

32.



City of West Allis Matter Summary

7525 W. Greenfield Ave.
West Allis, WI 53214

File Number	Title	Status
R-2008-0119	Resolution	In Committee
	Resolution recommending the dissolution of the Quad/Graphics Indemnity Fund.	
	Introduced: 5/14/2008	Controlling Body: Safety & Development Committee
		Sponsor(s): Safety & Development Committee

COMMITTEE RECOMMENDATION ADOPT

ACTION DATE:	MOVER	SECONDER		AYE	NO	PRESENT	EXCUSED
<u>5/20/08</u>			Barczak				
			Czaplewski				
		✓	Kopplin	✓			
			Lajsic	✓			
			Narlock	✓			
			Reinke				✓
			Roadt				
			Sengstock				
	✓		Vitale	✓			
			Weigel				
			TOTAL	<u>4</u>	<u>0</u>		<u>1</u>

SIGNATURE OF COMMITTEE MEMBER

Chair

Vice-Chair

Member

COMMON COUNCIL ACTION **ADOPT**

ACTION DATE:	MOVER	SECONDER		AYE	NO	PRESENT	EXCUSED
<u>MAY 20 2008</u>	✓		Barczak	✓			
			Czaplewski	✓			
			Kopplin	✓			
			Lajsic	✓			
		✓	Narlock	✓			
			Reinke				✓
			Roadt	✓			
			Sengstock	✓			
			Vitale	✓			
			Weigel	✓			
			TOTAL	<u>9</u>			<u>1</u>



City of West Allis

7525 W. Greenfield Ave.
West Allis, WI 53214

Resolution

File Number: R-2008-0119

Final Action:
MAY 20 2008

Sponsor(s): Safety & Development Committee

Resolution recommending the dissolution of the Quad/Graphics Indemnity Fund.

WHEREAS, the City of West Allis ("City") pursuant to agreements with Giddings & Lewis, Inc., and Quad/Graphics, Inc. for the acquisition and disposition of the former Kearney and Trecker site established an Environmental Indemnification Fund (the "Fund") and,

WHEREAS, the Director of Development has recommended dissolution of the Fund and distribution of moneys in accordance with the communication attached hereto as Exhibit "A" and by reference made a part hereof (Directors Communication"); and,

WHEREAS, it is in the interest of the City to proceed with the dissolution of the Fund and distribution of moneys as recommended in the Director's Communication.

NOW, THEREFORE, BE IT RESOLVED by the Common Council of the City of West Allis that the Fund be and is hereby dissolved and the moneys therein distributed in accordance with the Director's Communication.

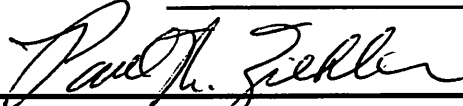
BE IT FURTHER RESOLVED that the Director of Development be and is hereby authorized and directed to execute and deliver on the part of the City such documents as may be required for dissolution of the Fund and the payments to be disbursed as herein approved.

BE IT FURTHER RESOLVED that the City Comptroller be and is hereby directed to disburse the moneys from the Fund upon written order from the Director of Development in accordance with the disposition herein approved.


Attachments

cc: Development
Finance

DEV-R-504-5-14-08

ADOPTED MAY 20 2008


Paul M. Ziehler, City Admin. Officer, Clerk/Treas.

APPROVED 5/22/08


Dan Devine, Mayor

November 3, 1999

To: Michael J. Sachen
From: Thomas P. McElligott
Re: Quad/Graphics-West Allis

INTRODUCTION

In 1994 the City of West Allis ("City") entered into purchase and sale agreements with Giddings & Lewis ("Giddings") and Quad/Graphics, Inc. ("Quad") in connection with the former Giddings facility (Main Parcel) in West Allis, Wisconsin. In negotiating the original agreements with Quad and Giddings, the City agreed to conduct remediation of the Main Parcel and provide limited environmental indemnification to Quad and Giddings. In both agreements, the City's indemnification obligation was capped at \$5.0 million. In each case, that cap would be reduced if the City incurred certain expenses in excess of the anticipated clean-up costs.

