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April 2, 2015

Brad Schmidt
The Oregonian
1500 SW 1st Avenue, Suite 400
Portland, Oregon 97201

Lisa Gramp, Esq.
The Office of the City Attorney
1221 SW 4th Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Brad Schmidt on behalf of *The Oregonian* to disclose appraisals in connection with sale of property from Hoyt Street Properties to the City of Portland

Dear Mr. Schmidt and Ms. Gramp:

After due consideration, and for the reasons expressed in this letter, my office has decided to deny the request for the release of the appraisal information related to the acquisition of real property by the Portland Housing Bureau from Hoyt Street Properties, L.L.C.

Background

In 1997, the City of Portland (“City”) and Hoyt Street Properties, L.L.C. (“HSP”) entered into an agreement to develop thirty-four acres of property owned by HSP (the “Property”), situated roughly between 9th Avenue and 14th Avenue, and bounded by NW Irving Street and Naito Parkway. As expressly stated, the intent of the agreement was “to provide for timely private development and public investments on the Property and in the vicinity... to encourage a rich urban environment, with housing that reflects the income diversity of the City as a whole, an active street life, a strong network of pedestrian connections, significant open spaces which capitalize on the proximity of the district to the river, and a diversity of architectural styles and scales appropriate to an urban environment.” *See* Amended and Restated Agreement for Development Between the City of Portland and Hoyt Street Properties, L.L.C. (1999) (the “Agreement”).

To effectuate these ideals, the City committed to making public infrastructure improvements, including the construction of a new streetcar system and the acquisition of land

for the development of public parks. (Id. at 11-20.) The Agreement identified certain housing goals, setting forth a minimum percentage of affordable units HSP was bound to develop and requiring the City to assess HSP's compliance on the fifth, tenth and fifteenth anniversaries of the original 1997 agreement. (Id. at 24, Ex D-2.)

In the event the affordable housing goals were not met, the Agreement provided an exclusive remedy. HSP was to select a parcel, designated the Affordable Housing Parcel, to be sold to the City, at the City's request. The sale price was to be determined in an elaborate process by which the City and HSP would each appoint an appraiser to set the market value of the parcel. If the appraisers failed to agree on the value, an independent third appraiser's determination "will be binding on HSP and the City." The independent appraiser was required to make a final determination within 30 days of receipt of all information from the parties and closing is required no later than 30 days after the final determination. Finally, the Agreement provided that HSP may repurchase the Affordable Housing Parcel if the City fails to commence construction within 2 years of the closing. (Id. at 24-26.)

In September 2014 – after the fifteenth anniversary assessment had been extended two years from 2012 – the City determined that HSP was not in compliance and notified HSP of its intent to exercise the contractual remedy.¹ HSP identified the Affordable Housing Parcel and the appraisal process was commenced.² Last week the independent third appraiser completed its analysis and set the purchase price for the Affordable Housing Parcel. The Office of the City Attorney has represented that closing is expected to occur on April 24th after presentation to the City Council and public comment.

The Request

On March 10, 2015, Brad Schmidt submitted a public records request to the Portland Housing Bureau (PHB) on behalf of *The Oregonian*, seeking disclosure of:

- 1) Portland's appraisal of the affordable housing parcel designated by HSP
- 2) HSP's appraisal of the parcel
- 3) Independent appraisal of the parcel
- 4) Modified appraisal outlining value solely attributable to City investments
- 5) HSP's rebuttal
- 6) Independent appraiser's final determination.

¹ The Agreement envisioned 2,730 total units with 956 of them (35%) affordable to individuals and families earning up to 80 percent of the region's median. Mr. Schmidt represents, and the City does not dispute, that 2,556 units have been build, with 727 (28%) that are affordable. The deficit is 168 units.

² Both parties produced fair market value appraisals before the independent third appraiser rendered its determination. Each party then produced a modified appraisal taking into consideration the value of the City's investments. The third appraiser then issued a final determination.

On March 16, 2015, PHB denied Mr. Schmidt's request in writing, citing ORS 192.501(6), which exempts information relating to the appraisal of real estate prior to its acquisition.

The Applicable Exemption

ORS 192.501(6) conditionally exempts from disclosure information relating to the appraisal of real estate prior to its acquisition. This exemption permits public bodies to obtain information in confidence concerning the value of real estate that the public body may purchase or condemn. For example, in an order dated December 2, 1994, the Oregon Attorney General denied Timothy M. Parks' petition for an order directing the Oregon Department of Transportation (ODOT) to make available an appraisal obtained by ODOT relating to property subject to a condemnation proceeding. Citing ORS 192.501(6), the Attorney General exempted from disclosure the appraisal analysis and conclusion as relevant to parcels of real estate yet to be acquired by ODOT. *See* Attorney General's Public Records and Meeting Manual 2014 (the "Manual"), Appendix F.³

Contrary to the petitioner's position, this office finds no basis in the law for the claim that this exemption is not applicable or has otherwise been waived. According to my office's review of the requested documents, and in contrast to Mr. Schmidt's assumption, HSP shared only its appraiser's final valuation, not the entirety of the report. In any event, sharing valuations between the parties is a necessary part of negotiating a purchase price and has never been held to effectuate a waiver of the exemption for appraisals.

