

PRIVILEGED INFORMATION--ATTORNEY/CLIENT INFORMATION

MEMORANDUM

TO: Legal and Finance Committee Members

FROM: Jason E. Green, City Attorney

DATE: December 13, 2006

RE: Proposed Conservation Easement for Skyline Drive

Pursuant to the Council's direction, I have been in contact with Skyline Drive Preservation, Inc. and the Northern Prairies Land Trust (hereafter "Land Trust") in regard to the proposed Conservation Easement for Skyline Drive. Both Skyline Drive Preservation, Inc. and the Land Trust have made a good faith effort to address the concerns that I have raised. A number of items have been modified in a manner that adequately addresses my concerns. However, there remain a number of items of significant concern that I wish to call to the Council's attention.

In Section 5.1 of the Easement, the Land Trust has included language that acknowledges that the City may have an obligation under the Americans with Disabilities Act or other statutes to provide access to the property. While this is a marked improvement over the previously proposed language, in my view it does not go far enough. Any modifications necessary to make accommodations for access under the ADA (or any other as yet unknown obligation that the City may incur as a result of the changes in Federal law) must first be presented to and approved by the Land Trust. This could put the City in a very difficult position if the City has an obligation under Federal law and the Land Trust is unwilling to negotiate or if the Land Trust is unwilling to accede to modifications that are necessary for the City to meet statutory obligations. In my view, this constitutes a significant potential liability to the City.

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Further exacerbating this concern, Section 6.5 of the Conservation Easement requires the City to provide notice at least 30 days in advance to the Grantee of any proposed changes. In addition, this section limits the types of changes that can be made to the property. This section, in conjunction with Section 9.3 of the Easement, would require the City to pay the costs of the Land Trust in considering and evaluating any request for changes. Essentially, not only does the City have to ask permission to make alterations to the property, the City must also pay the costs of obtaining any permission to make alterations to the property. This is highly inconsistent with the concept of ownership.

Section 8.6 of the proposed Easement contains an indemnification hold harmless provision that benefits the Land Trust. This provision required the City to defend and indemnify and hold the Land Trust harmless from any and all costs or liability relating to the Easement. This is a burden the City currently does not bear and in my view, should not take on. As the Council is aware, I routinely strike provisions that request that the City indemnify and hold harmless third parties. I believe it is in the best interest of the public at large that the City refrain from entering into agreements of this type.

The entirety of Section 10 of the proposed Easement is problematic. In essence, the Land Trust has the right to bring legal action against the City any time they feel that the conservation values contained in the Easement are not being met. The Land Trust is specifically authorized to go to court to obtain orders to require the City to take certain action without notice to the City. The Land Trust may also seek an order to require the City to pay damages. Typically, relief known as injunctive relief, that is, an order from the court for a party to do a specific thing such as to correct a deficiency on the property in this case, is only available if money damages are not available. This provision of the proposed easement turns the law of equity and damages on its head. Finally and most troubling, the City would be responsible for all costs incurred by the Land Trust, including attorney's fees, if the Land Trust is successful in suing the City. In a nut shell, the City must pay the Land Trust for the privilege of being sued. The converse is not true however. If the Land Trust sues the City and the City wins, each party bears its own costs. This is a highly inequitable provision. Finally, Section 10 of the proposed Easement imposes an obligation on the City to take necessary and reasonable measures to prevent or control ongoing injury to the property caused by third parties. This provision makes the City liable to the Land Trust and responsible for illegal acts of third parties.

Section 13.3(b) sets up the process by which this Easement will be amended. Consent to any amendment must be given by the Land Trust, but the Land Trust may, in its sole discretion, grant or withhold its consent and may impose additional conditions. This allows the Land Trust to refuse to negotiate in good faith. Reading this provision in conjunction with the balance of the Easement leaves me with the firm conviction that the Land Trust has no obligation to negotiate in good faith even if the City is faced with mandatory obligations under Federal law or a court order. This would put the City in a completely untenable position.

Additionally, Section 13.9 of the Easement is entitled "Liberal Interpretation." This provision requires that any ambiguities or questions about the interpretation of the Conservation Easement are to be interpreted in favor of the conservation values which really means in favor of the position advanced by the Land Trust. This provision is at best very problematic.

Conclusion

While I certainly appreciate the efforts of Skyline Drive Preservation, Inc. and the Northern Prairies Land Trust in attempting to address concerns that I have raised, I believe it is apparent that there are a number of provisions contained in this proposed Easement that are not consistent with the best interests of the City of Rapid City. If this were a contract or any other type of land acquisition, I would strongly and vehemently recommend to the Council that it not accept these conditions. However, in recognition of the special status of the Skyline Drive area and the City's commitment to its preservation, I believe it is incumbent upon the Council to weigh the priorities of the City and the obligations contained in this document in making a decision as to whether or not this proposed Conservation Easement is acceptable.

As a final note, I believe that the entirety of this Conservation Easement is unnecessary and redundant. As recited in the second paragraph of Section 5.1 of the proposed Conservation Easement, there are already restrictions on the permissible uses that the Skyline Wilderness Area could be put to as a result of the use of Federal funds that were allocated for the acquisition of a portion of this property. To the extent that Skyline Drive Preservation, Inc. desires additional assurance that the land can continue to be used for public purposes, that end can be achieved simply by transferring to the City the property as dedicated park land. This limits the use of the property to park purposes under South Dakota law, and also prevents the sale of the property in the absence of an election. In any case, the decision as to whether or not to accept this proposed Easement is the Council's and the Council's alone.

Please feel free to give me a call if you would like to discuss any of my concerns or any of the issues I have outlined in this memo.

JEG/map

cc: Public Works Committee
Mayor Shaw
Jerry Cole
Jim Preston
Marcia Elkins
Dirk Jablonski