

DIRECTORS'/ORGANIZATIONAL AGENDA
ADDENDUM
Monday, July 9, 2018

I. DIRECTORS CORRESPONDENCE

II. CONSTITUENT CORRESPONDENCE

1. City Council Action on DACA June 25, 2018 - Mary Boschult
Staff response provided by Angie Birkett, City Council Secretary
2. Public Market in the Railyard - Mark Hunzeker
3. Public Market in the Railyard - Jeff Galyen

Angela M. Birkett

From: Angela M. Birkett
Sent: Tuesday, July 03, 2018 4:15 PM
To: 'Mary Boschult'; Bennie R. Shobe
Cc: Roy A. Christensen; Leirion Gaylor Baird; Carl B. Eskridge; Jane Raybould; Jon Camp; Cyndi Lamm; Jeff R. Kirkpatrick
Subject: RE: City Council Action on DACA June 25, 2018

Good Afternoon Ms. Boschult,

The requested letter has been made available for public view through the City Clerk document management search.

The following link will take you directly to the site:

<https://www.lincoln.ne.gov/asp/city/clerk/docman.aspx>

In the Document Number field you'll need to enter the following:

38-4701

Once the next screen populates click the grey box next to document number to open the document. The letter is page 5 of the document with the individual Council member signatures appearing on page 6.

Please let me know if you have any trouble accessing the desired information.

Thanks,

Angie Birkett
Office Coordinator
Lincoln City Council
555 South 10th St., Ste 111
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abirkett@lincoln.ne.gov



From: Mary Boschult [mailto:mary4now@aol.com]
Sent: Tuesday, July 03, 2018 2:22 PM
To: Bennie R. Shobe <BShobe@lincoln.ne.gov>
Cc: Roy A. Christensen <RChristensen@lincoln.ne.gov>; Leirion Gaylor Baird <LGaylorBaird@lincoln.ne.gov>; Carl B. Eskridge <CEskridge@lincoln.ne.gov>; Jane Raybould <JRaybould@lincoln.ne.gov>; Jon Camp <jcamp@lincoln.ne.gov>;

Cyndi Lamm <CLamm@lincoln.ne.gov>; Jeff R. Kirkpatrick <JKirkpatrick@lincoln.ne.gov>

Subject: City Council Action on DACA June 25, 2018

Bennie Shobe, Chair,
Lincoln City Council

The Board of Directors of the League of Women Voters of Lincoln and Lancaster County met on June 26. Several members expressed concerns over the Council action on June 25, 2018 to withdraw resolution 18 R-111 regarding support for DACA and replacing it with a letter to the Congressional delegation.

We wanted to review the letter before making further comment on the action.

When the letter was not available on the City Council web site by Friday, I requested a copy in person at the Council office on Friday, June 29.

After searching on the computer and contacting someone else, the staff person was able to provide a copy of the letter to me. .

I expressed concerns that something that had been published and public (the resolution) and reviewed and commented on by the public, had been replaced by something that did not seem to be visible or accessible and seemed to be "secret". She explained that it wasn't secret, it just wasn't available yet since the city clerk has to follow a process to collect council information and send it to be posted on the site.

Was the public comment considered in development of the letter?

What is the plan and timeline for making the letter accessible to the public ?

Will the letter be published in the Journal Star?

Thank you.

Mary Boschult, President
League of Women Voters of Lincoln and Lancaster County
4600 Valley Road, Lincoln, NE 68510
mary4now@aol.com
402-483-0415

Angela M. Birkett

From: Mark A. Hunzeker <MHunzeker@baylorevnen.com>
Sent: Saturday, July 07, 2018 5:02 PM
To: Roy A. Christensen; Leirion Gaylor Baird; Cyndi Lamm; Bennie R. Shobe; Jon Camp; Jane Raybould; Carl B. Eskridge
Cc: Jeff Galyen; Ann K. Post
Subject: Public Market in the Railyard

Council Members:

You have received correspondence from Tom Huston which argues that the tenants have no right to enforce the terms of the redevelopment agreement. We strongly disagree. This is not a “third party beneficiary” situation. It is a covenant running with the land. Parties who acquire an interest in real estate, whether by deed or lease are bound by and are entitled to the benefits of covenants which run with the real estate.

