

# SPECIAL FARMINGTON CITY COUNCIL MEETING

Tuesday, June 23, 2009  
Farmington City Hall, 130 North Main  
3:00 p.m.

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**PRESENT:** Mayor Scott Harbertson, Council Members Paula Alder, Sid Young, and Rick Dutson, City Manager Max Forbush, Finance Director Keith Johnson, City Planner David Petersen, City Attorney Todd Godfrey, and City Recorder Margy Lomax. Council Member Hale was excused because of illness and Council Member Cory Ritz because he was out of town.

Others Present: Rich Haws and Scott Harwood of Shivas Company along with their attorney Greg Bell.

The purpose for the special meeting was to listen to the concerns of Rich Haws with respect to two previous Road Agreements entered into by Mr. Haws and the City. There were differences in opinions with respect to some of the terms in the two agreements.

**Mayor Harbertson** called the meeting to order at 3:10 p.m.

## **Review/Discussion of Road Agreements with Developer of Farmington Square**

Rich Haws, developer of Farmington Square, introduced Greg Bell as the attorney now representing Shivas Partners. He said they now have a joint venture partner for their project whose attorney happened to be Kirton & McKonkie, the same one who had been representing Shivas so Mr. Bell has now been retained as their legal counsel. He reported they will be meeting with the City's Planning staff on Thursday morning for a preliminary review of plans for Phase 1 of the development.

Greg Bell then addressed the Council stating they are looking for clarification of the road agreement previously entered into with the City. They have some questions on what some of it really means. An agenda with 10 items of concern had been prepared by Mr. Haws and was distributed to everyone present. Discussion items 1-10 as presented by Mr. Haws follow hereafter shown in italics.

- 1) *“Confirmation of the two working Agreements under review – tracking of key obligations, performance and key dates. What is the City doing to fulfill its obligations under Section 2 of the Escrow/Exchange Agreement “to acquire the balance of the ROW not controlled by Haws as soon as reasonably possible, and without undue delay.” Set up committee and standard meeting times to track progress and key Benchmark dates.*

Mr. Haws asked that a “working group” be created to coordinate and follow up on details. He said there are fairly heavy requirements regarding permitting, design, sign off, etc. He would like regularly-scheduled meetings with the Mayor and/or Max and someone from the City Council.

The question was raised regarding whether the Cooks are agreeable to the road traversing their small strip of property which is located in the path of the road. Mayor Harbertson reported he has met with the Cooks three or four times, and it is felt they are willing to dedicate the right of way. The City will need to enter into an agreement with them. There is another very small road parcel that will need to be acquired between the Cook property and Burke Lane. If needed, the road could be diverted around this small property parcel for now. Scott Harwood said he would supply Mayor Harbertson or Max Forbush with the contact person for the small parcel north of the Cook property.

- 2) *“Effective date of the Road to the North Agreement – September 19, 2008. Developer is relying on the City’s ordinances in effect as of that date, as it applies for the entitlements of the Developer Property and the agreed upon Vesting. (Section 2) General discussion as to development status and timing of its phases. Required “Flexibility” with the new Regulatory Plan.”*

Greg Bell stated they believe the developer is vested in the ordinance and zoning as of the date of the Road to the North Agreement – vested as to the right of the TOD Zone at the time of signing of the agreement. They believe the way the agreement was written, they are vested, but would also inherit provisions of the new zone. Todd Godfrey, City Attorney, did not agree with their interpretation and stated he would check into it.

Rich Haws stated that because of the Conoco gas line and other issues with the location of the road, they would need some flexibility with the Regulatory Plan.

- 3) *“Design of ROW Improvements – City’s responsibility for full “design and specifications” per section 4.”*

Attached to the Agenda Mr. Haws distributed was a “List of Deficiencies of the submitted Plans by CRS” prepared by Shivas listing 22 different engineering “deficiencies” to the CRS road design plans. Mr. Haws pointed out that the list did not constitute all of their comments back to the City, there will be more forthcoming on design issues and other matters.

- 4) *“Allocation of Costs:*
- a. *Fill, grading, studies, asphalt and paving, plans, permits and wetland mitigation as called out specifically in the Agreements are the City’s responsibility. It should be without discussion that any improvements relating to, or necessary for their construction of the same will be the City’s responsibility – these would be: storm water control from the ROW improvements; curb & gutter, per the exhibits and necessary to control run off; gas line and Weber Basin line that the ROW sits on; livestock fence; upsizing of the water line above 8”.*
  
  - b. *This will leave - landscaping, lighting and development utilities, which we will discuss their allocation at a later date.”*

Mr. Bell stated the developer will bear the water cost for up to an 8" water line, and said the City bears the cost of the livestock fence; storm water control for the road itself; curb and gutter. As far as sidewalk is concerned, he said that would need to be decided between the parties and also the Conoco gas line and Weber Basin water line would need to be dealt with because the right-of-way sits on them. Mr. Bell felt one of the major things will be storm water control, because it will be a down-sloping road and there will be some storm water issues.

(Tammy North of CRS Engineers arrived at the meeting at 3:25 p.m.)

