SPECIAL COMMITTEE TO REVIEW ENERGY CONTRACTS AND RELATED PROJECTS

December 15, 2003 **5:30 PM**

Chairman Shea called the meeting to order.

The Clerk called the roll.

Present: Aldermen Shea, Sysyn, Pinard, Lopez

Messrs.: Deputy Solicitor Arnold, W. Jabjiniak

Chairman Shea addressed Item 3 of the agenda:

> Communication from City Solicitor Clark advising that a second payment under the terms of an MOU between the City and TRC Power, LLC has not been received and recommending such matter be referred to the Special Committee to Review Energy Contracts and Related Projects.

Deputy Solicitor Tom Arnold stated as Mr. Clark's letter to the Committee points out, the second payment for the exclusivity provision of the MOU with TRC Power has not been paid. That brings a total I believe of $200,000 that has not been paid to the City out of the $250,000. A first payment of $50,000 was made. I guess at this point the Committee and the Board can proceed in either of two fashions depending on what your judgement of the best interest for the City are. We could certainly pursue TRC Power by declaring a default and pursuing the $200,000 most likely in court or if the Committee chose staff and TRC Power could get together to see if something could be worked out at this point. There is something to be said I guess for pursuing this power project rather than declaring TRC in default but that is a policy decision that is up to this Committee and the Board and certainly not staff.

Alderman Lopez stated in the agreement that I was reading it stated $500/day for every day that they didn't pay us. Did you read that part?

Deputy Solicitor Arnold responded it is on Page 8. That is $500/day for every day that TRC was in control of the project site. I think that is debatable up to this point because obviously the original site that was contemplated in this MOU was not…they chose not to take I guess at this point. Whether they would deem to be

in control of it under this agreement certainly would be open to some interpretation.

Alderman Lopez asked if we don't agree or we agree that it doesn't change that how can we agree to the verbiage.

Deputy Solicitor Arnold answered because the $250,000 was a payment for exclusivity under this agreement, which they certainly got and I don't believe that this agreement places any contingencies on the payment of that $250,000. Again, $50,000 of that has been paid and $200,000 has not.

Chairman Shea asked, Randy, do you have anything to add.

Mr. Randy Sherman stated I kind of agree with Tom. There are two directions you can go. My only concern about throwing them in default is…I guess I would almost like to not throw them in default but pursue the money. Now I guess I have this issue and maybe it is not a legal issue that if you call them in default does that weaken the case if you then try to go after the money. I know that was more the thought back in June when it was fresh and now that it is six months old maybe it doesn't matter at that point. I agree that those are the options. What I have heard is that Mr. Fitzpatrick is still interested in bringing a project to the City so if you go pursue the dollars before maybe the City has had a chance to sit down and talk to him again maybe you jeopardize the project. You have to make it very clear to them that the City doesn't like doing business with people who renege on their contract. So if he wants to do a project he has to bring his contract up to date. Again, I think the option would be to allow staff to go back and meet with him again and get an update and find out where we are. The most you lose is maybe a few weeks to come back and report back to you at that point.

Alderman Gatsas asked Tom did we receive a letter from them that has relinquished their exclusivity on the property.

Deputy Solicitor Arnold answered I don't believe so.

Alderman Gatsas asked so how can you determine that they are not in default of the exclusivity portion of $500/day if we are not in receipt of a letter that says they no longer want to develop down there.

Deputy Solicitor Arnold answered because the provision is $500 for every day that TRC was in control of the project site.

Alderman Gatsas asked have they sent you a letter to relinquish the control of the site.

Deputy Solicitor Arnold answered no they have not but I am not sure at this point that they were even given control of that site. I know that there was certainly a portion marked off on the original plans for Riverfront. There was some discussion of moving it down by the WasteWater Treatment Plant as well as a couple of other sites.

Alderman Gatsas stated there is only one site that goes with this MOU.

Deputy Solicitor Arnold responded yes.

Alderman Gatsas asked have you read this contract.

Deputy Solicitor Arnold answered of course I have.

Alderman Gatsas asked can you show me where you think they have relinquished their right.

Deputy Solicitor Arnold answered I draw a distinction between being in control of the site and their exclusivity.

Alderman Gatsas asked maybe you can give me a legal opinion on where you see that.

