

MINUTES OF THE PROCEEDINGS OF THE COUNCIL
OF THE CITY OF FOSTON, POLK COUNTY MINNESOTA
JANUARY 27, 2014

Pursuant to due call and notice thereof a special meeting of the City Council of the City of Fosston, Polk County Minnesota was held in Council Chambers on Monday, January 27, 2014 at 12:00 p.m.

The meeting was called to order by Mayor Offerdahl with the following members present: Veum, Dufault and Lambert. Member absent: Carlson. Also present was City Attorney Mike Brouse via telephone, Attorney Joan Dufault representing Greg Mireault, Greg Mireault, City Administrator Charles Lucken and Dean Vikan.

The Mayor stated that this meeting is to consider Greg Mireault's request for final payment on the Golf Course Purchase Option Contract. Our City Attorney has recommended not making final payment due to some title issues on the property. At that point, the Mayor turned it over to City Attorney Brouse.

Brouse stated that the problem is a title issue. The issue is a variance to reduce the ordinary high water setback requirements that was issued in 1997 for the property. The variance permitted the construction of the clubhouse and septic system closer to the lakeshore than normally permitted under the Polk County Zoning Ordinance. The variance is erroneous in that it names Greg Mireault as owner of the property when, as a matter of record, the property was titled in the name of Mireault's, Inc. Secondly, the Findings of Fact reflect that the subject property is located in Brandsvold Township, the legal description set forth in the findings reflects "Twp. 140" rather than the actual number of Brandsvold Township which is 148.

According to Brouse, the County Board of Adjustment needs to issue an Amended Order Granting Variance to correct the errors in the original variance.

The title needs to be cleared. If the council is sure that the Polk County Board of Adjustment will correct this issue the decision can be made. The council needs to decide how important that variance is.

The Mayor asked for questions the council may have of the City Attorney:

Roy Dufault – What is the issue with the Variance? Brouse: The variance was granted for a tract of property that was in a different township in the legal description.

Lambert – The issue? Lucken: The issue is the property description in the variance and the other issue is that it was issued in Greg Mireault's name instead of Mireault's, Inc.

Attorney Joan Dufault informed the council that the original findings of fact referred to Township 140 instead of Township 148. The County Zoning Administrator and Attorney have indicated that it's not a problem to fix. Brouse indicated that because they don't think this is a problem the actual signing off and correcting this lies with the board. If the City were to sell the property with this title defect it will not be able to demonstrate that it has a marketable title. The Zoning Administrator and County Attorney have no responsibility as to the consequences if the board does not correct the errors.

Council member Veum thinks we should get this straightened out before moving forward with this.

Roy Dufault asked what the City risk is if we proceed with this. Brouse stated that this problem can be corrected. He's prepared a petition and amended order to correct the problem. The risk in the short term is if the board is going to act on it. If it doesn't, then if the City wants to sell the property it won't have marketable title.

If the City Council is going to close the deal, they should have some assurances that the Board of Adjustment will sign off on the order without objection. If the Board of Adjustment refused to sign off on the order the City has no recourse. As Brouse informed the Council, variances are granted at will and if the City challenged that it would lose.

Offerdahl stated it's a defect that needs to be cured. Does the council believe it will be corrected? He assumes it is likely the County Board would act on it at a meeting and asked the date it would be reviewed by the board.

Attorney Dufault stated that it has been submitted and the Planning Administrator is looking into options. He feels the variance is sufficient. If it has to go before the Board of Adjustment, that meeting is on February 28th.

There was further lengthy discussion on this matter. City Attorney Brouse wants to see the amended findings signed off on and recorded beforehand. Veum thinks we need to wait and get this all done.

Greg Mireault believes they provided all the documents they need to and because of a couple of typos the City does not want to pay. If the board doesn't sign off on it, who does? The Mayor stated that if we pay Mireault, then we're stuck in this.

After further lengthy discussion Offerdahl stated it sounds like there are three options: 1) To wait for the Order to be approved and signed off on February 28th; 2) To operate on faith and go ahead and close; or 3) ask the county attorney and administrator to sign a document guaranteeing clear title. Brouse stated that they can't guarantee that. The most they can do is sign a letter saying they're confident that the zoning board will sign the petition. Any representations made by them carry some weight but zoning boards make their own decisions and the requirements they have giving an amended order. The board may not think it's necessary and they have no obligation to sign it. There's always a risk when dealing with a board.

