

CITY OF DANA POINT
AGENDA REPORT

Reviewed By:	
DH	_____
CM	_____
CA	_____

DATE: MARCH 22, 2006

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: INVESTMENT REVIEW COMMITTEE

SUBJECT: HEADLANDS PROPOSED CFD – SELECTION OF BOND COUNSEL AND UNDERWRITER

RECOMMENDED ACTION:

That the City Council approve the recommendations of the Investment Review Committee to accept respective Statements of Qualifications and to retain Rutan & Tucker LLP for bond counsel, and UBS Investment Bank for underwriting services relative to the proposed Headlands LLC Community Facilities District (CFD); and, authorize the City Manager to execute professional services contracts.

ISSUE:

Shall the City Council accept Statements of Qualifications from Rutan & Tucker LLP and UBS Investment Bank for bond counsel and underwriting services, respectively, and authorize the City Manager to execute professional services agreements, in connection with the proposed Headlands LLC Community Facilities District (CFD)?

BACKGROUND:

On February 12, 2002 the City Council adopted Ordinance No. 02-02 approving the Headlands Development Agreement (DA 01-01) between the City of Dana Point and Headlands Reserve LLC. The agreement contains provisions which state that upon the request of the Headlands, both parties shall cooperate in establishing one or more "Financing Districts" for financing the Headlands' obligations to construct public facilities and public park and open space facilities in conjunction with the Headlands development.

As the Council will recall, at your meeting of October 12, 2005 a financial services contract was awarded to Fieldman, Rolapp & Associates to provide independent financial advisory services, including assisting the City in coordinating the overall planning and execution of the CFD formation. The scope of services provided by

Mr. Rolapp includes assisting the City to identify other required financing team members and begin the process of coordinating their activities. Larry Rolapp and staff have done an outstanding job coordinating the pre-formation activities to date.

DISCUSSION:

At the City Council Meeting of February 22, 2006, the City Council authorized the City Manager to execute professional consultant agreements with Stephen G. White, MAI for real estate appraisal services, MuniFinancial for special tax services, and Empire Economics, Inc. for price point analysis and market absorption studies relative to the proposed CFD.

A recommendation was also made that proposals be solicited from outside firms with extensive prior experience in land based financing with respect to bond counsel and underwriting services, and to involve the Investment Review Committee in the selection process to assist the City Council with its final selection of consultants. Subsequently, on February 27, 2006, Mr. Rolapp, on behalf of the Investment Review Committee, issued Requests for Statements of Qualifications for bond counsel services to Stradling Yocca Carlson & Rauth, Best Best & Krieger, Orrick Herrington & Sutcliffe, McFarlin & Anderson, and Rutan & Tucker (**SUPPORTING DOCUMENT A**). The following firms were provided with Requests for Statements of Qualifications for underwriting services: Stone & Youngberg, Southwest Securities, UBS Financial Services, Bank of America Securities, and M.L. Stern & Company (**SUPPORTING DOCUMENT B**). The Requests for Statements of Qualifications were sent by E-mail to each firm and imposed a March 3, 2006 filing deadline.

Subsequently, on March 6, 2006, the Investment Review Committee held a special meeting at which time Mr. Rolapp recused himself from participating and taking action on the agenda items as a voting member of the Investment Review Committee. Instead he served in the capacity of the City's financial advisor, under contract, for the proposed CFD. Mr. Rolapp provided the Committee with an overview of the CFD process; including the pre-formation CFD activities, the CFD legal proceeding steps, and the subsequent CFD bond issue activities. As part of the discussion, Mr. Rolapp presented the usual sequence of events for Mello-Roos community facilities districts per State law. The Committee also briefly reviewed the Headlands Development Agreement (DA01-01), and the City's Draft Statement of Goals and Policies for the formation of CFD's. A subcommittee was formed to review the Goals and Policies draft and to report back to the Committee in order to develop a formal recommendation to the City Council with respect to this document. Finally, the Committee evaluated the proposals for bond counsel and underwriting services in order to develop a recommendation in time for the March 22, 2006 City Council Meeting.

