



County of Erie

MARK C. POLONCARZ
COMPTROLLER

May 8, 2006

Honorable Members
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Re: Wendt Beach Concession

Dear Honorable Members:

I am writing to inform the Erie County Legislature ("Legislature") of some concerns/issues my office has identified regarding the proposed concession at Wendt Beach Park and the designation of Precision Park Services ("PPS") as developer of the Wendt Beach concession.

Background

As you may know, in April 2003, the County Executive announced the completion of a parks master plan (the "Plan"), an ambitious, \$15 million project utilizing tobacco proceeds over a five year period to rehabilitate Erie County's parks and forests. Among the many projects in the Plan was a three-year rehabilitation of Wendt Beach between 2004 and 2006. In 2004, the Plan proposed to spend \$220,000 to reconstruct/enhance the main entrance, establish more dominant gateway features, preserve/enhance dune environment, and improve park signage. In 2005, the Plan proposed using \$480,000 to construct two new tennis courts, make improvements to the road and parking lot, and restore the mansion and complex. In 2006, the Plan proposed using \$200,000 for a phase II restoration of the mansion and complex. However, due to the county's budget crisis in 2004 and 2005, this work was never conducted.

Request for Proposals Issued

In July 2005, the Bureau of Purchase disseminated a request for proposals ("RFP") for concession services for Wendt Beach. Among others, was the leading requirement that the winning bidder renovate the historic Wendt Beach mansion and:

“operate the facility as a conference center, bed and breakfast facility, and/or any other related function that will make the now vacant site productive by enhancing public use of these facilities and providing financial support for the operation of the existing Wendt Beach public recreational facilities. It is anticipated that a minimum of \$500,000 will be required to renovate the facility for the conversion. Financing will be the responsibility of the selected respondent.”

The RFP was mailed to two organizations: Appraisal.com Inc. and Invest Lodging Services. After receiving requests, the RFP was sent to three other organizations: Clinton Brown Architecture, Red Apple Group, and PPS. The Bureau of Purchase advertised the RFP in the *Buffalo News* on July 29, 2005. On August 9, 2005, a site visit was scheduled, but only PPS attended. By August 26, 2005, the deadline for responses to the RFP, only PPS responded.

PPS' Response

Based upon my office's independent review, it appears that Appraisal.com Inc. and PPS are related entities. Mark H. Yellen is identified in company documents as being the president of both companies and they are headquartered at and use the same address, telephone number and e-mail address.

According to PPS' response to the RFP, PPS “is a for-profit New York State company.” However, please be advised that a recent review conducted by the undersigned of the New York Department of State's Division of Corporation's online corporation and business entity database failed to identify any past or present business entity with the name “Precision Park Services” or “Precision Park” in its title. Therefore, without conducting and paying for an official search of the records of the Department of State's Division of Corporation's Albany database, one can only conclude that PPS is not a legal corporation or limited liability company (either domestic or foreign) in New York.

The two principals listed on PPS' response are Mark Yellen and Steven J. Sherman, who, the proposal states, is “Northeast Regional Manager of Health and Safety at URS Corporation's Buffalo Office (“URS”). For the past five years, he has acted as the chief occupational health and safety consultant to the County of Erie Department of Public Works, resulting in his extensive knowledge of County facilities.”

To save time, allow me to summarize the key points in PPS' response:

- PPS response stated that it would conduct a “\$2 million + historically faithful renovation of the main Wendt Mansion and related buildings to bring them up to current building codes and contemporary standards for a world-class bed and breakfast facility.”
- PPS response stated that it would operate the facility year-round as a bed and breakfast and seasonal rental and food service operation under a ten year lease, with construction starting as early as January 2006 with no financing required from Erie County.

