

Municipal Building
625 52nd Street – Room 204

**Redevelopment Authority
of the City of Kenosha
Agenda**

Monday, November 21, 2011
5:00 p.m.

*Alderman Katherine Marks - Chairperson and Bob Johnson - Vice Chairperson
Alderman Michael Orth, Everett Butler, Eric Migrin, John Potente*

Call to Order and Roll Call

1. Consider the Proposed Settlement and Release of Litigation regarding Bear Development, LLC, v. City of Kenosha et al., 10CV1141 (United States District Court for the Eastern District of Wisconsin)
CLOSED SESSION: *The Redevelopment Authority may go into Closed Session regarding this item, pursuant to §19.85 (1)(g), Wisconsin Statutes to discuss the status and strategy with counsel. If the Redevelopment Authority goes into Closed Session, it will return to open session prior to taking any action on the item.*

Public Comments

Authority Comments

Staff Comments

Adjournment

Department of City Development
625 52nd Street – Room 308
Kenosha, WI 53140
262.653.4030 phone / 262.653.4045 fax
www.kenosha.org

If you are disabled in need of assistance, please call 262.653.4030 at least 72 hours before this meeting.

Notice is hereby given that a majority of the members of the Common Council may be present at the meeting. Although this may constitute a quorum of the Common Council, the Council will not take any action at this meeting.

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement") is made and entered into as of November 11, 2011 between Bear Development, LLC, a Wisconsin limited liability company (which, together with its members, officers, employees, and its affiliated entities owned or controlled by Stephen C. Mills and/or Stephen R. Mills, and their heirs, successors and assigns, is hereinafter referred to as "Bear"), and the City of Kenosha, a Wisconsin municipal corporation (which, together with its elected and appointed officials, employees, and constituent bodies, including the Redevelopment Authority of the City of Kenosha, along with its insurers, Cities and Villages Mutual Insurance Company, Chartis, Inc. and the Insurance Company of the State of Pennsylvania, is hereinafter referred to as "the City") (collectively "the parties").

WHEREAS, Bear Development, LLC commenced litigation against the City and the Redevelopment Authority of the City of Kenosha (a constituent body of the City) in the United States District Court for the Eastern District of Wisconsin as Civil Action No. 10-CV-1141 (hereinafter referred to as "the federal litigation"), relating to the City's actions with respect to a proposed development at 63rd Street and 18th Avenue in Kenosha known as "Uptown Gardens"; and

WHEREAS, Bear and the City are desirous of resolving the federal litigation upon the following terms and conditions,

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties hereto enter into the following Agreement:

1. The City agrees to pay Bear \$800,000.00 by wire transfer to an account designated by Bear in immediately available funds on or after January 1, 2012, but not later than January 11, 2012 toward costs that Bear incurred in connection with its efforts to develop

Uptown Gardens and in connection with the federal litigation, including but not limited to Bear's attorneys' fees.

2. The City also agrees to pay Bear \$2,900,000.00 by wire transfer to an account designated by Bear in immediately available funds on or after January 1, 2012, but not later than January 11, 2012. The date on which Bear receives this payment is referred to herein as the "Payment Date."

3. Bear agrees to develop projects located in the City ("Projects") that will create tax base of no less than \$5,800,000.00 in incremental assessed value, over and above the pre-development assessed value of the properties, owned by Bear or by others, on which the Projects are constructed. The Projects may include, but are not limited to, new construction, redevelopment, improvement of existing properties, and development on behalf of others, but no such developments, improvements, or properties will qualify as Projects for purposes of this paragraph if they are tax-exempt or otherwise do not increase the City's tax base. Bear shall use its best efforts to minimize the number of Projects in accomplishing the \$5,800,000 in incremental assessed value.

4. Bear agrees to commence construction on the Projects within five years of the Payment Date and to have achieved the agreed \$5,800,000.00 in incremental assessed value, assuming assessed fair value is 100% of estimated fair market value, to be established by the City's normal assessment processes, within seven years of the Payment Date. For a period of 3 years thereafter, Bear shall not challenge the assessment that accounted for the \$5,800,000 in incremental assessed value. For example, if in 7 years there is \$5,800,000 incremental assessed value, Bear shall not in year 8, 9 or 10 challenge the assessment on the property(ies) in order to decrease the assessed value.

