

W. S. C. I.

AGENDA MEMORANDUM

Date: August 24, 2006
Order Date: September 13, 2006

TO: Board of County Commissioners

DEPARTMENT: County Counsel

PRESENTED BY: Marc Kardell, Assistant County Counsel *mk*

AGENDA ITEM TITLE: ORDER NO. _____/IN THE MATTER OF RATIFYING THE ACKNOWLEDGMENT AND CONSENT WITH THE OREGON DEPARTMENT OF ENERGY SECURING A GROUND LEASE HELD BY SeQUENTIAL RETAIL STATION #1, LLC

I. MOTION:

ORDER NO. _____/In The Matter Of Ratifying The Acknowledgment and Consent to Oregon Department of Energy Securing a Ground Lease Held by Sequential Retail Station #1, LLC

II. AGENDA ITEM SUMMARY:

An acknowledgment and consent was executed securing SeQuential's leasehold interest so that the company could borrow funds (\$453,300) from the State Department of Energy under the erroneous impression that the Board had delegated authority to do so. The leasehold interest in property is a sufficient interest in property such that the Board's approval is needed. A ratification can accomplish that.

III. BACKGROUND/IMPLICATION OF ACTION:

A. Board Action and Other History.

This property is a former gas station that was tax foreclosed. The County entered into agreements with DEQ and SeQuential for the cleanup and transfer of the property to SeQuential, with the intention that the property be used as a bio-fuels station, per BCC Order 05-6-29-8. In that the Board Order reflected a desire to transfer the contaminated land to SeQuential and have the property cleaned up, the lease/purchase agreement with SeQuential was structured so that transfer of the property would occur either following cleanup as approved by DEQ, or upon grant funds obtained for clean-up purposes being fully expended, whichever should first occur.

The State Department of Energy then made available to SeQuential a loan in the amount of \$453,300, conditional upon it being secured by the leasehold interest and on condition that the County agree to the loan being secured. That leasehold ends upon the transfer of the property as set forth above. The loan also secures all fixtures on the property, which the State may remove within 180 days of lease termination, should that occur. If not removed, any improvements made by this loan would accrue to the County.

The consent was executed on November 28, 2005.

B. Policy Issues.

The previous Board Order, 05-6-29-8, authorized the use of \$50,000 of outside monies for "cleanup activities and (to) redevelop said property as a retail fueling station for bio-diesel fuels" and further noted that cleanup and transfer of the property would lead to economic development. Ratification of the agreement will assist in developing the property, as loan funds are to be used to place structures on the site.

C. Board Goals.

The cleanup, redevelopment, and return to the tax rolls of this property meet the Board's goals to:

1. Work for a strong regional economy to expand the number of family wage jobs available in Lane County;
2. Contribute to appropriate community development in the areas of transportation ... and land development; and
3. Maintain a healthy environment ...

D. Financial and/or Resource Considerations.

Ratifying the agreement is unlikely to have adverse financial implications. Should SeQuential not accept the property as agreed, which the lease/purchase agreement states "shall" occur upon either cleanup or DEQ grant funds being expended, the Department of Energy would be entitled to remove structures from the property up to the amount needed to pay off this \$453,300 loan.

E. Analysis.

The use of the loan money and the efforts of SeQuential likely will add significant value to the property. The underlying lease/purchase agreement reflects a desire by the County that this tax-foreclosed and contaminated property be rehabilitated and transferred to SeQuential for no consideration, only that the property be cleaned and

put to productive use. There is not much likelihood under the terms of that lease/purchase agreement that this property will continue to be owned by the County. Instead, the County and SeQuential have agreed that "Lessor (county) shall transfer ownership of the premises to Lessee, and Lessee shall accept said transfer, at the sooner of" cleanup or expenditures of grant funds (or expiration of time for spending grant funds).

Should transfer not occur for some reason, the Department of Energy would have the legal right to remove fixtures from the property. Any fixture not removed within 180 days would then belong to the County.

When this matter was reviewed by legal counsel in November 2005, I did not note that the right to remove fixtures made this acknowledgment and consent agreement an interest in land such that the Board of County Commissioners approval should have been sought, and the previous order did not delegate authority to the County Administrator to execute this document.

F. Alternatives/Options.

1. Ratify the acknowledgment and consent agreement with the Department of Energy; or

2. Do not ratify the acknowledgment and consent agreement with the Department of Energy.

IV. TIMING/IMPLEMENTATION:

Timing is somewhat important here, as development of the property is moving forward.

V. RECOMMENDATION:

A. Option 1:

VI. FOLLOW-UP:

If the Board ratifies the agreement, no additional follow-up is needed. If the Board does not ratify the agreement, staff would begin discussing with the Department of Energy seeking to rescind or re-negotiate the agreement.

VII. ATTACHMENTS:

Lessor's Acknowledgment and Consent agreement between Lane County and State Department of Energy dated November 28, 2005.

IN THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO.

