AGENDA #____

CITY OF MADISON, WISCONSIN

REPORT OF:	City Attorney and Real Estate Manager
TITLE:	The Center for Industry & Commerce--Proposed Amendment
AUTHORS:	James Voss and Don Marx
DATED:	April 7, 2005

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TO THE MAYOR AND COMMON COUNCIL:

This Report is for the purpose of responding to a series of communications made to various appointed and elected City officials over the past three months by Terrance R. Wall, President of T. Wall Properties Master Corporation, the Manager of The Center for Industry and Commerce L.L.C. (hereinafter "CIC"). Beginning with a December 9, 2004 letter, Mr. Wall proposed four separate amendments to the November, 2002 Agreement to Purchase and Undertake Development of the Northeast Industrial Property Between the City of Madison and The Center for Industry and Commerce L.L.C. (hereinafter "the Agreement"). City Real Estate and the Office of the City Attorney reviewed the requested amendments and summarily rejected all of them in a letter dated December 20, 2004. The Council has requested that legal and real estate staff take another look at the December 9 proposed amendments, and CIC has subsequently submitted alternative proposals on March 21 and April 4, 2005 for consideration. This Report contains the recommendation of the Real Estate Manager and the Office of the City Attorney.

BACKGROUND

The Agreement is for the sale and mixed-use industrial park development of 165 acres of the Chase Farm purchased by the City in 1996 (the "Property"). In 1999, the City exchanged 40 acres of the Chase Farm to Tancho Investment Limited Partnership for certain Tancho lands to be included in the Northeast Open Space. The Agreement requires CIC to acquire the Property from the City in not more than seven (7) phases over ten (10) years from the "Start Date," based upon the availability of public street, sewer and water being available for the first phase. The City installs the public improvements and defers the special assessments for them until particular lots are sold by CIC to third-party buyers. The base sale price of $35,578/acre is to increase by 10% each year from the Start Date. The Property is mostly zoned restricted M-1 classification including some office commercial use, with approximately 6 acres zoned for neighborhood commercial and hotel uses.

The four CIC-proposed Agreement changes are:

1. Extension of Time--for CIC to acquire the Property from ten (10) years to fourteen (14) years.

2. Future Notices--CIC to receive "written notice from the City of any action the City may take (or has knowledge of), which could have a material impact on the Property."

3. Non-Compete--CIC's Agreement terms are to be modified "to be at least as favorable as the terms offered to the owner of competing industrial parcels, if said parcels are within 2,500 feet."

4. Price/Terms--CIC proposes that the annual escalator percentage on the purchase price be reduced from 10% to 8%.

CIC's letter of December 9, implies that the then pending January, 2005 Agreement to Purchase and Undertake Development of the Interstate Commerce Park Between the City of Madison and Gregory A. Rice and John R. Brigham and Rice Associates and Brigham Woods Corporation and Barbara J. Hoel ("Interstate Agreement") was the trigger for CIC's proposed amendments. This principal reason was further advanced in February 7, 2005 letters to members of the Plan Commission, and it continues to be the primary focus of CIC's request.[1]

The Interstate Commerce Park involves approximately 59 acres of land immediately north of the CIC development which was formerly in the Town of Burke and the subject of a late 2002-early 2003 proposed preliminary plat in the Town for industrial development purposes. It was in the City's extraterritorial plat approval jurisdiction and, with considerable encouragement from CIC, rejected by the City in June, 2003. Subsequently, the Town of Burke appealed the plat rejection and the case went to Dane County Circuit Court. Prior to the conclusion of that case in mid-2004, the Interstate owners approached the City, seeking to annex the land to the City, to sell the land to the City, and to enter into a phased purchase and development agreement with the City, similar to the CIC Agreement. The City deemed this annexation and development proposal by the Interstate owners to be in its long-term best interests for many reasons that need not be repeated or discussed here.

GENERAL CONTRACT NEGOTIATION FACTORS

First, in any contract negotiation, there are specific factors that lead to the ultimate contract. It is rarely the case that two contracts would be expected to be exactly the same, due to the different times of the contracts, the relative bargaining positions of the parties, and various other terms and conditions in the contracts that may have been bargained for different terms and conditions. As an example, take the simple difference between a 15-year note and mortgage (contract A) and 30-year note and mortgage (contract B). The 15-year note will have higher monthly payments, but a lower interest rate.

