



The Commonwealth of Massachusetts
Office of the Inspector General

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Thatcher W. Kezer III
Mayor
Town of Amesbury
62 Friend Street
Amesbury MA 01913

Dear Mayor Kezer:

In 2005, the Amesbury Municipal Council requested that my office review and make recommendations concerning the Town of Amesbury's disposition of a city-owned parcel of approximately 24 acres identified as Bailey's Pond. This disposition remains a contentious issue within the city. Although this office agreed to review the issues, the intent of this review was not to interfere with the city's appropriately constituted development plans. However, our review of the city's disposition procedures identified possible violations of municipal finance and procurement law that the city must address and that could interfere with the current development plans. We are also referring this matter to the Department of Revenue regarding the possible municipal finance law violations. Preliminary discussions between this office and the department have indicated that the department concurs with our analysis.

My staff has reviewed the request for proposal; the purchase and sale agreement between the city and the developer, Fafard Real Estate and Development Corporation (Fafard); other documents provided by the city; and have interviewed individuals familiar with the project. According to city officials, we have been provided with all available information relating to this development project.

Bailey's Pond, the land area in question, is a component of the so-called Terrasphere redevelopment plan that encompasses an overall redevelopment area of 449 acres of which approximately 295 acres are developable. Overall, the city owns approximately 32 acres of the 449 acres proposed for redevelopment.

The city issued a request for proposals in 2002 and signed a purchase and sale agreement with Fafard in November 2003. Since signing this agreement, little progress has been made on the Bailey's Pond or Terrasphere plan. This appears mainly due to a disagreement between the city planning board and Fafard over Fafard's proposed plan. The issue is still before the planning board. City officials informed us that a planning board sub-committee has already reviewed the Fafard plan.

Our review has found that the city violated several statutory requirements of M.G.L. c.30B and appears to have violated municipal finance law as described later in this correspondence.

The weaknesses identified by this office could, if left uncorrected, undermine the fairness and effectiveness of future real property dispositions and development projects in the city and leave the city vulnerable to fraud, waste, and abuse. These vulnerabilities, had they been identified earlier in the process, would have been sufficient grounds for this office to strongly recommend re-issuing the Bailey's Pond request for proposal and for rejecting the Fafard proposal.

Our review also found that the development deal virtually guarantees that the city will receive no payment for the land it will convey to Fafard. The financial benefit to the city rests solely with any future tax revenue to be garnered by the development project. The development deal itself, which takes the form of a purchase and sale agreement, appears to have been poorly drafted to the detriment of the city's interests. Of concern to this office, is that the city did not draft a land development agreement although city documents reference plans to draft such an agreement. The proposal requirement of a minimum bid of one dollar indicated that the city contemplated an additional financial and/or development agreement. Again, none have been created. The request for proposals failed to spell out the need for, basis of, or components of any such supplemental agreements. This was poor business judgment by the city that has contributed to the current stagnant and contentious situation with the developer.

Issues

1. Request for Proposal (RFP) Process: This office found that the RFP process and the RFP document itself were flawed. For the large and complex project envisioned by the city, the RFP should have been more comprehensive. For example:
 - a. M.G.L. c. 30B requires a municipality to determine the value of property prior to disposition and to publish a notice in the *Central Register* if the property is to be disposed of for less than that value. The city did not appraise the parcel or otherwise determine its value using procedures customarily accepted in the appraisal industry;
 - b. The RFP did not describe the type of property interest being conveyed, any reuse requirements, and the terms and conditions of the development contract with any specificity, as required by M.G.L. c. 30B, §16;
 - c. The RFP evaluation criteria and rule for award were so vague as to be meaningless;

- d. A formal evaluation of the proposal received was not performed by city officials. The evaluation should not have been waived since it is an integral part of the RFP process. Had an evaluation been performed, the city intended to include a representative of a local not-for-profit with a vested interest in having a developer chosen. The RFP stipulated that the not-for-profit would receive \$80,000 from the chosen developer. This will be discussed later in the letter since the inclusion of staff from this not-for-profit could have raised ethical and conflict-of-interest issues;
 - e. There is no record that the name of the selected proposer was published in the Central Register as required by M.G.L. c.30B.
2. RFP Response: The city only received one response to this RFP. That proposal, from Fafard, was not responsive to the RFP. The proposal failed to meet the goals outlined in the RFP because the proposal did not address the Master Plan or the assemblage and acquisition of private parcels as discussed in the RFP. This non-responsive proposal should have been rejected. Instead of rejecting the proposal and re-issuing the RFP, the city proceeded to negotiate a purchase and sale agreement with Fafard.