To secure its indemnification obligation the City established a fund of approximately \$2.5 million which was compromised of state and local funds (the "Indemnity Fund"). In addition, Milwaukee County agreed to secure the remaining \$2.5 million.

In July of 1999, Quad purchased from Giddings an outlot (Outlot A) which adjoins the Main Parcel. In connection with the 1999 transaction, Quad and the City agreed to amend the original agreement. In that amendment, Quad agreed to release the City from virtually all of its environmental obligations and to assume responsibility for

environmental conditions at the Main Parcel in exchange for Quad's ability to use a specified amount of tax incremental financing funds.

In light of these recent developments, the City has asked whether it is under any obligation to continue the Indemnity Fund. This memorandum summarizes our review of the relevant documents. Specifically, we have reviewed: (1) Agreement For Sale by and between Giddings and the City, dated April 26, 1994 together with the attached exhibits and addendum ("Giddings Agreement"); (2) First Amendment of Agreement For Sale between Giddings and the City, dated May 11, 1994 ("Giddings Amendment"); (3) Agreement For Sale by and between the City and Quad/Graphics, dated May 11, 1994 together the attached exhibits and addendum ("Quad Agreement"); and (4) First Amendment To Purchase and Sale Agreement by and between the City and Quad, dated July 27, 1999 ("Quad Amendment"). To the best of our knowledge, these documents reflect all of the written agreements regarding environmental responsibilities for conditions at the Main Parcel.

GIDDINGS AGREEMENT

In Section 7.10 of its Giddings Agreement, the City agreed to indemnify Giddings for certain claims related to the presence of hazardous substances on the Main Parcel. Specifically included in the indemnity were cost and expenses related to any investigation, monitoring or clean-up required on the Main Parcel. Section 7.10.1 of the agreement caps the City's indemnification obligation at \$5 million. That section was amended by the Giddings Amendment to provide that the indemnity cap would be reduced if, and to the extent, the buyer incurred clean-up cost in excess of \$2 million. In

other words, the \$5 million cap would be reduced by the amount the clean-up cost exceeded \$2 million.

The City also agreed to indemnify Giddings for any claims asserted by Quad related to the presence of hazardous substances. There is no dollar cap on that indemnity, but in the Quad Agreement, Quad released its claims, except in limited circumstances, against Giddings. Quad also agreed to indemnify the City for any liability the City may incur in connection with this indemnity of Giddings.

The Environmental Addendum incorporated into the Giddings agreement also contained a number of provisions related to environmental matters. In paragraph 6 of the Environmental Addendum, the City agreed to release and waive most claims against Giddings arising out of the presence of hazardous substances. In paragraph 7 of the Environmental Addendum, Giddings agreed to indemnify the City for certain environmental matters. However, there is nothing in the Environmental Addendum which requires the City to establish or maintain the Indemnity Fund.

In summary, the Giddings Agreement requires the City to indemnify Giddings for environmental claims up to a maximum of \$5 million. The Giddings Agreement does not, however, require the City to create or maintain any type of fund or other type of financial security to assure fulfillment of the indemnification obligations.

QUAD AGREEMENTS

A. **May 11, 1994 Agreement.** The majority of the provisions related to the respective environmental liabilities and obligations of the City and Quad were contained in the Environmental Addendum to the Quad Agreement. In paragraph 6 of the Environmental Addendum, the City agreed to indemnify Quad for any claims related to

"Latent Hazardous Substance Contamination." The City's liability was limited to \$5 million, which could be reduced by costs the City incurred in connection with its indemnification obligation of Giddings. Paragraph 6 of the Environmental Addendum also includes the following sentence:

The Seller warrants and represents that it has made sufficient arrangements to create a fund designed to secure all obligations that may be covered by Seller's indemnification obligations under this paragraph.

To satisfy this obligation the City created the Indemnity Fund. The interest on that fund were then used to fund the "Special Cost Fund" created in paragraph 9 of the Environmental Addendum. Funds from the Special Cost Fund could be used to pay certain "incremental costs" incurred by Quad in its renovation and expansion activities. The City could also use these funds in the event that the cost of implementing the approved remedial plan exceeded \$2.1 million. The funds were also made available to a successful party for attorneys fees in the event there was a dispute between Buyer and Seller regarding a breach of the obligation to conduct the remedial work.

