



MEMORANDUM

To: Honorable Mayor and City Council

From: Stephen E. Johnson, City Manager 

Date: December 12, 2011

RE: Biscayne Landing Negotiation Update **(Effective December 9, 2011)**

Attached is a summary for the Biscayne Landing property which provides an update of the progress staff and the consultants have made thus far.

I will continue to provide updates as we progress through the negotiation process.

Should you have any questions, please feel free to contact me.

SEJ:am
Attachment

Biscayne Landing Negotiating Team

UPDATE FOR CITY COUNCIL

December 9, 2011

- I. The Lease. Pursuant to authorization by the City Council on October 25, 2011, the Negotiating Team met initially with Oleta Partners LLC to discuss what the Negotiating Team saw as major obstacles to a ground lease. These issues included bifurcation (where the Tenant would cut itself out of the middle and have no further obligations once it sold a portion of the lease, as was done with The Oaks Condominium) as opposed to subleasing (the Tenant remains contractually obligated to perform under the ground lease), increases in annual rent over the term of the ground lease (and other valuation issues), unacceptability of certain contingencies proposed by Oleta Partners, and the use of a different form of ground lease. After discussion, the Negotiating Team was assured that these issues could be worked out. As part of the discussion, the Negotiating Team encouraged Oleta Partners to consider an outright purchase instead of a ground lease, with purchase money financing from the City if desired. After consideration, Oleta Partners said that they preferred a ground lease format to a purchase, though at the right price they would do the purchase. This status was reported by the City Manager to the Council on November 22, 2011. The City's outside transactional counsel has since prepared a first draft of the proposed ground lease, which is being reviewed and commented on by the Negotiating Team. The first draft was provided to Oleta Partners on Dec. 1, 2011. The Negotiating Team met with Oleta Partners LLC on Dec. 6, 2011 to begin taking comments on the lease and identifying business issues for resolution.

- II. Valuation Issues. Although Oleta Partners provided its financial calculations to back up the economic package (initial payment, fixed annual rent, percentage rent, etc.) included in its proposal for the ground lease, the Negotiating Team considered it prudent to obtain outside valuations for the subject property as well. It is generally accepted in the real estate industry that the net present value of the income promised in a long term ground lease should equal the fair market value of the property today. Accordingly, the City will obtain a total of three appraisals. Two will be for the fair market value of the property. The third will be an appraisal/analysis of the economic package being offered by Oleta Partners in its proposal for the ground lease so it can be compared to the fair market value of the property. In each case, the environmental status and the availability of the grant money (for environmental remediation) have been provided to the appraiser. When the appraisals have been received, this information will be provided to the City Council.

- III. Environmental Status. Please see the attached Exhibit A for a summary of the regulatory history of the property. The Negotiating Team is gathering information on the current status of the property, and in the next update will include information regarding the current status, including grant status, permit status, and remaining work to be done.

- IV. Zoning Issues. The ground lease as presently drafted provides that it will be contingent on certain changes (see below) being made to the Land Development Regulations (LDRs) prior to a certain date. If the conditions are met, the ground lease term will begin running, the initial payment of \$21.2MM will be wired to the City, and possession of the property will be delivered to Oleta

Partners. If those conditions are not met prior to that “drop-dead” date, then either party will have right to terminate the lease, and the parties will have no further obligations.

The LDRs will be amended to incorporate additional uses to be permitted on the property among other changes. In addition, Article 4 of the LDRs will be further amended to create the Regional Activity Center (RAC) which will provide for the appropriate uses and square footage allowed within the RAC.

The amendments will be heard by the Planning Commission at its January 3, 2012 meeting and then by the City Council on January 10 and 24. No further amendments will be necessary and therefore, if the lease is signed after January 24, 2012, there will be no need for any conditions precedent.

These changes will enhance the value of the property for any lessee/buyer.

V. Recent Questions from City Council Members.

1. Whether the property would be worth more if we wait until the injection wells are installed and the land is properly capped, and whether we should wait and then do an outright sale?

