



Department of
Community Investment

Memorandum

June 30, 2016

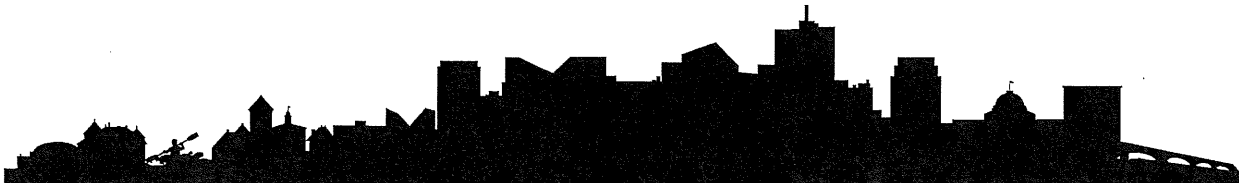
TO: Redevelopment Commission
FROM: Michael Schmidt / David Relos *DR*
SUBJECT: Memorandum of Understanding
Transfer of FERC Exemption for Hydroelectric Power Facility

Background:

The City of South Bend ("City") currently holds a FERC exemption which enables the City to operate a hydroelectric power facility. Due to the cost of construction and operation, the City has not utilized this exemption. Through a Memorandum of Understanding ("MOU") with the University of Notre Dame ("Notre Dame"), the City will avoid losing this exemption while also providing much needed capital improvement to Seitz Park and the surrounding area. While details are limited at this time, the MOU does commit the City to transfer its exemption to Notre Dame. In return for the exemption, Notre Dame and the City agree to negotiate in good faith a ground lease which will set forth Notre Dame's short term and long term financial obligations to the City.

Action Plan:

Because the Redevelopment Commission ("Commission") has a property interest in land that will likely be used for temporary construction access, in addition to granting a utility easement, it is appropriate for the Commission to take formal action on the MOU. The City requests Commission approval of the MOU.



MEMORANDUM OF UNDERSTANDING

University of Notre Dame du Lac

and

the City of South Bend

1) PURPOSE

This **Memorandum of Understanding** (“MOU”) sets forth the general understandings between the University of Notre Dame du Lac (“the University”) and the City of South Bend, Indiana, acting through its Board of Public Works (“City”) to pursue their mutual interest in obtaining regulatory approval for, and the design, construction, and long-term operation of, a hydroelectric power generation facility to be situated within a dam on the St. Joseph River owned by the City for the purpose of providing renewable electric power for the University of Notre Dame (“the Project”). The primary purpose of this MOU is to provide for the communication and coordination necessary to effect the transfer of the City’s FERC exemption from the City to the University, to apply for an amendment to the FERC exemption to enable the Project, and also to establish protocols to coordinate the design, construction, and operation of the Project.

2) THE PROJECT

Background

Since the 1980s, the City has maintained an approved exemption under the regulations of the Federal Energy Regulatory Commission (“FERC”) associated with a dam across the St. Joseph River for the purpose of building and maintaining a hydroelectric power facility. After an exhaustive review of potential parties best suited to make use of a hydroelectric power facility, the City determined, based on conversations with the University, that the University’s desire to create a sustainable energy source for a significant portion of the University’s electric power demand was a mutually beneficial goal for both the South Bend community and the University. Consistent with this determination, the City and the University hereby mutually agree to pursue the transfer of the FERC exemption to the University to enable the University to apply for an amendment to the exemption in order to design, construct, and maintain a suitable hydroelectric power generation facility within the City’s dam, consistent with the general terms herein.

