

CITY OF FARMINGTON  
CLOSED SESSION

A closed session of the Farmington City Council was held on July 17, 2006 in Council Chambers, 23600 Liberty Street, Farmington, Michigan. Notice of the meeting was posted in compliance with Public Act 267-1976.

The session was called to order at 8:55 p.m. by Mayor McShane.

**COUNCIL MEMBERS PRESENT:** Buck, Knol, McShane, Sutherland, Wiggins.

**COUNCIL MEMBERS ABSENT:** None.

**CITY REPRESENTATIVES PRESENT:** Director Gushman, Clerk Halberstadt, City Manager Pastue, Assistant City Manager Richards, Attorney Schultz.

Council met to review City Attorney Schultz's opinion regarding a pending Michigan Tax Tribunal case related to a special assessment on property owned by Kimco in the Downtown Center and issues related to an easement on the property.

City Manager Pasture reviewed the purpose of the meeting and pending issues.

Attorney Schultz reviewed the proposed "Amendment to Easement Agreement" with Kimco, advising Council that the agreement contains a no-build clause for twenty-five years, however, the underground parking remains an option as long as it does not impact above ground surface parking. He further advised that the no-build commitment would remain in effect for: (a) a period of 25 years; (b) until Office Depot, or successor, ceases to occupy premises; (c) until the premises are no longer consistent with a first class shopping center; and (d) use of the premises by a list of prohibited users.

Councilmember Knol questioned the definition of a "first class shopping center". She stated there are a lot of first class shopping centers that have dollar stores. She noted that "first class shopping center" does not mean anything.

Councilmember Buck noted that Office Depot could assign the lease to another store as long as that store has at least 15 other stores.

Knol speculated that sometime in the future if Office Max deems Farmington is no longer a marketable area they could sub-lease to Bargain Books or any other discount retailer which means the City would have the same business that is in there today plus but would also have the 25 year no-build restriction and would have signed away a lot of other rights and privileges.

Pastue stated that KIMCO has advised that the inability for Office Max to assign would be a deal killer.

Schultz advised that the two main issues before Council regarding both the "Easement Agreement" and the "Memorandum of Understanding" is the ability of Office Max to assign its lease and what the City can do with the area behind the pavilion. He stated that everything else in the documents is "not a big deal."

He stated the language the City had proposed was "Office Depot or subsidiary of the same national stature of Office Depot."

Schultz advised that the problem with the 1982 Easement Agreement was there was no historical context to it. He reviewed the "Memorandum of Understanding" with Council noting that it contains lengthy recitals in order to provide the necessary background concerning the agreement.

Pastue further reviewed the provisions of the "Memorandum of Understanding" citing the issue of "no further reduction of parking spaces."

Responding to a question, Pastue stated the parking limitation meant that there could be no expansion of any kind for 25 years. He stated the provision does allow for temporary shortfall of parking.

Pastue cited other provisions of the Memorandum regarding the parking lot behind the pavilion. He stated that the agreement allows the City to close that area for the Farmers Market, Founders Festival, five events during the year limited to three consecutive days.

Buck noted that based on the agreement, the Farmers Market would be prohibited on Sundays.

Pastue stated that the provisions under the Memorandum are permanent.

Discussion followed regarding possible future changes to the Farmers Market and what would be allowed.

Pastue reiterated the two substantive issues before Council: assignment of lease and parking behind the pavilion. Schultz also noted the "no permanent reduction in the number of parking spaces" as an additional issue.

Mayor McShane asked for Council's comments on the two proposed agreements.

Buck stated he has a problem with the "assignment of lease" provision of the amended easement agreement. He stated any concessions on the part of Council were based on Office Depot as the tenant. He stated this provision removes the City's ability to control leasing of that space.

Schultz stated that Kimco and Office Max believe that the no-build provision provides value to the lease and would like the ability to continue that value in sub-leases.

Councilmember Wiggins stated that the agreement removes the City's ability to ensure quality tenants. He stated if quality tenants cannot be ensured the City should not make a no-build concession.