These negotiations led to an agreement that strayed from the RFP components. The city should have cancelled or altered negotiations when it became clear that the negotiations were adding things to the purchase and sale agreement that had not been discussed or referenced in the RFP. This created a situation that could have been prejudicial to competition. Other developers might have submitted proposals had they known that the city was willing to negotiate beyond the scope of the RFP. In our opinion, the city acted contrary to business and public contracting practices. According to the former mayor, the desire to proceed with this long-awaited project and a positive recommendation of Fafard from the Massachusetts Development Finance Agency led the city to accept the proposal regardless of responsiveness and to develop a purchase and sale agreement regardless of RFP scope.

We also note that the municipal council, by vote of November 12, 2002, agreed with the mayor's recommendation to award the development project to Fafard subject to the successful negotiation of a Memorandum of Agreement between the city and Fafard. The memorandum was to include any contingencies for the development project such as a time schedule and was to be completed within 90 days of the signing of the purchase and sale agreement. The city did not provide the memorandum to this office, and according to city officials, no memorandum exists. With no memorandum, there is no way to know whether the

contingencies envisioned by the municipal council or the mayor have been taken into account.

3. Purchase and Sale Agreement: The purchase and sale agreement, dated November 18, 2003, does not mirror the RFP. Moreover, the agreement is indefinite as to critical terms and conditions, including the omission of dates for performance of obligations and is inconsistent as to the property definition and number of units to be constructed. This agreement reflects poor business judgment and practices by the city. Based on our review, the following issues arise from the purchase and sale agreement:
 - a. The city advertised the availability of two city-owned parcels, Bailey's Pond and the so-called Truck Stop site, totaling approximately 29.7 acres. However, the purchase and sale agreement only addresses Bailey's Pond, identified as containing a total of 24.51 acres+/. The agreement identifies a \$2.4 million sale price for the Bailey's Pond parcel, which is based on a certain number of housing units to be constructed. (The \$2.4 million represents the equivalent of nearly 10 percent of the city's current real property tax levy or approximately five percent of all current city revenues.) The city will only get paid if housing units are constructed. The purchase and sale agreement mentions the Truck Stop parcel, but only in the context of the environmental clean-up that will be conducted by Fafard and paid for with the proceeds derived from the Bailey's Pond sale. In other words, the clean-up costs will be paid from money due the city;
 - b. Under terms and conditions contained in the purchase and sale agreement, proceeds from the sale would be maintained in an escrow fund to be used by Fafard to make other project-related land purchases or for environmental remediation costs. This financing provision appears to violate M.G.L. c.44, §43 of the municipal finance law. The law states that proceeds from the sale of surplus municipal property must go into the city's general fund. The city should consult with the Department of Revenue to determine the legality of this provision and any resulting impact this could have on the purchase and sale agreement. Moreover, to the extent the city would have permitted flexible financial arrangements consistent with municipal finance law, in fairness to all potential proposers such terms and conditions should have been specified in the RFP;
 - c. Fafard proposed to build 200 units, but the purchase and sale agreement stipulates only 120 units. Confusing the issue is Fafard's continuing assertion that it plans to build 180 units despite the planning board's objections. Of course, the number of projected units can change during the transition from a conceptual to an actual design, but, had other

proposers known they could negotiate significant changes to the housing requirements, other developers may have submitted responses. The final number of units is still under negotiation between Fafard and the planning board;

- d. The purchase and sale agreement mentions the purchase by Fafard of the privately owned Amesbury Sports Park.¹ The RFP made no reference to this parcel. Fafard purchased the sports park almost immediately after the Bailey's Pond purchase and sale agreement was signed. Fafard is currently earning rent from the sports park. Our review indicates that Fafard may expect to be reimbursed for the \$1.4 million purchase price of the sports park once the Bailey's Pond portion of the project is complete, or possibly even if the Bailey's Pond development does not occur. This is yet another provision that may help to ensure that the city receives no land sale proceeds. The inclusion of this parcel in the disposition process for the Bailey's Pond parcel is prejudicial to competition and should not have been included at the end of the process. If the city was willing to pay for the acquisition of neighboring parcels, this information should have been included in the RFP. Also, the city agreed to "expedite [the] Project approval process" if Fafard purchased the sports park. Any incentives offered by the city to purchase adjacent parcels, such as expediting permit approvals for the Bailey's Pond site should have also been included in the RFP;
- e. The purchase and sale agreement refers to the acquisition by Fafard of a parcel owned by Waste Management Inc. The RFP made no reference to this purchase;
- f. The purchase and sale agreement calls for a PILOT (payment in lieu of taxes) to be made by Fafard for the Bailey's Pond property. Concern has been raised by opponents of this project that these funds might also be used as revenue for the project. Pursuant to M.G.L. c. 44, §63A, if any PILOT payments are made, these funds should be credited to the city's general fund;
- g. There is no enforceable development schedule in the purchase and sale.
- h. The purchase and sale agreement does not ensure the developers adherence to the Master Plan;