Project Description and Activities

Activities of the City

- **Preconstruction**
 - Upon execution of this MOU, or as soon as reasonably practical thereafter, initiate the process to transfer FERC Exemption to the University pursuant to applicable federal regulations and instructions, including providing satisfactory notice to FERC as required by regulation. The parties hereto understand that should this MOU or any subsequent agreement related to this Project be nullified or terminated that the University would transfer the FERC Exemption back to the City.
 - Cooperate with the University's application process for amendment of the FERC exemption related to the Project.
 - Verify, and obtain as necessary, at the University's sole expense for those properties not associated with existing City of South Bend, easements or rights-of-way (including but not limited to bike trails or other public access routes), sufficient rights of way/easements for the establishment of a path for power transmission infrastructure from the Project site at the St. Joseph River dam to the current University Hillcrest Hall site (formerly St. Joseph High School), terminating at or about the northwest corner of Indiana State Route 933 and Angela Boulevard.
 - Utilize its best efforts to coordinate Project construction site access and planning with current City facilities and City's third party lessees.
 - Coordinate as necessary closures of the park adjacent to the Project to accommodate construction needs of the University.
 - Enter into pre-lease right of entry agreement with University to allow for construction access to the Project areas.

- **During Construction**
 - Cooperate with the University for continuous Project construction site access, including but not limited to coordination with City's third party lessees.

- Post-Construction
 - Comply with all federal and state laws, regulations, orders, mandates, and agreements entered into by or on behalf of the City related to the operation, maintenance, and control of the dam on the St. Joseph River associated with the Project, including but not limited to commitments between the City and the US Army Corps of Engineers related to dam upkeep as well as between the City and the Indiana Department of Natural Resources related to fisheries protections.
 - Communicate and cooperate with the University on any matters that may affect the operation and maintenance of, or access to, the Project, including the coordination of event schedules, IDNR activities, dam maintenance, or activities affecting flows.

Activities of the University

- Preconstruction
 - Cooperate with the City in the transfer of its FERC exemption to the University.
 - Submit an application to FERC to amend the exemption and complete amendment process to allow for commencement of the Project.
 - Identify water flow allocations between the Project and all other users of the river associated with the dam on the St. Joseph River.
 - Enter into pre-lease access agreement with the City to allow for construction access to the Project areas.
 - Obtain all rights of way/easements required for power transmission infrastructure from the Hillcrest Hall site (termination point of the City's responsibility) to the University's power plant.
 - Retire and remove the existing 45 KW turbine from the dam.
 - Coordinate with relevant state or federal regulatory agencies as necessary to finalize planning for the Project.
- During Construction
 - Provide for and conduct all required construction at the dam site as required for the Project.

- Provide for and construct all required power transmission infrastructure from the Project site to the University's power plant.
- Provide access during construction to the physical plant of the dam for the Indiana Department of Natural Resources and the City for upkeep, maintenance, and routine operations.
- In areas where there is physical disruption resulting from the Project, restore the East Bank Bike trail to its pre-existing condition, unless otherwise mutually agreed upon by the Parties.
- Restore or provide a mutually agreed upon payment for the restoration of the park adjacent to the Project (Seitz Park) to its pre-existing configuration, including like-for-like replacement of surfaces, and removal, storage and resetting of the structures. This includes providing structurally safe access, driving, and parking for all necessary City, IDNR, and lessee vehicles. The City acknowledges that, pursuant to Project construction, some trees may be removed; the University will reasonably replace same with mature trees.
 - In the event that the City wishes to make modifications to the park adjacent to the Project, the City will:
 - coordinate schedules to accommodate the construction schedule of the Project,
 - provide any additional costs required for such modifications, and
 - either permit the University to perform modification work (subject to reimbursement) as part of the Project or direct the University to leave the work site in a rough-grade condition for work by others. If modification work is to be performed by the City or a third party contractor, the City will coordinate with the University to allow continuous access by IDNR and the University to conduct Project work.