Once the injection wells have been put in and all of the property has been capped, it will be easier for a developer to come in and build as the developer will not have to worry about that part of the environmental remediation work. However, even after the site has been “closed”, there will be ongoing monitoring obligations and associated costs on the property for years to come. The Financial Cost Assurance Estimate dated August 17, 2011 shows an **annual** cost of \$580,728.97 which will need to be placed in escrow or otherwise secured. This cost is not covered by the environmental grant from Miami-Dade County. Accordingly, there will still be environmental issues after the work on the injection wells is completed. A potential buyer now and in the future would include these elements in a calculation of value, as will the City’s appraiser. In addition, there are potential downsides to completion of the well installation and capping prior to ascertaining the proposed development. Because building and asphalt can constitute part of the cap, capping then building could be less efficient and more expensive than a planned coordinated effort.

2. Will the tenant be obligated to cap the entire property prior to commencement of construction on any part of it?

Although we were initially given different information, it has been confirmed that the tenant does not need to cap the entire property prior to commencing construction. The tenant can cap only the portion for which it obtains an approved site plan. However, the environmental grant that provides funds for the capping is disbursed on a pro-rata basis, so that funds for capping remaining areas cannot be used until those areas are capped. Oleta Partners plans to incorporate the cap (which can include buildings and asphalt) in each development portion.

VI. *Business Questions for Consideration by the Council.

1. Whether the tenant under the ground lease can have a renewal option for a second 99 year term, and if so, on what terms?

(*More questions will be presented as we progress further in the process and receive the information regarding valuation and comments from Oleta Partners)

VII. Negotiating Team meetings:

Next meeting with Oleta Partners is scheduled for Wednesday, December 14, 2011.

VIII. Public Meetings:

The first public meeting is scheduled for December 12, 2011, at the Gwen Margolis Community Center, 6-8 pm.

EXHIBIT A

REGULATORY HISTORY

The State of Florida Department of Environmental Regulation (“FDER”)¹ revoked Munisport's landfill operating permit in 1981. The United States Environmental Protection Agency (the “EPA”) evaluated the landfill for inclusion on the National Priorities List (“NPL”) in 1982, and the Munisport Landfill, including approximately 291 acres, was listed on the NPL on September 8, 1983, primarily due to the potential threat that it posed to nearby municipal wells. These wells were subsequently taken out of service, due to saltwater intrusion, and the City petitioned EPA for the deletion of the site from the NPL in 1986. However, EPA, as a matter of policy at that time, avoided rescoring sites wherever possible.

With the Agency for Toxic Substances and Disease Registry (“ATSDR”) having just evaluated the site in 1985, and having determined that the existing data was inadequate to assess the public health threat, the EPA refused to rescore the site. The ATSDR recommended that the EPA conduct additional investigations. A Remedial Investigation/Feasibility Study (“RI/FS”), to determine the nature and extent of contamination, was completed by EPA through its contractor, Camp Dresser and McKee, Inc. (“CDM”), in 1988. A variety of organic and inorganic chemicals were detected in groundwater, but most of these, however, were detected at low concentrations with a few exceedances of applicable water quality standards. In part, CDM concluded that leachate (primarily ammonia) potentially represented a threat to the environment, but did not threaten public health or welfare.

Based on these findings, EPA reevaluated the potential environmental threat posed by the site, and issued a revised proposed plan for site actions in November of 1988. The revised plan stated that an alternative of “no action” under the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA” *a.k.a.*, “Superfund”) was appropriate given the limited human health risk. However, in response to lingering public concerns, a Water Quality and Toxicity Assessment was completed in June of 1989. This study was designed to specifically evaluate the “environmental” (rather than the public health) threat that the site posed to aquatic life present in the mangrove swamp located adjacent to the landfill. In part, this study also confirmed that the landfill posed no threat to human health. Nevertheless, concerns regarding aquatic organisms in the adjacent wetlands remained.

The EPA issued its Record of Decision (“ROD”) on July 26, 1990 at which time EPA presented their evaluation of cleanup alternatives, and selected a preferred remedy. At that time, and in light of the lack of any ongoing threats to public health or welfare, the size of the site remaining on the NPL list, was reduced to approximately 30 acres, serving as a protective buffer situated between the landfill and the adjacent State Mangrove Preserve. This action was formalized pursuant to a Consent Decree entered into between the City of North Miami and EPA in September 1991 and was approved by the United States District Court for the Southern District of Florida in March of 1992.