IN THE MATTER OF RATIFYING THE
ACKNOWLEDGMENT AND CONSENT WITH
THE OREGON DEPARTMENT OF ENERGY
SECURING A GROUND LEASE HELD BY
SeSEQUENTIAL RETAIL STATION #1, LLC

WHEREAS, Lane County has entered into a lease/purchase agreement pursuant to Board Order 05-6-29-8 with SeSequential Retail Station #1, LLC (SeSequential) for the lease and purchase of tax-foreclosed property formerly used as a gas station (86714 McVay Hwy., Eugene);

WHEREAS, a loan was then authorized from the State of Oregon, Department of Environmental Quality (DEQ), to be secured against the property for \$50,000 to assist in clean-up and later transfer of the property to SeSequential;

WHEREAS, the State Department of Energy then made available to SeSequential a loan of \$453,300 to be used for development of the property and to be secured by SeSequential's leasehold interest in the property;

WHEREAS, in order for the Department of Energy loan to be secured by SeSequential, the County was required to consent to the leasehold being secured to the loan amount and the County Administrator signed the agreement on November 28, 2005, following approval from legal counsel (Exhibit 1); and

WHEREAS, the leasehold interest is a sufficient interest in land such that Board authorization is needed;

IT IS HEREBY ORDERED that the acknowledgement and consent attached hereto at Exhibit 1 is hereby approved, and the execution of this document by the County Administrator is ratified.

Adopted this _____ day of _____ 2006.

Chair, Lane County Board of Commissioners

APPROVED AS TO FORM

Date 8-31-06, Lane County



OFFICE OF LEGAL COUNSEL

• WHEN RECORDED, RETURN TO:

OREGON DEPARTMENT OF ENERGY
Attention: SELP
625 Marion Street NE
Salem, OR 97301-3742

LESSOR'S ACKNOWLEDGMENT AND CONSENT

DATE: October____, 2005

TO: OREGON DEPARTMENT OF ENERGY.
625 Marion Street NE
Salem, OR 97301-3742
ATTN: SELP

"Beneficiary"

FROM: LANE COUNTY
Property Management Division
125 E. 8th Avenue
Eugene, OR 97401

"Lessor"

RECITALS

A. Lessor is the lessor in that certain lease (the "Ground Lease") between Lessor and SeQuential Retail Station #1, LLC as Lessee (the "Borrower") dated September 20, 2005. The Ground Lease (or a memorandum of the Ground Lease) was recorded in the Real Property Records of Lane County, State of Oregon, on _____, _____, as Recording No. _____. The real property covered by the Ground Lease is described in Exhibit A attached hereto and by this reference made a part hereof.

B. Borrower has requested that Beneficiary loan Borrower the sum of Four Hundred Fifty Three Thousand Three Hundred and No/100's Dollars (\$453,300) to be secured by among other collateral a Leasehold Commercial Deed of Trust (the "Trust Deed") on Borrower's Lessee's interest in the Ground Lease, and in Borrower's right, title and interest in the property covered by the Ground Lease; Beneficiary has agreed to make the Loan only so long as Lessor executes this Agreement.

C. Lessor acknowledges that Beneficiary making the Loan to Borrower will result in a material benefit to the property which is the subject of the Ground Lease (the "Premises") and to Lessor. To induce Beneficiary to make the Loan to Borrower, Lessor has agreed to execute this Agreement. Lessor acknowledges that Beneficiary is relying upon Lessor's covenants and representations contained in this Agreement in making the Loan to Borrower.

LESSOR'S AGREEMENT:

Lessor covenants and agrees as follows:

1. Recitals Incorporated. The recitals are incorporated into this Agreement.
2. Amendments. Prior to the date of this Agreement, there have been no changes, supplements, amendments or modifications to the Ground Lease, except for as indicated in Recital A above and such changes, supplements, amendments or modifications which have been approved by Beneficiary in writing. Lessor agrees that Lessor shall not supplement, modify or amend the Ground Lease without the prior written consent of Beneficiary. Any such supplementation, modification or amendment without the prior written consent of Beneficiary shall be void and of no force and effect.

3. Ground Lease in Effect. All conditions precedent to the Ground Lease taking effect have been satisfied; the Ground Lease is in full force and effect; and no events of default or events which with the passage of time or notice or both would become an event of default have occurred.

4. Consent to Lien and Security Interest. Lessor consents to Borrower granting to Beneficiary, pursuant to the terms of the Trust Deed, an assignment and a lien on and security interest in:

- (a) All of Borrower's right, title and interest in and to the Lease;
- (b) All of Borrower's present and future right, title and interest in and to the property covered by the Lease;
- (c) All of Borrower's right, title and interest in and to the collateral described in the Trust Deed.

