


## MEMORANDUM

To: City Commission

From: Robert M. Fournier, City Attorney 

Re: Fillmore Drive surface parking lot  
St. Armands Key

Date: July 14, 2021

## INTRODUCTION

At the regular City Commission meeting of May 17, 2021, John Meshad, Gavin Meshad and Dennis McGillicuddy made a presentation to the Commission regarding the potential for sale and development of the City owned Fillmore Drive surface parking lot on St. Armands Key. An inquiry was made as to whether the City could and would sell the Fillmore lot subject to specified contingencies, including a proposal for development of the site with a 98 room boutique hotel, 6 residential townhouses, a 15,000 square foot gourmet grocery store, landscaped boundaries, public restrooms and the burying of overhead power lines. Additionally, the proposal included the replacement of the existing public parking spaces on the surface lot with spaces in an enclosed parking structure. This structure would also contain the off street parking spaces required by code for the hotel and the grocery store.

The proposed sales price of the lot would be its fair market value based on an appraisal to be obtained by the City. The appraiser would have to make certain assumptions as to the approval of various land use applications that would be required to permit the development of the lot. These land use applications are discussed in Part III of this memorandum. It was not clear to me whether the formal offer to purchase would include a charge back to the City (presumably in the form of a credit against the purchase price) as a contribution to a portion of the construction cost of this parking structure that would contain the public parking spaces. Another question to be answered is how the new interior parking spaces would be kept public and under the control of the City, if the underlying property was no longer owned by the City.

At the conclusion of the discussion following the presentation, the City Commission (by a 4-1 vote) directed that after appropriate consultation with the City Manager and staff, I prepare a report summarizing all of the various matters that would have to be addressed if the conceptual development proposal were going to move forward. I stated that the report would be divided into three parts. These three parts would address (1) the location of the Fillmore Drive surface parking lot within the St. Armands Paid Parking Area; (2) the question of whether the property could be sold in accordance with an unsolicited offer to purchase or whether Florida law would require the City to initiate a competitive solicitation and selection process to choose a prospective buyer/developer; and (3) a list and summary of the Comprehensive Plan amendments, zoning text amendments, rezonings and other development approvals that would have to be obtained before the proposal described on May 17th would be possible to develop.

## **PART I. ST. ARMANDS PAID PARKING AREA**

On May 16, 2016, the City Commission adopted Ordinance 16-5174 creating the St. Armands Paid Parking Area. Two months before, the City Commission had adopted a plan to fund the construction of a public parking garage to serve St. Armands Circle. The plan called for funding the construction cost of the garage by using a combination of a special assessment on the 77 parcels within the Commercial Tourist zone district and the revenues from metered parking spaces located within the paid parking area established by Ordinance 16-5174. Except for the new garage where paid parking is in effect 24 hours a day including Saturdays, paid parking within the St. Armands Paid Parking Area is in effect on weekdays only from 9 am until 8 pm. The parking rates established by the ordinance are \$1.50 per hour for "core" parking spaces; \$1.00 per hour for "perimeter" parking spaces; 75 cents per hour for "surface lot" parking spaces and 50 cents per hour for garage parking spaces. These rates have been in effect since February of 2019.

Parking Manager Mark Lyons advises that there are a total of 268 public parking spaces in and surrounding the Fillmore Drive surface parking lot. There are 217 parking spaces within the actual Fillmore Drive parking lot. The charge to park in these spaces is 75 cents per hour. There are a total of 25 parking spaces in the alley adjacent to the Fillmore parking lot and a total of 26 parking spaces on S. Adams Drive and Monroe Drive adjacent to the Fillmore lot. The charge to park in these 51 spaces adjacent to the Fillmore parking lot is \$1.00 per hour.

All of the 268 parking spaces described above are within the St. Armands Parking District. If the proposed development of the Fillmore lot described above were to move forward, all of these 268 parking spaces would be temporarily lost during the construction of the hotel, grocery store and garage. However, the revenues derived from the paid parking on all of these 268 spaces is pledged to pay off the debt service on the revenue bonds that were issued to partially finance the construction of the St. Armands parking garage over a twenty year period.