Second, due to these differences, it is dangerous to suggest that contract A should be changed to adopt some of the provisions of a supposedly similar contract B. Without knowing all the circumstances of the contract negotiations, what some might claim to be a lack of equal treatment may be a bargained-for difference based on different situations. Taking the example above, it would at first appear to be unfair that contract A pays a lower interest rate than contract B, when both contracts are for the purchase of similar properties. Only when one examines all the terms and discovers that there is a basis for the difference does it make sense that the contracts are different.

Third, in such circumstances, one must be very careful not to allow one side to "cherry pick" only the best terms from contract B without taking along the related, less favorable terms of the contract.

REOPENING NEGOTIATIONS--WHEN IS A DEAL FINAL?

Staff has a fundamental concern about the wisdom and propriety of reopening arms-length agreement negotiations whenever one party complains that circumstances have changed, particularly when there is no reopener provision in the original agreement. In this case, there was a very public RFQ process for the development of the remaining 165 acres of the original 264 acre Chase Farm, beginning with the September 17, 2001 advertisement of a Request for Qualifications (RFQ), an April 1, 2002, recommendation to the Board of Estimates that the City accept the proposal submitted by T. Wall Properties, Inc., and the twenty page development Agreement.

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[1] However, CIC now also cites other reasons for the proposed amendments, including, but not limited to: a) Competition from and special assessments related to the Tancho property (letters of March 3 and 21, 2005); and b) CIC being willing to do three things: 1) reducing overall "retail" pricing by 25 to 50 cents; 2) developing two new flex-space buildings totaling 24,500 square feet, and 3) committing to the cost of architectural design and pricing of an 8,000 square foot office condominium building.

There is nothing anywhere in the Agreement that establishes the CIC Development as **the** exclusive industrial park development on the northeast side of Madison. In fact, Tancho was already there and the Burke lands had already been brought into the Urban Service Area with the Chase Farm. There is also nothing in the Agreement which obligates the City to refrain from assisting any other industrial park development in the area. And, there is nothing in the Agreement that promises CIC "a level playing field" by CIC's or anyone else's definition, or a never-ending opportunity to renegotiate terms whenever the market or economic conditions may be perceived by CIC to have changed.

The fact that the Agreement with CIC was the direct result of an open public RFQ process, in which the terms of the Agreement were derived from that RFQ process, raises a question about whether others who actually did or may have considered submitting competing RFQ responses should also have known that they could have submitted more attractive proposals, but then renegotiated the terms whenever they deemed market or economic conditions to have changed. In negotiations, CIC initially wanted a more rigorous notice provision in the Agreement than what is there now. However, CIC absolutely should not have viewed its development Agreement as an exclusive deal that would not ever have competition in the immediate vicinity. That view is not incorporated or otherwise supported anywhere in the Agreement.

It is very important to note that CIC has essentially been making these same flawed arguments for the past two years, since the Interstate commercial preliminary plat was first proposed in the Town of Burke, but just a few short months after signing the November, 2002 Agreement. In May of 2003, even before the City rejected the Town of Burke extraterritorial plat as CIC requested, CIC was also asking the City for a new pricing schedule with price reductions and credits that CIC alone might attribute to any competition, a reduction in the price escalator to 3% for purchase of the next phase, and an extension of the take-down timeframe from 10 to 15 years if any competing lot would be sold within 1,000 feet of the Property.

CIC is still persistently making some variation of the same arguments. The only significant change in two years is that CIC is perhaps now closer than ever before to convincing City policymakers that there should be a so-called "level playing field" standard incorporated into the Agreement--almost as if there actually was one, even though there is not. In fact, by simply comparing these two industrial park development agreements, haven't we essentially assumed that all competitive advantage is to be avoided between them and the terms are hereby reopened for negotiation? One might reasonably ask: "What isn't on the table once again? Will the City also have to consider amending the Interstate Agreement? And, where does it end?" Reopening of negotiations as CIC proposes here is a very slippery slope of essentially negotiating against ourselves.