5. Bear will have complete discretion in choosing the Projects, except that, to qualify as a Project under this Agreement, any multi-family housing development constructed using low-income housing tax credits pursuant to 26 U.S.C § 42 may not consist of 100% low- to moderate-income units. This exception relating to multi-family housing does not apply to senior housing developments.

6. The City, its officials, employees, and constituent bodies will act in good faith and will not obstruct or delay Bear's efforts with respect to any of the above-described Projects, including with respect to the timing, level, or issuance, as applicable, of inspections, approvals, permits, and other similar matters. Specifically, the City, its officials, and constituent bodies will treat Bear in a manner consistent with their treatment of other similarly-situated developers and will not arbitrarily impose construction or other requirements on Bear that could cause undue burdens with respect to costs relating to the Projects. Nothing in this Agreement, however, shall be considered as limiting the right of the City to enforce the terms of its code of ordinances including its building and zoning codes. Nor shall this Agreement be deemed to constitute a building permit, occupancy permit or any other permit or approval required by applicable federal state or City statute, ordinance, code, rule, regulation, order or any other law, or to constitute a waiver of, exemption from, or exception to the need for any such permit or approval, except as expressly provided in this Agreement.

7. Bear will be responsible for tracking progress toward the required incremental assessed value described herein and will, upon request, but not more frequently than annually, provide the City written reports on its progress.

8. Whenever Bear states, by notice and supporting documentation delivered to the City Administrator, that it has satisfied its obligation to create the required incremental

assessed value, the City will have 45 days to deliver to Bear any written objection to or statement of disagreement with Bear's statement or documentation. If no such objection or statement of disagreement is timely delivered, Bear's obligations under the Agreement will be deemed satisfied.

9. Should Bear and its affiliated companies fail to create the required incremental assessed value within seven years of the Payment Date, Bear agrees to return a portion of the \$2,900,000.00 payment that is proportionately equal to the shortfall of the required \$5,800,000.00 incremental assessed value. For example, if Bear and its affiliated companies create only \$5,220,000 in incremental assessed value by the deadline, leaving a shortfall of \$580,000.00 (10% of \$5,800,000.00), Bear will return to the City \$290,000.00 (10% of \$2,900,000.00 payment). Any money to be returned pursuant to this paragraph will be due within 30 days of the date that is seven years after the Payment Date. This obligation to return applies only to Bear and its affiliated entities and not to S.R. Mills, Steven Mills and/or their family and heirs in their individual capacity.

10. Upon approval of this Agreement, Bear will prepare, and the parties to the federal litigation will direct their attorneys to sign, a stipulation requesting that the Court remove all existing dates relating to the federal litigation from its calendar, including but not limited to the December 5, 2011 trial date.

11. Upon receipt of the above-referenced payments, Bear will, within three business days, prepare, and the parties to the federal litigation will direct their attorneys to sign, a stipulation dismissing the federal litigation with prejudice and on its merits and without costs. The terms of this Agreement will survive any such dismissal. The stipulation will also provided

that the Court will retain jurisdiction over the federal litigation to enforce the terms of this Agreement.

12. Each of the parties hereto, for itself, its members, constituent bodies, representatives, and successors, releases and discharges the other parties hereto and their members, constituent bodies, representatives, successors and insurers including Cities and Villages Mutual Insurance Company, Chartis, Inc. and the Insurance Company of the State of Pennsylvania, from any and all claims, demands actions, causes of action, or liability of any nature whatsoever, whether known or unknown, whether at law or in equity, that it had or they could have had for damages of any kind, including punitive damages, injunctive or equitable relief, or costs, expenses or attorneys' fees, that relates in any way to the Uptown Gardens development, including but not limited to any actions for (1) damages for breach of any contract, oral or written; or (2) violation of any state or federal statute or regulation that were asserted or that could have been asserted in the federal litigation.