¹ The Sports Park is an approximately 21 acre parcel that hosts winter snow tubing, a golf range, a restaurant and other sporting and entertainment venues.

- i. The purchase and sale agreement includes certain timetables for due diligence, but according to city staff, these dates have not been met and have not been extended by agreement of the parties. The city should consult with legal counsel as to whether Fafard's failure to meet due diligence timetables violates and/or nullifies the agreement.
4. Execution of the purchase and sale agreement: The municipal council voted to approve the award of the sale of the Bailey's Pond parcel and the former mayor signed the purchase and sale agreement. The non-specific nature of the terms and conditions contained in the agreement reflects unsound business practice and possible inadequate legal review. Consequently, the city's interest in increasing city revenue has been undermined and has reduced the likelihood of implementing other development from the greater Terrasphere plan.
5. Alliance for Amesbury: The RFP included a requirement for the successful respondent to reimburse certain expenses of the Alliance for Amesbury. The Alliance for Amesbury is a private not-for-profit entity that has been referred to by city officials as a chamber of commerce. The city provided some funding to the Alliance. According to the RFP, the Alliance incurred \$80,000 in costs for the preparation of a study, legal fees, RFP preparation and consultant services related to the project. Several issues arise from this component of the RFP.

Based on our review, by not conducting a competitive procurement process for the consultant services provided by the Alliance for Amesbury, the city violated the provisions of M.G.L. c. 30B. Public procurement contracts created in violation of competitive bidding statutes are invalid and unenforceable and, therefore, no payments may be made for work performed.² According to city officials, Fafard will reimburse the Alliance \$80,000 from the amount due to the city under the purchase and sale agreement. This is yet another provision that may help to ensure that the city receives no proceeds from the land sale. The city cannot use this payment arrangement to skirt Chapter 30B.

Any payments outstanding may not be paid to the Alliance by any city funds or money due and payable to the city.

In addition, this office notes that if the city did have a valid contract with the Alliance for Amesbury to perform certain services, the city's mechanism to require payment of an obligation of the city by a private entity would need to be structured carefully to comply with municipal finance law. According to the Department of Revenue, the type of arrangement the city has with the Alliance may be a violation of M.G.L. c.44. In a recent case, the Department of Revenue

² See Majestic Radiator Co. v. Commissioners of Middlesex, 397 Mass. 1002 (1986).

found that the city of Marlborough could not provide funds to not-for-profits absent competitive procurement for services and there being a contract in place. The Alliance would not meet these criteria. Generally, special acts or general laws authorize establishment of certain types of funding mechanisms for a specific purpose. Based on our review, the city's plan as specified in the RFP, which called for the successful respondent to directly reimburse expenses of the Alliance, would leave the city vulnerable to fraud, waste, and abuse. Private entities are not subject to the same regulation, oversight, and control as public agencies. We found that although the city provided some funding to the Alliance, the city never had a contract or agreement with the Alliance and never monitored how the Alliance spent this money which is another potential violation of M.G.L. c.44. No clear oversight over the expenditure of funds by the Alliance exists, and the Alliance is not accountable to the taxpayers. This type of arrangement could be used by public agencies to circumvent state and local laws and regulations.

Also, in the case of the city providing funding to the Alliance for Amesbury, a potential conflict of interest may exist because according to the Alliance by-laws, the mayor and other public officials sit on the board. The mayor is in a position to oversee the transfer of public funds to the Alliance. This office believes that even though the State Ethics Commission opined that having municipal employees on the Alliance board is not a legal violation, certain actions taken by municipal officials to support the Alliance, may be a violation. To this end, this office recommends that the city seek an additional opinion from the State Ethics Commission regarding the provision of funds or contracts to the Alliance and the specific actions taken by municipal officials to provide the Alliance with public funds.