COMPARING CIC AND INTERSTATE AGREEMENTS

It is important to note that at least two very different circumstances existed in the case of the 2004 Rice/Brigham/Hoel Interstate Development from the 2002 CIC Development. First, the City did not originally own the Interstate property, as it did the Chase Farm. With the Chase Farm, the RFQ process resulted in the selection of the competitive CIC proposal. Contrast this with Interstate, where the owners were the only proposed developers of land still in the Town of Burke, but already located within the Central Urban Service Area and otherwise fully capable of being developed in the Town. Interstate had considerably more negotiating leverage to establish terms by which they would annex and sell the land to the City, and subsequently buy it back and develop it. Second, the City's adopted Hanson Road Neighborhood Development Plan only identified the Rice/Brigham/Hoel property (even before it was annexed) for light-industrial uses, not the additional hotel and neighborhood commercial uses permitted on the CIC Property.

Consequently, although the City staff could not commit to allow the Interstate development to have the more valuable hotel and neighborhood commercial uses that CIC was permitted, it attempted to negotiate similar, not identical, but comparatively fair, terms with Interstate. Material among them, the Interstate development will be acquired from the City in not more than five (5) phases over ten (10) years, at the

same $39,136/acre base price[2] that the City acquired it from Rice, Brigham and Hoel, with an increase of 8% each year from the Start Date. The Interstate Developers did originally want more valuable commercial zoning and uses and began seeking only a 3% price escalator, but City staff held firm on the adopted Neighborhood Plan uses. Given that Interstate's proposed permitted uses were then (in late 2004) believed by staff as likely to be comparatively less valuable than those of CIC, the 8% escalator represented a fair negotiated balancing of these different material terms.

Subsequent to negotiation and execution of the Interstate Agreement, the Madison Plan Commission and Common Council have recently adopted permanent zoning for the Interstate Development which includes more commercial uses than originally contemplated by the staff negotiating team, although not the Hotel or all of the neighborhood commercial. While this has resulted in a benefit to Interstate that was unforeseen by the negotiating team, there is nothing in either agreement that requires modification or adjustment of terms. That is, neither agreement contains an "even playing field" clause or provision.

EXTENSION OF TIME AND LOWER INTEREST RATE ESCALATOR

CIC says that it only seeks to "level the playing field" by making the proposed changes to its Agreement. Recognizing that the two separate agreements are the collective sum of their individual components, let's compare some of the individual terms and circumstances:

A. CIC has a two year head start on development and marketing over the Interstate project. It has industrial property that is ready to develop and Interstate does not, because no public improvements have yet been installed for Interstate. Current advantage--CIC.

B. Both developments are subject to a contractual ten (10) year acquisition period. CIC wants to better its negotiated position by increasing its required take-down period to fourteen (14) years (the March 21 letter seeks twelve years). Current advantage--none.

C. Interstate's price escalator is 8% and CIC's is 10%. Current Advantage--Interstate.

NON-COMPETE PROPOSAL

CIC's proposed "non-compete" language seeks to "cherry-pick" only the more favorable individual terms and conditions out of any "competing industrial development" within 2,500 feet of the CIC Property. (The March 21 letter reduces the proximity to 1,000 feet, as previously proposed in May, 2003.) There would be no reasoned balancing of the positive and negative impacts of such "competing" development's terms and conditions. CIC would automatically reap the benefit of any term that would be better than those in its Agreement. This amounts to an economic "hold harmless" clause that CIC and the City staff never agreed to in late 2002 and City staff already rejected in 2003 and 2004.

Prior to the Agreement in November, 2002, CIC was, or should have been, aware of the adjacent Chase Farm/Tancho property that the City had already conveyed to Tancho for similar development purposes three years prior in 1999. CIC was also, or should have been, aware of the August 1, 2000, adopted Hanson Road Neighborhood Development Plan that identified the adjacent Interstate lands in the Town of Burke for light-industrial uses. Also, the Interstate 59 acres had already been brought into the Urban Service Area at the same time as the Chase Farm. Interstate stood a reasonable chance of developing in the Town of Burke, on Town public services, but with significant potential advantages as to Town vs. City street and storm water management design, among others. That the Interstate development will occur in the City and be required to meet City development standards represents an incalculable advantage to the City and to every nearby property in the City, notably including the CIC Property.