5. Borrower's Default, Surrender, Termination or Abandonment. In the event of any default by Borrower under the Ground Lease or if Borrower attempts to surrender, terminate or abandon the Ground Lease, Lessor will take no action to terminate the Ground Lease nor accept the surrender, termination or abandonment, without giving ninety (90) days' prior written notice to Beneficiary, and hereby grants to Beneficiary the right to cure such default or prevent such surrender, termination or abandonment within such period. Lessor further agrees that in the event of any insolvency or filing of any petition in bankruptcy by or against Borrower, and so long as Beneficiary elects to assume Borrower's rights and obligations under the Ground Lease, and cures all of Borrower's defaults under the Ground Lease which are susceptible of cure by Beneficiary, then Lessor shall not have the right to terminate the Ground Lease or foreclose the Ground Lease or exercise any other remedies with respect to the Premises solely by reason of the existence of bankruptcy or other insolvency proceedings or the like relating to Borrower.

6. Beneficiary Not Liable. So long as Beneficiary has not entered into possession of the Premises, Beneficiary shall not be liable for rent or any other obligations of Borrower under the Ground Lease. If Beneficiary does enter into possession of the Premises, Beneficiary shall only be liable for such rent and other obligations of Borrower which arise while Beneficiary remains in possession of the Premises.

7. Leasehold Improvements. Lessor disclaims all right, title and interest in and to all leasehold improvements, buildings, fixtures, personal property and appurtenances placed by Borrower on the Premises and waives any right of Lessor's distraint, provided that subject to Beneficiary receiving notice of lease termination on or prior to the effective date of termination, Lessor shall receive notice in writing within sixty (60) days of lease termination of Beneficiary's intention to remove the improvements from the premises, and removal of all improvements, buildings, fixtures, personal property and appurtenances shall be completed within 90 days of the lease's expiration or termination (or if such property cannot reasonably be removed within such 90 day period, within a commercially reasonable period to remove such property, not to exceed 180 days), if the Beneficiary has chosen to remove the improvements. After said removal period, all improvements, buildings, fixtures, personal property and appurtenances remaining upon the property shall become the property of the Lessor, free and clear of all claims of the Beneficiary.

8. Copy of Leasehold Commercial Deed of Trust. Lessor acknowledges receipt of a copy of the Leasehold Commercial Deed of Trust.

9. Captions for Convenience. The captions of the sections of this Agreement are for convenience only and are not to be used to interpret or define the provisions of this Agreement.

10. Binding Effect. This Acknowledgment shall be binding upon Lessor and its successors and assigns, and shall inure to the benefit of Beneficiary and its successors and assigns.

11. Attorneys' Fees. In the event suit or action is instituted to enforce or interpret any of the provisions of this Consent and Acknowledgment, including, but not limited to, any action or participation by Borrower, Lessor

or Beneficiary in or in connection with the case or proceeding under the Bankruptcy Code or any successor statute, the prevailing party shall be entitled to recover all expenses reasonably incurred at, before and after trial and on appeal, whether or not taxable as costs, including, without limitation, attorneys' fees, witness fees and other expenses.

12. Borrower Acknowledgment. Borrower also signs this Consent and Acknowledgment to signify it has read the Consent and Acknowledgment and has agreed to disclose to Lessor the information contained in the Consent and Acknowledgment and in the Trust Deed attached to this Consent and Acknowledgment.

IN WITNESS WHEREOF, Lessor has signed this Lessor's Acknowledgment and Consent the day and year first written above.

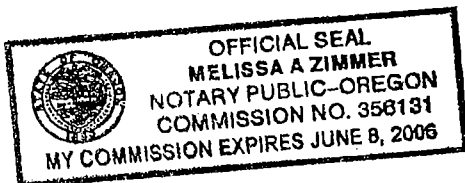
Lane County

By: [Signature]
Title: County Administrator

STATE OF OR
County of Lane) ss.)

This instrument was acknowledged before me this 28th day of November, 2005 by William Van Vactor as County Admin of Lane County.

[Signature]
Notary Public for Lane County
My Commission expires: June 8, 2006



APPROVED AS TO FORM

Date 11-23-05 Lane county
[Signature]
OFFICE OF JUDICIAL COUNSEL

EXHIBIT "A"

PROPERTY DESCRIPTION

Beginning at the Southeast corner of the A.H. Coryell Donation Land Claim No. 59, in Section 10, Township 18 South, Range 3 West of the Willamette Meridian; thence South $89^{\circ} 43' 18''$ West 506.00 feet; thence North $17^{\circ} 41' 30''$ West 926.80 feet to the intersection of the North line of County Road No. 1129 (Bloomberg Road) with the West line of Interstate 5 and the TRUE POINT OF BEGINNING of the following described tract of land; thence South $89^{\circ} 56' 30''$ West 134.00 feet; thence North $18^{\circ} 59' 10''$ West 207.78; thence North $89^{\circ} 43' 20''$ East 138.77 feet to the Westerly right of way of Interstate 5; thence South $17^{\circ} 41' 30''$ East along the Westerly right of way of Interstate 5 206.80 feet to the TRUE POINT OF BEGINNING, in Lane County, Oregon (map# 18-03-10-10-03200).