



Request for Council Action

TO: Mayor and City Council
THROUGH: Tim Murray, City Administrator
FROM: Deanna Kuennen, Com. & Econ. Dev. Director
MEETING DATE: March 26, 2019
SUBJECT: Resolution 2019-054 Authorizing Execution of an Option and Purchase Agreement for Property located at 601 1st Avenue NE

Background:

At the January 15, 2019 Joint Council Committee meeting, City Council reviewed the proposals received from interested developers for the redevelopment of the former Public Works Site and identified Coldwell Banker Commercial/Fisher Group Development as the preferred developer, primarily based on the timeline associated with their proposed market rate multi-family housing development. Since then, Staff has been meeting with the Coldwell Banker Commercial/Fisher Group Development, and American Engineering Testing (AET), to work through the details of the proposed development as it relates to the ongoing required environmental testing and monitoring and MPCA submittals. These efforts are underway in order to submit a Response Action Plan associated with the specific development plan, and move towards cleanup and construction.

One of the environmental components is the need for the developer to obtain a “no action” letter from the MPCA. This is an assurance that states that the developer is not the responsible party in regards to the contamination on the site. In order to submit for and receive a no action letter, the developer must demonstrate that they have a financial interest in the property. The attached Option and Purchase Agreement conveys an interest in the property, to the developer, as required. The agreement grants the developer exclusive rights to purchase the property for a period until December 31, 2019.

Recommendation:

Approve Resolution 2019-054 and execute Option and Purchase Agreement

Attachments:

- Resolution 2019-054

CITY OF FARIBAULT

RESOLUTION #2019-054

AUTHORIZING EXECUTION OF AN OPTION AND PURCHASE AGREEMENT FOR PROPERTY LOCATED AT 601 1ST AVENUE NE

WHEREAS, the City of Faribault (the "City") is the owner of real estate located at 601 1st Avenue NE, Faribault, Rice County, Minnesota, and which is legally described in the Agreement as hereinafter defined (the "Property"); and

WHEREAS, Coldwell Banker Commercial Fisher Group Development (the "Developer") desires to have an option to purchase the Property from the City; and

WHEREAS, the City has followed applicable statutory provisions and the City finds that the option and purchase of the Property will fulfill the objectives, goals and mission of the City; and

WHEREAS, the City has caused to be prepared an Option and Purchase Agreement dated March 26, 2019 (the "Agreement") providing for the terms of the option to purchase and conveyance of the Property from the City to the Developer, with such Agreement being as set forth in Exhibit A and incorporated into and made a part of this Resolution.

NOW, THEREFORE BE IT RESOLVED, that the recitals set forth in this Resolution are incorporated into and made a part of this Resolution.

ALSO, BE IT RESOLVED, that the option to purchase the Property by the Developer is hereby approved pursuant to the terms of the Agreement, which is also approved in substantially the form presented to the City Council on this date, subject to modifications that do not materially alter the City's rights and obligations under the Agreement and that are approved by the City's Mayor and City Administrator, which approvals shall be conclusively evidenced by execution of the Agreement.

ALSO, BE IT RESOLVED, that the Mayor and the City Administrator of the City are hereby authorized and directed to execute all appropriate documents, including but not limited to the Agreement, to effectuate the transaction contemplated by this Resolution.

ALSO, BE IT RESOLVED, that the Mayor, City Administrator, staff and consultants are hereby authorized and directed to take any and all additional steps and actions necessary or convenient in order to accomplish the intent of this Resolution.

Date Adopted: March 26, 2019

Faribault City Council

Kevin F. Voracek, Mayor

ATTEST:

Timothy C. Murray, City Administrator

Exhibit A

OPTION AND PURCHASE AGREEMENT

OPTION AND PURCHASE AND DEVELOPMENT AGREEMENT

IN CONSIDERATION OF THE MUTUAL COVENANTS, DUTIES AND OBLIGATIONS CONTAINED HEREIN, THIS OPTION AND PURCHASE AND DEVELOPMENT AGREEMENT (“Option Agreement”) is entered into this ___ day of March, 2019 by the City of Faribault, a Minnesota municipal corporation under the laws of the State of Minnesota, whose business address is 208 - 1st Avenue NW, Faribault, Minnesota 55021, (“Seller”) and Cheney Properties, LLC, a Minnesota limited liability company (“Developer”), wherein the Seller and Developer agree to the option to purchase certain real property all as hereinafter defined and pursuant to the terms and conditions of the following as hereinafter defined.

WHEREAS, Seller is the owner of property located in the City of Faribault, Rice County, Minnesota, located at 601 - 1st Avenue NE, Faribault, Minnesota, being legally described on Exhibit A attached hereto (the “Property”); and

WHEREAS, pursuant to a request for qualifications process conducted by Seller, Developer submitted a response regarding development of the Property for market rate apartments; and

WHEREAS, Developer wishes to obtain an option to purchase the Property for the use described above and consistent with the long term plans for development of the community; and

WHEREAS, Seller is willing to grant to Developer a right of first refusal and an option to purchase the Property under certain terms and conditions.