Resolution 16R-1658, also adopted on May 16, 2016, contains certain applicable covenants which have to be considered at this time. The first covenant provides in relevant part that ". . . if the Net Parking Revenues within the St. Armands Paid Parking Area are not expected to generate enough money to satisfy 110% of the Annual Debt Service in the then current Bond Year, the Issuer (i.e. the City) shall be required to take action to increase Net Parking Revenues in a magnitude that in the aggregate is expected to make up the difference." Based on my review of the report prepared by Walker Consultants dated April 14, 2020 which evaluated the paid parking program after one year and also based on the business closures experienced during the COVID-19 pandemic, it is my understanding that the City could be required to take action to meet its obligation under this covenant in any event, whether or not the Fillmore lot is sold or developed. Of course there is a practical limit to how much parking rates could be raised before people would become unwilling to pay and simply not utilize the spaces. If this point were reached, the bond resolution also contains a covenant to budget and appropriate other legally available funds (excluding funds derived from ad valorem property taxes) to pay the debt service on the bonds.

Another applicable bond covenant, the so called "no impairment" clause, was discussed by former Financial Administration Director John Lege in his March 21, 2016 memorandum to the City Commission regarding the St. Armands Parking Garage Project. In that memo, Mr. Lege wrote that this covenant "will prohibit the City from taking any action (e.g. a decrease or elimination of the parking hourly rate or increasing free parking opportunities *or reducing the size of the parking district*), the effect of which is expected . . . to have a material adverse impact upon the net parking revenue within the parking district." (emphasis mine). Basically this covenant and related provisions prohibit the City from taking any action that could be expected to "impair" or interfere with the flow of the revenue stream that has been pledged to pay off the bonds.

I have had the opportunity to speak with Mr. Draper, the City's bond counsel, about the City's obligations under this covenant. The covenant does not necessarily

prohibit the City from proceeding with the sale and development of the Fillmore lot and replacement of surface parking spaces with in structure parking spaces, provided that the City has a documented plan in place to make up for the revenue loss during the period of time the project is under construction. Initially, devising such a plan would require a review of the history of the revenue generated from the 268 parking spaces in and around the Fillmore lot since paid parking was implemented in February 2019 and an estimate of the amount of revenue the temporarily lost parking spaces would have generated during the construction period. Mr. Draper suggested that this amount be augmented by ten percent (10%) to arrive at a final number.

After the amount of lost revenue from the temporarily displaced spaces has been estimated, the City should take steps to obtain an equivalent amount from another source and utilize the amount received from the substituted source to contribute toward payment of the debt service on the bonds. Possible ways to obtain an alternate revenue source might be to advise a prospective purchaser/developer that the City will not sell the Fillmore lot unless the amount of anticipated lost revenue from the temporarily displaced parking spaces is added to the purchase price. Alternatively, the City could use funds from another legally available non ad valorem revenue source, raise parking rates in the garage; charge for parking on weekends; add to the St. Armands Paid Parking Area. These possibilities are intended only as illustrative examples, not as an exhaustive list of alternatives.

## **PART II. COMPETITIVE SOLICITATION AND SELECTION OF PURCHASER/DEVELOPER**

The proposal made to the City Commission on May 17, 2021 contemplated a future offer to purchase the Fillmore lot property from the City for a specified price and subject to specified conditions relating to the development of the site. Some of the public comments received in response noted that if the Commission were going to proceed with the sale and development of this property, that this should be accomplished in accordance with a competitive selection process such as a City initiated Request for Proposals or an Invitation to Negotiate.

Subject to the limitations explained below, it is my opinion that the City Commission may lawfully enter into a contract for the sale of this property without initiating a competitive selection process for development of the site. The law in Florida is that in the absence of specific legislation requiring a public agency, such as the City, to competitively bid a contract, the public agency is not required to competitively bid. In this situation, I believe that the City may enter into a contract

for the sale of this property provided that such a contract is (1) motivated by a proper municipal purpose; and (2) is not approved or entered into in an arbitrary and capricious manner.

There is no specific legislative directive in this situation that would apply to require the City to initiate a competitive process to select a developer for the site. For example, Section 287.055 Florida Statutes, the Consultants' Competitive Negotiation Act, requires the City to follow the competitive selection process outlined in that statute when contracting for professional architectural, engineering, landscape architectural or surveying and mapping services. There is no comparable statute that applies to the approval of a contract for the sale and development of City property under the circumstances presented.