- PPS response stated that there would be no property taxes levied upon PPS for the use of the facility.
- PPS response stated that the County would continue to operate the beach and the soccer fields.
- PPS response stated the company would receive, as revenue, proceeds from the bed and breakfast operations, paid parking, the weekly rental of the carriage house and the gardener's house, and food concessions.
- PPS response stated that the company would pay the County a 20% concession fee, plus Erie County bed taxes. Under the response, the County would also save \$60,000 per year in costs that it currently pays to maintain the park.
- PPS response stated that including the \$60,000 per year reduction in costs, plus \$200,000 per year of "amortization of improvements" (the rehabilitation of the facility), the County would see an annual financial benefit of \$268,894 in year one, rising to \$378,929 in year five.

As required in the RFP, PPS offered three references: former Erie County Commissioner of Public Works Maria Lehman (who, it is believed at that point, had returned to URS), local entrepreneur Howard Zemsky and Stephen Macintyre of Eastman Kodak in Rochester.

The Four Year Plan

Please note that the County's Four Year Financial Plan, as approved by your Honorable Body, includes an initiative (number 2) entitled "Secure Wendt Mansion Concessionaire." The plan says the following:

"As noted in the 2003 Masterplan, the Wendt facility has several potential reuses, including use as a catering facility, bed and breakfast, wedding or conference center, restaurant and/or tea room. The County has recently issued an RFP for this facility, and has received a positive response. Although no specific concessions agreement has yet been reached, on the basis of these proposals, it is projected that this facility has the potential to generate moderate revenue for the County in future years."

The initiative says the discounted fiscal impact (revenue) for the county is 0 in 2005 and 2006, \$20,000 in 2007, \$40,000 in 2008 and \$60,000 in 2009.

Erie County Legislature Action

On November 10, 2005, the Erie County Legislature unanimously approved a request from the County Executive to designate PPS as developer of the Wendt Beach project (coded by the Legislature as Comm. 24E-8).

Among the key items in the resolution was a whereas clause stating that the Parks Department "will include in contract negotiations with Precision Park Services, a plan to reopen

the beach for swimming by funding the cost of lifeguard salaries through the use of parking and concession fees." The Legislature, however, amended the item to delete any reference to parking fees being levied. A copy of that resolution, as amended and approved, is enclosed.

The legislative resolution stated "that the Department of Parks, Recreation and Forestry is authorized to negotiate a Term Sheet with Precision Park Services and to submit the same as soon as possible to the Erie County Legislature," and that after such a document is approved, "that the County Executive be authorized to enter into a concession agreement with Precision Park Services pursuant to said Term Sheet."

Term Sheet

In a letter dated April 20, 2006, and time-stamped as being received by the Legislature on April 21, 2006, Commissioner of Parks, Recreation and Forestry Angelo Sedita transmitted to the Legislature a copy of the proposed term sheet between the county and PPS (coded by the Legislature as Comm. 8D-5).

To save time, allow me to summarize the key points in the term sheet:

- The county will continue to own Wendt Beach Park but will enter into a concession agreement with Wendt Beach Partners, LLC ("WBP"), an alleged subsidiary of PPS to be formed. WBP would then manage and operate a concession for a defined portion of the park
- The term would be for ten years, with two ten-year options for renewal. Should the agreement between the county and WBP be terminated early, other than by the default of WBP, or the county refuses to renew, the county would be obligated to reimburse WBP for the non-depreciated portion of its investment into Wendt Beach Park.
- WBP would make improvements to the site in an amount "to exceed \$1,000,000 (and possibly to exceed \$2,000,000)."
- WBP would receive 20% of all concession revenues.
- WBP would collect parking revenues of \$3.00 per day for the beach and provide the first \$65,000 of such revenues to the county to pay for lifeguard payroll and expenses.
- The soccer fields would not be within the scope of PPS proposal.
- There would be no property taxes levied upon WBP for the use of the property.
- The county will assist WBP in obtaining a rezoning of the site in order to operate a bed and breakfast operation, and the agreement will terminate with no liability to the county if said rezoning is not granted by December 31, 2006.
- The county will supply the site with water, sewer, electricity, natural gas and other utilities.

On May 4, 2006, Commissioner Sedita and Mr. Yellen attended a meeting of the Legislature's Energy and Environment Committee to discuss the proposal and term sheet, and to answer questions. Based on statements and comments made by both individuals at the meeting, our office has additional questions, which we detail below.

