



## Legislation Text

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**File #:** 20636, **Version:** 1

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### Fiscal Note

This resolution authorizes the purchase of land for the expansion of Esther Beach Park, funded by the Citywide Parkland Acquisition Fund (SI32). A total cash disbursement of \$996,000 is anticipated, including \$991,000 for land acquisition, \$3,000 for a Phase I Environmental Assessment, and \$2,000 for miscellaneous closing costs including the City's portion of pro-rated real estate taxes, recording and settlement fees. Sufficient funding is available within Fund SI32 to allow for this purchase and related costs.

\$996,000 SI32-57442-000000-00-0000000-00810398-00000000 Transfer out to Land and Land Improvements  
(\$996,000) CL60-79449-810398-00-0000000-60237N00-00000000 Transfer in from Impact Fees  
\$996,000 CL60-58110-810398-00-0000000-60237N00-00000000 Parkland Acquisition

### Title

Authorizing the execution of an Offer to Sell and Gift Real Estate with Scott M. Faust ("Seller") for the purchase of two lots located at 2724 and 2728 Waunona Way for the expansion of Esther Beach Park and authorizing the amendment of the 2010 Parks Capital Budget for the acquisition of the lots.

### Body

Esther Beach Park is located along the southern edge of Lake Monona on Waunona Way, providing spectacular skyline views of downtown Madison. The Park includes one parcel and the unimproved Esther Beach Road right-of-way. In 1961 the Town of Blooming Grove conveyed Esther Beach Park to the City of Madison (the "City").

The City's legacy of acquiring lakefront property for the enjoyment and general welfare of the public took root in the 1890's initiated by the philosophy of John Olin who during his tenure established 8 miles of public water frontage. For the past 120 years, the City has continued his efforts through implementing his suggestions from *Madison a Model City* to secure for public use the most important lake frontages with a view to the formation of a Four Lakes District". In the spirit of this legacy, the City's Common Council adopted a resolution on March 28, 1972 that resolved that when property along Madison's lakeshores is available that the City investigates the desirability and feasibility of acquiring the property and, if deemed appropriate secure an offer to acquire the property for consideration by the Common Council.

Scott M, Faust owns two lots located at 2724 and 2728 Waunona Way (the "Properties") which he has offered to the City. The Properties total 29,960 square feet or .69 acres. They have frontage on Lake Monona and abut Esther Beach Park. The Office of Real Estate Services has negotiated terms with the Seller for the acquisition of the Properties. The Seller has agreed to gift a portion of the purchase price to the City. The purchase price is supported by an appraisal obtained by the City.

The acquisition of the Properties would facilitate the expansion of Esther Beach Park and help satisfy parkland deficiencies that have been specifically identified in this neighborhood in the 2005-2010 Park and Open Space Plan.

NOW, THEREFORE BE IT RESOLVED that the Mayor and City Clerk are hereby authorized to execute an Offer to Sell and Gift Real Estate ("Offer") with Scott M. Faust ("Seller") for the purchase by the City of Madison ("Buyer") of two lots owned by the Seller located at 2724 and 2728 Waunona Way (the "Properties), as legally described below and shown on the attached exhibit, on the following terms and conditions:

1. **Properties.** Seller hereby agrees to convey to Buyer and Buyer hereby agrees to acquire from Seller the Properties.

2. **Purchase Price.** The purchase price for the Properties is One Million Sixty Six Thousand Dollars (\$1,066,000) ("Purchase Price") and shall be paid as follows: Buyer shall pay Nine Hundred Ninety One Thousand and 00/100 Dollars (\$991,000) in cash or a cash equivalent at closing, subject to closing prorations and credits, and Seller shall credit Buyer at closing Seventy Five Thousand and 00/100 Dollars (\$75,000) of the Purchase Price as a gift (the "Gift Credit"). The parties acknowledge and agree that the Purchase Price was established by an appraisal commissioned by Buyer and accepted by Seller dated August 18, 2010 establishing this value as the fair market value for the Properties and that the Gift Credit represents the difference between Buyer's payment for the Properties and the fair market value of the Properties.

3. **Seller's Representations and Warranties.** Seller makes the following representations and warranties in connection with Buyer's purchase of the Properties, and no others, express or implied, which representations and warranties shall be true as of the closing date and shall survive the closing of this transaction for a period of one (1) year:

- (a) Seller has the authority necessary to enter into Offer and comply with Seller's obligations hereunder;
- (b) There are no pending or, to Seller's knowledge, threatened condemnation or eminent domain proceedings which would affect the Properties;
- (c) There are no undisclosed agreements between Seller and any other party which relate to the Properties;
- (d) Until the closing date, the Properties will be maintained in substantially the same condition as it is in on the date of Offer, subject to ordinary wear and tear and casualty damage; and
- (e) There is no litigation pending or, to Seller's knowledge, threatened which would affect the Properties or the use thereof by Buyer.

