

Tuesday, January 12, 2021 5:00 PM
CITY OF MINNETONKA BEACH
CITY COUNCIL MEETING MINUTES

Mayor Lindstrom determined that an in-person Council meeting was not practical or prudent because of the COVID 19 health pandemic and that this Council meeting was held remotely using Zoom Teleconferencing. This was done in accordance with MN State 13D.02

- 1. Mayor Lindstrom called the meeting to order at 5:02 p.m.**
- 2. Roll Call:** Mayor Jaci Lindstrom; Council Members: Tracey Breazeale, Susan Enlow, Steve Howarth, Vibhu Sharma, and Treasurer Chris Zinn. Staff Members: City Administrator Pat Melvin, City Clerk Heidi Honey, City Attorney Ron Batty. Absent: none. Guests: Lauren Livingston and Steve Ryan (legal counsel).
- 3. Approve Agenda for the January 12, 2021 City Council Meeting**

Howarth motion, Sharma second to approve the January 12, 2021 agenda. Roll Call Vote: Breazeale – aye, Enlow -aye, Howarth – aye, Sharma - aye. All ayes, the motion carried.

Lindstrom provided a summary to date. On December 22, 2020 council reviewed and discussed a revised third draft of the donation agreement. It was not acceptable to council and City Attorney Batty was directed to discuss indemnification language and contingency funds with Livingston legal counsel. Because of an increase in playground equipment pricing after January 8, a special meeting was scheduled for December 30, cancelled, and rescheduled for today. Council is meeting to review and discuss a revised agreement that incorporated council's directives from the December 22 meeting and to consider amendments to the Donation Policy.

Lauren Livingston reflected on her original proposal from March 2020. Her intent was not to determine the details of the playground. She reviewed accommodations she made: providing contingency funds, reducing the size of the sign, eliminating the gaga pit unless it can be put at Ray Peters Park, and eliminating most of the poured rubber surface. She feels she has tried to be as flexible as possible to bring forth a playground the city would be willing to approve. She stated indemnification and the sign have been known since the beginning. She stated she is hopeful council will reflect what is in the best interest of the city and she feels she has demonstrated that.

4. Old Business

4.1. Consider Livingston Strong Playground Donation Agreement

Batty stated that donations must be accepted by 2/3 majority of council members (3 of 4 voting members). He explained that the city enjoys broad immunity for parks and recreation issues and other forms of discretionary immunity. The city also has insurance through the League of MN Cities insurance trust which is a bit over statutory limits at \$2 million. The donor does not enjoy statutory exemptions and she has asked to be indemnified with no limit to her indemnification as an additional insured under the city's League of MN Cities policy. Sharma discussed that remote risks are often the largest and it would put the taxpayers at risk for settlement. Batty stated indemnification would only apply to Livingston and no other parties. He then said this is a policy question and council needs to decide if it's a risk worth taking in this context. Enlow stated she is in favor of the project, she believes they are willing to add Livingston to the city's policy and

indemnify her, but she believes the indemnification limits should not be any better than those provided to city staff and elected officials for fiduciary responsibility to taxpayers. Ryan stated that up to this point Livingston's role has been as a donor of funds with limited involvement in design. The city would take over from here and she will not be involved going forward. Sharma stated that Livingston has been involved in site selection and equipment design. Ryan stated that since March, Livingston's involvement in the design of the project was at the request of Council. Breazeale prefers the city not have any liability outside of its insurance limits but she cannot imagine a situation where Livingston would have any liability since it is a monetary donation for equipment installed by the city, so she is ok with indemnification language. Howarth stated it is a like kind exchange of equipment that does not substantially change the playground use. He asked if they could eliminate Livingston's personal exposure by allowing the city to make the decisions on deployment of the use of her financial donation. Ryan stated the donation is close to an in-kind donation, the risk is very small, and they cannot rewind the project. Livingston discussed the work to date and that she never hid the fact that she asked for indemnification. Howarth asked about buying a catastrophic policy for this piece of equipment. Sharma stated remote events should be protected against and the language troubles him. Enlow believes it is not appropriate for the city to take on this risk and asked that Livingston think about accepting the city's limit of \$2 million. She would be indemnified and listed as insured on the city's policy. Breazeale asked if the contract could specify that the city takes responsibility for the equipment and associated risks. Batty did not think that would change anything and he does not know what a claim would be because she is simply making a monetary donation. Livingston stated she cannot take on any liability. She added that had this playground not been so contentious, she would not be as concerned but it is litigious environment. Ryan stated they all agree the possibility of risk is infinitesimal and he said it is remarkable the city would ask the donor to bear the risk. Enlow thinks the playground will benefit the city, she is disturbed that it comes down to the city having to take extra risk, but she will accept the indemnification and hopes the risks are minimal. Howarth stated he is still trying to find a solution. Livingston asked that exploration of additional coverage be made outside of this meeting and that a decision be made. Sharma stated additional insurance costs may be prohibitive. Enlow stated a cash donation has less risk and Livingston should walk away after the donation is received. Batty stated this is a cash donation and the provision in the original draft regarding consulting with Livingston on changes was removed so she can make the donation with no further involvement. Batty and Ryan agreed that reflection that this is a cash donation and there is no further involvement of Livingston can be in the resolution accepting the donation. Howarth asked to remove Attachment A. Batty and Ryan did not think that changes the risk. Howarth stated the city attorney said the risk is remote, the donation benefits the city, and he will accept indemnification. Lindstrom stated with three for and one opposed to the indemnification language, so it stands.