NOW, THEREFORE, Seller and Developer have agreed to set forth their agreement regarding the Property pursuant to this Option Agreement, as follows:

Section 1. Option to Purchase.

1.1. Grant of Option. In consideration of the sum of One Dollar (\$1.00) paid by Developer to Seller (the “Option Deposit”), receipt of which is hereby acknowledged by Seller, Seller hereby grants to Developer the exclusive right to purchase the Property on the terms and conditions hereinafter set forth (the “Option”) and pursuant to a Purchase and Development Agreement to be negotiated by the parties in substantially the form attached as Exhibit B (the “Purchase Agreement”) to this Option Agreement. Developer shall provide written notice to Seller that Developer is exercising the Option, with the purchase of the Property to proceed to closing pursuant to the terms and conditions of the Purchase Agreement.

1.2. Term of Option. The period during which the Option may be exercised by Buyer (the "Option Term") shall be until December 31, 2019.

1.3. Property Purchase Price. Upon exercise of the Option, Developer agrees to pay the Seller the sum of One Dollar (\$1.00) for the Property pursuant to the terms and conditions of the Purchase Agreement.

1.4. Exercise of Option. This Option and any extension thereof shall be deemed exercised if Developer gives written notice to Seller of Developer's intention to extend or exercise the Option on or before expiration of the Option Term.

1.5. Closing. If the Developer exercises this Option, and unless extended by agreement of the parties, the closing ("Closing") on the purchase of the Property pursuant to the Purchase Agreement shall occur on a business day not later than ninety (90) days after execution of the Purchase Agreement by both Seller and Developer.

1.6. Termination of Option. In the event developer determines in its sole discretion to abandon pursuit of the Property, the Developer shall have the unilateral right to immediately terminate this Option Agreement without further obligation to Seller. Such termination of this Option Agreement by the Developer pursuant to this paragraph shall be effective upon the giving of written notice to Seller. If Developer shall fail to provide the requisite written notice to Seller that Developer exercises Developer's Option during the Option Term, then this Option Agreement shall be null and void without further liability or obligation and the Option Deposit shall be retained by Seller.

Section 2. Right of Entry; Cooperation.

2.1 Right of Entry. During the Option Term, and, if applicable, any extension of the Option Term, Developer and Developer's agents and representatives shall have the right, from time to time, to enter the Property for the purpose of making such building inspections, measurements, design and architectural studies, environmental, geological, geotechnical, hydrological, engineering feasibility, soils, wetlands and other studies and inspections including test borings, surveying, soil and subsurface soil samples, environmental testing and the like and any other inspections as Developer, in Developer's sole discretion, deems necessary or appropriate to determine the status and acceptability of the Property. Developer hereby indemnifies, defends and holds Seller harmless from any loss, cost, expense (including attorneys' fees) and claims of third parties as a result of Developer or Developer's agents, representatives or independent contractors entering the Property. The risk of loss or damage to the Property is assumed by Seller until Closing; provided, however, that Developer shall reimburse Seller for any damages to the Property caused by Developer or its agents. This indemnity shall be continuing and shall survive Seller's delivery of a Warranty Deed for the Property and shall survive termination or cancellation of this Option Agreement. Nothing in this Option Agreement shall be construed as a waiver or modification of immunity or limitation on liability to which Seller is entitled pursuant to Minnesota Statutes, Chapter 466, or otherwise.

2.2 Seller Cooperation. Seller agrees to make its best effort to assist and cooperate with Developer in making any and all investigations, reviews and applications in connection with this Option Agreement, and to execute any and all documents, instruments, consents and authorizations required by Developer which shall be necessary or desirable for Developer to satisfy Developer's investigation of the Property. In addition, during the Option Term, Seller shall provide to Developer, without cost to Developer, any and all information and reports pertaining to the Property requested by Developer, as well as copies of all drawings, plans,

reports, approvals, insurance policies and title commitments pertaining to the Property which are in Seller's possession or reasonably accessible to Seller.

Section 3. Conditions Precedent.

3.1 Government Approvals. Seller agrees that Developer will make application to city, county, state and/or federal authorities whose approvals are necessary to allow development of the Property (the "Government Approvals"). Seller shall fully cooperate with the preparation of all materials required to seek Government Approvals. Completion of all Government Approvals, including but not limited to receipt by Developer of the so-called "No Association Determination" from the Minnesota Pollution Control Agency, will be a condition precedent to Seller's and Developer's obligation to close on the purchase and sale of the Property.

3.2 Marketable Title. Seller shall convey good and marketable, fee simple title, free and clear of all liens and encumbrances, subject only to such easements, restrictions, conditions, and covenants of record or visible on the ground and all zoning ordinances and other governmental regulations affecting the Property ("Marketable Title"). The conveyance of Marketable Title will be a condition precedent to Seller's and Developer's obligation to close on the purchase and sale of the Property.

Section 4. Miscellaneous.

4.1. Notices. Any notice must be in writing, and will be deemed delivered if delivered personally or when deposited in the United States Mail, postage pre-paid at the following addresses (or such other address as may be designated in writing):

- a) If to Developer: Cheney Properties, LLC
14025 – 23rd Avenue North, #A
Plymouth, MN 55447
Attn: Steven J. Cheney

with a copy to: Cozen O'Connor
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402
Attn: Steven P. Katkov, Esq.