The Terrasphere case is not the only time when a developer was required to reimburse the Alliance. The Upper Millyard project in Amesbury had a similar clause for the developer to reimburse the Alliance \$30,000 for expenses incurred on behalf of the city to develop that parcel. The Alliance also paid for management studies on behalf of the city, possibly using city funds that had been given to the Alliance. These activities may violate M.G.L. c.30B as well as the municipal finance law.

6. Alliance for Amesbury Terrasphere Expenses. Based on our review, this office believes that even if the arrangement between the city and the Alliance is legally valid and enforceable the Alliance may not be entitled to any reimbursement from the city or a respondent, since mostly public money was used to fund the Terrasphere plan. When the Alliance contracted for the Terrasphere plan, the city had given \$50,000 to the Alliance, MassDevelopment loaned \$25,000 to the Alliance specifically for development related to the Terrasphere plan, and it

appears that Provident bank gave \$10,000 to the Alliance for the Terrasphere plan for a total of \$85,000. In sum, it appears that the Alliance received mostly public money to fund the specific development of the Terrasphere plan. As a result, the Alliance simply acted as a conduit for the funds and should not be entitled to reimbursement.

More troubling, based on a review of documents filed by the Alliance with the Office of the Attorney General and provided to this office upon our request, is that this office could not confirm that the Alliance spent what it claimed for the Terrasphere and Upper Millyard projects. For example, the Terrasphere plan was completed in May 2001. No "study" expenses appear in the Alliance's financial statements for 2000. In 2001, there is a "study" expense of about \$33,000. In 2002, there is a "study" expense of nearly \$36,000. The Alliance is seeking reimbursement for a total of \$115,000 for two projects, but its financial statements only reflect "study" expenses of \$69,000 and the statements do not indicate if these studies are in fact related to Terrasphere and the Upper Millyard. According to the Alliance, they did not maintain a breakdown of expenses for this project; rather, they simply paid the Terrasphere design firm what was invoiced. As a result, there is no clear evidence as to whether the public funds provided to the Alliance have been used for its intended purpose. At best, this is poor business practice. This could also indicate the misuse or misappropriation of public funds. If the city were to reimburse the Alliance, it should only do so for legitimate and verifiable expenses incurred specifically for the project in question. If the Alliance is requesting reimbursement from the city for expenses never incurred this is fraud.

Conclusion and Recommendations

The process used by the city to implement the redevelopment plan raises many concerns. Overall, the city should have incorporated an emphasis on the importance of adhering to legal requirements, sound contracting practices, and principles of public accountability. Because the city failed to include milestones in the purchase and sale agreement, the Bailey's Pond project is on indefinite hold pending resolution of certain issues, including the number of units Fafard will be allowed to build.

Going forward, this office strongly recommends that the city contact the Division of Local Services at the Department of Revenue regarding the appropriate Massachusetts municipal finance laws applicable to controlling revenues received from the sale of public property and proceed to establish the financial and accounting structure to meet those requirements.

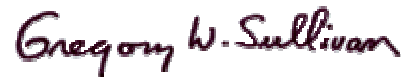
Second, considering the fundamentally flawed disposition process and resulting agreement with Fafard, this office recommends that the city seek appropriate legal

counsel to protect its rights with regard to the city's property. To date, it does not appear that the city has done this. This office believes that there remain significant problems with the purchase and sale agreement and other elements of the project, including the above noted financial issues that may render the agreement invalid.

Finally, this office recommends that the city examine its practices with regard to conducting real property transactions and service procurements and take appropriate action to ensure compliance with applicable laws. Investing in the training of city officials responsible for procurement, real property dispositions, and municipal finance law is one way to help rectify deficient practices. In addition, the city should review its process for the preparation and review of documents to ensure that adequate legal advice and review is reflected in any RFPs and contract documents that legally bind the city. To assist public officials to operate lawfully and effectively, this office, as well as the Department of Revenue, offer a number of training options.

Thank you for giving us the opportunity to assist you. If you have any further questions or concerns, please do not hesitate to contact Deputy Inspector General Neil Cohen.

Sincerely,



Gregory W. Sullivan
Inspector General

cc: Members of the Municipal Council
Joseph Fahey, Director of Economic Development
Nipun Jain, Planner
Gerard Perry, Department of Revenue
Kathleen Colleary, Department of Revenue
Peter Sturges, State Ethics Commission