My client, Yard Investments, LLC acquired an interest in real estate which was subject to the redevelopment agreement and the licensing agreement you are being asked to modify. As a party bound by the covenants of the redevelopment agreement, Yard Investments, LLC is also entitled to the benefits of the agreement as the owner of an interest in the real estate. The redevelopment agreement paints a verbal picture of the project a tenant invests in. The use restrictions are important to tenants, as they consider how their business model will fit into the environment being created, and what kind of competitive atmosphere will exist. Limitations on uses guide decisions about whether to attempt a new business within the project. The covenants of the redevelopment agreement are enforceable by its own terms:

“It is intended that each of the restrictions set forth herein shall extend beyond the expiration of the Tax Increment Period, shall run with the land and shall bind every person having any fee or other interest in [the Project] and shall inure to the benefit of the parties hereto and their successors and permitted assigns” (Section 404).

Aside from the legal arguments, however, it is also very disconcerting that the City has been cooperative in the effort to modify the licensing agreement, knowing of my clients’ concerns and legal position, and has never once inquired as to how we believe the change could affect the interests of Yard Investments, LLC. In virtually every other context, city actions which involve changing the use of real estate are preceded by notice to neighbors and some kind of informational meeting. Such notices and meetings are not necessarily required, but are strongly encouraged, nonetheless. Here, with the City a party to the proposed changes, the lack of communication despite repeated requests to participate in discussion, the process has forged ahead with no consideration whatsoever of the “neighborhood” interests.

My client is willing to discuss the “Settlement Agreement” and its potential impacts, and hopefully reach agreement on changes and implementation of changes. We suggested in correspondence to Andrew Willis that the proposed “Settlement Agreement” be deferred pending such discussions taking place. We have had no response to that request. We now formally ask the City Council to defer the public hearing and action on the proposed “Settlement Agreement” until August 6, 2018. That should be sufficient time to know whether the matter can be supported by the other parties whose interests are affected.

Mark A. Hunzeker
Baylor Evnen, LLP

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Angela M. Birkett

From: Jeff Galyen <jeff@krotterlaw.com>
Sent: Monday, July 09, 2018 9:47 AM
To: Roy A. Christensen; Carl B. Eskridge; Leirion Gaylor Baird; Bennie R. Shobe; Jane Raybould; Cyndi Lamm; Jon Camp
Cc: Mark A. Hunzeker; apost@baylorevnen.com
Subject: Public Market in the Railyard
Attachments: Ltr to Lincoln City Council - 7-9-18.pdf

Council Members:

Please see the attached letter. Thank you for your consideration of the letter, and our request for a continuance of today's hearing.

Sincerely,

Jeff Galyen

[Jeffrey P. Galyen](#)

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July 9, 2018

Via Email:

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RE: Public Market / Redevelopment Agreement

Dear Sir or Madam:

I am one of the principal owners of Yard Investments, LLC dba "Gate 25." TDP Phase One, LLC ("TDP Phase One") received public money to help fund the development of The Public Market, within the Railyard. As a condition of receiving those funds, TDP Phase One was, and is, subject to certain obligations and requirements under a Redevelopment Agreement and Plaza/Cube License Agreement ("License Agreement"). TDP Phase One has recently argued that the Redevelopment Agreement and License Agreement should be amended because, despite its best efforts to follow those agreements, the Public Market concept has failed. The information in this letter, which likely was not made available to the City of Lincoln or the West Haymarket JPA by TDP Phase One, outlines the factual flaws in that argument.

The License Agreement stipulates that "The Public Market will be designed for small tenant spaces that provide smaller businesses an opportunity to sell their products *without incurring large overhead capital and rent expenses.*"¹

The Public Market consists of 4,054 total square feet,² initially divided into six tenant spaces. The Doughnut Hole occupied one of those tenant spaces, with 500 square feet, and initially paid rent in the amount of \$4,500 per month.³ This equates to \$71.15 per square foot per year.⁴ ***These rent numbers are extremely high for the Lincoln market, and appear to be approximately 3.5X market rent.***

¹ Plaza/Cube License Agreement dated December 14, 2012, recorded December 19, 2012 as Instrument #2012064872.

² WRK Spreadsheet dated December 19, 2012, listing square footage of all tenant spaces.

³ Lease Agreement dated March 27, 2013, between The Doughnut Hole, LLC and TDP Phase One, LLC.