Paragraph 9 of the Environmental Addendum also included a deadline on the filing of claims against the Special Cost Fund and the timing of those disbursements. All claims against the Special Cost Fund were to have been filed within five (5) years after the closing date, or before May 14, 1999. The claims would then be paid from the interest remaining, if any, in the special cost fund at the end of ten (10) years, or on May 14, 2004. In essence, this paragraph required the City to maintain the fund for a period of ten (10) years after closing.

Paragraph 9 also specifically prohibited payments from the Special Cost Fund that reduced the amount otherwise available to secure the \$5 million indemnification obligation. In other words, Special Cost Funds claims could only be paid from the interest on the Indemnity Fund and the principal could not be used for such payments. Paragraph 9 also provided that if adequate monies were available to pay all Special Cost Fund claims, the parties agreed that Milwaukee County would be allowed to reduce its contingent obligation. This paragraph concluded with an obligation on the City, Quad and the County to consult with each other in the establishment and investment of the Special Cost Fund.

B. July 23, 1999 First Amendment to Quad Agreement. The obligations of the City and Quad with respect to environmental liabilities were substantially revised by the Quad Amendment. In general, the Quad Amendment made available to Quad approximately \$500,000.00 in tax incremental financing funds, in exchange for Quad's release of the City from any further environmental obligation, Quad's commitment to complete any required remediation on the Main Parcel and Quad's indemnification of the City for environmental liabilities remaining at the Main Parcel.

In paragraph 5 of the Quad Amendment, Quad released and forever discharged the City "from any further liability or obligation" under the listed paragraphs of the Environmental Addendum, except for Special Cost Fund claims which had been submitted prior to the execution of the Quad Amendment. This paragraph does require the City to process and pay, as appropriate, Special Cost Fund claims that had been previously submitted.

In light of the provisions of paragraph 5 of the Quad Amendment, the City has no further obligation under paragraph 6 of the Environmental Addendum (the indemnity paragraph) or paragraph 9 of the Environmental Addendum (Special Cost Fund), except an obligation to pay, as appropriate, the previously submitted claims. As long as the City makes available the funds necessary to pay Special Cost Fund claims previously submitted by Quad, the City is no longer under a contractual obligation to maintain the Indemnity Fund.

SUMMARY

Following execution of the Quad Amendment and except for an obligation to pay previously submitted Special Cost Fund claims, the City has been released from its remedial and indemnification obligations to Quad, including its obligation to establish and maintain the Indemnity Fund.

The City's indemnification obligation with respect to Giddings & Lewis will continue indefinitely. That obligation is capped at \$5 million. Under the Giddings Agreement, however, the City was and is under no obligation to create or maintain the Indemnity Fund.



November 15, 1999

To: Michael J. Sachen
From: Thomas P. McElligott
Re: Quad/Graphics Facility

INTRODUCTION

This memorandum is a follow-up to our memorandum of November 3, 1999 regarding the Quad/Graphics, Inc. ("Quad") facility in West Allis, Wisconsin ("Main Parcel"). That memorandum addressed the question of whether the City of West Allis ("City") was contractually obligated to maintain the Indemnity Fund which had been established to secure the City's indemnification obligations with respect to the Main Parcel. We concluded that, with the exception of claims previously submitted under the Special Cost Fund, the City is under no continuing contractual obligation to maintain the Indemnity Fund.

We understand that the City is now considering replacing the Indemnity Fund with an insurance policy. As a part of that analysis, the City has asked that we summarize the City's remaining environmental risk in connection with the Main Parcel under the various agreements with Giddings & Lewis ("Giddings") and Quad. In that regard, we have reviewed the following documents: (1) Agreement For Sale by and between Giddings and the City, dated April 26, 1994 together with the attached exhibits and addendum ("Giddings Agreement"); (2) First Amendment of Agreement For Sale between Giddings and the City, dated May 11, 1994 ("Giddings Amendment"); (3) Agreement For Sale by and between the City and Quad/Graphics, dated May

11, 1994 together with the attached exhibits and addendum ("Quad Agreement"); and (4) First Amendment To Purchase and Sale Agreement by and between the City and Quad, dated July 27, 1999 ("Quad Amendment"). We understand that these documents reflect all the written agreements regarding environmental responsibilities in connection with the Main Parcel.