Council discussed the contingency. Batty stated the gaga pit and legal fees over \$2,500 were contingency matters but other restrictions were eliminated. He reviewed items that may be subject to price increases and eligible for the contingency. Melvin referred to his memo in the packet which states that Chad Simich, owner of Landscape Structures and Flagship, was only able to hold prices until Jan. 8 and increases after that are 1.5-2%. Equipment price increase is \$816 (1.5%), and labor cost increases \$938 - \$1,250 (1.5 to 2%). Ryan stated that with a reduction of \$2,066 (2%), the contingency would still be 10.02% of the potential variable costs. Melvin mentioned equipment storage concerns brought up by Simich. Livingston offered to have her team call him because they felt storage was negotiated.

Howarth stated \$7,500 would remain for other contingencies which is tight, and he is ready to move forward. He stated the project needs to be well managed. Breazeale accepted the contingency and suggested the Livingston Strong Team assist with solving increased cost and storage issues with Simich. She encouraged finding dirt that can be donated to the project. She recommended proceeding. Enlow expressed concerns about staff time spent on this and project management. She stated that she thinks the playground replacement is good for the city, the city is internally good at managing things, and she is disappointed the meeting could not occur before the January 8 deadline. She recommended moving forward. Sharma expressed concerns about project management and liability coverage for Nick Dalsin. He agreed the 10% contingency is tight due to unknowns and increasing costs. Melvin stated that equipment vendors only allow trained installers to install equipment and they did not feel it necessary to have someone oversee the project. Melvin suggested Council could explore this further unless they have confidence in the installer. Sharma did not support proceeding. Batty explained that Exhibit A to the Resolution is the Agreement which includes Attachment A (financial summary).

Breazeale motion, Howarth second to adopt Resolution 2021 – 11 Accepting LivingstonStrong Playground Donation. Roll Call Vote: Breazeale – aye, Enlow -aye, Howarth – aye, Sharma - nay. The motion carried.

4.2. Consider Revised City Donation Policy

Batty proposed minimal edits to the Donation Policy because council had previously expressed concerns that the LivingstonStrong donation does not technically meet the Policy. Council unanimously agreed to leave the Donation Policy as is. Council can possibly review it in the future. Lindstrom stated the city can accept the donation as an exception to the Donation Policy.

Batty will get the agreement executed and work with Melvin to execute contracts with vendors. Melvin will work with Livingston and Simich on costs and communicate information to council.

5. Adjourn

Howarth motion, Sharma second to adjourn the meeting. Roll Call Vote: Breazeale – aye, Enlow - aye, Howarth – aye, Sharma - aye. All ayes, the motion carried.

The meeting adjourned at 6:59 pm.

Guests/Members of the Public: Joe, Lisa Melamed, Susan Carlson, Alan Carlson, Judy Soukup, Jill Bartel, Joann Anderson, Joe Tilli, Nell Mathews, Ann Brillley, Davida Suiter, J, Laura Inglis, Jane Burgess, Marnie Johnson, Robert Gillum, Amber Arnold, Jillian Moriarty, Jennifer Halverson, Kim Petersen, Isabelle Haag, Liz Grabeck, Bridget Wortman, Diane Rogers, Carrie, Heather Ellis, Colby Skelton

Respectfully submitted,

Heidi Honey, City Clerk