The provisions of Section 125.35 Florida Statutes apply to the disposition of property owned by a county, but not by a municipality. In the absence of a municipal charter provision or ordinance prescribing the procedures to be followed in the sale of municipal property, the manner of selling such property is left to the discretion of the municipal governing body subject to the limitations noted above.

The City's Procurement Code states that the City's central procurement system has been established to *procure goods and services* of every nature necessary to the operation of city government. Thus, the code requires that contracts to acquire goods and services for the City must be competitively bid, although there are specifically enumerated exceptions to this general rule in the Code as well. There is nothing in the City's Procurement Code specifically applicable to contracts for the sale of real estate.

The City has an administrative regulation that appears to be the only specific regulation that would be applicable to this situation. The administrative regulation allows for the sale of municipal property at public auction, by competitive sealed bids or by negotiated sale after an appraisal of the property has been obtained for informational purposes. Because of the development approvals required (see Part III), the term "negotiated sale" in this situation has to be a process that is initiated when a prospective purchaser/developer makes an initial offer to purchase and develop the property that the City can react to as contrasted with a process that begins with a collaborative discussion between the parties culminating in an approved contract for purchase and sale. In other words, under the circumstances presented here, it would be best if the City confined itself to consideration of an offer to purchase unilaterally submitted by a prospective developer rather than negotiating the terms of a contract before an offer to purchase has been made.

With the above having been said, I think it is worth noting that the question of whether the City *is legally required* to undertake a competitive selection process to find a purchaser/developer for the Fillmore parking lot is distinct from the question of whether the City *should* undertake a competitive selection process as a matter of policy. Certainly, if the City Commission's paramount goal is to get the highest sales price possible to the exclusion of all other factors, then it would be sensible to undertake a competitive selection process. Likewise, if the Commission wanted to see the property developed but had no strong preferences as to the type of development desired and the mix of uses, the Commission would likely benefit by issuing a Request For Proposals, to enable proposers to be innovative and creative in coming up with ideas that might work well for the site. However, in this particular case, the prospective purchasers/developers have already described their vision for the development of the site which is consistent with the "Master Plan of the Commercial Tourist District on St. Armands Key" prepared for the City of Sarasota by Heidt & Associates, Inc. dated December 15, 2008.

The first limitation noted above on the discretion of the City Commission to sell the property for development is that the sale serves a valid municipal purpose. In this case if the property is sold to a developer who proposes to develop the site in a certain way, a valid or proper municipal purpose might be to sustain and promote the economic vitality of St. Armands Circle. Arguably, a valid municipal purpose could be negated if the City were going to permanently lose all of the public parking spaces that would be temporarily lost during construction on the site. Consequently, the stipulation that the public parking spaces be maintained is an important consideration. However, if the City were to go too far in imposing various requirements on a purchaser pertaining to desired development on the site that were not part of the original offer to purchase, this may support an argument that the transaction looks less like a sale of real estate and more like procurement of a service that must be competitively bid. For example an offer to purchase the property might contain a proposal to construct public restrooms, but if the City actively solicits construction of public restrooms with specifications, this supports the position that a competitive solicitation is required.

The second limitation on the City's ability to act is that approval of a contract for the sale of this property may not be done in an arbitrary and capricious manner. For example, any contract that is approved on the basis of personal or political favoritism to the exclusion of other factors could be subject to challenge on the grounds that approval of the sale was arbitrary and without a rational basis. However, if it can be shown that there is a rational basis to sell the property because

it would genuinely help to promote and maintain the economic vitality of St. Armands Circle and the City as a whole and because it is consistent with a previously approved Master Plan, then it is unlikely that the transaction would be found to have been accomplished arbitrarily. A court should be reluctant to interfere with the legislative judgment of the City Commission that a sale is in the best interest of the City which in turn supports a finding that it is not arbitrary.

Any contract providing for the sale and development of the Fillmore Drive surface parking lot approved at the present time would have to contain certain contingencies to allow the property to be developed. This presents certain challenges because the City cannot lawfully contract away its authority to make land use decisions pertaining to the use and development of property in a purchase and sale agreement. That is, any contract for the sale of the Fillmore lot entered into by the City cannot lawfully obligate the City to grant all of the various land use approvals that would be required to permit the development of the property. These decisions must still be based on the relevant criteria found in the Zoning Code as further discussed in Part III below. If an approval that is vital to the development of the site is not granted, then presumably the contract would provide that that particular contractual contingency would not be satisfied and the contract would be canceled and terminated.

