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TO: Detroit City Council

FROM: David Whitaker, Director
Legislative Policy Division 

DATE: February 20, 2019

RE: **Report on Second Amended and Restated Memorandum of Understanding between the City of Detroit and the Detroit Land Bank Authority**

The Legislative Policy Division (LPD) has been requested by the Planning and Economic Development Committee of the Detroit City Council to review the proposed Second Amended and Restated Memorandum of Understanding between the City of Detroit (City) and the Detroit Land Bank Authority (DLBA).

LPD reminds this Honorable Body that one of the reasons this Second Amended MOU is being brought forth was at City Council's request to have a document that could serve as the underlying basis for specified transactions with the DLBA. On numerous occasions in the past business transactions occurred and there were serious concerns with regard to the procedural process the Administration was taking in providing resources (financial and otherwise) to the DLBA absent any contractual support.¹ The proposed Second Amended MOU was presented with a resolution to be approved by City Council. LPD will first address the concerns with this document:

- LPD believes the second Resolve clause indicate that: the City Council approves the transfer of certain City owned properties to the DLBA would provide better clarity if it referenced Exhibit D of the MOU which list the city parcels to be transferred.

¹ A few examples of concern were (1) two transfers of \$5 million to an escrow account required by the State of Michigan to cover any unauthorized expenditures; (2) the deposit of \$2 million into a designated Title Insurance escrow account to address third party claims against the DLBA from Nuisance Abatement Proceeding; (3) the transfer of general fund dollars appropriated for COD Blight and utilized for DLBA expenditures. All were done by the Office of the Chief Financial Officer without proper documentation and/or City Council approval.

- The fourth Resolve references properties described (under Exhibit E) in the MOU that are possessed by the DLBA and being transferred to the City. The Resolve indicates the City Council has made findings that the properties have received appropriate environmental inquiry in accordance with the review conducted by the Building, Safety Engineering and Environmental Department (BSEED) in accordance with Chapter 2, Article I, Division 2 of the Detroit City Code. The resolution indicates that a review has been conducted by BSEED, however, no report from BSEED or the Planning and Development Department (P&DD) has been provided through which the City Council's findings can be made as required by the City Code. LPD believes that before this resolution is approved the requisite reports should be provided for City Council's review and analysis.
- LPD believes the last Resolve on the resolution page should indicate that it is the final resolve, if in fact no further resolves follow. The standard language indicating such being, BE IT FINALLY RESOLVED.

Summary of Second Amended MOU

Turning to the Second Amended MOU itself:

Section 1, *Incorporation of Recitals*, provides that the "Whereas" recitals are made a part of the contract. The fourth "Whereas" indicates the City is engaging the DLBA to perform certain programs to serve and enhance the City policies and help eliminate blight in exchange for the supplemental funding to the DLBA. The sixth "Whereas" indicates it is the purpose of the Second Amended MOU to serve as an enforceable contract that defines the scope and manner of certain services to be provided to the City by the DLBA.

Section 2, provides that the Second Amended MOU supersedes and replaces the prior original and First Amended MOU.

Section 3, *Term*, extends the term of the MOU an additional three years. It was indicated that this was done simply to have the MOU be coterminous with the date of the end of the Second Amended Intergovernmental Agreement (IGA) between the City and the Michigan Land Bank Authority which enabled the creation of the DLBA. The term of the Second Amended IGA will expire on December 19, 2023. City Council should be aware that the First Amended MOU is set to expire on June 30, 2020. There are a number of provisions within the Second Amended MOU that allows the Administration to take action without going through the normal procedure of having City Council's approval.² If the Second Amended MOU term is extended to 2023 as written, it will allow the Administration to bypass that process for four (4) years.

² The Second Amended MOU allows action to be taken without going through the normal procedure of City Council's approval under Section 4(b), expenditures to be paid by the CFO where the HHF \$25,000 limit for demolitions have been exceeded, there is no procedure for City Council to review or provide oversight; Section 4(c), the open ended blight services that are necessary or convenient require only the CFO's approval for payment to be rendered, there is no procedure for City Council to review or provide oversight; and Section 5(a) the open ended use of Blight Remediation appropriations for DLBA expenditures require only the CFO's approval, there is no procedure for City Council to review or provide oversight.