The Investment Review Committee evaluated the proposals received for bond counsel services from Best Best & Krieger, Orrick, Herrington & Sutcliff LLP, Rutan

& Tucker LLP, and Stradling Yocca Carlson & Rauth. To clarify the role of bond counsel, the bond counsel firm, on behalf of the issuer of CFD bonds typically: (i) Advises the issuer on state laws authorizing the bonds and the appropriate legal structure. Bond counsel usually drafts the authorizing resolutions adopted by the issuer's legislative body; (ii) Drafts the legal documents pursuant to which the bonds are issued and the stream of revenue securing the bonds is pledged; (iii) Provides a legal opinion to the issuer that states: (a) the issuer has the authority to issue the bonds and to pledge the revenue stream securing the bonds; (b) the bonds have been properly authorized by the issuer, and are legal, valid, and binding obligations of the issuer; (c) the legal documents authorized by the issuer create a valid lien on the revenue stream pledged as security for the bonds; (d) the interest on the bonds is exempt from federal and state income tax, as applicable; (e) the bonds are exempt from registration under the federal securities laws; and (f) the summary of the legal documents in the Official Statement is accurate.

After discussion and evaluation of the proposals submitted, the Committee took action to recommend to the City Council that Rutan & Tucker be retained to provide bond counsel services (**ACTION DOCUMENT A**). Should the City Council concur with this recommendation, Rutan & Tucker would be responsible for the CFD proceedings as well as preparing a legal opinion on the bonds being tax exempt and performing the additional tasks as outlined above. In turn, it is recommended that the preparation of the disclosure statement/prospectus (Official Statement) be handled by a separate law firm, either the underwriter's counsel or disclosure counsel, but not the City's/CFD bond counsel. The firm preparing the Official Statement would issue a 10b-5 opinion or a reliance letter to the City that would contain language that, based upon its due diligence, the Official Statement meets the requirements of Rule 10b-5. SEC Rule 10b-5, which was issued under the 1934 Act, is the anti-fraud provision typically cited by the SEC in connection with the evaluation of an Official Statement, namely that "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, ... to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading..." According to the United States Supreme Court, for an omitted fact to be material, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."

The Committee also evaluated the proposals for underwriter services submitted by Bank of America, Stone & Youngberg, M.L. Stern & Co., and UBS Investment Bank. The function of the underwriter is to assist the other members of the financing team with the following: (i) Reviewing the capital needs of the issuer and the revenue available to finance those capital needs; (ii) Structuring the bond financing, including the security features, debt service coverage, reserve accounts, and credit enhancement, among other things; (iii) Interacting with any credit

enhancement providers and rating agencies; (iv) Helping to organize the Official Statement in a manner that addresses the information needs of the marketplace; (v) Working with underwriter's counsel or disclosure counsel and the issuer to define the continuing disclosure undertaking of the issuer and the other obligated persons; (vi) Marketing the issue; (vii) Maintaining a secondary market for the bonds following the initial bond sale, thereby providing investors with liquidity (the ability to sell their bonds) prior to maturity.

After evaluating the proposals, the Committee took action to recommend to the City Council that UBS Investment Bank (**ACTION DOCUMENT B**) be retained as the underwriter for the proposed CFD; and, that all four firms that submitted proposals be approved as eligible underwriters for future City financings. This would create a "pool" of approved underwriters for the City to draw upon for potential future financings such as any future underground utility district financings, rather than solicit proposals again in the future for these services.

The proposals submitted by all of the firms for bond counsel and underwriting services are on file in the City Clerk's Office for public review.

NOTIFICATION AND FOLLOW-UP:

Rutan & Tucker
UBS Investment Bank

STRATEGIC PLAN INITIATIVE:

Achieve total excellence in municipal services and City administration/planning with excellent customer service and cost-effectiveness.

FISCAL IMPACT:

There is no impact to the City's General Fund Budget. While it is anticipated that the fees associated with bond counsel and underwriter will be contingent upon the sale of bonds (excluding any out of pocket costs and expenses), Section 3.13 of the Headlands Development Agreement (DA01-01) requires the developer to reimburse the City for the actual and reasonable costs incurred to establish the CFD, including administrative staff costs, consultants' costs, and legal fees. On February 28, 2006, the developer provided the City with an advance deposit in the amount of \$75,000 as required under Section 3.13 of the Development Agreement. Section 3.13 also states that within thirty (30) days after the City Council takes its final action on the request to form the district, regardless of whether the Financing District is formed, the City will provide the Headlands with a detailed written accounting showing the amount and basis for its claim for reimbursement. If the amount of the \$75,000 deposit exceeds the claim, the City