### **PART III. DEVELOPMENT APPROVALS REQUIRED**

#### **A. COMPREHENSIVE PLAN AMENDMENT (Building height)**

The future land use classification of the Fillmore Drive parking lot on the Future Land Use Map in the Comprehensive Plan is Metropolitan Regional, Site 7. This future land use classification includes the entire St. Armands Circle business district. There are only two implementing zone districts for this future land use classification. These two zone districts are the Governmental or G zone district and the Commercial Tourist or CT zone district. Presently, the Fillmore Drive parking lot is zoned Governmental.

If the Fillmore Drive parking lot were to be developed in accordance with the May 17th presentation to the City Commission, this would most likely require a rezoning of the lot from Governmental (G) to Commercial Tourist (CT). Non governmental uses are allowed in the G zone, but only under a leasehold and subject to approval of a major conditional use application. If plans for development of the lot move forward, the City Manager has expressed a preference that the property be

sold outright rather than be leased out under a long term lease. A sale to enable private development would require a rezoning to the Commercial Tourist zone, which is further discussed in Part III.C below.

During the presentation to the City Commission on May 17th, it was made clear that a maximum height limit of forty five (45) feet would have to be allowed in order for the conceptual development proposal that was described to become a reality. With three exceptions, the maximum height limit for buildings on the coastal islands, including St. Armands Key is thirty five (35) feet. These exceptions are (1) Plymouth Harbor; (2) the area on Lido Key classified as Resort Residential on the Future Land Use Map; and (3) the site of the City's new public parking garage on which the maximum height limit is forty (40) feet. The maximum height limit of thirty five (35) feet elsewhere on the barrier islands is imposed by the "Coastal Islands Maximum Building Height Overlay Map" (Illustration EP-15) and supporting text which appears in the Environmental Protection and Coastal Islands Chapter of the City of Sarasota Comprehensive Plan. An increase in the applicable maximum height limitation of ten (10) feet to achieve the desired maximum height of forty five (45) feet would require an amendment to the Comprehensive Plan.

It is my understanding that the St. Armands Business Improvement District has submitted a pre-application for an amendment to the Comprehensive Plan to increase the maximum allowable height of structures located within the District, which includes the area on St. Armands Key zoned Commercial Tourist, but would not include the Fillmore Drive lot, which as previously stated is zoned G rather than CT and is also outside the business improvement district. This proposed amendment would not be an amendment to the Future Land Use Map because the Building Height Overlay Map is found in the Environmental Protection and Coastal Islands Chapter of the Comprehensive Plan.

If the BID initiated Comprehensive Plan amendment application proceeds and is ultimately approved, the Comprehensive Plan would allow structures in the CT zone district up to a maximum height of forty five (45) feet. Consequently, a rezoning of the Fillmore Drive lot from G to CT would enable a 45 ft. tall structure to be built on this property. Alternatively, if so inclined, the City Commission could expand the geographical scope of the BID initiated Comprehensive Plan amendment to include the Fillmore Drive lot, whether or not it is ultimately rezoned to CT.



**B. ZONING TEXT AMENDMENTS (Building height, Hotel as permitted use, Hotel density, location of residential uses)**

In addition to the 35 ft height limitation in the Comprehensive Plan described above, the Commercial Tourist zone district development standards also provide that the maximum height of buildings in the CT zone district is 35 feet. So, in addition to the Comprehensive Plan amendment discussed above, a zoning text amendment (ZTA) to the CT zone district regulations would likewise be required to increase the maximum building height limit. It is my understanding that the St. Armands BID is or will be also seeking a ZTA to amend this restriction to increase the maximum allowable height to 45 ft. in the CT zone in order to be consistent with the Comprehensive Plan amendment. If a BID initiated zoning text amendment proceeds and is ultimately approved, the Commercial Tourist zone would allow buildings to be constructed up to a maximum of 45 ft. Consequently, if both the Comprehensive Plan amendment described above and the subject zoning text amendment are approved, then a rezoning of the Fillmore Drive lot from G to CT would enable a 45 ft. tall structure to be built on this property.