This memorandum first compares and contrasts the indemnification obligations of the Giddings Agreement and the Quad Agreement and then discusses the City's potential environmental liability in light of those agreements.

CITY'S ENVIRONMENTAL INDEMNIFICATION OF GIDDINGS

In Section 7.10 of the Giddings Agreement, the City agreed to indemnify Giddings and its affiliates:

... from and against any and all liabilities, claims, penalties, forfeitures and suits, and all reasonable costs and expenses related thereto, including the costs of defense, settlement, and reasonable attorney's fees (hereinafter "Liability") arising out of or in any way connected with the presence of any Hazardous Substance on, in, under or migrating¹ from the Property, including but not limited, to Liability arising out of or in any way connected with the investigation, monitoring or clean-up under any federal, state or local law or regulation or ordinance of any Hazardous Substance on, in, under or migrating from the Property.

Excluded from the City's indemnification obligation are claims related to the actual or alleged exposure of any person, except the City's agents, to any Hazardous Substance on the Property prior to the closing and any fines or penalties imposed by governmental authorities arising out of Giddings actions or inactions with respect to Hazardous Substances on the

¹ The word "migrating" was added by the Giddings Amendment to clarify that the City's indemnity did not extend to liability for Giddings' offsite disposal of waste, e.g. generator liability.

Property prior to the closing date. In addition, Section 7.10.1 of the Giddings Agreement caps the City's indemnification obligation at \$5.0 million. That section was amended by the Giddings Amendment to provide that the indemnity cap would be reduced if, and to the extent, the City incurred clean up costs in excess of \$2.0 million.²

Section 7.10.2 also provides that the \$5.0 million cap does not apply to any claims against Giddings brought by "Buyer's Successor", i.e Quad. However, in Section 7.11 of the Quad Agreement, Quad waived any claims against Giddings related to the transaction and agreed to indemnify the City for liability the City may incur under Section 7.10.2 of the Giddings Agreement.

QUAD INDEMNIFICATION OF CITY

Under the Quad Agreement, the City originally agreed to indemnify Quad for "Latent Hazardous Substance Contamination," as that term was defined in the Agreement. Under the original Agreement, the City was also under an obligation to complete the remediation required by the Wisconsin DNR in the Assurance Letter. As discussed in more detail in our November 3, 1999 memorandum, in July of 1999, Quad and the City executed the First Amendment to Purchase and Sale Agreement by and between the City and Quad. In that amendment, Quad agreed to release the City from virtually all of its environmental obligations and to assume

² Giddings is under certain limited obligations to indemnify the City, primarily related to "Outlot A" and a breach of the representation in the Giddings Environmental Addendum. The City released Giddings from its indemnity related to Outlot A as a part of the transaction with Quad and, as a conservative assumption, we have not considered Giddings indemnity of the City in our analysis.

responsibility for environmental conditions at the Main Parcel. In addition, Quad's indemnity of the City in Paragraph 5 of the Environmental Addendum was revised to read as follows:

Except for Previously Submitted Special Cost Fund Claims, Buyer [Quad] agrees to indemnify, hold harmless and defend Seller from and against any and all liabilities, claims, penalties, forfeitures and suits and all reasonable costs and expenses related thereto, including the cost of defense and settlement and reasonable attorneys' fees arising out of or in any way connected with the presence on, in, under or from the Property of any Hazardous Substances, including, but not limited to any investigation, monitoring or clean up under any applicable federal, state or local law, regulation or ordinance.

As a result of the Quad Amendment, therefore, Quad now has an obligation to indemnify the City with respect to claims related to the presence of Hazardous Substances on the Main Parcel.

