CITY OF
OXNARD
CALIFORNIA

Meeting Date: 06/12/12

ACTION	TYPE OF ITEM
☐ Approved Recommendation	☐ Info/Consent
☐ Ord. No(s). _____	■ Report
☐ Res. No(s). _____	☐ Public Hearing (Info/consent)
☐ Other _____	☐ Other:

Prepared By: Alan Holmberg _____ Agenda Item No. O-1

Reviewed By: City Manager KRB City Attorney AH Finance JL Other *(Specify)*

DATE: May 21, 2012

TO: City Council

FROM: Alan Holmberg, City Attorney AH

SUBJECT: **Big League Dreams, $400,000 License Fee**

RECOMMENDATION

That City Council receive and file this report concerning the Big League Dreams $400,000 license fee paid by the City to Big League Dreams USA ("BLD USA").

DISCUSSION

This report provides the reasons for the determination not to pursue at this time claims against Big League Dreams Oxnard LLC ("BLD Oxnard") or BLD USA (collectively "BLD") for return of the $400,000 license fee paid to BLD USA.

THE AGREEMENTS

On December 21, 2004, the City Council approved and the Mayor executed a license agreement with BLD USA ("License Agreement"). The License Agreement granted to the City a proprietary interest and intellectual property rights in the Big League Dreams concept in the particular area defined in the License Agreement, including a 15-mile radius around the proposed Sports Park and certain specified communities. The fee for the license was $400,000.

The License Agreement provided that the City could terminate the License Agreement and demand that BLD USA repay the license fee if a maintenance and operations agreement for the operation of a Big League Dreams concept sports park was not entered before June 25, 2005. Although the date of June 25, 2005 expired, the City did not make written demand at that time for refund of the license fee, because negotiations for a maintenance and operations agreement were almost complete.

On July 26, 2005, the City Council approved and the Mayor executed a Maintenance and Operations Agreement (BLD Oxnard Sports Park) ("MOA") by and between the City and BLD Oxnard, with BLD USA also signing the MOA with respect to certain provisions relating to the license.

The MOA provides that the City will construct, at the City's expense, a "Sports Park" (as defined in the MOA) on a 22-acre parcel in College Park. The Sports Park would contain, among other things, five

baseball/softball diamonds, four of which would be constructed with stadium design features inspired by famous professional stadiums. It would also include a pavilion adaptable for soccer use, a playground, batting cages, parkways, walkways, restrooms, and a sports-themed family style stadium club food and beverage concession facility seating for 200 people. The MOA contains detailed provisions concerning the operation of the facility. It contains provisions for accomplishment of maintenance, accomplishment of major repairs, signage requirements, provisions concerning programs to be provided and hours of operation, fees and charges to be collected and so forth.

The MOA provides that the City is to as soon as practicable after the date of the MOA, complete design, financial and environment review of the Sports Park. The environmental review was satisfactorily completed. The MOA provides that if the City determines to construct the Sports Park, the City shall develop the Sports Park by improving the property without undue interruption or delay, with due diligence and in a good, workman-like manner.

Section 4.1(b) of the MOA contains the following provisions concerning eventualities which would entitle the City to terminate the MOA and License Agreement and to obtain a refund of the license fee paid to BLD USA:

> "(b) Inability to Obtain Financing Termination Rights. If, on or before eighteen (18) months after the Effective Date, the City, in good faith, despite diligent efforts the City shall undertake to do so, determines that (1) the City cannot secure financing on reasonable terms and conditions for the construction of the Sports Park Improvements, based upon current cost estimates and reasonably foreseeable increases in Sports Park construction costs or (2) the City cannot satisfy itself, BLD Oxnard, and at least one financing source that use restrictions imposed by the County of Ventura and agencies which provided funding for the Property do not prevent construction and operation of the Sports Park, and therefore in good faith determines that it is unable to construct the Sports Park, the City will within forty-five (45) days of such decision, so notify BLD Oxnard. If the City does so notify BLD Oxnard, this MOA, the License Agreement and the Consulting Agreement will terminate thirty (30) days after the date of such notice and the parties (or, as applicable, BLD USA or BLD Consulting) shall thereafter have no further obligation or liability one to the other. Further, if the City does so notify BLD Oxnard within one (1) year from the Effective Date, BLD USA shall be obligated to refund the license fee to the City in its entirety within sixty (60) days thereafter. If the City so notifies BLD Oxnard later than one (1) year but on or prior to eighteen (18) months after the Effective Date, BLD USA shall be obligated to refund one-half of the license fee to the City within sixty (60) days thereafter."

The time period for the City to extend its termination rights was administratively extended eight times.

Neither the License Agreement nor the MOA create a "refundable deposit." Rather, they contain provisions allowing termination of the License Agreement and repayment of monies under certain circumstances, specifically, inability to obtain financing and inability to obtain permission from relevant agencies with an interest in the use of College Park.

THE TERMINATION

The City Council, on April 19, 2011, considered an agenda report prepared by the City Manager and

City Attorney with respect to the Big League Dreams project. That report contained alternatives. One alternative was to authorize the City Manager to continue discussions with the State Department of Parks and Recreation and others concerning the acceptability of the MOA. The report sought authorization to execute a Ninth Amendment of the MOA to extend the periods of time for making the determinations required under section 4.2(n) quoted above. The report stated that in the alternative the City Council could instruct the City Manager to cease negotiations.