Questions/Concerns of Office of Comptroller

In mid-April 2006, a concerned citizen contacted this office in writing to express his/her concerns regarding the Wendt Beach concession. At that point, this office commenced an internal review of documents pertaining to this matter, including, but not limited to, the following: the RFP; the Bureau of Purchase's formal bid control file (identifying all entities contacted); PPS' response; the 2003 parks master plan; and the four year financial plan. This office also made other inquiries pertaining to this matter.

This office has a variety of concerns regarding this matter that we wish to bring to your attention as you undertake your own review of this project.

1. Dissemination of the RFP

This office questions why the Department of Parks, Recreation and Forestry and/or the Bureau of Purchase only disseminated the RFP to two entities. For instance, why wasn't the RFP sent to Delaware North Companies, a leading national and international hospitality and concession operator that is based in Buffalo? Additionally, our office questions exactly how the RFP was publicized. Was an advertisement taken in national trade magazines to maximize responses? Our office believes that if the RFP was disseminated to more entities it is quite possible more than one response would have been forthcoming.

2. Responses to RFP

This office questions why did only one company conduct a site visit and respond to the RFP? In examining this issue this office contacted two of the three companies that received the RFP (one of which was originally solicited and one of which requested the RFP). Each entity said they did not have the time and resources to both respond in time to the RFP, as well as operate the concession. This office questions the value of the sole response to an RFP when the RFP was disseminated to such few parties.

3. Legal and Financial Status of Proposed Concessionaire

This office is concerned about both the legal and the financial status of PPS and WBP. As noted previously, PPS alleges in its RFP response to be a "for-profit New York State company." However, a recent search of the New York Department of State's online business entity database failed to identify any past or present business entity with the name "Precision Park Services" or "Precision Park" in its title. That is not say that PPS is not a business entity; it could be an unincorporated association or partnership, but it is not registered with the Department of State as either a domestic or foreign business entity.

The same can be said for WBP. A recent search of the New York Department of State's online business entity database failed to identify any past or present business entity with the name "Wendt Beach Partners" or "Wendt Beach" in its title. However, this is not entirely surprising as the term sheet notes that the entity is to be formed.

Because of the above legal issues, our office questions the potential resources, capacity and experience of PPS, which, as PPS admitted in its proposal and Mr. Yellen confirmed in committee, is a relatively new company. PPS appears to have been created expressly to respond to this RFP, as will be WBP. There is nothing in the record to establish that PPS has any experience managing concessions, though PPS' response to the RFP does note that Mr. Yellen does have some past similar experience.

Mr. Yellen stated in committee that he would personally invest \$2 million in the project. This is consistent with PPS' original response, but not the term sheet, which says an "amount to exceed \$1,000,000 (and possibly to exceed \$2,000,000)." Our office believes that the exact amount of investment by the proposed concessionaire (either PPS or the to-be formed subsidiary WBP), must be identified in the term sheet, and the county must be provided monthly reports of investment evidencing the actual contribution of private money to the project.

4. Ancillary Facilities at the Park

The main thrust of the proposed concession agreement is the operation of a bed and breakfast at Wendt Beach Park. Our office questions the exact use of the other ancillary facilities (soccer fields, beach, and green space) at the park. In committee, Mr. Yellen stated that PPS/WBP would control the soccer fields. However, the RFP and term sheet expressly state that the soccer fields shall stay under county control and operation. This issue must be resolved prior to execution of a term sheet.

Also, the term sheet includes a \$3.00 per day parking fee for the beach. As I am sure you are aware, the Legislature specifically deleted any reference to, and rejected the levying of any parking fees at Wendt Beach, when it approved the designation of PPS as developer on November 10, 2005. Our office also questions whether the \$3.00 charge is per person or per vehicle, as the term sheet does not state either way. This issue must be resolved.

Also, the term sheet states that the first \$65,000 of revenue generated from parking fees will be remitted to the county to support lifeguards. However, the legislative resolution of November 10, 2005 specifically stated that the Parks Department would negotiate with PPS to reopen the beach and support lifeguards through concession fees – not parking fees. This issue must be fully resolved prior to execution of a term sheet.