Further discussion included:

- This issue is a legal technicality matter; letting a technical violation remain in place.
- Considerable value was placed on the clubhouse in the purchase process ranging from \$100,000 to \$150,000.00. Getting this variance cleaned up is at least necessary for the property that the clubhouse is on.
- Lambert stated that we have experts to help us out. Does he think it will be cleared – yes. But he wants to see it cleared before we move forward. Veum agrees. Lambert continued that it's incumbent upon the seller to make sure the title is clear.
- Offerdahl again stated options: 1) Wait until the board acts; 2) require no more action and close; or, 3) wait for letters from the administrator and county attorney from the board.

Roy Dufault stated that the type of discrepancy that this is he is comfortable that the board will clear this up and he is fine to close now and continue working on it. The risk is that for a short period of time the property is not immediately marketable. He wants to move forward.

Veum and Lambert both indicated they want to see this all cleared up first.

Mayor Offerdahl then called for a motion. He cautioned council member Dufault that he should consider abstaining or refrain from making a motion due to a potential conflict of interest because Roy's wife, Joan Dufault, is the Attorney representing Greg Mireault.

City Attorney Brouse stated that he assumed that council member Dufault would recuse himself and this may be something that would merit reconsideration after this meeting.

Mireault stated that he is willing to get signatures on the two letters to close this (from the Zoning Administrator and County Attorney).

Mayor Offerdahl then asked if the council would entertain a motion to close upon receipt of signed letters from the two.

Veum asked if this clears the clouded title and it does not.

Offerdahl again asked for a motion to close upon no board approval but upon the Administrator and the County Attorney approval.

Dufault introduced the following motion that the council proceed based on Greg Mireault being able to obtain from the County Attorney and County Zoning Administrator signed letters recommending to the Polk County Board of Adjustment that they approve the Amended Order Granting Variance comes before the board on February 28th.

Brouse then recommended that this motion state that if full payment is made the burden continues to rest with the seller – at the seller's expense to deliver a clear and marketable title. Lambert seconded the motion.

Offerdahl stated he is concerned that this motion was made by the council member who may have a potential conflict of interest. Lambert stated that if Dufault withdraws his motion then he will introduce it. Dufault then withdrew his motion and Lambert's second was also withdrawn.

Brouse then recommends including language that states this is a conditional closing and a recital that council is doing this on reliance that it will receive marketable title.

Member Lambert introduced the following resolution and moved its adoption:

**RESOLUTION APPROVING CONDITIONAL CLOSING AGREEMENT
RESOLUTION NO. 14-09**

WHEREAS, the parties entered into a Purchase Option Contract dated October 31, 2013 for the sale and purchase of the real property described in attached Exhibit A (hereinafter "Property"); and

WHEREAS, the Seller agreed to provide Buyer with marketable title to the Property consistent with the professional opinion of Buyer's legal counsel; and

WHEREAS, Buyer's legal counsel has made objection to the condition of the title of the Property on several grounds; and

WHEREAS, one objection remains unresolved, viz that objection related to the issuance of a defective variance as set forth in section 6 of the title opinion rendered by Buyer's legal counsel dated October 24, 2013;

WHEREAS, Seller has agreed to take such action at Seller's expense as may be necessary to correct the deficiency noted by Buyer's legal counsel in order to induce Buyer to pay the balance of the purchase price prior to correction of title as required by Buyer's legal counsel; and

WHEREAS, Buyer, by resolution, has agreed to pay the balance of the purchase price to Seller pursuant to the conditions set forth below.

THEREFORE, in consideration of the mutual promises and covenants set forth below, the parties, and each of them, agree as follows:

1. **SELLER'S OBLIGATIONS.** Seller shall provide Buyer with letters executed by the Polk County Attorney and by the Polk County Administrator in which each of them agrees to recommend to the Polk County Zoning Board, or any other governmental agency which has jurisdiction (hereinafter "Board"), approval and adoption of an Amended Order per the attached Exhibit B.

In exchange for payment in the amount of \$65,000.00 from Buyer, Seller shall deliver to Buyer the following documents:

- a. Warranty Deed for the Property as provided in said Purchase Option Contract (as subsequently corrected);
- b. A check payable to the Polk County Treasurer in the amount of \$1,019.70 for deed tax;
- c. Completed Certificate of Real Estate Value and supplemental form #PE-20A;
- d. Completed Well Disclosure Certificate;
- e. Copy of recorded Partial Release of Mortgages from Ultima Bank Minnesota releasing the subject property from its five (5) mortgages; and
- f. Abstract of title to the subject property.

Seller shall take such further action as may be necessary to procure the adoption of the above-referenced Amended Order at the first Board meeting following the execution of this agreement and shall thereafter obtain and record said Order at its expense and provide a copy of the officially adopted and recorded Amended Order to Buyer at the earliest practicable date.

In addition, Seller or Seller's attorney shall be responsible for filing any requisite 1099 to Seller.

