

CITY OF NEWTON
IN BOARD OF ALDERMEN
FINANCE COMMITTEE REPORT

MONDAY, SEPTEMBER 20, 2010

Present: Ald. Gentile (Chairman), Ciccone, Linsky, Salvucci, Rice, Danberg and Fuller

Absent: Ald. Freedman

Also present: Ouida Young (Associate City Solicitor)

#201-10 HIS HONOR THE MAYOR requesting authorization to transfer the unobligated balances held by the City in two special appropriation accounts, totaling fifty thousand nine hundred sixty-six dollars and twenty-six cents (\$50,966.26), from Bradford Development's Sedimentation Chamber Fund and Traffic Mitigation Fund [special permit nos. 514-99(2) and 515-99(2)) and board order nos. 131-05 and 289-03(5)] to the Law Department's Judgment and Settlement Account and authorization for the City Solicitor to settle a claim brought by the developer and its successor to recover the unexpended funds in these two special appropriation accounts in accordance with the above special permits. [6/14/10 @6:13PM]

ACTION: **APPROVED AS AMENDED 7-0 @ \$43,466.26**

NOTE: The item was discussed at a previous Finance Committee meeting on September 13, 2010. The Committee held the item in order to receive a response from the developer regarding whether they will allow the City to retain use of the money in the traffic mitigation fund for a future project. Since that meeting, the Associate City Solicitor Ouida Young has corresponded with the developers' attorney. The letter sent by Ms. Young to the attorney after the September 13, 2010 was attached to the meeting agenda and the response from the attorney is attached to this report. The traffic mitigation fund began with \$25,000 in it and the city used \$7,483.74 before the five-year deadline. The developer has agreed to allow the City to retain an additional \$7,500 from the Traffic Mitigation Fund resulting in a \$10,016.26 refund to the developer from that fund. The \$10,016.26 is to be added to the \$33,450 that is unexpended in the Sedimentation Chamber Fund for a total refund to the developer of \$43,466.26.

Ms. Young stated that the refund is appropriate and more than what the developer is legally obligated to provide. Ms. Young clarified that the City and developer have been working together and there was never a risk that the City was going to be defaulted. Ald. Ciccone moved approval of the item as amended at \$43,466.26, which carried unanimously.

LAW OFFICES OF
WARREN H. BRODIE, P.C.

40 Grove Street, Suite 220
Wellesley, MA 02482-7702

Warren H. Brodie
wbrodie@whbrodielaw.com

John J. Gallagher
jgallagher@whbrodielaw.com

Tel:
(781) 235-1100

Fax:
(781) 237-8686

September 20, 2010

BY E-MAIL ONLY

City of Newton
Law Department
1000 Commonwealth Avenue
Newton Centre, MA 02459

Attn: Ouida C. M. Young
Assistant City Solicitor

Re: Refund of Mitigation Funds
Special Permits # 514-99(2) & # 515-99(2)
Cardinal Funding Group, LLC and Robert Fox
Vs. City of Newton
Middlesex Superior Court, C.A. MICV2010-01370

Dear Assistant City Solicitor Young:

I am in receipt of your letter of September 16, 2010 to which this will serve as a response. Cardinal Funding, LLC, as assignee of Bradford Development Corporation, is willing to agree permit the city of Newton to withhold \$7,500.00 from the Traffic Mitigation Fund. That would result in a refund in the amount of \$10,016.26 which is the original \$25,000.00 less the \$7,483.74 spent by the City less the additional \$7,500.00. This is to be added to the unexpended Sedimentation Chamber fund of \$33,450.00 for a total of \$43,466.26. This offer is made on the express condition that the Finance Committee approve the refunds at its special meeting on September 20, 2010, that the refunds be approved and appropriated by the Board of Alderman at its meeting on September 20, 2010 and that funds be actually paid within one week of the expiration of the appeal period on October 10, 2010. Upon timely receipt of the funds, I will file a notice of voluntary dismissal of the action with prejudice and without costs.

10 SEP 20 P 3:53
CITY CLERK
NEWTON, MA. 02459

City of Newton
September 20, 2010
Page 2

Frankly, I believe my client is being more than generous. A request for the return of the funds was made to Michael Kruse, then the City's Director of Planning and Development, approximately one year ago. Unfortunately, Mr. Kruse was terminated after Mayor Warren's inauguration with the result that the matter "fell between the cracks," leaving my client with no apparent option other than litigation. As to the litigation, your own opinion, as given to the Mayor on September 10, 2010, is that the developer or its assignees are entitled to at least \$50,966.26. The Mayor requested the Board of Alderman to appropriate that amount by his letter of September 10, 2010. We have accommodated the City by agreeing to not actively pursue the pending civil action based on representations that the matter would be brought to a prompt conclusion *five months ago*. In that time, I could have obtained judgment by default or by summary judgment, including interest at the rate of twelve percent from the commencement of the action.

My client has acted in good faith. I would appreciate your cooperation in bringing this matter to a conclusion. If you have any questions, please feel free to contact me.

Very truly yours,



WARREN H. BRODIE

cc: Robert Fox

WHB/abm