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2 The 39,136/acre base price for Interstate is identical to the current CIC base price.

FUTURE NOTICES

By the terms of the existing Agreement, CIC is to receive "all public notices as though the Developer were owner of the Property." CIC proposes to expand this section of the Agreement "to assure that the Developer receives written notice from the City of any action the City may take or which the City has knowledge of, **which could have a material impact on the Property**." (Emphasis supplied.) "Material" is to be defined as "any act or action or other matter **which might have an adverse financial effect on the Developer**." (Emphasis supplied.) This proposal would effectively make CIC the final arbitrator as to what events or actions or other matters it would be entitled to written notices of from the City. This is the second time in just over two years that CIC has sought essentially this same unreasonable change in the contractual notice requirement.

By this proposed language, staff submits that the City could not have successfully negotiated the Interstate Agreement, without including or consulting CIC at each and every step of the negotiations. CIC is already entitled to notices as if it were the owner of the Property. It is not entitled to be uniquely privy to confidential and/or privileged information and negotiations that are lawfully exempt from disclosure to other similarly situated members of the general public when City staff or officials are negotiating or deliberating the purchase of public properties, the investing of public funds or conducting other specified public business whenever competitive or bargaining reasons require that such information not be disclosed or discussed in public. Sec. 19.85(1)(e), Wis. Stats. We submit that the City, and not CIC, must ultimately determine what negotiation items are in its best interest.

Moreover, the notification standard proposed by CIC is almost impossible for the City to meet. Arguably, even such external factors as the price of oil could have an "adverse financial effect" on CIC and the City would be required to monitor and notify CIC of such market changes. This request is completely and absolutely unacceptable, and must be soundly rejected, as it was by staff in 2003 and 2004.

LATER "COMPROMISE" PROPOSAL

As mentioned in the first footnote above, CIC proposed in another letter dated March 21, 2005, that CIC would do certain things in exchange for staff support of a so-called "compromise" concession of the four points, modified only to reduce the take down time to twelve (12) years and the notice area to 1,000 feet. First, CIC would reduce its overall "retail" pricing by 25 to 50 cents per square foot. Second, it would begin developing two new 100% speculative flex-space buildings totaling 24,500 square feet. Third, it would commit to the cost of architectural design and pricing, but not the actual construction, of an 8,000 square foot office condominium building.

All of these proposed actions are business and/or marketing decisions that may enhance the marketing of the Property and which CIC may well have to do and which it may have been considering for some time. Staff does not support contractually obligating CIC to do any of these things in exchange for any valuable Agreement concessions.

LATEST COMPROMISE PROPOSAL

Now, on Monday, April 4, 2005, CIC has delivered a second proposed compromise consisting of two alternatives. Alternative A eliminates all four points of the December 9 proposal (and the March 21 compromise proposal) in exchange for a TIF District commitment of $2 million to pay for public infrastructure. Alternative B eliminates all prior requests, except reducing the annual escalator from 10% to 8%, but further requests that the price per acre be immediately reset from $39,136 to $34,100 per acre, a $5,036 per acre or nearly 13% reduction. The TIF proposal is so completely different, in terms of City policy implications and factual complexity, that it must be considered totally separate from any Agreement renegotiation, if TIF is to be considered at all. Alternative B is not that different from proposals pitched by CIC over the past two years and certainly no better than any of them. The price reset could immediately impact the overall price received by the City for the next phase and future phases, even before so-called "competing" Interstate lots would be sold and developed. It could even inspire and effectively subsidize

CIC to independently finance early acquisition of the remaining 95± acres owned by the City, probably just prior to next year's effective date of the annual escalator. Staff is strongly opposed to Alternative B.

As is quite evident from the recent flurry of Agreement amendment proposals from CIC, they don't seem to be any more reasonable than proposals made and rejected nearly two years ago. They just keep coming, with no end in sight. CIC obviously feels that its persistence will ultimately be rewarded.

CONCLUSION

There is no factual, economic or legal basis to favorably consider any of CIC's proposed Agreement amendments. Staff was justified in summarily rejecting all of them. If the City determines to re-open the Agreement with CIC, it should be prepared for similar requests from other developers.

Michael P. May, City Attorney

Donald Marx, Real Estate Manager