- b) If to Seller: City of Faribault
Attn: City Administrator
208 NW 1st Avenue
Faribault, MN 55021

with a copy to: Scott J. Riggs
Kennedy & Graven, Chartered
470 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, MN 55402

Notices shall be deemed effective on the earlier of the date of receipt or the date of deposit as aforesaid; provided, however, that if notice is given by deposit, that the time for the response to any notice by the other party shall commence to run one (1) business day after any such deposit. Any party may change its address for the service of notice by giving written notice of such change to the other party, or in any manner above specified, ten (10) days prior to the effective date of such change.

The delivery of all papers and monies pursuant to this Option Agreement are to be made at the offices of the City of Faribault, 208 1st Avenue NW, Faribault, MN 55021.

4.2. Memorandum of Option. At the request of either party, the parties hereto shall execute a Memorandum of Option Agreement in recordable form memorializing this Option Agreement.

4.3. Runs with the Land. The terms, covenants, indemnities and conditions of this Option Agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto. Time is of the essence of this Option Agreement.

4.4. Entire Agreement. This Option Agreement represents the entire agreement and understanding between the parties concerning the subject matter hereof and supersedes all prior agreements, whether written or oral.

4.5. Modification and Waiver. No purported amendment, modification or waiver of any provision hereof shall be binding unless set forth in a written document signed by both parties (in the case of amendments or modifications) or by the party to be charged thereby (in the case of waivers). Any waiver shall be limited to the circumstance or event specifically referenced in the written waiver document and shall not be deemed a waiver of any other term hereof or of the same circumstance or event upon any recurrence thereof.

4.6. Broker. Developer represents that it has not engaged any real estate broker in connection with the purchase of the Property, or if Developer has engaged the services of a broker, Developer shall be solely responsible for the costs of such broker and shall defend, indemnify and hold Seller harmless from any claims of such broker. Seller has not engaged the services of a broker.

4.7. No Merger of Representations, Warranties. The representations and warranties contained in this Agreement shall not be merged into any instruments of conveyance delivered at closing, but instead shall survive closing, and the parties shall be bound accordingly.

4.8. Specific Performance. This Option Agreement may be specifically enforced by the parties, provided that any action for specific enforcement is brought within six months after the date of the alleged breach. This paragraph is not intended to create an exclusive remedy for breach of this Option Agreement; the parties reserve all other remedies available at law or in equity.

4.9. Execution in Counterparts. This Option Agreement may be executed in counterparts by the parties hereto, each of which when so executed shall be deemed an original, but all of which taken together shall constitute one and the same agreement.

4.10. Choice of Law and Venue; Interpretation. This Option Agreement shall be governed by, enforced and construed in accordance with the laws of the State of Minnesota. Any disputes, controversies, or claims arising out of this Option Agreement shall be heard in the state or federal courts of Minnesota, and all parties to this Agreement waive any objection to the jurisdiction of these courts, whether based on convenience or otherwise.

4.11. Cumulative Rights. Except as may be otherwise provided elsewhere herein, no right or remedy herein conferred on or reserved to Developer or Seller is intended to be exclusive of any other right or remedy provided herein or by law, but such rights and remedies shall be cumulative and in addition to every other right or remedy given herein or elsewhere or hereafter existing at law in equity, or by statute.

4.12. Captions, Headings or Titles. All captions, headings, or titles in the paragraphs or sections of this Option Agreement are inserted for convenience of reference only and shall not constitute a part of the Option Agreement or a limitation of the scope of the particular paragraphs or sections to which they apply.

4.13 Time of Essence. Time is of the essence in the exercise of all rights and duties set forth in this Agreement.

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IN WITNESS WHEREOF, the parties hereto have caused this Option Agreement to be duly executed in their names and on their behalf on or as of the date and year first above written.

NOTICE: THIS IS A LEGALLY BINDING CONTRACT BETWEEN SELLER AND DEVELOPER. IF YOU DESIRE LEGAL OR TAX ADVICE, CONSULT AN APPROPRIATE PROFESSIONAL.

The undersigned, Seller of the above Property, does hereby approve the Option Agreement for the Property for the price and upon the terms above mentioned, and subject to all conditions herein expressed.

SELLER: City of Faribault

By: _____
Kevin F. Voracek, Mayor

By: _____
Timothy C. Murray, City Administrator

Dated: _____

The undersigned, Developer, does hereby approve the Option Agreement for the Property for the price and upon the terms above mentioned, and subject to all conditions herein expressed.

BUYER: Cheney Properties, LLC

By: _____
Steven J. Cheney, Manager

Dated: _____

This instrument was drafted by:
KENNEDY & GRAVEN, CHARTERED (SJR)
470 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, MN 55402
(612) 337-9300

EXHIBIT A
LEGAL DESCRIPTION

[TO BE INSERTED]

EXHIBIT B
PURCHASE AGREEMENT

[Insert Standard City Purchase and Development Agreement]