5. Payment of Utilities at the Park

The RFP states that the concessionaire shall be responsible for paying all utilities. PPS' response acknowledges that, and states that the county will continue to provide utilities at "Erie County negotiated rates," with PPS paying for said actual usage of the utilities at "Erie County negotiated rates." However, the term sheet excludes such language; it simply states "Erie County will continue to supply the site with water, sewer, electricity, natural gas and other utilities from existing vendors." There is no provision in the term sheet specifying that PPS/WBP shall pay for the utilities. At a minimum, the term sheet must be revised to indicate

that PPS/WBP is responsible for the entire cost of actual utilities used at "Erie County negotiated rates."

6. Payment of Taxes by PPS/WBP

The RFP states that the concessionaire shall pay for all taxes incurred in the operation of the facilities. PPS' response and the term sheet state that there will be no levy of property taxes on PPS for the use of the property. This discrepancy needs to be addressed (if PPS/WBP is not responsible for property taxes, is it responsible for sales and compensating use and other taxes?)

7. Revenues Generated and Expenses Saved

PPS' proposal says their operation of the concession will save the County \$60,000 per year on costs at Wendt Beach, but does not say what those costs are. This needs to be clarified in the term sheet (i.e., specifically, what existing county costs are going to be reduced or eliminated through award of the concession to PPS/WBP)?

Additionally, between bed and breakfast revenue, parking revenue (which again, needs to be clarified) and food concessions, and after discounting the amortization of improvements that PPS/WBP would make to the buildings and the unspecified reduced county costs of \$60,000 per year, my office has calculated that PPS potentially receives income of between \$71,875 (in year one) to \$556,355 (in year five), while the county's actual revenue is only \$8,894 (in year one) to \$118,929 (in year five). Our office questions how these estimates were determined - were these estimates based on net or gross revenues - and whether the county should obtain a larger share of the gross/net income received? These questions should be answered in greater detail before a term sheet is executed.

8. Conflict of Interest Issues

This office has questions regarding the role of former Erie County Public Works Commissioner Maria Lehman and URS in this project. Ms. Lehman left URS to join the county in 2000 and returned to the company in mid-2005 after she resigned from the county. We have been told anecdotally that Ms. Lehman was a promoter of this project prior to leaving county service, and PPS' response to the RFP appears to confirm this fact where it notes that "in 2002, Mark Yellen and Steven Sherman were contacted by the Erie County Commissioner of Public Works to assist the county by providing ideas for the improvement of the facilities and operations at several Erie County parks which contained buildings that had fallen into a state of decrepitude.... (they) provided their time, assistance and opinions at no charge to the county."

After Ms. Lehman left the employment of the county to return to URS, she was listed as a reference for PPS on their response to the RFP. Steven Sherman, one of the two principals in PPS, is a URS employee, as is now Ms. Lehman. In committee, when asked, Mr. Yellen stated that URS is architect for the project.

May 8, 2006

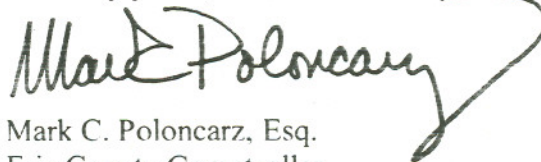
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As a result of these issues, this office has serious reservations about the role both URS and/or Ms. Lehman may play or played in this project. If URS acts as the architect for the project, URS, and potentially Ms. Lehman, will undoubtedly profit from the project moving forward. Before a term sheet is executed the roles of all parties involved must be further examined to ensure that no conflict of interest exists that would detrimentally impact the county. While one may not exist, we believe that further examination of this issue is required by your Honorable Body.

Please note that this office fully supports any effort to open the facilities at Wendt Beach Park, including the beach, and the rehabilitation and reuse of the buildings. However, we do have significant concerns regarding the RFP, proposed award of the concession, control of the facilities, and capacity of the winning respondent to operate, maintain and manage the concession. We encourage your Honorable Body to fully examine these issues prior to approval of any term sheet and concession agreement.