⁴ Calculating the rent based only on the 500 square feet would yield a much higher number: \$4,500 per month, multiplied by 12 months, divided by 500 square feet, equals \$108 per square foot per year. But this is not accurate. The Public Market tenants share a common area, with tables and chairs. Assuming the six initial tenants occupied 2,500 of the 4,054 total square feet, and allocating the remaining 1,554 square feet equally among the six tenants (259 square feet per tenant), The Doughnut Hole would be allocated 759 square feet. Therefore, rent would be

TDP Phase One may make the following counter-arguments:

1. Reduced Rent. The landlord accepted reduced rent from certain tenants, including The Doughnut Hole, for certain periods of time. The Doughnut Hole did pay reduced rent for a period of time during which Breezy Island was permitted to sell alcoholic beverages from its premises, but the landlord increased the rent back to \$4,500 per month when that arrangement ended. It is believed that the landlord accepted reduced rent from Breezy Island in exchange for a higher share of sales.
2. No CAM Charges. The Public Market tenants were not required to pay CAM charges. This is true; however, the rents charged were so grossly in excess of Lincoln market rents that even if a reasonable CAM charge was factored into the rental amount, the rents were still three times market rent.
3. Inability to Obtain Tenants. TDP Phase One may argue that it was unable to locate tenants. However, the landlord did not attempt to obtain tenants at the lower “rent expense” amounts dictated by the License Agreement.

What is a low “rent expense” (as required by the License Agreement)?

WRK Real Estate, LLC is the listing agent on three retail properties within a few blocks of The Public Market:

- (a) Hudl Building, 1st Floor Suite, 1st Floor East: \$18-22 per square foot per year⁵
- (b) Hudl Building, 1st Floor Suite, 1st Floor West: \$15-19 per square foot per year⁶
- (c) 440 N. 8th Street (formerly Bread & Cup): \$20 per square foot per year⁷

Based on the WRK Real Estate listings, a low rent expense would be in the neighborhood of \$15 per square foot per year. Compare that to the \$71.15 per square foot per year initially charged by TDP Phase One.

Returning to the 500 square foot tenant space discussed above, to equal \$15 per square foot per year, the landlord would need to charge rent of approximately \$948.75 per month.⁸ Some adjustment is appropriate for CAM charges, but the \$4,500 monthly rent was exorbitant and did not meet the terms of the Plaza/Cube License Agreement. In addition, the “discounted” rent charged by the landlord was not in fact a “discount,” but in excess of fair market rents and two times a low rent expense of \$15 per square foot. After now being presented with information not previously disclosed by TDP Phase One, LLC, the City of Lincoln should require TDP Phase One to offer low “rent expense” in The Public Market, as dictated by the License Agreement and Redevelopment Agreement, prior to making a declaration that The Public Market cannot be successful.

calculated as follows: \$4,500 per month, multiplied by 12 months, divided by 759 square feet, equals \$71.15 per square foot per year.

⁵ http://www.loopnet.com/for-lease/?bb=hj4wtv_h4Knh20C (600 P St.).

⁶ http://www.loopnet.com/for-lease/?bb=hj4wtv_h4Knh20C (600 P St.).

⁷ http://www.loopnet.com/for-lease/?bb=hj4wtv_h4Knh20C (440 N. 8th St.).

⁸ Again, the 500 square foot tenant space, in fairness, is allocated 1/6 of the common area of 1,554 square feet, for a total of 759 square feet. A monthly rent, based on an annual rent of \$15 per square foot, is \$948.75 per month (759 square feet x \$15 per square foot ÷ 12 months).

July 9, 2018

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Our attorney, Mark Hunzeker, requested that this matter be continued until August 6, 2018. Yard Investments, LLC reiterates that request for three reasons: (a) the unavailability of our counsel, Mr. Hunzeker, to address the counsel and answer questions at today's hearing; (b) a personal deadline for a Supreme Court brief that makes today's hearing inconvenient for me; and (c) the unavailability of Ryan Funke, a partner in Yard Investments and the owner of The Doughnut Hole, to be available for today's hearing.

Thank you for your consideration.

Sincerely,

KROTTER LAW GROUP PC, LLO



JEFFREY P. GALYEN

JPG/tsc

Cc: Mark Hunzeker (via email: MHunkzeker@baylorevnen.com)
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