Currently, the Commercial Tourist zone district regulations do not allow a hotel as a permitted use in the CT zone district. Consequently, a ZTA to add hotels as a permitted land use in the CT zone district would also be required either before or simultaneously with the rezoning of the Fillmore lot to CT in order to permit the construction of a hotel on the site. It is my understanding that the St. Armands BID ZTA application will include a request to allow hotels as a permitted use in the Commercial Tourist zone district. If the BID initiated ZTA to add hotels as a permitted use in the CT zone proceeds and is ultimately approved, the Commercial Tourist zone district would allow the construction of a hotel as a matter of right as a permitted use. Consequently, if the ZTA is ultimately approved and the Fillmore Drive lot is rezoned from G to CT, then construction of a hotel as a permitted use on the Fillmore Drive lot would be allowed.

Based on the description of the development proposal given to the City Commission on May 17, 2021, it appears that if hotels became a permitted land use in the Commercial Tourist zone district and are allowed subject to a maximum number of guest units per acre, that fifty (50) guest units per acre would have to be allowed to build the hotel as proposed. The Fillmore Drive parking lot is 1.98 acres or just under two acres in size. During the May 17th presentation, it was stated that a 98 room hotel was the size of the hotel proposed for the site. This is a density level of approximately 50 guest units per acre.

The Commercial Tourist zone district regulations allow residential uses but subject to the restriction that such residential uses are included within a mixed use development and that the use must be located above the first floor of the building. The former restriction should not present a problem for the Fillmore development proposal; however the later restriction may need to be amended to allow the six townhouses that are proposed which according to the information presented would have a first floor at or closer than a building story to street level.

### **C. REZONING and SITE PLAN**

Because the Fillmore Drive lot is presently zoned Governmental, any future plans for development of the site depend on a rezoning of the site to the Commercial Tourist zone district. However, a rezoning to the Commercial Tourist zone district *before* the three above described zoning text amendments have been adopted to (1) allow hotels in the zone at an appropriate density of guest units, (2) allow the desired maximum height limitation and (3) allow residential use on the first floor would still not make it possible to develop the site in accordance with the May 17th presentation. These three zoning text amendments are needed as well.

Any contract for purchase and sale of the property that is approved at this time or in the foreseeable future would have to contain a provision to the effect that the purchaser's obligation to close under the contract and acquire title to the property is contingent on a re-zoning of the property to Commercial Tourist. However, a contract for purchase and sale cannot lawfully obligate the City to re-zone the property to Commercial Tourist because re-zonings are quasi-judicial decisions in Florida and the City Commission cannot make a decision in advance of a hearing at which competent substantial evidence in support and in opposition to the re-zoning could be presented. Any contract for purchase and sale would have to preserve the right of the City Commission to deny the re-zone application in the event that after being presented with competent substantial evidence to support the denial, the City Commission wanted to do so.

Any contract for purchase and sale of the Fillmore Drive lot should allow the purchaser to file an application for rezoning of the property as a contract vendee with the prior consent of the City as the property owner. A contractual provision that obligated the City to file the application for rezoning would enhance the likelihood of a challenge to the contract based on the allegation that the City was engaged in "contract zoning" which is impermissible under Florida law.

The question of whether a contract for purchase and sale of the property should require the purchaser/developer to submit a full site plan for the proposed development of the property together with an application for rezoning is also presented. I believe there are many citizens who would oppose an application to rezone the property if not accompanied by a site plan because of the concern that there would be too much uncertainty about what development might ultimately occur. Also, a site plan submitted together with an application for re-zoning would be considered by the City Commission at the same public hearing simultaneously with the rezoning while an application for site plan approval filed subsequent to a rezoning would be heard only by the Planning Board subject to an appeal from the decision of the Planning Board to the City Commission by the applicant or by an affected person.

Like the decision on the re-zoning, a decision of whether to approve or to deny a site plan is a quasi-judicial decision under Florida law. Consequently, any contract for the purchase and sale of the property would have to contain a provision making the purchaser's obligation to close the sale contingent upon approval of the site plan. At the same time, the purchase and sale contract could not lawfully require the City to approve the site plan. The City must retain the authority to disapprove the site plan in the event a denial is warranted based on the evidence received at a quasi-judicial public hearing. Any contract for sale and purchase of the Fillmore lot executed before the property has been re-zoned to Commercial Tourist should contain a provision whereby the prospective purchaser/developer of the site waives the right to seek damages from the City for expenses incurred in preparing and submitting an application for re-zoning and a site plan in the event these applications are denied.

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