2. **BUYER'S OBLIGATION.** Upon receipt of the above-referenced letters and in exchange for the delivery of those items set forth in section 1, a-f above, Buyer shall pay to Seller the sum of \$65,000.00 and deliver the Limited Easement to Seller.
3. **NO WAIVER OF PRIOR CONDITIONS.** No term or condition of this agreement or the transaction contemplated hereby shall be construed or deemed a waiver of Buyer's rights as set forth in the above-referenced Purchase Option Contract.

4. **NO MERGER.** No term or condition set forth in the above-referenced Purchase Option Contract or in this agreement shall merge or be deemed to merge with the deed and all terms and conditions set forth in this agreement and said Purchase Option Contract shall survive the closing and remain enforceable pursuant to their terms.
5. **DEFAULT, ASSESSMENT OF COSTS.** In the event of a default by Seller under said Purchase Option Contract or under this agreement, all costs and expenses, including but not limited to reasonable attorney's fees incurred by Buyer in connection with enforcement of the terms of said agreements, whether such costs are incurred in connection with a settlement or with litigation, shall be reimbursed by Seller to Buyer promptly upon demand therefore and submission of a bill of particulars.
6. **DESTRUCTION OF PROPERTY.** In the event that the property is destroyed or substantially damaged by fire or other cause before correction of title as provided herein, this agreement shall be null and void, at the Buyer's option, and the option money and all other monies paid by the Buyer to the Seller shall be promptly refunded to the Buyer.

In the event that the Property is less than substantially damaged by fire or any other cause on or before correction of title, then the Seller shall promptly and diligently repair or replace the damage, and if repairs are not completed within a reasonable time after correction of title, this agreement shall be null and void, at the Buyer's option, and the option of money and all other monies paid by the Buyer to the Seller shall be promptly refunded to the Buyer.

7. **WAIVER.** Waiver by any party of any breach of any provisions of this agreement shall not constitute a continuing waiver or a waiver of any subsequent breach by any party either of the same or of another provision of this agreement. All waivers to be enforceable must be executed in writing.
8. **SEVERABILITY.** In the event a court of competent jurisdiction shall declare any provisions of this agreement invalid, said provisions shall be severed and all other provisions herein shall continue to be effective and binding upon the parties, their heirs, successors, representatives, administrators and assigns.
9. **VENUE.** All actions arising out of this Agreement shall be venued in Polk County. Each party hereby specifically waives any and all right to have any action commenced hereunder venued elsewhere.
10. **INTERCHANGEABLE TERMS.** References to gender shall not be exclusive. Where appropriate, specific reference to feminine, masculine and neuter may be read to include the others. Where appropriate the singular may be read to include the plural and vice versa.

11. **CAPTIONS.** Captions and headings are for convenience only and shall not be construed as a limitation or supplementation of any term or condition of this agreement.
12. **COUNTERPARTS, PHOTOCOPIES.** This agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument. Photographic reproductions of this agreement, inclusive of the signatures of the respective parties, shall have the same force and effect as the original.
13. **BINDING EFFECT.** This agreement shall inure to the benefit of, and be binding upon, the heirs, legal representatives, successors and assigns of the parties hereto.
14. **INTEGRATION CLAUSE.** This instrument contains the entire agreement between the parties hereto, and except as expressly referenced herein, no prior agreement, whether oral or written, shall be effective to modify or supplement the terms of this agreement. No contemporaneous or future modification or addition shall be effective unless made in writing and endorsed by both parties hereto.
15. **JOINT RESPONSIBILITY.** With respect to the form of this Agreement, both parties assume joint responsibility for the form and composition of each paragraph and they further agree that this Agreement shall be interpreted as though each of the parties participated equally in the composition of each part thereof.

This Agreement is not to be strictly construed for or against either of the parties. It shall be interpreted simply and fairly to both parties.

16. **RECITALS.** For purposes of this agreement, the recitals (whether denoted separately or integrated into provisions of this agreement) shall be deemed by any court or other tribunal as determinative of the facts set forth therein. Said recitals shall be used to construe the terms, conditions, and purposes of this agreement and to decide any dispute or claim which may arise in connection herewith.

The motion for the adoption of the foregoing resolution was duly seconded by member Veum and upon vote being taken thereon the following voted in favor thereof: Lambert, Veum, Offerdahl and Dufault

And the following voted against same : None

Whereupon said resolution was passed and adopted this 27th day of January, 2014.

James Offerdahl, Mayor

ATTEST:

Charles Lucken, City Administrator

Offerdahl restated again that he is not sure Roy Dufault can vote on this matter.

There being no further business to come before the council, the meeting was adjourned at 1:17 p.m.

Charles Lucken, City Administrator