Section 4, *The Detroit Land Bank Duties*, this section outlines the responsibilities of the DLBA and the services it performs under the Second Amended MOU. LPD finds the following provisions in Section 4 of particular interest:

- Subsection 4(a) acknowledges the prior transfer of \$2 million in Title Insurance Escrow Account and arguably ratifies the transaction where prior approval by City Council should have been obtained, but was not.
- Subsection 4(b) provides where the Federal Hardest Hit Funds (HHF) used for residential demolition exceeds the \$25,000 limit, the Second Amended MOU is authorizing the City to pay the cost above the limit. The Second Amended MOU provides that the Chief Financial Officer (CFO) has the authority to approve the invoice submitted by the DLBA for the payment.

LPD notes the provision in 4(b) allows the CFO to approve and pay the invoice without the matter coming to the City Council in some manner for review and approval of the expenditure.

- Subsection 4(c) provides that the DLBA will provide mutually agreed upon services and/or activities necessary or convenient to the City to address blight remediation. The MOU provides that the CFO shall provide approval for the Blight Services.

LPD notes, the language identifying the services and/or activities in extremely broad terms. Anything deemed necessary or convenient can fall into the category of Blight Services and only requires the CFO's approval. There is no oversight in the determination as to what should be considered necessary or convenient to the City to address blight remediation. Once work has been assigned to the DLBA and identified by the CFO as necessary or convenient, the City is obligated to provide payment under Section 5 without City Council review or approval.

Section 5, *City Duties*

- Subsection 5(a) *Compensation*, provides that the City will provide compensation to the DLBA for services that are provided under the Second Amended MOU (those broad services and/or activities) indicated in 4(c), and other DLBA operations in amounts as approved by City Council for blight remediation services and any other relevant services.

One of the reasons City Council requested an amended MOU was the use of Blight Remediation appropriated dollars for DLBA expenditures without City Council approval and documentation identifying the purpose.³ This provision allows the Administration to compensate the DLBA for blight remediation services, and any other relevant services⁴ with general fund dollars that have been appropriated by City Council for blight remediation. LPD notes that a portion of the Blight Remediation dollars in the current year's budget are specifically appropriated to the DLBA. The

³ The Blight Remediation appropriation was used for the two separate \$5 million wire transfers to the escrow account held by the Michigan Homeowner Assistance Housing Corporation (MHA) on behalf of the DLBA to cover any unauthorized use of HHF dollars. The \$10 million transferred from the Blight Remediation appropriation was done without City Council approval or knowledge.

⁴ The language allowing for any other relevant services is extremely broad. What are other relevant services? Who decides if the other services are relevant? Once the MOU is approved by City Council, there will not be another opportunity for City Council to weigh in as to what is a relevant and an appropriate expenditure.

Second Amended MOU will allow the CFO to expend dollars that are not specifically appropriated to the DLBA from Blight Remediation appropriated dollars on the DLBA without any further approval from City Council.

In addition, subsection 5(a) provides that the DLBA will be compensated for operating expenses that are approved by City Council. While this has been a consistent practice by the City, it is now identified as part of the "compensation" in the Second Amended MOU.

- Subsection 5(b) *Demolition Advance Fund*. This provision has been modified from the First Amended and Restated MOU by adding language authorizing the CFO to enter into and execute any and all agreements and loan documents with the DLBA necessary or convenient to administer the Demolition Advance Fund.