Mayor McShane asked if language providing for City approval of tenants could be included.

Knol stated the language in the agreement, "recognized nationally" does not ensure quality. She stated City approval should be included.

Sutherland stated that City approval would promote a working relationship with Kimco.

Wiggins asked about the inclusion of a prohibited tenant list.

Schultz advised that a lease agreement with an approval requirement attached to it would be viewed as not marketable.

Sutherland stated if the City accepted the terms of the easement agreement then it should not accept the terms of the Memorandum concerning the parking lot behind the pavilion. She stated her belief that this would not be a deal breaker for Office Depot.

Pastue noted that national retailers call a lot of the shots regarding their leases because they are the anchor that brings in a lot of other stores.

Knol asked why the city would give a 25-year no-build provision if a dollar store could come in at any time. She asked if other retailers would have the same requirement as Kimco.

Buck confirmed that the tenant could give consent to the City to put up a parking structure.

McShane questioned if this is a standard contract with a major retailer? Pastue responded that Kimco stated as such, however, he noted this is an unusual situation because of the city owned parking lot.

McShane stated she has a problem with "giving away the store." She stated she does not like the provision of the Memorandum that states the City can only have a Farmers Market through November. She stated the city should not agree to a no-build if a lease can be assigned.

Knol stated she has an issue with never being able to expand the park, lack of flexibility with the market and any other types of events the City may want to put on.

Pastue stated that his goal is to find a happy medium between enjoying as much benefit from the park as possible while still retaining enough parking space for retailers.

McShane asked if both agreements needed to be accepted as stated in order to secure a major retailer. Pastue responded yes unless Council wanted to risk losing Office Depot.

Buck stated he is comfortable with the restrictions regarding the parking lot behind the pavilion because if ever there was a need to expand the opportunity is there to go east. He reiterated his object to (a)iii of Article 1 of the Amendment to Easement Agreement.

McShane stated her concern that an agreement would limit the City in what they could do with the market or any other event.

Sutherland expressed her belief that the addition of Office Depot would provide the City of Farmington with the momentum it needs to bring in other businesses. She stated that she could agree with the 25 year no-build, although it is a bitter pill to swallow, as long as the restrictions concerning the parking lot behind the pavilion were removed.

Wiggins expressed his concern with the (a)iii provision of the easement agreement because there is not assurance of a quality tenant.

Buck stated that with the no-build provision Kimco essentially owns the lot.

Knol stated that she cannot accept the (a)iii provision because of the potential for getting a dollar store. She further stated that she cannot accept the new easement agreement under the Memorandum of Understanding because the limitations are permanent. She stated that it would be unfair to residents or retailers to limit the activities in the Downtown Center. She further stated that she could agree to a 5-year agreement and then re-evaluate it.

McShane asked why the City should limit itself. She stated no to (a)iii. She expressed her concern regarding the proposed restrictions to the parking lot behind the pavilion.

Buck spoke about the positive impact the events have had on the retailers. He stated Kimco should want the City to run as many events as possible in order to bring in customers.

Schultz advised that if Council does not agree with the provisions of the two agreements then the City is probably headed to Court.

Discussion followed regarding the possibility of re-negotiation.

Schultz recommended Council take no action. He reminded Council that this property is not similar to property in Birmingham in that Kimco helped the City acquire the property for retail purposes.

Knol asked if a decision could be delayed until other potential opportunities in the Center materialize.

Director Gushman advised that based on activities with the building department Office Depot appears to be committed to moving in the Center.

Council concurred to not accept the language of (a)iii of the Article 1 of the Amendment to Easement Agreement concerning the assignment of lease.

Council concurred to not take any action and direct City Attorney and Administration to renegotiate the items of concern as expressed under the Amendment to Easement Agreement and the Memorandum of Understanding.

Council concurred to return to open session

Closed session concluded at 10:30 p.m. with Council returning to open session.

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Susan K. Halberstadt, City Clerk