Deputy Solicitor Arnold answered under 1.0 Exclusive Development Rights it says "the City grants TRC the exclusive right to develop the project. The right includes control over the site as hereafter provided for" as well as some other items in here. "The City shall not exempt to grant any of these development rights to a third party." Again that goes to the exclusive rights to develop the project. I think there is some distinction between that and control of the site.

Alderman Gatsas stated I think 1.1 is pretty clear. It says the site.

Deputy Solicitor Arnold responded yes "developer's lease shall provide for a sub lease and the sub lease shall have a term of two years." I don't think there was ever a sub lease executed, not with TRC Power anyway.

Chairman Shea asked who drew up this contractual agreement.

Mr. Sherman answered the MOU was drafted by Peter Grills who was the energy attorney that the City had and it was reviewed by Tom.

Chairman Shea asked have we had any contact with the fellow who drew it up.

Deputy Solicitor Arnold answered no I have not recently.

Chairman Shea stated I am not quite sure exactly…for instance just by the sake of discussion here if, in fact, there is a meeting assuming the Committee says well the person doesn't want to meet or he agrees to meet but there is no change what then would be the scenario.

Mr. Sherman responded I guess at that point it would come back to the Committee and then your option at that point would be to pursue your legal avenue.

Chairman Shea asked is there any place in this for the original lawyer who drew this up to be involved in this or does he just draw it up and…

Mr. Sherman interjected his role and correct me if I am wrong Tom but his role was to deal with the specifics having to do with the power industry where really the contract law…I think Tom is clearly…again it is a New Hampshire issue. I mean again unless you feel you have a…

Deputy Solicitor Arnold interjected I wouldn't see a need to involve him at this point. Depending on what develops that might change but I wouldn't see that need and I wouldn't want to incur that expense.

Chairman Shea stated but because of the issues raised by Alderman Gatsas would the person who drew up the contract have a different interpretation than what your…

Deputy Solicitor Arnold interjected that is always possible and I could certainly speak to him about that.

Chairman Shea responded that might be helpful.

Alderman Forest stated several months ago was it Mr. Fitzpatrick from TRC who showed up before the full Board to try to explain why he has not made the first payment.

Deputy Solicitor Arnold replied yes.

Alderman Forest stated I think we had this discussion then about the disagreement and whether he had the site or he didn't have the site. Has anybody from the staff or the Committee talked to them since that meeting? That was like two or three months ago and now we are back here asking the same question on the second payment because they have a disagreement whether they owe it or not. Has

anybody talked to him at all? I think somebody should have talked to him after the last discussion.

Mr. Sherman responded I might have talked to him the next day or so but since it got sent to Committee I haven't. I was told that Tom Clark would take care of it.

Deputy Solicitor Arnold stated I think that our interpretations are a little different also.

Alderman Forest responded I understand that we have different interpretations as to they are saying they don't owe and we are saying they do but there was that similar discussion on the first $100,000 and now here we sit in Committee and he has missed a second $100,000 and nobody has talked to him.

Mr. Sherman replied he didn't feel he owed the money until he had control of the site and I think Tom agrees with my position that you had exclusive rights and that is what you are paying for.

Alderman Lopez stated in conversations at the Board meeting you indicated that they owed us some money and the dispute was they said they didn't. Even if you guys meet you are going to run into the same situation and drag this thing out. It has already been dragging since May. Do you think that you have a case to go to court?

Deputy Solicitor Arnold responded yes I think we do. I guess the decision in a nutshell that needs to be made is we can certainly pursue with the court and I think we are going to have a good chance of prevailing but the cost to that, the true cost of that might be TRC Power deciding that they don't want to do a project in the City with the consequent loss if they were to do it at another site of tax revenues from the site that they do develop for these power peaking plants.

Alderman Lopez stated I don't even want to deal with them if they are going to be like this.

Deputy Solicitor Arnold responded that is certainly a decision to be made by the Committee.

Alderman Lopez stated there is still some argument as to whether or not it is going to be profitable in the long run according to my resources in Public Service. I am comfortable if you can defend the City in court…how much money do you think is…where is that money going to come from?

