

Memo

TO: Mayor and Town Council
VIA: Kirk Blouin, Town Manager
FROM: John C. Randolph, Town Attorney
RE: Friends of Recreation
DATE: June 28, 2018

REQUEST FOR CONSIDERATION

It is requested that Town Council give consideration to clarifying and amending the terms of the Friends of Recreation Capital Grant Agreement conditionally approved pursuant to Resolution No. 63-2018.

GENERAL INFORMATION/FINANCIAL CONSIDERATIONS

Friends of Recreation, Inc. and the Town entered into a Letter of Agreement in December 2016 in which FOR committed to raising \$5,000,000 for the purpose of constructing and operating a new Community Center (Recreation Center). That Letter of Agreement is attached. The Agreement further provided FOR's understanding that the Town of Palm Beach must have guaranteed funding in place before placing the Community Center (Recreation Center) under a construction contract. The agreement further provided that, "The FOR will identify a bank that will provide a loan against any quality pledges that have not been fully paid at the time construction will begin. This should enable the Town to have the full funding in place to start construction...."

Subsequent to entering into that Letter of Agreement, FOR approached Town staff to request that FOR enter into a Capital Grant Agreement with the Town patterned after the agreement that had been entered into between the Town and the Morton Mandel Foundation. This agreement would allow for payments to be made by FOR to the Town on a scheduled basis, with 40% to be paid upon selection of contractors, less prior payments made in the amount of \$78,642, with the remaining 60% to be paid at various stages of construction.

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Staff reviewed the agreement and found it acceptable for presentation to the Town Council at its June meeting for consideration and potential adoption by resolution. Some council members understood this amendment as an accommodation to Friends of Recreation to keep them from having to borrow up to \$2,500,000 and pay the interest thereon during the 15 months the project was anticipated to be under construction. In actuality, this was not just an accommodation, but was an amendment to the Letter of Agreement of December 2016, which differed from the original December 2016 agreement requiring all funding to be in place prior to the start of construction. Although the apparent intent of FOR was simply to amend the initial Letter of Agreement to allow for the funding to still be guaranteed but paid in installments, the new Capital Grant Agreement contained a provision which provided that this agreement took precedence over any and all previous agreements made. Therefore, it was not an amendment to the original agreement, but a new agreement.

At the June meeting, in an attempt to meet the spirit and intent of the 2016 Letter of Agreement, FOR presented to the Town a letter from Northern Trust, which met that provision in the original agreement which states as follows, "The FOR will identify a bank that will provide a loan against any quality pledges that have not been fully paid at the time construction will begin." In adopting Resolution No. 63-2018, the Town Council did so conditionally upon the Town being provided with a copy of the Letter of Commitment from Northern Trust, and being otherwise satisfied that FOR's commitment to the Town of up to \$5,000,000 will be met.

Subsequent to the June meeting, Friends of Recreation provided a copy of the Letter of Commitment, a copy of which is attached. This Letter of Commitment commits to a line of credit in the amount of up to \$2,500,000, the collateral of which would be pledges evidenced by completed, signed pledge cards provided to the bank and reported by the borrower on a monthly pledge report. These pledges are backed by a Charitable Contribution Agreement prepared by Northern Trust which is legally binding upon the donor(s) and their estates. The form of agreement is attached.

In regard to the \$2,500,000 in cash receipts already received by Friends of Recreation, although Friends of Recreation suggested that those monies remain in an escrow account with Northern Trust, we have requested that the \$2,500,000 be placed in a Town "construction account" which would assure that those funds are available for payment in accordance with the payment schedule set forth in the Capital Grant Agreement. Friends of Recreation agreed to this change. In further review of the Capital Grant Agreement, because it is a full substitute for the initial Letter of Agreement dated December 2016, we have requested the inclusion of additional language previously included in the Letter of Agreement intended to guarantee the commitment to the Town of the additional up to \$2,500,000 owed. That language is included in redlined format in the attached draft agreement. Additionally, we had suggested that because FOR had the ability to borrow the remaining funds from Northern Trust pursuant to the terms of the Commitment Letter, that they draw down on that loan prior to the Town entering into a construction contract so that the Town would be assured that all these funds are in place as intended in the December 2016 Letter of Agreement. The response we received was that it would defeat the entire purpose of entering into the new Capital Grant Agreement, as Friends of Recreation would have to pay interest on the

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loan for the full 15 months that the Recreation Center was under construction. The amended draft agreement, therefore, does not contain language requiring that the monies be paid to the Town prior to the start of construction, however, to provide a further measure of security, the agreement provides that all such Charitable Contribution Agreements required by the bank as collateral for the loan, representing the full amount due under the bank's loan and under this agreement, shall be fully executed and in the possession of the bank and all loan documents shall be executed and the loan closed prior to the Town entering into a construction agreement for the Recreation Center.”

Because there was considerable controversy over the question of whether the Town was obtaining the security it needed to assure itself that FOR would be bound to its commitment to pay the full amount of its share up to \$5,000,000, the Town Manager requested that I obtain advice from someone who has a special expertise in matters such as these. Toward that end, I requested that Scott McMullen of my office look into this matter and provide his advice in regard to same. Attached is a copy of his memorandum which is self-explanatory. The bottom line is that the Letter of Credit should provide comfort to the Town that FOR will be in a financial position to comply with the terms of the FOR agreement. Mr. McMullen opines, however, that to be deemed fully secure, FOR should immediately draw the full \$2,500,000 on the Letter of Credit and place the proceeds in the Town's construction account, which would result in interest expense to FOR, which FOR would not want to incur, or that Northern Trust issue an irrevocable standby letter of credit in favor of the Town in the amount of \$2,500,000.

In addition to FOR advising that it does not wish to pay the full amount up front for the reason stated above, and because it has backed its commitment with a fully binding commitment letter from the bank against pledges received, I have been further advised, as of the date of this memo, that FOR spoke to Northern Trust, the result being that the letter of credit from Northern to the Town, as suggested by Mr. McMullen, is not practical for FOR and cannot be accomplished in the short time available. Attached is Michael Ainslie's email to me explaining FOR's position on this matter.

The Mayor and Town Council should give consideration to this matter and take whatever action it deems appropriate under the circumstances. In the event the Council is satisfied with the Capital Grant Agreement as modified and attached, the appropriate action would be to move that Resolution No. 63-2018 be ratified, substituting the amended Capital Grant Agreement as Exhibit A to the resolution. Alternatively, the Council should give direction to staff and Town Attorney as to how to proceed.

Attachments: 2016 Letter of Agreement; Letter of Commitment; Capital Grant Agreement as amended; Charitable Contribution Agreement; memo dated June 22, 2018 from Scott McMullen; email from Michael dated June 27, 2018