¹ Since renamed the Florida Department of Environmental Protection, (the “FDEP”).

The ROD contemplated the use of a hydraulic barrier consisting of a series of recovery wells that would intercept the discharge of groundwater impacted by the presence of ammonia, prior to its arrival at the adjacent mangrove preserve. Ammonia-impacted water would be treated using an air-stripping pond to remove this contaminant. Treated water would be either cycled back through the landfill or discharged to adjoining surface waters, such as the southern canal or hydrologically altered wetlands. The overall cleanup envisioned the following steps:

- Tidal restoration of a wetland area included in the Biscayne Bay Aquatic Preserve (Completed September, 1995);
- Construction of an access and service road (Completed in 1996);
- Construction of hydraulic barrier recovery wells (Completed in 1996);
- Installation of a Treatment and Disposal system (Design Completed December 7, 2000).

However, based on results from treatability studies conducted in 1994, EPA determined that air stripping was not as effective as originally believed and subsequently revised the remedial approach to off-site treatment and disposal at the North Dade Wastewater Treatment Plant. These studies also confirmed that un-ionized ammonia, (representing only a fraction of total ammonia), and not “unknown toxicants”, were the cause of the previous toxicity concerns.

On April 25, 1995, the FDEP and the City of North Miami entered into a Consent Decree modifying the 30-acre NPL parcel to include a limited corridor of land within which the groundwater withdrawal pumps and related components for groundwater restoration could be placed. This action was deemed consistent with the National Contingency Plan (“NCP”), wherein the amount of land included in the Superfund response action only needed to include the extent of the release of ammonia that could migrate into the mangrove preserve, and that area of land required for the construction of the various components of the groundwater remediation system.

This Consent Decree also addressed closure of the landfill. In accordance with Part IV, Chapter 373, Fla. Stat. and Rule 62-701.600, F.A.C., owners or operators of landfills which were no longer receiving wastes on January 6, 1993, but which were not closed in accordance with Department Rules, had to comply with the current closure requirements by May 19, 1995. The City acknowledged its intent to use a permeable cover as part of its landfill closure design to minimize impacts on groundwater flow characteristics in order to facilitate implementation of the proposed groundwater remedy.

Results of the monitoring of the changes in water quality in the Mangrove Preserve, resulting from the 1995/96 tidal restoration of the Preserve, prompted EPA to conclude, in part, that the increased tidal circulation was adequate to mitigate the threat to the environment, and that further response pursuant to CERCLA was not warranted. The ROD was amended to a "No Further Action" determination on September 5, 1997.

EPA may delete an NPL site if it determines that no further response is required to protect human health. The Munisport Landfill was removed (de-listed) from the NPL on September 24, 1999. At that time, the Munisport Landfill continued to be under regulatory scrutiny and laid fallow. Currently, a Consent Agreement between the City and Miami-Dade County Department of

Environmental Resources Management (“DERM”)², and executed February 10, 1998, governs site activities. The order requires that the City continue to plan, model, test and evaluate a groundwater remediation system, implement a water quality monitoring program, restore and maintain the wetlands that are located immediately adjacent to, and which were impacted by, operations of the landfill, pursue proper landfill closure through the FDEP, and eventually restore tidal influences and other beneficial biological and chemical reactions between the wetland and the mangrove preserve by removing the dike. On January 18, 2000, the City submitted a Remedial Action Plan to serve as the first phase in addressing ammonia-impacted groundwater migrating into the adjacent wetlands.

Due to concerns pertaining to treatment capacity and rising salinity levels in extracted groundwater, as well as the potential toxic effect this water could have on the biological community within an off-site treatment plant, attention was refocused on an on-site treatment solution rather than use of the off-site wastewater treatment plant, as originally intended. Three denitrification system alternatives were eventually evaluated. These were an artificial wetland, a mechanical biological system and a turfgrass treatment system. Eventually, it was determined that a series of mechanical biological systems (essentially domestic wastewater treatment plants) would be constructed on-site. The City submitted its 100% Design and Treatment Report on December 8, 2000, that included the first of what was envisioned as a series of 500,000 gallons per day (gpd) above-ground treatment facilities on-site.