Deputy Solicitor Arnold responded who would handle the case of course would have a big impact on that. If our office were to handle the case then the expenses would probably be relatively speaking rather minor and probably come out of our contingency account that we keep for things like depositions and stuff like that. If the decision was to send it out outside counsel of course that is something different and I haven't looked at where those funds would come from.

Alderman Lopez stated well we are capable…I mean this is a simple contract to a degree right. Would you agree to that?

Deputy Solicitor Arnold responded it is certainly a contract issue yes and it doesn't appear to be that complicated but…

Alderman Lopez interjected we have the expertise in our own office, the Solicitor's office to handle this.

Deputy Solicitor Arnold stated again I think we could. I just don't want to speak for Mr. Clark because he is ultimately the one who makes those decisions but I think we could.

Alderman Lopez responded well if the Board decides that we are going to handle this in-house that would be the decision right.

Deputy Solicitor Arnold replied if the Board so desired that, yes.

Alderman Gatsas stated it is very clear in here what the indemnification reads and it says that we are included any judgements, costs including reasonable attorney's fees can be or expenses or other liabilities due to loss, damage or injury to…I mean it is pretty clear to me that we are entitled to legal fees.

Deputy Solicitor Arnold responded that is correct.

Alderman Gatsas stated I guess maybe what we need to do is to find out the attorney that drafted this that represented the City because he has to defend it. It is his agreement. I would think that he should be here talking to the Board or talking to this Committee because it is his…and I don't know if there was ever a sub lease ever negotiated with the developer. Does anybody know that?

Mr. Sherman responded I believe they wrote the sub lease but I don't think they ever executed the sub lease.

Alderman Gatsas asked can we get a copy of that sub lease.

Alderman Forest stated as far as Mr. Fitzpatrick I think in order to be fair to him…I realize that he said that he doesn't owe the City money but nobody has actually sat down with this firm and said hey the money was due at this time and you have a contract. I think what we ought to do is just sit down with him and give him an ultimatum that says hey the money is due and we will give you so many weeks to pay and if he doesn't pay then we can pursue this court action. Nobody actually sat down and talked to him when he said that he didn't think he owed the money six months ago. I think it is only fair to sit down with them and say yes you do owe them this money and then take it from there. If he says no we don't then we can pursue the court action but I think at least give him the opportunity to say why he doesn't owe us the money. Again, I am not on the Committee but…

Chairman Shea interjected when was the last time anyone had any dealings with him. I know that we have correspondence here dated July 8, 2003. Tom Clark said at the last Board meeting that he had been in touch with him a week before that or something of that sort.

Deputy Solicitor Arnold stated I have an e-mail dated November 17 from Tom Clark to Mr. Fitzpatrick asking when he would like to meet. It said I have some availability later this week, next week is not very good or we could meet in early December. I am not sure what the ultimate resolution of those e-mails was. That is the latest one I think I see.

Chairman Shea asked was that from Tom to him.

Deputy Solicitor Arnold answered yes that was from Tom to Mr. Fitzpatrick.

Chairman Shea asked and there was no reply.

Deputy Solicitor Arnold stated I couldn't say that for sure. I don't see one here in the file but this is the most recent one I believe I have in the file.

Alderman Sysyn asked maybe we should have him come before the Committee or should he sit with Tom Clark.

Alderman Lopez stated I don't know if it is going to do any good. We could give him one more shot and if he says no I am not going to pay then we can take him to court. They all know what the problem is. If he doesn't want to come to a mutual agreement that they can bring back to the Committee, let's say for example once they meet they come up with a compromise and say here is $100,000 and we are going to walk away or whatever the case may be. If they want to bring that back to the Committee that is one thing. If the answer is I don't owe you any money

then we can take him to court. I don't know what other option we have here. Let's go to court.

Chairman Shea stated the other thought I had is has there been any movement on anyone's part in terms of locating this particular facility anywhere but where he initially was going to.

Mr. Sherman responded I haven't spoken to him since June. At that point he was checking out a number of sites. Have you heard from him, Bill?

Mr. William Jabjiniak stated nothing recent. I think it was back during the same timeframe we are dealing with. He was evaluating some sites down towards the sewage treatment plant and looking at others as well.

Chairman Shea asked do you think he intends to do anything or is he just going to pass it off as being something he was going to do but can't do or doesn't want to do. What would your…you guys dealt with him I guess. What are your feelings?

