use. UP requires the City to give it a full release regarding any and all conditions or liability from the past extending into the future and to be indemnified and defended from all risks and costs relating in any way to the entire property.

Easement for the Pipeline Segment

A condition of the acquisition is that UP will retain a perpetual easement over a segment, 25 feet wide, that contains the underground pipelines and the attached, above-ground manifold valve and pump station. UP will then continue their current arrangement with the firms of Kinder Morgan and Phillips Petroleum on the use of this equipment and will continue collecting revenue. If UP is granted an easement, the City needs to have terms ensuring that the future use of the segment by any third party adheres to applicable regulations. The City should also require periodic submittal of State Fire Marshall inspections, etc. The City needs protection if it becomes the fee owner of the segment since UP insists that the City accept full liability for any future activity or condition.

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It is unclear to what extent the City would have effective use of the surface of the pipeline segment or easement, which occupies about a tenth of the total UP site. The transfer document specifically focused on the segment forms a separate Donation Agreement, recently developed by UP and labeled "2504-65". Most of the terms match those in the original Donation Agreement, which is labeled "1794-76" and concerns the rest of the UP property; however, there are severe restrictions on the City's future use of the easement's surface.

Article 1 (a, b) of Donation Agreement No. 2504-65 states that in addition to leaving the pipeline easement unencumbered by structures, the City cannot "make any improvement" to the easement "without the prior written approval of Seller, its successors and assigns" as well as the approval of the two private firms having a license agreement or lease with UP and their "successors and assigns". The City is not to "interfere in any manner with the rights" of these two firms contained in their agreement/lease with UP. Finally, the City is forbidden to fence off the easement, including the above-ground valve manifold and pump station; this prohibition will leave the equipment vulnerable to vandalism and accidental damage from the general public.

A literal interpretation of these terms would keep the City from initially landscaping the surface of the easement for passive public use unless the City obtains written approval from all three entities. Taken together, these sections have the potential for creating onerous operational requirements for the City at the same time that the City is to retain all liability for any future condition of the easement.

Non-Disclosure or Submittal of Documents

Some time ago, the City Attorney requested that UP send documentation concerning any complaints or lawsuits, hazardous materials, leases and other agreements, etc., pertaining to the property's past use and present condition. There was no response from UP. In May 2008 the City first learned about the existence of two current agreements affecting the pipeline segment; one is with Phillips Petroleum, and the other is with Kinder Morgan. UP has declined to make these documents available to the City. UP has also been most concerned about the City's not disclosing to a third party environmental information gained from the Phase II assessments; for example, UP did not want the City to voluntarily seek to cooperate with the California Department of Toxic Substances Control on the development of a remediation action plan.

UP stated in a separate document on June 10, 2008, that they do not know of any legal impediment to the City's acquiring the property, including any relevant court actions. However, the City Attorney learned of Case No. BC 319170 filed in Los Angeles Superior Court in May 2006 in which UP is the plaintiff and the firms of Santa Fe Pacific Pipelines and Kinder Morgan are the defendants. The summary refers to an "ongoing dispute concerning Union Pacific's production of documents...concerning environmental contamination and/or clean-up on or adjacent to Union Pacific's (or its predecessor's) right-of-way." Attached to the summary are three lists of sites covered by the case. Several of those in Los Angeles seem unrelated to the Wilmington property, but it is not possible to determine the location of all the City citations. This case seems ongoing and

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related to a continuing, multi-year dispute between Kinder Morgan and UP on fees due UP for the use of pipelines beneath its property in California and elsewhere.

The City wanted escrow instructions to contain a provision regarding documentary disclosure, especially since the City is supposed to accept all current and future liability for the entire site. UP did not agree to the City's escrow provision but did agree to a very limited amount of disclosure. They are willing to disclose relevant real estate records kept in their Omaha, Nebraska, office and associated with certain physical "mile posts"; however, records citing the two Wilmington parcels that also cite other UP property need not be disclosed or made available to the City. Furthermore, UP declined to make an independent investigation of relevant documents or circumstances but instead will restrict its "representations and warranties" to those currently known to the Omaha real-estate liaison involved with the Donation Agreements.

The City's acquisition, remediation and development of the UP property would greatly enhance the public's use of the Department's new community center; that site is not large enough for outdoor sports. The preliminary design for the UP property includes two sports fields and another play area, security lighting, modular restrooms and a small parking lot. The direction being sought from the Board through this report is whether these advantages are outweighed by the potential liability and costs contained in the two Donation Agreements that UP considers to be final and non-negotiable.

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

FISCAL IMPACT STATEMENT:

There is uncertainty regarding the City's total, potential liability resulting from this project, given UP's terms in the two Donation Agreements and unwillingness to provide assurance that there are no legal issues involving the site. Moreover, there are not sufficient funds to add the \$730,000 - \$1,230,000 cost of groundwater testing and remediation to the total sum of \$5.5 million available for the project, which is to fund soil remediation and site development outside the pipeline segment. The \$5.5 million includes \$200,000 in remediation funds from the federal Environmental Protection Agency (EPA) that may be lost if not renewed in their next grant cycle; such an action did occur on another Department project. (The current EPA award is conditioned upon escrow closing by June 30, 2008).

There is a total of \$3.3 million available from Proposition 40. The grant deadline for the \$3 million in competitive "Urban Park" funding is June 30, 2010, while the deadline for the \$150,000 each in discretionary "per capita" and "Roberti Z-Berg Harris" funding is June 30, 2011. The planned amenities funded through these programs must be completed and ready for public use by the deadline. The project manager from the Bureau of Engineering indicates that if escrow does not close by September 2008, there will be insufficient time to meet the earlier grant deadline. The state is agreeable to the City's applying to relocate the project to a nearby site that will serve the same Wilmington community; however, staff has been unable to identify a substitute site large enough to

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accommodate the two sports fields, which are a requirement of the “Urban Park” grant. If the City does not acquire the UP property, the \$3 million in competitive Proposition 40 funds will be lost. The remaining \$300,000 in Proposition 40 funds can be used for another project at the discretion of Council District Fifteen. Even if the City does acquire the UP property, the need to test and monitor for groundwater contamination may delay the start of site development and hinder its progress so that the project could not be completed by the 2010 close-out deadline for the “Urban Park” grant.

This report was prepared by Joan Reitzel, Senior Management Analyst in Real Estate and Asset Management, Planning and Development Division.

EXCERPT FROM THE MINUTES OF THE SPECIAL MEETING
BOARD OF RECREATION AND PARK COMMISSIONERS
JUNE 18, 2008

08-189:

EAST WILMINGTON GREENBELT COMMUNITY CENTER – DIRECTION TO STAFF
ON WHETHER TO PROCEED WITH THE ACQUISITION FOR EXPANSION

President Barry Sanders instructed staff to continue negotiations with Union Pacific Railroad (UAP) and to seek an agreement that will not present any current or future liabilities that will cause the Department to exceed the approximate \$5.4 million dollars budgeted for this project.

Board Report 08-164, which directed staff to proceed with the acquisition of property for the expansion of the East Wilmington Greenbelt Community Center, is continued and is on file, but subject to the changes and instructions on negotiations as communicated by the Board.