COMPARISON OF INDEMNIFICATION OBLIGATIONS

This section of the memorandum compares the individual components of the City's indemnification obligation of Giddings with Quad's indemnification of the City. The references to "City" below are the City's indemnification of Giddings and "Quad" refers to Quad's indemnification of the City.

Liabilities Covered

City - all liabilities, claims, penalties, forfeitures, and suits, and all reasonable costs and expenses related thereto, including the cost of defense, settlement, and reasonable attorney's fees...

Quad - any and all liabilities, claims, penalties, forfeitures and suits and all reasonable costs and expenses related thereto, including the costs of defense and settlement, and reasonable attorneys' fees...

Triggering Clause

City - arising out of or in any way connected with the presence of a Hazardous Substance on, in, under or migrating from the Property, including but not limited to liability arising out of or in any way connected with the investigation, monitoring or clean up under any federal, state or local law or regulation or ordinance of any Hazardous Substance.

Quad - arising out of or in any way connected with the presence on, in, under or from the Property of any Hazardous Substance, including, but not limited to, any investigation, monitoring or clean up under any applicable federal, state or local law, regulation or ordinance.

Hazardous Substance Definition

City - Hazardous Substance shall mean any substance defined or regulated as a hazardous substance under applicable federal or Wisconsin law.

Quad - Hazardous Substance means any substance defined or regulated as a hazardous substance under applicable federal or Wisconsin law.

Exclusions from Indemnity

City - exposure to any person, except City's agents, to Hazardous Substance prior to closing and claims for governmental fines or penalties related to Gidding's actions or inactions prior to closing.

Quad - Previously submitted Special Cost Fund claims.

Indemnity Cap

City - \$5.0 million, reduced if City's clean up expense is more than \$2.0 million.

Quad - None.

In comparing the provisions of the respective indemnification obligations, they are virtually identical as they relate to the types of claims covered, the trigger for coverage and the definition of Hazardous Substance. However, with respect to the exclusions and caps, Quad's indemnification of the City is broader than the City's indemnification of Giddings & Lewis.

It should be noted that neither the City's nor Quad's indemnity is limited as to the time at which a Hazardous Substance first became "present" on the Property. In the original negotiations with Giddings, the Company refused to limit the indemnity to Hazardous Substances present on the Property prior to closing. In any event, the Quad indemnity likewise has no temporal limitation or restriction related to when a Hazardous Substance became present on the Property.

DISCUSSION OF INDEMNITY PROVISIONS

A. City's Direct Liability

We understand that the City continues to hold legal title to the Main Parcel as a vendor on a land contract with Quad. For the purposes of this discussion, we are assuming that the City is therefore potentially liable for environmental conditions at the Main Parcel under federal and state law, e.g. § 292.11 Wis. Stats. We would note, however, that as a vendor on a land contract the City may have defenses and/or claims which would not otherwise be available to an entity

which held both legal and equitable title.³ In any event, as a conservative assumption we are assuming that the City has direct liability under federal and state laws for environmental conditions at the Main Parcel.

Quad's indemnity of the City covers all liabilities related to the presence of Hazardous Substances on or from the Main Parcel. Quad's obligation continues indefinitely and is not subject to a monetary cap. Consequently, if the City were to receive a clean up demand or order from a governmental authority or if a private cause of action were asserted against it related to the presence of Hazardous Substances, Quad would be required to indemnify the City for any cost and expenses related to such claims. As such, claims against the City related to the presence of Hazardous Substances on or from the Main Parcel would be covered by Quad's indemnity of the City.

B. City's Liability Under Indemnification Agreements

Irrespective of the City's direct liability, the City's indemnification of Giddings will continue indefinitely. Based on the above comparison of the indemnification language, it appears that any claim which Giddings could assert against the City under the Giddings Agreement would also be subject to Quad's indemnity of the City under the Quad Agreement. While the existence of the Quad Agreement would not defeat Giddings' ability to assert a claim

³ We would also note that the potential for direct liability will be greatly diminished when legal title is conveyed to Quad. While it is beyond the scope of this memorandum to address these issues in detail, the liability of a former owner would likely be more limited than that of the current owner, particularly in the absence of any evidence the City caused or contributed to any contamination on the Property.

against the City, the liability which is the subject of that claim would be covered by Quad's indemnity of the City.