- Post-Construction

- Operate the Project in accordance with the terms of the ground lease agreement and in compliance with the terms of the approved amended FERC Exemption and all applicable federal, state and local laws and regulations.
- Communicate and coordinate with the City on all matters that arise concerning the operation of the dam on the St. Joseph River associated with the Project, including any activities impacting the use of Seitz Park, associated parking, and City lessees.
- Contribute mutually agreed upon amounts on a timetable to be determined by the parties to provide material assistance to the City in the upkeep and maintenance of the dam associated with the Project, taking into account that the Project (funded by the University) will likely result in physical improvements to the dam rendering some previously planned dam maintenance unnecessary.
- Provide for all maintenance and upkeep of the University's equipment associated with the Project, including but not limited to turbines and power transmission infrastructure.
- Explore with the City appropriate community educational opportunities involving the Project. The parties acknowledge that such opportunities, while potentially beneficial and desired, are not the primary purpose for the Project.
- The planned ground lease agreement which the parties intend to execute at a future date shall outline the responsibilities of the Parties in further detail.

However, it is the understanding as of the date of this MOU that the University shall, in addition to any terms contained herein this MOU, provide the City with the following:

- Reimbursement of expenses associated with the restoration of Seitz Park as agreed upon by the Parties.
- Reimbursement of undetermined mutually agreed upon amount in the event the City realizes revenue loss from the East Race directly attributable to construction of the Project.
- Reimbursement for expenses associated with the temporary resettlement of parking spaces stemming from construction in and around Stevenson Mills Apartments.

- Cover expenses, if applicable, should there be a displacement of the fish ladder immediately adjacent to the planned Project site.
- Provide ongoing support and collaboration with the City in any potential environmental matters related to the dam or the Project.

3) **DOCUMENTATION**

Pursuant to the Project, the City intends to transfer its FERC exemption to the University, and will be responsible for pursuing all administrative requirements for such transfer. The University subsequently intends to submit an application to amend such exemption, with the cooperation of the City, in order to effect the Project. Following satisfactory transfer of exemption and regulatory approval of the exemption amendment, the parties intend to enter into a long-term lease and operating agreement for the Project, and a pre-lease right of entry agreement related to the University's construction of the Project. The ground lease shall be for a minimum term of fifty (50) years and renewable upon mutual agreement of the parties, as allowed by law. The pre-lease right of entry agreement shall provide access to the University prior to execution of the lease in order to allow necessary preliminary activity related to Project construction.

4) **INSURANCE AND INDEMNIFICATION**

A. Insurance

The University shall provide appropriate broad form casualty and liability insurance with respect to the Project as shall be reflected in the insurance provisions within the documentation referenced in Section 3 above. The City shall provide appropriate insurance coverage as shall also be reflected in the documentation referenced in Section 3 above, and to the extent allowed by law.

B. Indemnification

The University agrees to appropriately indemnify, defend, and hold harmless the City from any claims caused by or resulting from the University's negligence, or intentional acts or omissions as shall be reflected in the indemnification provisions within the documentation referenced in Section 3 above. The City shall provide reciprocal indemnification as appropriate, which shall be reflected within the documentation referenced in Section 3 above consistent with the termination provisions set forth in

Section 7 below, and to the extent allowed by law. The University further acknowledges that it shall indemnify the City, including appropriate legal costs, should the operation or construction of the Project result in a third-party environmental based lawsuit regardless of any negligence or intentional omissions from the University, its employees, or agents.

5) PERMITS AND COMPLIANCE

As part of the Project, the City will be responsible for transferring its existing exemption with FERC to the University in order to enable it to best perform its obligations under the Project. The City shall be responsible for maintaining all environmental, regulatory, and governmental requirements related to the maintenance and operation of the dam, consistent with all existing or future agreements with any federal or state authorities unless otherwise required by the FERC exemption.

The University will be responsible for applying for and obtaining the amendment to the FERC exemption to enable the Project and any costs related thereto. The University, at its sole expense, will also obtain any required environmental, building or other permits required for construction and operation of the Project.

In all events, the City and the University will comply with all applicable federal, state, and local laws, regulations, ordinances, and governmental orders in the performance of the Project.