4. **Title Contingency.** Promptly after Effective Date, Seller shall deliver or cause to be delivered to Buyer a current commitment (the "Commitment") for an ALTA owner's title insurance policy for the Properties in the amount of the total purchase price issued by a title agent selected by Seller using a nationally recognized title insurance underwriter ("Title Company"), together with a gap endorsement and copies of the instruments listed in the schedule of exceptions in such Commitment. Buyer shall have ten (10) days after receipt of the Commitment to deliver to Seller in writing any objection to a matter shown on the Commitment which materially affects the Properties or Buyer's use of the Properties ("Title Objections"). If Buyer fails to deliver timely notice of Title Objections to Seller, Buyer shall be deemed to have fully accepted the Commitment and all matters disclosed therein. If Buyer timely delivers Title Objections, Seller shall have five (5) days after receipt of Buyer's objection notice to notify Buyer in writing what, if anything, Seller shall do to cure the Title Objections. Failure of Seller to respond within said period shall indicate that Seller elects not to cure the Title Objections. Seller shall have no obligation to cure any Title Objection or incur any expense with respect thereto. If Seller elects not to cure one or more of the Title Objections, Buyer shall have five (5) business days to deliver notice to Seller terminating Offer and the parties shall have no further obligations hereunder except those provisions that expressly survive. If Seller pursues a cure and is unable to cure a Title Objection by the closing date, then Buyer shall have the option to either terminate Offer and the parties shall have no further obligations hereunder except those provisions that expressly survive or close on the purchase of the Properties with no Purchase Price reduction, in which case Buyer is deemed to have accepted any uncured Title Objections and waived any rights against Seller relating thereto.

Notwithstanding anything to the contrary herein, the following matters shall be deemed "Permitted Exceptions" and Buyer shall have no right to object to any of said matters on the Commitment:

- (a) municipal and zoning ordinances and agreements entered under them, agreements with any municipality regarding the development of the Properties, building and use restrictions and covenants, and State and/or Federal statutes and regulations;
- (b) recorded easements for the distribution of utility and municipal services;
- (c) property taxes and special assessments levied in the year of closing and subsequent years;
- (d) such other matters as disclosed by the Commitment and waived or deemed waived by Buyer pursuant to this Section.

At closing, Seller shall cause the Title Company to issue a current ALTA owner's title insurance policy in the amount of the Purchase Price of the Properties insuring Buyer as the fee simple owner of the Properties as of the date of recording the deed, subject to the Permitted Exceptions ("Title Policy").

**5. Inspection Contingency.** Promptly after Effective Date, Seller shall make available to Buyer any and all environmental studies, permits, applications, remediation plans or assessments of the Properties in Seller's possession or control for the Properties. Buyer, at its sole expense, may obtain an inspection of the Properties and related improvements located on the Properties and/or a Phase I Environmental Assessment of the Properties. Buyer shall not have the right to conduct any sampling of the water, soil, air or improvements without Seller's express prior written consent. Buyer shall have ten (10) days from Effective Date to terminate Offer by written notice to Seller resulting from Buyer's objection to any matter shown in an inspection report or Phase I Environmental Assessment, which materially affects the Properties or any improvements located thereon or Buyer's use of the Properties. If Buyer does not terminate Offer hereunder, then Buyer is deemed to have waived this inspection contingency and any right to object to the condition of the Properties or any improvements located thereon. In no event shall Seller be required to cure any matter to which the Buyer objects relating to the condition of the Properties or any improvements located thereon.

**6. No Representations or Warranties; AS-IS Condition.**

- (a) Buyer is purchasing the Properties in "AS-IS, WHERE-IS" condition and "with all faults", and agrees that it relies upon no warranties, representations or statements by Seller, or any other persons for Seller, in entering into Offer or in closing the transaction described herein, except for the express representations and warranties set forth in Section 3 above. Buyer's closing on the acquisition of the Properties shall constitute conclusive evidence that Buyer is satisfied with the condition of and title to the Properties and has waived or satisfied Buyer's title and inspection contingencies set forth in Sections 4 and 5 above. In closing and completing this transaction, Buyer will have relied exclusively upon its own inspections and reviews, and not upon any representation or warranty of Seller or its agents or employees except those expressly set forth in Section 3 above.
- (b) Except for the express representations and warranties set forth in Section 3 above, Seller makes no warranties, representations or statements whatsoever, express or implied, concerning or relating to the Properties, including without limitation: the income or expenses of the Properties; zoning and building codes and other similar restrictions; availability or cost of utilities; the environmental condition of the Properties; the presence or absence of any hazardous substances, hazardous materials, petroleum, or any substances regulated by federal, state or local law in, on or under the Properties; compliance of the Properties with any law, regulation, ordinance or similar requirement, including without limitation the Americans with Disabilities Act; or the physical condition of the Properties or any improvements thereon. Buyer acknowledges that no agents, employees, brokers or other persons are authorized to make any representations or warranties for Seller.
- (c) Buyer (and any party claiming through or under Buyer) hereby agrees that following the closing, Seller shall be fully and finally released from any and all claims or liabilities against the Seller relating to or arising on account of the condition of or title to the Properties, including without limitation, any matters specifically referenced in Offer. This Section 6(a) through (c) shall survive the closing of this Offer.