In light of the overlapping indemnities, in theory the City's obligation to Giddings should be covered by Quad's indemnity of the City. As a practical matter, however, there are some remaining risks. Obviously, Quad's financial ability to fulfill its obligation is a potential concern. At this time, however, it appears unlikely that Quad would be unable to fulfill its obligation. A more significant risk is that the City could be caught in a dispute regarding the scope or coverage of the indemnities. In that case, the City may find itself in the position of having to defend a claim from Giddings, while at the same time pursuing an action to enforce Quad's indemnification obligation. While we would expect that the terms of the Agreements would be construed in a consistent manner, the transactional costs associated with litigation of this type could be significant and, if different judges separately interpreted the agreements, it is possible that different interpretations could result in gaps in coverage. Obviously, the City could take steps, e.g. consolidation of the actions, to minimize that risk. In the end, we would expect that the terms of the Agreements would be construed in a consistent manner and that the claims themselves would be treated in a similar manner.

C. Other Considerations

In addition to the terms of the various indemnities, other factors should be considered in evaluating the City's remaining environmental risk at the Main Parcel. First, on May 11, 1994 the Wisconsin DNR issued the original "Assurance Letter" which provided certain protections for Quad and the City related to environmental conditions at the Main Parcel. Essentially, the

Assurance Letter provided that if the City performs the remediation of certain identified areas, the City and Quad would have no further liability under Sec. 292.11 Wis. Stats. (formerly Sec. 144.76) for Hazardous Substances present on the Property prior to closing. In conjunction with the Quad Amendment, on July 22, 1999 DNR issued a letter clarifying the protections to which the parties would be entitled following Quad's assumption of the environmental responsibilities at the Main Parcel. That letter provided that the protections of the Assurance Letter would continue as long as the City or Quad continued to remediate the identified areas. The letter also clarified that natural attenuation could be considered in closing the site, assuming that the technical criteria were otherwise satisfied, without the City or Quad losing the protections of the Assurance Letter.

In light of the assurances received from DNR, the liability of both the City and Quad are limited with respect to potential claims from the DNR. Furthermore, in Paragraph 9 of the Assurance Letter, DNR agreed to "honor" the indemnification provisions in the Giddings Agreement. Although it is unlikely that this paragraph would be construed to absolutely prohibit DNR from asserting a claim against Giddings, it certainly minimizes the risk that DNR would pursue Giddings and, therefore, reduces the likelihood that Giddings would ever assert a claim against the City. The City should recognize, however, that the DNR assurances would not prohibit any third party, e.g. adjoining landowner, from asserting a claim directly against the parties.

There are other practical considerations which should also be considered in evaluating the City's direct and indirect potential liability. Prior to entering into the original agreements in

1994, a comprehensive Phase II investigation of the Main Parcel was undertaken. That investigation, along with the substantial construction activities already undertaken on the Property by Quad, minimize the risk that significant environmental problems will be encountered in the future. Perhaps more importantly, the vast majority of the known impacts have already been addressed by the remediation performed by the City over the past several years. As noted above, DNR staff indicated a willingness to consider a natural attenuation based closure for the site. While we cannot rule out the possibility that a significant environmental claim may arise in the future, the likelihood of such a claim has greatly diminished since the original agreements were executed.

CONCLUSION

With respect to the City's direct liability as owner of the Main Parcel, the Agreement with Quad requires Quad to indemnify the City for all liabilities related to the presence of Hazardous Substances on or from the Main Parcel. Quad's indemnification obligation would remain indefinitely and is not subject to a monetary cap.

The City's indemnification obligation with respect to Giddings & Lewis will continue indefinitely, but is subject to a \$5.0 million cap. However, a claim which Giddings could assert under its Agreement with the City should likewise be subject to Quad's indemnity of the City. The City's primary risk in this regard relates to the potential the City could be caught in a dispute regarding the terms of the indemnity provisions. While we would expect that similar terms of the respective agreements would be construed in a consistent manner, the transactional costs associated with such a dispute could be significant.