Neither is a waiver effected by the City's decision in other unrelated cases to disclose appraisals.

Public Interest Balancing

Conditional exemptions, like ORS 192.501(6), require a balancing of confidentiality interest versus public interest in disclosure. *See Springfield School Dist. # 19 v. Guard Publishing Co.*, 156 Ore. App. 176, 179, 967 P.2d 510 (1998). This is a delicate balance in real estate transactions involving public bodies. Accountability to taxpayers is always an issue; yet the legislature carved out a specific exemption for appraisals in acknowledgement of how damaging premature disclosure could be to the public interest in negotiating a favorable conveyance in some instances. This is such an instance.

³ In discussing ORS 192.501(6) and the parallel public meetings provision ORS 192.660(1)(e), the Attorney General has noted that the policy underlying both provisions is to permit public bodies to protect their negotiating position in real property transactions by keeping certain information confidential. Manual at 18; 1990 Ore. AG Lexis 10.

The City's interest in confidentiality stems from the risk that disclosure of the appraisals could entice a third party to intervene and offer a higher purchase price. Here, where the Agreement provides that the purchase price can be discounted to account for the City's infrastructure investments, this concern is particularly acute. In such a case, the City asserts that "public interest would be harmed because the public agency could either lose the opportunity to purchase the property to a higher bidder or lose its leverage to negotiate other important public benefits." (Ofc. of the City Atty Letter 3/27/15 at 2.) Mr. Schmidt argues that HSP is contractually obligated to sell to the City, and therefore this is not a free-market transaction where a third party could intervene. But even he acknowledges that the City's leverage is relevant and that there are concessions that may be sought at this final stage of negotiation. (Schmidt Letter 3/19/15 at 5.)

The arguments in favor of disclosure do not justify jeopardizing the City's bargaining position. First, the availability of a hearing ensures a public debate about the transaction before it closes. As Mr. Schmidt acknowledges, this deal will be sent to the City Council for approval. Public comment will be taken and therefore the only "question is how much of an advance preview taxpayers will receive." (Schmidt Letter 3/30/15 at 3.)

Second, Mr. Schmidt argues that because HSP is hundreds of units behind target and the City failed to monitor HSP's efforts, disclosure serves a compelling public interest. These failures do not compel disclosure of the appraisals, which do not speak to these issues. Moreover, coverage by *The Oregonian* has already informed the public of the shortfall and the City's delayed response. See Brad Schmidt, *Will Portland Score Big Discount Buying Land from Prominent Developer*, *THE OREGONIAN*, Mar. 30, 2015; Brad Schmidt, *Portland Will Force Hoyt Street Properties to Sell Land for Affordable Housing in Pearl District*, *THE OREGONIAN*, Sept. 2, 2014; Brad Schmidt, *Hoyt Street Properties Fails to Deliver Enough Affordable Housing Under Portland's Pearl District Development Deal*, *THE OREGONIAN*, Aug. 20, 2014.

Finally, the petitioner questions the City's competency, drawing attention to the complicated nature of the public improvements discount process as a failure to protect the public interest. Citing a "significant public interest [in understanding] how purported contractual safeguards ... may in fact not produce the intended results," Mr. Schmidt correctly asserts that this deal could be a learning experience for future affordable housing development agreements. There is, however, no compelling reason that this conversation relies on the disclosure of the appraisals or that disclosure before closing is imperative. While acknowledging problems with the Agreement, Mr. Schmidt's requested disclosure would tie the City's hands to mitigate these problems before closing by exposing them to the interference of third parties.

Mr. Schmidt's investigation and his efforts to inform the public about the difficulties of affordable housing contracting generally, and the flaws in this contract specifically, have helped to focus the issues for public debate at the upcoming City Council meeting. This office fails to see how disclosure in the waning days of a complicated negotiation, one that the City believes could scuttle their opportunity to provide the promised affordable housing, furthers the public interest.

Leave to Submit Subsequent Petition

My decision in this matter is based in part on Ms. Gramp's assurances that the appraisal documents sought by Mr. Schmidt will be made available after Closing, currently scheduled for April 24, 2015. While Mr. Schmidt's request is denied at this time, he has leave to re-petition this office if the requested documents are not made available to him promptly as represented.

Regards,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with the first name "Rod" being more prominent than the last name "Underhill".

ROD UNDERHILL
District Attorney
Multnomah County, Oregon