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August 31, 2016

Brad Schmidt
The Oregonian
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Portland, Oregon 97201

Lisa Gramp
Deputy City Attorney
City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Brad Schmidt, for The Oregonian, requesting unredacted Housing Investment Committee approval documents.

Dear Mr. Schmidt and Ms. Gramp:

In his public records petition, dated August 12, 2016, petitioner Brad Schmidt, on behalf of The Oregonian, requests this office to order the Portland Housing Bureau to disclose unredacted copies of the following records:

HIC (Housing Investment Committee) approval for Jarrett Street Condos project.¹

The Housing Investment Committee (HIC) is a committee within the Portland Housing Bureau (PHB). The HIC reviews requests for funding by developers and makes recommendations to the bureau director for further action. Prior to the HIC meeting and making a recommendation, bureau staff prepare a memorandum for the committee members discussing the project proposal.

The Jarrett Street Condos project is a twelve-unit project in North Portland expected to provide ownership of micro-condominiums to members of the community who had been displaced or priced out of the area consistent with the city's N/NE preference policy. The units range from 387–556 square feet and are expected to sell for between \$164,000 and \$204,000. PHB ultimately provided \$453,898 as a junior lender in the project, roughly a fifth of the total funding sources available to the developer.

In response to Mr. Schmidt's initial public records request, PHB provided him a one page form titled "Housing Investment Committee Recommendation & Approval Form" and a heavily redacted sixteen page "Internal Memorandum" with the supporting analysis. On these documents, each page with content had at least some redaction and eleven of the pages had at least half of their content blacked out (eight were entirely redacted.)

¹ Petitioner initially requested additional documents, however PHB subsequently provided them to petitioner and we need not consider them further.

Subsequent to the filing of Mr. Schmidt's petition, PHB provided a substantially less redacted version of the memorandum supporting the recommendation and approval form. The new version contains eight pages that are still effectively redacted in their entirety. However, the remaining nine pages now contain only a handful of redacted sentences and six of these pages are entirely unredacted. PHB has also, now, provided two different versions of the recommendation and approval form that, between the two, show the estimated profit to the developer and that the HIC did not initially recommend the loan for approval.²

The information that PHB continues to assert is exempt from disclosure falls into one of three categories: 1) opinions of HIC staff on speculative risks to the project; 2) the project's pro forma and information drawn directly from it; and 3) information quoted from the market analysis and appraisal commissioned by the developer and supplied to HIC staff. In support of these redactions, PHB cites ORS 192.502(1), the internal advisory communications exemption, and ORS 192.501(21), the housing authority records exemption.

As explained below, we agree with PHB as to the 192.501(21) claims, and with petitioner as to the 192.502(1) claims.

DISCUSSION

A. Internal Advisory Communication – 192.502(1)

ORS 192.502(1) exempts from disclosure,

Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

The redacted information on pages 4 and 8 is generally opinion, non-factual, and preliminary to any final determination of policy or action. These findings are necessary but not sufficient to support a claim of exemption under this section. No category of internal communication is per se exempt from disclosure under this exemption. The public records law requires a particularized and fact-specific evaluation of the public interest.

Frequently under the public records law we must assess whether the "public interest requires disclosure in a particular instance." ORS 192.501. Although the agency always has the burden of establishing an exemption, under ORS 192.502(1) the presumption and standard is more stringent: the agency must establish that the interest in frank communication "clearly outweighs" the public interest in disclosure. A strong showing is necessary to sustain a claim under this section. *Coos County v. Oregon Dept. of Fish and Wildlife*, 86 Or App 168, 173 (1987).

² These two forms are both dated April 21, 2016, one contains an "approval" recommendation from the committee, the other a "no approval" recommendation. PHB has stated that the initial recommendation was "no approval," which was reconsidered at a subsequent meeting on May 5, 2016 and resulted in an "approval" recommendation. The same date appearing on both forms is, according to PHB, a clerical error.