Mr. Jabjiniak answered my feeling is that he would like to do something in the City. We have an issue where he signed an exclusivity for that location. He is looking…he has a difference of opinion on how the contract is interpreted and that is the issue in front of you but I still maintain he would like to do something in the City.

Chairman Shea asked do you have any idea as far as the timing is concerned. Is it within a reasonable time that he wants to? Has he made an overtures as far as trying to purchase land or anything?

Mr. Jabjiniak replied the search continues to try to find a piece of land that is suitable for distribution and all of the issues that he faces. Do you want it down on top of the sewage treatment plant? Do you want it down by the Mall? Do you want it up here? Those are some of the issues. It doesn't always fit in the best location. That was one of his issues with the Riverfront.

Chairman Shea asked why would he enter into an agreement with the City with the type of agreement he entered into not knowing what the implications of that might be. Why would he do that?

Mr. Jabjiniak answered my opinion is that he wanted exclusivity and that is what he was trying to tie up.

Chairman Shea asked by that you mean that he is the only one who has the right to come into the City. Is that correct?

Mr. Jabjiniak answered yes.

Chairman Shea asked and that is for how long a period.

Mr. Jabjiniak responded that is what your agreement laid out and if he continued to pay I would say until we have a site developed but the issue is has he continued to pay and does he maintain that exclusivity.

Alderman Gatsas stated I certainly believe that when Mr. Fitzpatrick came to the City the cost of generating natural gas was much lower. Since then, natural gas prices have gone out of site and it is very difficult for anyone to enter into the natural gas market and do a power plant. We can see what is happening down in Londonderry with their natural gas power plant. So I think the writing is on the wall. I think it is very clear that when this agreement started in 2002 the cost of natural gas was low. It probably made sense to do a power plant with natural gas. I think that if you asked anyone today to come in and do an actual gas power plant, unless you had an awful great deal on the table I don't think you are going to find anyone doing it. I think that is really where we are at. That is probably the honest opinion. Somebody that was going to give you that, that is probably where they are at.

Alderman Lopez asked, Tom, if you look at 6.2 does that mean if we let this thing linger on for the second year the contract is no longer valid.

Deputy Solicitor Arnold answered that is confidential information.

Chairman Shea asked what does the Committee want to do.

Alderman Lopez moved to have the City Solicitor make one more official attempt, either in person or by e-mail to get our money according to the MOU within 30 days and if the end result is that they are not going to pay us then I would have the City Solicitor proceed with legal action. Alderman Sysyn duly seconded the motion.

Deputy Solicitor Arnold stated we can certainly attempt to do so. I can't speak for Mr. Fitzpatrick but we could certainly work within that timeframe. Just so we are clear as to our direction here, is that just to demand money or for Mr. Fitzpatrick to come in and say I am looking to do a project and put some definite timeframe on it. Do you want staff to sit down and negotiate with him?

Chairman Shea responded that was not his proposal.

Deputy Solicitor Arnold stated I just want to be clear.

Alderman Lopez stated he has to make good on the MOU in some aspect. If he comes to staff and says all right I will give you $100,000 then that is a counter proposal that you can bring back to this Committee and we will have another meeting. Otherwise…does this have to go to the full Board?

City Clerk Bernier stated yes.

Chairman Shea asked is this going to the full Board tomorrow night.

City Clerk Bernier replied you can bring it in under new business. There is no committee report if available on the Board agenda but we can bring it in under new business. It is a direction that you are giving City staff.

Chairman Shea stated there is a precedent. In other words when we make a contractual agreement with people we are always getting the short end of it, it seems. We are making accommodations to them whereas…you know you enter in good faith. I think the point that Alderman Gatsas brought up is very important. I personally don't really believe that this guy intends to do anything here. I think he just kind of got caught up in the situation. Somebody may have talked to him, whether it was Mr. Sanborn or somebody else and he decided okay it seemed like a good idea but like you said where Londonderry owes them I don't how much maybe millions I guess – they reneged on the second payment of their taxes. It was like $1.1 million or something like that so obviously it is not producing.

Chairman Shea called for a vote. There being none opposed, the motion carried.

There being no further business, on motion of Alderman Sysyn, duly seconded by Alderman Lopez, it was voted to adjourn.

A True Record. Attest.

Clerk of Committee