LPD notes the Original Demolition Advance Fund Loan Agreement was submitted to City Council for approval. The First Amended Demolition Advance Fund Loan Agreement was also submitted to City Council for Approval. However, the Second Amended Demolition Advance Fund Loan Agreement was not presented to City Council for approval. This Second Amended MOU if approved would allow the CFO to execute any and all agreements and loan documents without them being presented to City Council for approval and would arguably ratify the Second Amended Demolition Advance Fund Loan Agreement. Ideally, the Second Amended Demolition Advance Fund Loan Agreement should still come to City Council for approval since the Demolition Advance Fund is a separate program used specifically to expedite payment to demolition contractors when HHF funds are unavailable due to a lag in processing of demolition invoices with the Michigan State Housing Development Authority (MSHDA).

- Subsection 5(c) provides that the City shall provide the DLBA the use of the services of certain City Departments in an effort to reduce the overall cost of public expenditures. While the Second Amended MOU identifies assistance from certain departments (Procurement systems, Office of the CFO; and General Services) there is no limitation as to the use of City Departments.

LPD notes that the City is funding the DLBA operations and the normal charge-back for City services would only amount to the DLBA giving back what the City has provided.

- Subsection 5(d) indicates the City is releasing any and all lis pendens⁵ that were executed by the Building Safety, Engineering and Environmental Department (BSEED) on or before 12 /21/2008, to assist in clearing the title of the DLBA's abandoned property inventory.

Section 6 *Property Transfers*, addresses residential property transfers the City has already consolidated and transferred to the DLBA through multiple City Council resolutions. The document acknowledges all the prior transfers authorized in the Original MOU and the First Amended MOU and indicates they are ratified and approved under this Second Amended MOU. This Section also indicates the City is continuing to consolidate the public ownership of certain

⁵ Lis Pendens: A notice filed in the office of public records that the ownership of real property is the subject of a legal controversy and that anyone who purchases it takes it subject to any claims asserted in the action and thereby its value might be diminished. Since the properties are in possession of the DLBA in an effort to return the properties to productive use the city's lis pendens is being released.

residential parcels with the DLBA and the Second Amended MOU authorizes the City's Planning and Development Department (P&DD) to do the following:

- (i) Transfer to the DLBA all of the city's rights and interest for no consideration the residential parcels listed in Exhibit D of the Second Amended MOU. Exhibit D consist of 1,402 residential parcels within the Detroit.
- (ii) Accept the transfer from the DLBA of all rights and interest for no consideration the residential parcels listed in Exhibit E of the Second Amended MOU. Exhibit E consist of 19 residential parcels in Detroit that have been identified by the Administration for development projects.⁶

Section 7 *Invoicing Requirements* provides the invoicing requirements from the DLBA to the City. The invoicing is to occur no more often than monthly in a form and manner reasonably acceptable to the CFO for payments to the DLBA as provided in this Second Amended MOU. Based on Section 5 Compensation for services provided under the Second Amended MOU, the CFO is authorized to receive the DLBA invoices and make payment on behalf of the City without further approval from City Council.

Section 8, *Audits, Monitoring, Record Keeping and Report*, this provision has been modified to specifically include the authority of the City's Auditor General as well as MSHDA to have access to all books, documents, papers, records and project sites directly pertinent to this MOU for monitoring, audits, inspections, examinations, and making excerpts and transcriptions at all reasonable times.

Section 9, *Indemnification*, provides that the DLBA shall indemnify and hold harmless the City, its officials, employees and agents from any and all liability, loss, claim, damage cost and expense arising from or related to this MOU. LPD notes that although the language indicates the DLBA will indemnify the City, other than any insurance coverage obtained by the DLBA they are limited in resources to potentially fully indemnify the City.

Section 10, *Confirmation*, this provision ratifies and confirms all prior actions of the City that was authorized by the Original MOU and the First Amended MOU.

Section 11, provides that any modification to this Second Amended MOU must be in writing and signed by the parties identified in Section 112.

Section 12, provides that the Second Amended MOU will not be effective until it has been approved by the Mayor and City Council as well approvals by the DLBA Board.

If we can be of further assistance please call upon us.

⁶ LPD notes that pursuant to the City Code, Section 2-1-13, *Requirement for environmental review and assessment*, the 19 parcels to be transferred to the City from the DLBA are to undergo an environmental assessment by P&DD and reported to City Council.