Mr. Haws stated in the road agreement it is very clear that the City is to build the road and that there are certain items the developer will reimburse the City. He said the full build-out of the road is the responsibility of the City. He said the actual design of the storm water begins to get addressed in the plans, but the actual size and detail of catch basins, calculations of storm water flow and all that off the road are not provided in the plans.

Mr. Haws expressed his concern that the Scope of Work prepared by CRS did not look at addressing the Conoco gas line and the Weber Basin water line which are located in the right of way. Mr. Haws stated he had been in contact with Conoco and Matt Rasmussen of Weber Basin discussing ways to solve the problem. He believes the design of building a road over the lines should be, in his mind, a City expense. Mr. Haws said the items listed under #4.a. above are City expenses and the items listed under #4.b., they believe, are developer-associated costs.

Mr. Bell said the development will be landscaped out from their project on a project basis. Street lighting is not discussed in the agreement along with a few other issues that will need to be resolved as they beautify and improve the project.

(Wes James of CRS Engineers arrived at the meeting at 3:40 p.m.)

5. *“Bidding process - obligation by the City to construct ALL the improvements required under the “Plans” and the Developer to reimburse those that are his responsibility. NOTE: This is an obligation for FULL build out, there is NO provision for any phasing in the existing agreements. Developer fully expects to be kept in this loop and part of the value engineering to help keep costs low and coordination high.”*

Mr. Bell stated that the agreement calls for the City to go forward with construction of the road and then the developer will reimburse the City. He stated that if the City doesn't feel like it wants to or is not able to, the developer could do some of the construction.

Mr. Haws pointed out that the agreement does not provide for any phasing of the road, but for full build out so anything less than full build out would have to be an amendment or an agreement between the parties.

Max Forbush asked Mr. Haws if he were suggesting the City do full build out all the way to 1525 West when there are no development proposals there yet. Mr. Haws replied that he is simply stating what the agreement says. Mr. Bell says it's obvious the City can't do what it can't do, and it's a tough environment and that is why both parties need to talk. He asked that Rich Haws and their engineers be “in the loop” as plans move forward and even in the bidding process.

6. *“Status of UDOT permit - City's obligation to obtain. Sense of urgency needed. Time is of the Essence for all obligations in the Agreements. City's obligation for UDOT/UTS permitting the Trail continuance under Park Lane - Per previous commitments and City General Plan. Agency Coordination to be at the City level – not the Developer.”*

Mr. Bell said it is urgent the City pursue the UDOT encroachment permit. Time is of the essence now that the developer has a deal with a joint venture partner. He stated the trail coming under Park Lane will be a real amenity, but needs to be tied into their project. He is fearful UDOT has not set aside money to construct the trail north of Park Lane.

Mr. Haws stated that if there is not a connection from their project to the Legacy Trail under Park Lane everyone loses.

Mr. Forbush stated this trail is on the City's Trails Master Plan. He questioned Mr. Haws as to what he perceived was the City's obligation in seeing the trail is completed. Mr. Bell said they are asking the City to think about how it could be funded, once permission is given by UDOT. Mr. Haws felt the easement should be granted on a perpetual basis. Mr. Godfrey pointed out that UDOT has not been granting anything lately on a perpetual basis.

Mr. Forbush said the City is in favor of the trail. He said there is a possibility of using Park Improvement Impact Fees with either the City building the trail or the developer building it and then a credit given against the impact fees on the residential units. He said he believes UDOT has preserved the space for the trail, but the question is who has the right of way. Mr. Haws said they are going to be asked to convey the property with these rights in place and need to know exactly what they will be.

Mr. Bell stated that coordination needs to take place to move forward to get the permit, get the easement established and to find a funding mechanism for the trail. It was pointed out that in order for the development to be a TOD, the trail is a critical part.

7. *"Approval of the right-of-way description. All improvements for the Road need to be within the ROW, including slope (which is a 2:1 in the exhibit). There has never been any discussion as to other alternatives, such as easements, etc. The "varies" language on the Exhibit always intended to account for the topography of the property based on the final design of the Road. "Toe to Slope to Toe of Slope" has always been the intent and design of the ROW."*
8. *"Impact Fee Credits – first fees collected from the Developer Property are to be credited back, up to the amount of the excess ROW as determined per #7 above. These include all impact fees and NOT just the transportation fees. Additional reimbursement out of future Transportation Fees (50%) outside of the Developer Property are also to be used if needed."*

Mr. Bell said the Agreement states developer will dedicate approximately a 55 foot right-of-way access of property and will be reimbursed at \$12/s.f. He said the reimbursement is from two sources: (a) Impact fees from developer's property; and (b) Transportation Impact Fees in the service area in which the Transportation Impact Fees would be computed. They would get up to 50% of them. He said the developer is interpreting the impact fees to be all impact fees.