At the April 19, 2011 City Council meeting, the City Council instructed the City Attorney to send a letter terminating the MOA and License Agreement and requesting a refund of the $400,000 license fee based upon paragraph 4.1(b) of the MOA. It was noted that a period of over six (6) years had elapsed since the execution of the MOA and permission to build the complex had not been obtained from the State or the National Park Service.

BLD RESPONSE

The City Attorney prepared such a letter dated April 22, 2011. BLD responded with two written responses and met with City staff. BLD's written and verbal responses are summarized in the following paragraphs.

The City did not demonstrate that it satisfied the requirement contained in 4.1(b) of the MOA that the City "in good faith despite diligent efforts,...determine that the City cannot satisfy itself, BLD Oxnard, and at least one financing source that use restrictions imposed by the County of Ventura and agencies which provided funding for the property do not prevent construction and operation of the Sports Park..."

BLD's position in this respect is that although the City had not obtained State and Federal agency consents as of the April 22, 2011 letter, the City's requests had not been denied. In fact, the City and BLD had worked to be able to satisfy a number of requests made by State officials (which officials were the administrators for the National Park Service Program), and were close to satisfying all requirements. BLD pointed out that negotiations had been in an agreed upon hiatus for some period of time because a similar issue (permission for a restaurant facility) was being addressed in Las Vegas, Nevada. In Las Vegas, Nevada, the issue was resolved favorably to the BLD entities and the City of Las Vegas, and the construction of a park there had begun. Accordingly, BLD took the position that the City could, if it had continued dialogue with the State and National Park Service, received the required approvals.

BLD also indicated out that although the letter sent by the Oxnard City Attorney stated that the City had determined that after exercising diligent efforts, the City could not finance the project, there was no evidence to indicate that this was in fact the case.

BLD stated that on the same evening the City Council determined to terminate the Licnese Agreement with BLD, the City Council had discussions concerning projects to use $200,000,000 of anticipated revenue from Measure "O" and in fact, the City was continuing with the development of College Park. BLD also pointed out that it had on January 28, 2011, communicated with the City concerning BLD's ability to assist with financing any portions of the "gap" between a park constructed to City's usual specifications and a park constructed to BLD's specifications, to the extent that the gap was not

covered by the MOA, and that the City did not explore this option. (Payments to the City under the MOA were provided to address this gap.)

BLD also stated that on February 15, 2011, the matter of the Big League Dreams Sports Park was discussed in a City Council meeting and a majority of Councilmembers, without referring to the criteria in section 4.1(b) of the MOA strongly indicated an inclination to terminate the BLD License Agreement.

BLD's conclusion in this respect was that the reason for the contract termination was the result of a change in the City Council membership and a reversal of the views of Council, based on a change in community support, not a result of being unable to carry out the project.

BLD also pointed out that if the City did not prove that it was entitled to terminate the agreement for the reasons stated in the April 22, 2011 termination letter sent by the City Attorney, the City may be exposed to damages for profits that BLD would have made had the MOA not been terminated, which would amount to millions of dollars, based on the 30-year term of the MOA.

BLD pointed out that it had removed itself from the Ventura County and surrounding area market for a period of over six (6) years while working with the City of Oxnard, and that this also caused harm to the company.

CONCLUSION

While the City Council and the City Attorney do not necessarily agree with these contentions, they all have significant evidentiary support. At the very least, recovery of a $400,000 license fee paid to BLD would be difficult. At worst, the City, if it pursues action to recover the fee, would expose itself to a counter-suit for millions of dollars of lost profits, based upon an alleged breach of the MOA.

For these reasons, while no claims are being waived, no action is being pursued against BLD at this time.

EL PASO COUNTY

The City Attorney has also received information concerning a transaction which took place in El Paso County, Texas.

In El Paso County, BLD USA and the County entered into a license agreement on April 16, 2007. The El Paso County agreement provided that the parties would negotiate to attempt to come to terms on a subsequent agreement for the maintenance and operation of the El Paso County Sports Park. The El Paso County license agreement is, therefore, similar to the License Agreement entered into by BLD USA and the City of Oxnard on December 21, 2004, which License Agreement also provides that the license fee would be returned if a MOA were not executed.

The difference between the El Paso County situation and the Oxnard situation is that El Paso County did not enter into a MOA. The El Paso County license agreement provided that it could be terminated for any reason prior to the execution of the MOA. In El Paso no MOA was ever executed and the

license agreement was terminated in accordance with its terms.

The facts in the El Paso County case are therefore extremely different from the facts in the City of Oxnard. In El Paso County, there were no hurdles such as the proof of inability to obtain financing or approval from other agencies to terminate the license agreement.

Had the City of Oxnard determined in June or July 2005 (before the MOA was executed) to terminate the License Agreement it would be in a position similar to the position El Paso County was in. The City of Oxnard did not do so. It entered the MOA.

FINANCIAL IMPACT

The City has not recognized the $400,000 fee paid to BLD USA as owed by BLD USA to the City and has not reflected this amount in the City's financial statements.

AH:rs