shall refund the difference to the Headlands together with the claim. If the amount of the claim exceeds the deposit, the Headlands shall pay the City the difference within fifteen days. If the Headlands fails to make the payment within the required period, the City shall be entitled to recover such unpaid amounts from the proceeds of the Financing District’s sale of bonds. Any costs incurred by the City to process the request to form the Financing District that are reimbursed by the Headlands shall, in the event the district is formed, be included as a cost of the facilities along with all other reasonable costs associated with the formation of the district that are incurred by the Headlands prior to formation of the financing district.

As the Council is aware, on February 28, 2006, the Headlands advised the Council that it desires not to execute the revised Reimbursement Agreement that was approved by the City Council on February 22, 2006. Absent an executed Reimbursement Agreement, the Development Agreement, which includes the provisions in Section 3.13, is the prevailing document. However, at the Investment Review Committee’s meeting of March 6, 2006, Chairman Rayfield and Committee Member Harkey expressed a strong support for a Reimbursement Agreement regardless of the provisions in the Development Agreement, to show good faith on the part of the developer and to ensure the City is not out of pocket for any costs. After discussions, the Committee unanimously directed the City Manager and City Attorney to negotiate a new, simple form of the Reimbursement Agreement with the Headlands and to report back to the Committee.

ALTERNATIVE ACTIONS:

Other actions as deemed appropriate by the City Council.

SUPPORTING DOCUMENTS: **PAGE NO.**

- | | | |
|----|---|-----------|
| A. | <u>Bond Counsel - Request for Statement of Qualifications and list of firms solicited</u> | <u>7</u> |
| B. | <u>Underwriter Services – Request for Statement of Qualifications and list of Firms solicited</u> | <u>12</u> |

ACTION DOCUMENTS:

- C. Rutan & Tucker - Bond Counsel Proposal
(Hard copy to be provided)

Note: All proposals are on file in the City Clerk’s Office.

- D. UBS Investment Bank – Underwriting Services Proposal
(Hard copy to be provided)

Note: All proposals are on file in the City Clerk's Office.

SUPPORTING DOCUMENT A**BOND COUNSEL SERVICES**

LIST OF FIRMS SENT A REQUEST FOR STATEMENT OF QUALIFICATIONS ON FEBRUARY 27, 2006 FOR BOND COUNSEL SERVICES RELATIVE TO THE HEADLANDS LLC PROPOSED COMMUNITY FACILITIES DISTRICT

Bond Counsel Firms:

1) Stradling Yocca Carlson & Rauth - Robert Whalen, Esq.

660 Newport Center Drive

Suite 1600

Newport Beach, CA 92660

Tel.: (949) 725-4166

E-mail: rwhalen@sycr.com

2) Best Best & Krieger - Richard Anderson, Esq.

400 Mission Square

3750 University Avenue

Riverside, CA 92502

Tel.: (951) 686-1450

E-mail: richard.anderson@bbklaw.com

3) Orrick Herrington & Sutcliffe - Greg Harrington, Esq.

777 South Figueroa Street, 32nd Floor

Los Angeles, CA 90017

Tel.: (213) 612-2280

E-mail: gharrington@orrick.com

4) McFarlin & Anderson - George McFarlin, Esq.

23101 Lake Center Drive

Suite 120

Lake Forest, Ca 92630

Tel.: (949) 452-0500

E-mail: mcfarlin@fea.net

5) Rutan & Tucker - Stan Wolcott, Esq.

Central Bank Tower

611 Anton Blvd, Suite 1400

Costa Mesa, CA 92626

Tel.: (714) 641-3421

E-mail: swolcott@rutan.com

February 27, 2006

NOTICE

THE CITY OF DANA POINT

REQUEST FOR STATEMENT OF QUALIFICATIONS FOR BOND COUNSEL SERVICES

The Investment Review Committee (IRC) on behalf of the City of Dana Point (the City) is currently soliciting *Statement of Qualifications* from firms interested in providing Bond Counsel services to the City to perform services related to potential land based financings being considered by the City. This Statement of Qualifications has been prepared to solicit your interest in performing these services. Proposals will be accepted only from firms with extensive prior experience in land based financings.

