



OFFICE OF THE INTERNAL AUDITOR

To: Honorable City Council

From: Gina M. Costa, Internal Auditor *GC*

Date: December 15, 2022

Subject: Confidential Memorandum to Full Council dated
December 1, 2022, regarding Commercial 8 Law Properties

Attached you will find a copy of the confidential memorandum that I provided to each council member. I am submitting to the full council removing the confidential attachments.

I believe that it is in the best interest of the city for the City Council to hire their own attorney to challenge the unilateral action of the City Solicitor, with the intent of preventing at least an \$18 million dollar loss in tax revenue to the city. I am prepared to provide any additional documents in executive session to help make a more informed decision at your request.

IN CITY COUNCIL
DEC 15 2022

READ
WHEREUPON IT IS ORDERED THAT
THE SAME BE RECEIVED.

Jina & Masterson CLERK
ACTING



Office of the Internal Auditor

CONFIDENTIAL MEMORANDUM

To: Honorable City Council Members

CC: James J. Lombardi, III, Acting Chief of Staff
Sean Bouchard, Senior Deputy Chief of Staff

From: Gina M. Costa, Internal Auditor

Date: December 1, 2022

Subject: Commercial 8Law Properties

On June 9, 2021, a consent order (ATTACHMENT A) was entered in the Providence/Bristol County Superior Court that applies 8% tax law treatment pursuant to Rhode Island General Law 44-5-13.11 which is a special tax provision for low-income housing units. 8% tax law treatment allows the property owner to pay 8% of the previous year's rent collected as its property tax instead of the full commercial or residential rate depending on the property. The Consent Order applied this low-income housing tax treatment to several mixed-use properties in the City, which results in a significant reduction in the amount of taxes the City collects from these properties.

The properties that benefit from this consent order are:

1. Harrisburg Associates, LLC – 89 Eddy Street
2. Lerner Associates, LLC – 90 Eddy Street
3. The Alice Building – 236 Westminster Street
4. Smith/Keen, LP – 1 Fulton Street
5. Lapham 290, LLC – 290 Westminster Street
6. Peerless Lofts, LLC – 150 Union Street
7. Clemence 91, LLC – 91 Clemence Street
8. RWB Associates, LLC – 270 Westminster Street
9. 276 Westminister, LLC – 276 Westminister Street
10. Downtown Revitalization Fund I, LLC – 326 Westminister Street

Some issues that should be made known:

1. This consent order was approved and implemented without the approval of the City Council, the Committee on Claims and Pending Suits or the Board of Tax Assessment and Review. The City Solicitor claims that his authority to enter into the Consent Order rests in Code of Ordinances Sec 2-99 (b) (4). (ATTACHMENT B) This section does allow the Solicitor to settle however that settlement authority requires the city Tax Assessor's consent. My research has been unable to identify any such consent from the Tax Assessor at the time the Consent Order was signed, but a response from the Solicitor is pending.
2. The Area Median Income (AMI) level used in this consent judgement to be deemed as an "affordable unit" is 100%. The Department of Housing and Urban Development (HUD) defines "low-income" as 80% AMI or below. The leases that are being used to justify restricted "low-income" units includes students with zero income level. Housing and Urban Development (HUD) does not include students as eligible for qualification in other HUD approved properties.
3. These properties are mixed-use and contain both commercial and residential space. Under this Consent Order the entire property, including commercial space such as restaurants and stores, is now being taxed the same as the residential – 8% of the previous year's gross income. The Tax Assessor is empowered to separate the commercial from the residential, however the Consent Order does not allow for that separation.
4. Per the consent order, the Tax Assessor's office is responsible for reviewing all lease agreements and leaser's income to determine the annual gross income. The standard practice in Providence is to have RI Housing certify compliance with HUD regulations prior to receiving 8Law treatment. It is questionable why the Consent Order breaks from standard practice and instead burdens the Tax Assessor with compliance responsibilities that are better suited to be run through RI Housing. One may ask if a conflict of interest could occur.
5. There is retroactivity to abate taxes to July 24, 2020, even though there was no restricted covenant in place at that time, as required. Approximately \$626,000 has been abated for six of the ten properties. The Assessor did ask for the HUD forms that would confirm the qualification of "affordability" after the Consent Order was entered with the Court but was instead simply provided with the leases themselves.

BACKGROUND

Please note that attachments C, D, and E may be protected by the attorney client privilege.