EPA’s assessment of the site and its proposed remedial actions did not proceed in a vacuum. Beginning in July of 1988, EPA held numerous public and technical meetings and issued numerous fact sheets to keep the community apprised of the progress, and to solicit input during the design and construction processes. Coordination has included DERM, FDEP, the National Oceanic and Atmospheric Administration, United States Fish & Wildlife Service, Florida and Tropical Audubon Societies, the Izaak Walton League of America, Mangrove Chapter, the Highland Beach Residents Committee, the Highland Village Residents Committee, the Sierra Club, Miami Group, Friends of the Oleta River State Park, Keystone Point Homeowners Association, Westside Property Owners Association, the current and three former mayors of the City of North Miami, Friends of the Everglades, Dade County Chapter, Munisport Dump Coalition, the Concerned Citizens for the Public Use of Munisport, the City of Bay Harbor Islands, Florida, and numerous other local residents. EPA, FDEP and DERM have formally addressed all comments and concerns in writing as the cleanup strategy has moved forward.

On December 24, 2003, a new Interim Remedial Project Approval Order (“IRPAO”) was executed by the City, FDEP and DERM, allowing for the testing and implementation of a “Prototype” modified groundwater remedy that utilized a below-ground delivery of air and biological treatment system, (the “In Situ System”). The In Situ System prototype was instituted and monitored but failed to meet the treatment levels required by DERM. As a result, in a letter dated April 9, 2007, DERM disapproved the “Prototype” system and instructed the tenant developer to implement the remedial system as proposed in the Interim Remedial Project (IRP) approved on January 29, 2002. In a follow-up letter on April 23, 2007, DERM noted that the tenant developer may pursue alternative remedial options. In July 2007, the tenant developer presented DERM with three remedial options for consideration and included: 1) In Situ System as per the “Prototype”; 2) traditional pump and treat system as per the approved 2002 IRP; and 3) an enhanced pump and treat

² Recently renamed the Department of Permitting, Environment and Regulatory Affairs

system using a “funnel and gate” concept. In a letter dated August 23, 2007, DERM disapproved the proposed use of the In Situ System and conceptually approved the implementation of the traditional pump and treat or the “funnel and gate” system. Subsequently, the tenant developer selected the “funnel and gate” system as the most suitable, and on September 24, 2007, as directed by DERM, submitted an implementation plan and pilot study plan for the funnel and gate system. While the property was under receivership, additional information including groundwater modeling and geotechnical data essential for the funnel and gate design was submitted to DERM on March 14, 2008 for approval of the required pilot study plan prior to full scale system design. This pilot study implementation plan was approved by DERM on May 27, 2009. However, upon further review of the “funnel and gate” system alternative, it was determined that the cost of such a system would far exceed (by \$19 million) monies held in escrow to effectuate the groundwater remediation system. A request for an increase in the grant escrow to cover the cost of the “funnel and gate” was not approved.

An alternative remediation system was proposed by the team of CH2M Hill prime and ES Consultants subcontractor (collectively the Contractor) for the project site consisted of a conventional groundwater extraction system utilizing vertical groundwater recovery wells and a Class I injection well to dispose of the groundwater into the boulder zone (approximately 3,300 feet below ground). This approach provides the level of protection required; uses technology that has been proven and approved in the past by DERM throughout Miami-Dade County; can be implemented more timely than other proposed systems; drastically reduces capital and O&M costs; has less uncertainty; and provides much greater flexibility than other systems. Moreover, the receiver for the site, at that time, sought and received Court approval to enter into a “not to exceed” contract with CH2M Hill to implement the system for a cost that would not exceed the amount held in escrow from the grant. CH2M Hill is currently working on preparation of final design plans to be submitted to FDEP and DERM approval. Both entities have “conceptually” approved this system.

FDEP has modified the closure plan so that the full scale system now needs to be up and running by October 1, 2012. Further extensions may be requested and granted based upon the good faith efforts of the City and/or developer to implement this system.