6) PROJECT FUNDING

This MOU does not constitute a commitment of funds to either party or on behalf of the other party. Notwithstanding the foregoing, in the event that the Project moves forward following FERC approval, the parties shall be responsible for their respective costs related to the Project, including but not limited to transaction costs such as legal or consultant fees, and the financial responsibilities as set forth generally herein.

7) TERMINATION

- A. In the event that the City is unable to transfer the exemption to the University or the University's application to amend the exemption is not approved by FERC, this MOU shall become null and void upon either party's written notification to the

other. In such an event, neither party shall have any other or further obligation to the other arising out of this MOU.

- B. In the event that activities conducted by the University during the preconstruction or construction periods reveal conditions that would reasonably prevent the University, in its discretion, from proceeding with the Project as planned, the University may terminate this MOU. In such an event, neither party shall have any other or further obligation to the other arising out of this MOU.
- C. The lease and operating agreements shall provide that in the event of default by one party, the other shall have cause to terminate said agreements. In the event of termination for cause, the parties shall work together to establish mutually agreeable terms regarding the breaching party's obligations.
- D. The parties shall also work together to establish mutually agreeable terms regarding termination for a reason other than default. The City recognizes the significant resources to be committed to the Project by the University and acknowledges that the University would suffer damages in the event of termination by the City for reasons other than default by the University. Therefore, the City agrees that, where possible, time restrictions on its ability to terminate without cause would be appropriate along with corresponding designated damages or other remedies in the event of early termination by the City.
- E. The parties shall also work together to establish mutually agreeable terms regarding the University's obligation to return the premises to an agreed upon state upon termination of the Project. The City acknowledges the significant resources to be committed to the Project by the University, including potential construction of permanent structures. Therefore, the City agrees that the University's obligation to return the premises to an agreed upon state shall not be absolute.
- F. Any permanent structures existing at the termination of the lease and operating agreement which the University is not obligated to demolish shall be transferred to the City. Such requirement to transfer will not, however, apply to equipment or

personal property associated with the Project provided by the University that are not fixtures to the permanent structures.

8) NOTICE

All written notifications required hereunder must be sent via certified mail or overnight carrier to the addresses designated below:

The University:

Senior Director Utilities & Maintenance
Planning, Design, and Construction
University of Notre Dame
104 Facilities Building
Notre Dame, IN 46556

With a copy to:

Office of General Counsel
University of Notre Dame
203 Main Building
Notre Dame, IN 46556

The City:

The Mayor of South Bend
1400 County-City Building
227 West Jefferson Boulevard
South Bend, Indiana 46601

With a copy to:

Corporation Counsel
1200 County-City Building
227 West Jefferson Boulevard
South Bend, Indiana 46601

9) MISCELLANEOUS

The City and the University will coordinate public communication, to the extent allowed by law, concerning the Project. To the extent possible, each party shall provide notice and advance copy of press releases or public statements to the public relations office of the appropriate party in advance of public release.

The designated representatives, on behalf of the University and the City indicate by their signatures below that the provisions set forth in this Memorandum of Understanding (MOU) correctly state their understanding regarding the establishment and operation of the Project.

This MOU shall become effective upon signature by the authorized representatives of the City and the University, and it may be modified by mutual consent of authorized officials from the University or the City.

[SIGNATURE PAGE FOLLOWS]

UNIVERSITY OF NOTRE DAME DU LAC

CITY OF SOUTH BEND INDIANA

Date Signed: _____

Date Signed: 6/14/2016

Gary A. Gilot

Gary Gilot, President

David P. Relos

David P. Relos, Member

James A. Mueller

James A. Mueller, Member

Therese J. Dorau

Therese J. Dorau, Member

Elizabeth A. Maradik

Elizabeth A. Maradik, Member

ATTEST:

Linda Martin

Linda Martin, Clerk of the Board of Public Works

CITY OF SOUTH BEND
BOARD OF PARKS COMMISSIONERS

SOUTH BEND REDEVELOPMENT
COMMISSION

William C. Buccella
D. Ball