In 2016, an Assistant City Solicitor provided a response to the City Solicitor's inquiry of "how the city applies RIGL 44-5-13.11 to properties which are deed-restricted but not

comprised of 100% affordable units". (ATTACHMENT C) The response provided the following criteria:

1. Be residential property.
2. Has been issued a certificate of occupancy after January 1, 1995.
3. Has been "substantially rehabilitated".
4. Has a restricted covenant recorded restricting either the rents to be charged or the income of the tenants, or both.

The properties in question are not 100% residential. There are stores and restaurants occupying the first level of many of these buildings. The assessor has the discretion to provide the 8% rate to the residential portion of the property and the remainder would be at the commercial rate. Based on the review, there is no indication that the assessor agreed to providing this benefit to the property owner and states her disagreement in various emails. This consent order includes the entire property at the 8% rate, not just residential. All properties meet eligibility criteria 2 and 3. Eligibility Criteria 4 has been completed after the Consent Order was entered. It is interesting that the Consent Order provides for retroactive relief of taxes for a period in which the properties do not meet the eligibility criteria outlined above.

In March 2020, a different Assistant City Solicitor responded to a question "Can the City accommodate a developer who intends to rehab a multi-unit residential property in Providence by applying 8% tax law treatment to the property as a whole, when only 25% or less of the residential units will be restricted for affordable housing". In short, the Assistant City Solicitor said that the "appropriate way to do this would be to enter into a Tax Stabilization Agreement (TSA) with the developer". The problem with this approach is that most, or all, of the properties in question had already been granted tax stabilizations and would not qualify for additional relief. (ATTACHMENT D)

On June 24, 2020, a complaint with the Providence/Bristol Superior Court was initiated.

In January 2021, the third (and different) Assistant City Solicitor reviewed the draft consent order and the memorandums of the other attorneys and provided this comment: "Because this project is mixed use (not solely residential) and because the entirety of the property is not restricted, I agree with my colleagues that the project does not meet the criteria for 8 Law under 44-5-13.11. I share my colleague's suggestion that it would be generous of the city to apportion 8 law treatment to those qualifying units within the project." Once the agreement was signed by the City Solicitor, without any council approval, the property owner applied for a 30-year restricted covenant for each property. The restricted covenants were then signed by the mayor and recorded in the City's land evidence records.

An email exists dated June 15, 2021, from the third Assistant City Solicitor to the Tax Assessor with the attached approved consent order stating "Sorry Elyse, I tried". The assessor responds, "am I allowed to reach out to them [plaintiff's counsel] directly". Based on this email, one could

assume that the Tax Assessor had known about this consent order but did not agree with it. As previously stated, the City Solicitor's authority to enter into this Consent Order required the Tax Assessor's consent. Another presumption one could make from these emails is that there was no fiscal oversight of this agreement. The City Solicitor was asked to produce a fiscal note from my office on March 9, 2022. He has not provided one. I question the authority of the City Solicitor to bind the city with thirty years of restricted covenants. The city council, by state law can only relieve twenty years of taxes through a tax stabilization. Elected officials have more authority than an appointed employee. It is questionable as to why a consent agreement had to be created to do so. If the properties are HUD qualified, there would be no reason for the Consent Order to receive 8Law treatment, except that the properties would not have received such treatment for the commercial space.

It is my opinion that this Consent Order was created specifically to allow certain properties that have already exhausted twenty years of tax stabilization to obtain further preferential tax treatment that may not have been allowable without the Consent Order. If not challenged, these properties will receive fifty years of tax relief.

It is my recommendation to hire outside counsel to challenge consent order 2020—04757. If \$626,000 is abated from 2020 and the thirty-year life of the Consent Order's tax treatment is followed, then the city would be facing a potential loss in the amount of \$18,780,000, at a minimum since only six of the ten properties received retroactive abatements. The City Council was not provided with an opportunity to approve or deny this "generous" abatement. Additionally, since the City Solicitor has stated that his authority falls under the Code of Ordinance, Section 2-99 (b) (4), the consent of the assessor is required. This section is to settle complaints, not bind the city for the future. The assessor at the time of this consent order has since separated from the city.

The abatements are currently in the Finance Committee under tax certificate 62H. However, a new set of certificates were introduced to the council with the same numbers (not subbed) that did not include the consent judgement properties. That version was approved by the council. The original submission of Certificate 62H is still pending in Finance.

**STATE OF RHODE ISLAND
PROVIDENCE, SC**

SUPERIOR COURT

**HARRISBURG ASSOCIATES, LLC,
LERNER ASSOCIATES, LLC,
ALICE BUILDING, LLC,
PEERLESS LOFTS, LLC,
SMITH/KEEN, LP
LAPHAM 290, LLC
RWB ASSOCIATES, LLC
276 WESTMINSTER, LLC
CLEMENCE 91, LLC
DOWNCITY REVITALIZATION FUND I, LLC
PLAINTIFFS**

VS.