Mr. Godfrey responded regarding their interpretation of impact fees to be all impact fees. Todd said that he would need to look at the language of the agreement, because he didn't believe

the City was pledging all the impact fees, but were pledging specifically Transportation Impact Fees and credits. He does not believe the City can legally, for instance, take a water fee and reimburse a transportation obligation. He will check it out. He said the City has never pledged the broad impact fees. The Road Agreement is the standard language used by the City in all impact fee reimbursement agreements for the last 10-12 years and has never pledged the broad impact fee, only the specific. It would violate the law.

Mr. Haws read the sentence from the agreement regarding the impact fees as follows: *“In the event the value of the excess property exceeds the impact fees for the development developer property, then the City shall pay the difference to the developer.”* He said then the agreement addresses the service area as to transportation fees. Mr. Haws stated they have always assumed there were “varying” impact fees – whatever impact fees come to the City. He feels it is pretty broad.

Todd Godfrey responded he understood what Mr. Haws was saying, but did not necessarily agree with him, and hoped this was not an issue, because he is guessing the transportation credit might get us where we need to go and also due to the fact impact fees can be used for capital facilities.

Mr. Haws responded stating, “if the transportation impact fee alone is all that is on the table, we have an issue.” He believes there are other impact fees that would pertain to this project.

Max Forbush stated that he thought the intent on the water impact fees was to pay the cost difference between an 8" water line and a 12" water line.

Mr. Bell stated it's their position if you build a road, including the slope, that it has to be within the right of way and to extend beyond the right of way onto private property burdens a private property with a public purpose and asked the City for consideration of that position.

Mr. Haws said the word “*varies*” on the exhibit, he believes, is there because the existing topography was not known and there had to be a varying width because some of it is steep. He stated he believes the word “*vary*” was never intended to mean that a renegotiation would take place right away.

9. *Time Line for Construction – need to start the surcharging this fall, thus the critical nature of the gas line design and approval along with the UDOT permit. All necessary to meet the 9/18/10 guaranteed “completion date” by the City.*

Mr. Haws stated the developer would like to start construction this fall and be open next summer for the first phase. He emphasized the outside date for completion of the road is September of 2010 which is critical to them and their development. Therefore, there is an urgency to get the Conoco and Weber Basin lines replaced and get dirt in place in order to be building next spring.

10. *Financing of Improvements – City and Developer to discuss what their options are and timing for alternatives. Again, anything less than a full build out will have to be mutually agreed on.*

Mr. Bell said once the plans are prepared a lot of things will come together – the tie-ins with the developer, the utility layouts, the access points, etc. He said the focus now should be on the completion date. He again asked for some type of an “executive committee” to address the issues as they come up on a flexible and timely basis. He said ideas are needed on how to get the road financed.

At the end of the discussion, no definitive conclusions were forthcoming.

### **Consideration of Lease Agreement pertaining to old City Shop Building located at 42 North 650 West**

A Lease Agreement has been signed by Station Park CenterCal to lease part of the old City Shop building the City is purchasing back from UDOT. CenterCal wants to get into the building to do some cleanup and remodeling. Mr. Forbush reported CenterCal is concerned about moving the model of their development into the building and then, if the City is not able for some reason to obtain the property from UDOT, having to move it out again. There is a provision in the Lease Agreement for the City to reimburse them \$5,000 towards their costs if the City is unable to obtain the property from UDOT.

Max Forbush also stated the reason for the delay in closing on the UDOT property is an issue dealing with taxable vs. tax-exempt bonds. To qualify for tax- exempt bonds, the City must show a public benefit, not a private benefit. The City is putting in \$500,000 towards the purchase of the property and bonding over \$600,000. The bond attorneys are trying to find a way to ensure the bonds will be tax exempt.

Todd Godfrey stated he did not like the provision in the agreement calling for a reimbursement to Station Park CenterCal in the amount of \$5,000 and suggested that that language be stricken from the Lease Agreement and that CenterCal be informed if they make improvements to the building before the sale is finalized, they are working at their own risk.

**Motion**

**Rick Dutson** made the motion to authorize the Mayor to sign the Lease Agreement once he is assured that Zions Bank Public Finance has the issue resolved with their bond attorneys regarding the status of the bonds being taxable or tax-exempt and also striking the provision in the Lease Agreement requiring the City to reimburse Station Park CenterCal \$5,000.00 for improvements they make to the premises.

**Paula Alder** seconded the motion and it passed with Council Members Dutson, Alder and Young voting in favor.

Mr. Forbush reported the City will receive \$2,500 per month lease payments from CenterCal who will occupy the office portion of the building and the City will use the rest.

**Motion to Adjourn to Closed Session to discuss strategy as it relates to pending litigation.**

At 4:15 p.m. **Sid Young** made a motion to go into a closed session to discuss strategy as it relates to pending litigation. The motion was seconded by **Paula Alder** and passed with Council Members Dutson, Alder and Young voting in favor.

At 4:59 p.m. motion to go back into open session was made by **Rick Dutson** with a second by **Sid Young**. The motion passed with Council Members Dutson, Alder and Young voting in favor.

There being no further business and upon motion by **Rick Dutson** with a second by **Sid Young** the meeting was adjourned at 5:00 p.m.

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Margy L. Lomax  
City Recorder