**7. Closing.** The closing of this transaction shall take place after expiration of all Buyer's contingencies set forth in Offer but no later than December 31, 2010, at the offices of Title Company, or at such other time and place as may be agreed upon by Buyer and Seller. Unless other contingencies are expressly granted in Offer, Buyer's contingencies include only the title and inspection contingencies set forth in Sections 4 and 5 above. At closing, Buyer shall deliver to Title Company wired funds or other immediately available funds in the amount of the Purchase Price, as adjusted by the Gift Credit and any prorations and closing costs provided for herein, and such affidavits, resolutions and other documents agreed between the parties, required for a legal conveyance of real estate in the state where the Properties are located or otherwise required by Title Company to issue Title Policy.

At closing, Seller shall deliver to Title Company a Warranty Deed conveying the Properties to Buyer, subject only to the exceptions permitted herein and such affidavits, resolutions and other documents agreed between the parties, required for a legal conveyance of real estate in the state where the Properties are located or otherwise required by Title Company to issue Title Policy. All prorations required hereunder shall be computed as of the date of closing. Possession of the Properties shall be delivered to Buyer on the closing date. Buyer shall pay for recording the deed. Seller shall pay the title insurance premium for Title Policy to be issued to Buyer and gap endorsement charges and for recording/filing fees for such documents as are required to be recorded / filed in order to cause title to the Properties to be in the condition called for by Offer. Buyer shall pay for all other endorsement charges and the title insurance premium for any loan policy, including endorsement charges related thereto. All Title Company closing charges shall be shared equally by Seller and Buyer. All other closing costs, including without limitation transfer taxes and other recording fees, shall be allocated as customary in the state in which the Properties are located.

**8. Taxes.** All general real property taxes payable with respect to the Properties for the year of closing shall be prorated between Buyer and Seller as of the closing date. If the precise amount of taxes and assessments payable for the year of closing cannot be ascertained, proration shall be computed on the basis of taxes and assessments on the Properties for the immediately preceding tax year.

**9. Special Assessments.** Any and all special assessments, area assessments, connection charges, interceptor charges or any other charges due and payable to any municipality or utility with regard to the Properties as of the date of closing shall be paid by Seller at closing.

**10. Access to Property.** From Effective Date to the date ten (10) days thereafter, Buyer and Buyer's authorized agents and contractors shall be permitted access to the Properties at reasonable times for the purpose of conducting any of the following at Buyer's election: a Phase I environmental assessment of the Properties and/or a physical inspection of the Properties and related improvements located on the Properties. This Section does not authorize Buyer or Buyer's authorized agents or contractors to conduct any sampling on the Properties.

**11. Real Estate Commissions.** Seller hereby represents and warrants that it has not engaged the services of any real estate agent, broker or firm in connection with the Properties or this real estate transaction other than Sanford Enterprises Incorporated. Seller hereby agrees to defend, indemnify and hold Buyer harmless from any and all loss, cost or expense from any claim for real estate commission made by any agent, broker or firm engaged by Seller in connection with the Properties or this transaction. Buyer hereby represents and warrants that it has not engaged the services of any real estate agent, broker or firm in connection with the Properties or this real estate transaction.

**12. Assignment.** Buyer shall have the right to assign Offer without Seller's prior written consent only to any entity owned and/or controlled by Buyer or its principals. All other assignments shall require Seller's prior written consent, which may be withheld in Seller's sole discretion. Notwithstanding the foregoing, if Offer is assigned by Buyer hereunder, Buyer shall remain jointly and severally liable, along with the

assignee, for the Buyer's obligations under Offer through closing. Buyer shall cause any permitted assignee to acknowledge in writing that it will be bound by all of the terms and conditions of Offer, with said acknowledgement set forth in a form subject to Seller's reasonable approval.

BE IT FURTHER RESOLVED that the 2010 Parks Capital Budget Project #6, "Parkland Acquisition" be amended by the addition of expenditure authorization of \$996,000.00 for the acquisition of the Properties funded with City parkland dedication fees. The acquisition costs include the following: \$991,000 of the Purchase Price, \$3,000 for a Phase I Environmental Assessment, \$2,000 for miscellaneous closing costs including the City's portion of pro-rated real estate taxes, recording and settlement fees.

BE IT STILL FURTHER RESOLVED that the Mayor and City Clerk are authorized to execute, deliver accept and record any and all documents and take such actions as shall be necessary or desirable to accomplish the purpose of this resolution in a form approved by the City Attorney.

#### Legal Descriptions

Lot 1 and Lot 2, Certified Survey Map No. 11988 as recorded in Dane County Register of Deeds in Volume 73, Page 340 of Certified Surveys, City of Madison, Dane County, Wisconsin.

2728 Waunona Way  
251-0710-302-0224-7

2724 Waunona Way  
251-0710-302-0201-5