C.A.NO.: PC-2020-04757

**THE CITY OF PROVIDENCE,
ELYSSE PARE, in her capacity as Tax Assessor
Of the City of Providence, and
JAMES LOMBARDI, III, in his capacity as
Treasurer of the City of Providence
DEFENDANTS**

CONSENT ORDER

The above captioned matter was filed by the Plaintiffs seeking declaratory judgment to resolve disputes between the parties related to the Plaintiffs' request for taxes to be assessed on their respective properties pursuant to R.I.Gen.Laws §44-5-13.11. After a series of settlement conferences between the parties, the parties have agreed upon the terms of this Consent Order. Therefore, by agreement of the parties, it is hereby:

ORDERED, ADJUDGED AND DECREED:

1. Plaintiffs Motion to Amend its Complaint to add additional plaintiffs is granted.
2. The Plaintiff and City of Providence shall enter into and record a 30-year restrictive covenant in favor of the City of Providence restricting twenty five percent (25%) of the

SUPERIOR COURT
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CLERK'S OFFICE
21 JUN -9 PM 12:05

total residential units at each Plaintiff's respective property for occupancy by tenants who have an income of no greater than one hundred percent (100%) of the area median income (AMI) for each respective property within forty-five (45) days of the entry of this Consent Order.¹ Each respective Plaintiff shall have the option to terminate the restrictive covenant in favor of the City of Providence upon providing ninety (90) days written notice to the Tax Assessor and City Solicitor's Office. In the event that any Plaintiff and the City wish to extend the restrictive covenant beyond thirty (30) years, nothing herein shall preclude the parties from doing so.

3. In exchange for restricting the units for occupancy by tenants making no more than one hundred percent (100%) AMI, the City agrees that each Plaintiffs' respective properties will be subject to a real property tax that is equal to eight percent (8%) of each properties' previous years' gross scheduled income pursuant to R.I.Gen.Laws §44-5-13.11 retroactive to tax year 2020's first quarterly payment of July 24, 2020.
4. The Plaintiffs shall have ninety (90) days from the date of the recording of the restrictive covenant to demonstrate compliance with the requirement that each of the Plaintiffs' respective properties has twenty five percent (25%) of its residential units restricted for occupancy by tenants making no more than one hundred percent (100%) of AMI.

¹ As pled in the Complaint, the Plaintiffs' respective properties are as follows:

1. Harrisburg Associates, LLC – 89 Eddy Street, Providence, RI
2. Lerner Associates, LLC – 90 Eddy Street, Providence, RI
3. The Alice Building, LLC – 236 Westminster Street, Providence, RI
4. Smith/Keen, LP – 1 Fulton Street, Providence, RI
5. Lapham 290, LLC – 290 Westminster Street, Providence, RI
6. Peerless Lofts, LLC – 150 Union Street, Providence, RI
7. Clemence 91, LLC – 91 Clemence Street, Providence, RI
8. RWB Associates, LLC – 270 Westminster Street, Providence, RI
9. 276 Westminster, LLC – 276 Westminster Street, Providence, RI
10. Downcity Revitalization Fund I, LLC – 326 Westminster Street, Providence, RI

5. Failure on the part of any Plaintiffs to demonstrate compliance with the requirements that Plaintiff's respective properties has twenty-five percent (25%) of its residential units restricted for occupancy by tenants making no more than one hundred percent (100%) of AMI will result in retroactive assessment such that full and fair taxation without the benefit of R.I.Gen.Laws §44-5-13.11 shall become immediately due and payable upon 10 days notice on the part of the City.
6. The 2021 tax bills for each Plaintiffs' property shall be adjusted to reflect an assessment pursuant to R.I.Gen.Laws §44-5-13.11 and the Plaintiffs shall receive a credit from the Defendants for any overpayment of taxes that has occurred since tax year 2020's first quarterly payment of July 24, 2020 provided that the Plaintiff must bring the Plaintiffs' properties into compliance with the terms of the restrictive covenant referenced in paragraph 1 of this Consent Order within ninety (90) days of the recording of said restrictive covenant.
7. In the event that one of the Plaintiffs is unable to bring its respective property into compliance with the terms of the restrictive covenant referenced in paragraph 1 of this Consent Order within ninety (90) days of the recording of the restrictive covenant, each respective property shall receive retroactive assessment such that full and fair taxation without the benefit of R.I.Gen.Laws §44-5-13.11 shall become immediately due and payable upon 10 days notice. . That particular Plaintiff shall be given until December 31, 2021 to bring the property into full compliance in order to begin being assessed taxes pursuant to §44-5-13.11 for tax year 2022.
8. Lapham 290, LLC ("Lapham Owner"), 276 Westminster, LLC, RWB Associates, LLC, Clemence 91, LLC agree to withdraw and forever forgo any right, entitlement, or benefit

provided under the existing TSA beginning with tax assessment as of December 31, 2020
for tax year 2021 and thereafter.