SUBMITTAL INFORMATION

The *Statement of Qualifications* should be submitted in electronic form as follows:

City of Dana Point
33282 Golden Lantern
Suite 203
Dana Point, CA 92629
Attn: Sharie Apodaca
Director of Administrative Services
(949) 248-3523
sapodaca@danapoint.org

and

Fieldman, Rolapp & Associates
19900 MacArthur Blvd., Suite 1100
Irvine, CA 92612
Attn: Larry Rolapp, Principal
(949) 660-7309

lrolapp@fieldman.com

Proposals should be submitted no later than 4:00 p.m., Friday, March 3, 2006.

The IRC has not determined at this point if it will establish a pool of bond counsel firms from which it may recommend to the City Council bond counsel for specific potential financings or recommend a single bond counsel for any and all land based financings over a designated period of time. The IRC reserves the right to reject any and all proposals and to waive informalities and minor irregularities in any proposal reviewed. Further, the IRC may reject any proposal that does not conform to the instructions herewith. Additionally, the IRC reserves the right to negotiate all final terms and conditions of any preliminary agreement entered into with the bond counsel firm. The IRC makes no representations that any contract will be awarded to any respondent.

Nothing in this Request for Statement of Qualifications shall be deemed to commit the IRC or the City to engage any bond counsel firm or to proceed with the sale of the Bonds. All costs associated with any proposal shall be the sole responsibility of the proposer.

ADDITIONAL INFORMATION

For additional information, please contact the following persons:

Sharie Apodaca
Director of Administrative Services
(949) 248-3523
sapodaca@danapoint.org

Anna Racheva or Larry Rolapp
Fieldman, Rolapp & Associates
(949) 660-7300
aracheva@fieldman.com or
lrolapp@fieldman.com

BACKGROUND

The first potential land based financing to be considered by the City Council is for the Headlands development project located in the City of Dana Point. The contemplated taxable property within this potential CFD includes 118 single-family residential lots with minimum sizes of 6,000 s.f., 7,000 s.f. and 11,000 s.f., a 1.6-acre commercial site planned for retail development, and a 2.8-acre hotel site. Most of the residential lots have ocean views, and these lots are planned to be sold off as custom lots. The size of the potential CFD transaction has not been determined but initial calculations indicate that the amount to bond may approach +/- \$50 million. While a Reimbursement Agreement has been

approved by the City Council to receive deposits from the single landowner, the CFD proceedings have not been commenced. It is the desire of the landowner to complete proceedings and issue bonds in 2006. The City is operating in good faith with the developer and has indicated that a thorough due diligence process must accompany all steps of the process.

OTHER RELEVANT INFORMATION

The City has currently retained the following professionals as part of its finance team:

- ◆ Fieldman, Rolapp & Associates – Larry Rolapp and Anna Racheva
- ◆ MuniFinancial – Chris Fisher and Camille Mahant
- ◆ Stephen G. White – Steve White
- ◆ Empire Economics – Joe Janczyk

CONTENT OF RESPONSE TO STATEMENT OF QUALIFICATIONS

Your response to the *Statement of Qualifications* must include sufficient evidence to document the firm's capability to perform, such as the experience and qualifications pertinent to the requirements of this request for qualifications.

Bond Counsel Qualifications – Information to be presented in a concise and factual manner should include:

1. A brief history of your firm specifying its experience acting as Bond Counsel on land based financings.
2. A list of CFD/AD transactions completed or underway on which personnel proposed to assist the City have worked.
3. A list of three (3) to five (5) former or current CFD/AD clients for which Bond Counsel services were performed. Include agency name, name of individual contact and telephone number.
4. A scope of work for Bond Counsel services.
5. Basis of compensation including proposed fee and additional costs and expenses above the base fee. Please specify if proposed fee is calculated on an all- or partially contingent basis.
6. Other information you deem relevant.
7. A sample legal opinion.

EVALUATION

Your submitted response to this *Statement(s) of Qualifications* will be evaluated with specific emphasis on the following criteria:

1. The professional qualifications of the firm and its experience conducting similar projects.
2. The professional qualifications of the actual staff of your firm that will be conducting the work.
3. Responses from references provided.
4. Analysis of information submitted in the *Statement of Qualifications*.
5. Fees.