The thrust of PHB's argument appears to be that, generally, disclosure of their analysis could prevent future developers from agreeing to work with the city on similar projects. Under the public records law we cannot accept a blanket assertion and must examine the actual statements at issue. The redacted sections in this case are 1) a relatively bland, unattributed, analysis of certain speculative risks associated with the project and, 2) an explanation of a somewhat unusual provision relating to a financing surplus. We have previously held that where the anonymous recommendations in an internal memorandum were "unremarkable" and any criticisms "muted" that an agency had not met its burden. *In re petition of Lane*, MCDA PRO 04-06 (2004).

Disclosure of these particular sentences will marginally advance the public's ability to monitor and assess the decision-making process of its government as related to a project acknowledged to be unusual. Even accepting PHB's premise that disclosure of HIC staff analysis might chill future developers, the particular statements at issue here are not disparaging to the developer. The speculative risk to future public-private partnerships does not "clearly" overcome the public's interest in disclosure in this instance.³

B. Housing Authority Records – 192.501(21)

ORS 192.501(21) provides, in relevant part,

The following records, communications and information submitted to a housing authority as defined in ORS 456.005, or to an urban renewal agency as defined in ORS 457.010, by applicants for and recipients of loans, grants and tax credits:

- (a) Personal and corporate financial statements and information, including tax returns; [...]
- (c) Project appraisals;
- (d) Market studies and analyses; [...]
- (g) Project pro forma statements;
- (h) Project cost certifications and cost data; [...]

i. *Applicability of ORS 192.501(21) to the Portland Housing Bureau generally*

As a threshold matter, petitioner advances the argument that, although the Portland Development Commission has lawfully delegated its role as the local housing authority to the Portland Housing Bureau, the public records exemptions that apply to local housing authorities do not likewise make the transfer from one agency to the next. The intent of the legislature in enacting ORS 192.501(21) appears clear: in order to facilitate construction of affordable housing by way of public-private partnerships, certain information submitted by developers in furtherance of such projects should be kept confidential. We decline petitioner's invitation to read the applicable statutes to achieve a result inconsistent with this purpose.

ii. *Applicability of the exemption to these records*

The categories of exemption found in ORS 192.501(21) apply not just to "records" but to "information." We take that to mean that the exemption from disclosure follows the information

³ The last redacted "word" on page 4 is a number. That number is taken from the pro forma and may be redacted at PHB's election pursuant to ORS 192.502(21). The remainder of that sentence, beginning "The budget..." is subject to disclosure.

wherever it may be found. That may be in a pro forma, as on pages 11-16 or where restated in the body of an advisory memo, as on pages 5-7.

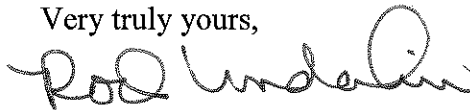
Otherwise exempt material may still be subject to disclosure if “the public interest requires in a particular instance.” ORS 192.501. Petitioner suggests that the facts already available indicate there may be something questionable about the Jarrett Street project and its approval process and that the public interest thereby requires full disclosure. Petitioner points to the most recently released versions of the documents at issue, which show that the Jarrett Street project estimated a 17.4% profit for the developer, that the HIC initially forwarded the project to the bureau director with “no approval recommended,” that this recommendation was revised upon reconsideration at a subsequent meeting, that the 12 units in the project ranged from 387–556 square feet at a cost of \$367–435 / square foot, that PHB ultimately approved a \$453,898 loan to the developer, and that the project had a financing surplus of \$543,813, an amount in excess of the PHB loan.

Having carefully reviewed the information contained in the developer’s pro forma and market analysis, this office cannot say that the public interest requires its disclosure. This is not to say that such information might never meet the public interest test, but in this instance it does not. Much of the financial detail of this project, as described above, has already been released. PHB is of course free to release whatever records it wishes to provide full context to its decision to fund this project, but we cannot say that it is required to do so as to the information covered by ORS 192.501(21).

ORDER

In sum, we agree with PHB that the financial information and market analysis from the private developer may be redacted. However, the analysis presented to the housing investment committee must in this instance be disclosed. The petition is granted as to the redactions appearing on pages 4 and 8 of 16, and denied as to the others.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.450(2), 192.460, and 192.490(3) your agency may become liable to pay petitioner’s attorney’s fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.