By agreement of the parties:

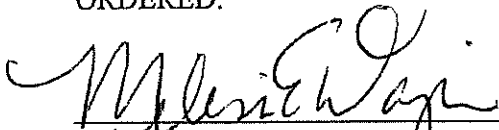
Plaintiffs,
By their attorney,

/s/ Nicholas J. Hemond, Esq.
Nicholas J. Hemond, Esq. #8782
DarrowEverett, LLP
One Turks Head Place, Suite 1200
Providence, Rhode Island
401-453-1200
nhemond@darroweverett.com

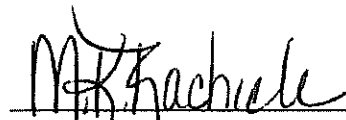
Defendants,
By their attorney,

/s/ Jeffrey Dana, Esq.
Jeffrey Dana, Esq.
City Solicitor
444 Westminster Street, Suite 220
Providence, Rhode Island
401-680-5333
jdana@providenceri.gov

ORDERED:


Honorable Melissa Darigan 6/8/21

ENTERED:


Clerk
Dated: 6/8/21

Case Number: PC-2020-04757
Filed in Providence/Bristol County Superior Court
Submitted: 5/14/2021 3:23 PM
Envelope: 3102136
Reviewer: Jalden H.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2021, I filed and served a true copy of the within document through the electronic filing system on the counsels of record for the opposing parties.

This document, electronically filed and served, is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Sean M. Rock

Sec. 2-99. - Authority delegated to city solicitor to settle small claims against the city.

- (a) The city solicitor shall have the authority and power delegated to him and his office to settle claims against the city for damages and injuries due to, or occasioned by, the negligence of the city or any officer, agent, or employee of the city without the necessity of the approval of the mayor or the chairman of the committee on claims and pending suits in claims not to exceed three thousand dollars (\$3,000.00). At any time when the city solicitor shall exercise the authority and power delegated to him under this ordinance he shall report the disposition to the committee on claims and pending suits.
- (b) For the settlement of claims, pending suits, arbitrations, mediations, consent decrees, consent judgments and/or any other legal matters of any kind that the city seeks to resolve by agreement, and whose resolution would have a fiscal impact of more than three thousand dollars (\$3,000.00), the city solicitor, or other attorney representing the city, shall not have the authority to settle the matter without approval of the committee on claims and pending suits and the mayor. This approval requirement shall not apply to the matters listed below; but when a settlement of one (1) of the matters listed below occurs, the settlement shall be reported, at least quarterly to the committee on claims and pending suits:
 - (1) Matters involving collective bargaining agreements that are subject to section 17-27;
 - (2) Labor disputes, including grievances, arbitrations, and separation agreements, where the settlement amount does not exceed ten thousand dollars (\$10,000.00), and where the director of human resources, or, in the case of public safety employees, the commissioner of public safety, consents to the settlement;
 - (3) Actions brought pursuant to the Rhode Island Workers' Compensation Act; and
 - (4) Matters concerning appeals for relief from tax assessment where the tax assessor consents to the settlement.

(Ord. 1926, ch. 501, § 1; Rev. Ords. 1946, ch. 2, § 59; Ords. 1974, ch. 74-25, § 1, 9-9-74; Ords. 1994, ch. 94-28, § 1, 9-9-94; Ord. No. 2018-39, § 1, 7-1-18)

ATTACHMENT C

Confidential Intraoffice memorandum from assistant city solicitor (1) to the City Solicitor, dated June 15, 2016.

The information contained in this confidential intraoffice memorandum can be made available in executive session

ATTACHMENT D

Confidential Interoffice Memorandum from assistant city solicitor (2) to the City Solicitor, dated March 11, 2020.

The information contained in this confidential interoffice memorandum can be made available in executive session

ATTACHMENT E

E-mail from assistant city solicitor (3) to the City Solicitor regarding Harrisburg Consent Order dated January 29, 2021

The information contained in this email can be made available in executive session