13. It is further understood that the money paid and the covenants and agreements contained herein for this unqualified Agreement are received not only as a full satisfaction for all known and unknown injuries and damages, but is also received for future injuries and damages, arising out of or related to the acts or omissions of the City and its officials alleged in the federal litigation. It is understood in making this Agreement that Bear will have no right to make a claim against the City for more money even if it is later dissatisfied with this settlement for any reason whatsoever.

14. Bear represents that no portion of its claims in the federal litigation have been assigned to anyone else and that no other person or entity has any legal right to pursue such claims or share in the proceeds of this settlement.

15. The parties hereto further expressly agree that this Agreement is for settlement purposes only, and neither the act of entering into, nor any provision contained in, this Agreement, nor any action taken hereunder shall constitute, or be construed as, any admission of the validity of any claim or any fact alleged in the federal litigation or of any wrongdoing, obligation, fault, violation of law, or liability of any kind on the part of the parties. In addition, this Agreement is the result of unique circumstances particular to the federal litigation and shall not be construed as precedent for any future agreements between the City and Bear or the City and others.

16. All notices and other communications required or permitted under this Agreement shall be in writing and deemed given when mailed, certified mail return receipt requested, addressed to Bear or the City, as the case may be, at the address set forth below:

If to Bear:

S.R. Mills
Bear Development, LLC
4015 80th Street
Kenosha, Wisconsin 53142

With a copy to:

Thomas L. Shriner, Jr.
Foley & Lardner LLP
777 East Wisconsin Ave.
Milwaukee, Wisconsin 53202

If to the City:

Frank J. Pacetti, City Administrator
625 52nd Street
Room 300
Kenosha, Wisconsin 53140

With a copy to:

Edward R. Antaramian, City Attorney
625 52nd Street

Room 201
Kenosha, Wisconsin 53140

17. This Agreement, and any disputes that arise out of this Agreement, shall be governed by the substantive laws of the State of Wisconsin, without regard to its choice of law rules.

18. None of the parties hereto shall be considered to be the drafter of this Settlement Agreement or any provision hereof for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof. With full knowledge and understanding of the contents of this Agreement, the parties voluntarily enter into the settlement and do so without having relied on any statement or representation by the released parties, their representatives or anyone retained by them.

19. This Agreement contains the entire agreement of the parties with respect to the subject matter hereof and shall not be subject to any change, modification, amendment, or addition without the express written consent of the parties hereto. With respect to any change, modification, amendment, or addition, the Department of City Development may act on behalf of the City.

20. The Agreement contains an entire, complete, and integrated statement of each and every term and provision agreed to by and among the parties hereto, and it is not subject to any condition not provided for herein. The statements in this Agreement are contractual terms, and are not mere recitals.

21. This Agreement may be executed in counterparts by the parties hereto, and the attachment of separate valid signature pages may constitute a single executed original, and a facsimile signature shall be deemed an original signature for purposes of this Agreement.

22. The parties hereto covenant and agree to cooperate fully, diligently, and in good faith to carry this Agreement into effect and agree to execute hereafter any such additional documentation and to take such additional action as may be necessary to give effect to this Agreement.

23. At the City's request, Bear agrees to state to the United States Department of Justice, in writing, that it has reached a settlement with the City, satisfactory to Bear, of all of its claims in the federal litigation and that the settlement does not constitute an admission of liability by the City or of the validity of any of Bear's claims or allegations whatsoever.

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this Agreement effective as of the date stated above.

Bear Development LLC,
A Wisconsin Limited Liability Company

By _____
S.R. Mills
President

CITY OF KENOSHA, WISCONSIN,
A Wisconsin Municipal Corporation

By 
Keith Bosman
Mayor

Attest: 

REDEVELOPMENT AUTHORITY OF THE
CITY OF KENOSHA, WISCONSIN,
A Wisconsin Redevelopment Authority

By _____
Katherine Marks – Chairperson

Attest: _____