Designated IRC representatives have not determined if interviews will be conducted. If held, interviews will be scheduled at the City of Dana Point at a date agreed upon with all participants.

SUPPORTING DOCUMENT B**UNDERWRITER SERVICES**

LIST OF FIRMS SENT A REQUEST FOR STATEMENT OF QUALIFICATIONS ON FEBRUARY 27, 2006 FOR UNDERWRITING SERVICES RELATIVE TO THE HEADLANDS LLC PROPOSED COMMUNITY FACILITIES DISTRICT

Underwriting Firms:

1) Stone & Youngberg - Bill Huck, Managing Principal

Stone & Youngberg, LLC

4350 La Jolla Village Drive, Suite 140

San Diego, CA 92122

Tel.: (858) 795-8701

E-mail: bhuck@syllc.com

2) Southwest Securities - Tony Wetherbee, Managing Director

620 Newport Center Drive

Suite 300

Newport Beach, CA 92660

Tel.: (949) 717-2010

E-mail: twetherbee@swst.com

3) UBS Financial Services - John Gibson, Principal

26522 La Alameda, Suite 300

Mission Viejo, CA 92691

Tel.: (949) 364-7829

E-mail: john.gibson@ubs.com

4) Bank of America Securities - Dan Gangwish, Managing Director

Tax-Exempt Real Estate Securities

5 Park Plaza, 5th Floor

Irvine, CA 92614

United States of America

Tel.: (949) 260-5938

E-mail: daniel.gangwish@bankofamerica.com

5) M.L.Stern & Co. - Todd Smith, First Vice President

1921 Palomar Oaks Way, Suite 310

Carlsbad, CA 92008

Tel.: (760) 602-1265

E-mail: SmithT@mlstern.com

February 27, 2006

NOTICE

THE CITY OF DANA POINT

REQUEST FOR STATEMENT OF QUALIFICATIONS FOR UNDERWRITING SERVICES

The Investment Review Committee (IRC) on behalf of the City of Dana Point (the City) is currently soliciting *Statement of Qualifications* from firms interested in providing underwriting services to the City related to potential land based financings being considered by the City. This Statement of Qualifications has been prepared to solicit your interest in performing these services. Proposals will be accepted only from firms with extensive prior experience in land based financings.

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The IRC has not determined at this point if it will establish a pool of underwriting firms from which it may recommend to the City Council underwriters for specific potential financings or recommend a single underwriter for any and all land based financings over a designated period of time. The IRC reserves the right to reject any and all proposals and to waive informalities and minor irregularities in any proposal reviewed. Further, the IRC may reject any proposal that does not conform to the instructions herewith. Additionally, the IRC reserves the right to negotiate all final terms and conditions of any preliminary agreement entered into with the underwriter. The IRC makes no representations that any contract will be awarded to any respondent.

Nothing in this Request for Statement of Qualifications shall be deemed to commit the IRC or the City to engage any underwriter or to proceed with the sale of the Bonds. All costs associated with any proposal shall be the sole responsibility of the proposer.

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CONTENT OF RESPONSE TO STATEMENT OF QUALIFICATIONS

Your response to the *Statement of Qualifications* must include sufficient evidence to document the firm's capability to perform, such as the experience and qualifications pertinent to the requirements of this request for qualifications.

Underwriting Qualifications – Information to be presented in a concise and factual manner should include:

1. A brief history of your firm specifying its experience acting as underwriter on land secured financings.
2. A list of financings completed or underway for CFD/AD transactions on which personnel proposed to assist the City have worked.
3. A list of five (5) former or current clients for which underwriting services were performed for land secured debt. Include agency name, name of individual contact and telephone number.
4. A scope of work for underwriting services.
5. A description of your firm's marketing capabilities.
6. Other information you deem relevant.

EVALUATION

Your submitted response to this *Statement of Qualifications* will be evaluated with specific emphasis on the following criteria:

6. The professional qualifications of the firm and its experience underwriting non-rated land-secured debt.

7. The professional qualifications and experience of the actual staff of your firm that will be involved.
8. Responses from references provided.
9. Analysis of information submitted in the *Statement of Qualifications*.
10. Marketing capabilities.

Designated IRC representatives have not determined if interviews will be conducted. If held, interviews will be scheduled at the City of Dana Point at a date agreed upon with all participants.