This office stands ready to assist your Honorable Body and/or answer any questions you may have concerning this document. Please contact Deputy Comptroller-Audit Michael Szukala at 858-8430 if you have any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Mark Poloncarz", with a large, sweeping flourish extending from the end of the name.

Mark C. Poloncarz, Esq.
Erie County Comptroller

MCP/nr
Enclosure

cc: Joel A. Giambra, County Executive
Angelo Sedita, Commissioner of Parks, Recreation and Forestry
Joseph Gervase, Director of Purchase
Laurence K. Rubin, Esq., County Attorney

**MEETING NO. 28
NOVEMBER 10, 2005**

ERIE COUNTY LEGISLATURE

Fund	Department	Fund Center	Account	Appropriations	2006 Executive Recommended	2006 Leg Adopt	Reduction
110	Risk Retention	16020	555050	Insurance Charges	\$3,500,000	\$1,500,000	\$2,000,000
110	Bureau of Fleet Services	10710	505600	Auto Supplies	\$1,700,000	\$1,000,000	\$700,000
110	Countywide		516000	Tourism, Visitors and Convention Services	\$1,450,000	\$1,000,000	\$450,000
110	Sheriff Division	11510	561440	Motor Vehicle Equipment	\$225,000	\$50,000	\$175,000
210	Highways (DPW)		530000	Other Expenses	\$3,100,000	\$2,600,000	\$500,000
					\$9,975,000	\$6,150,000	
				TOTAL SAVINGS:		\$3,825,000	\$3,825,000

(6-1) Legislator Wroblewski voted in the negative.

**DEMONE SMITH
CHAIRMAN**

MR. SWANICK moved to put the item on the table. MS. MARINELLI seconded.

CARRIED UNANIMOUSLY.

***Mr. Swanick left the Legislative Chambers and is no longer available.

Item 23 – MS. MARINELLI moved to discharge the ENERGY & ENVIRONMENT COMMITTEE from further consideration of Comm. 24E-8. MS. CHASE seconded.

CARRIED UNANIMOUSLY.

RESOLUTION NO. 296

**Re: Dept. of Parks, Recreation and Forestry -
Authorization for Designation of Developer for
Wendt Beach**

WHEREAS, the Erie County Parks Department has suspended the majority of operations at Wendt Beach Park due to a reduction in the 2005 Budget, and

WHEREAS, the Erie County Master Plan call for substantial renovation of the Wendt Beach Mansion and other park buildings cannot proceed in the current budgeting environment, and

WHEREAS, the Erie County Parks Department solicited requests for proposals (RFPs) for qualified professional firms to establish, expand, manage and maintain concession operations at Wendt Beach, and

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ERIE COUNTY LEGISLATURE

WHEREAS, the RFP requires that the selective respondent renovate the historic Wendt Mansion and operate the facility consistent with public usage, and

WHEREAS, the Erie County Parks Department requests to designate as developer, for Wendt Beach, the company of Precision Park Services LLC, and

WHEREAS, Precision Park Services will renovate, at no cost to the County, the Wendt Beach Mansion to contemporary standards, and

WHEREAS, Precision Park Services will expand, manage and maintain all concession operations at Wendt Beach Park pertaining to the following buildings:

Wendt Beach Mansion
Carriage House
Garden Cottage
Large Concession Stand
Stable Building
Superintendent House

and,

WHEREAS, the Parks Department will retain operation and maintenance of the beach, public restrooms and soccer fields, and

WHEREAS, the Parks Department will receive a percentage of concession revenue from Precision Park Services, and

WHEREAS, the Parks Department will include in contract negotiations with Precision Park Services, a plan to reopen the beach for swimming by funding the cost of lifeguard salaries through the use of parking and concession fees.

NOW, THEREFORE, BE IT

RESOLVED, that Precision Park Services be the designated developer of the concession operations at Wendt Beach for a period no longer than six months while a Term Sheet and full concession agreement is developed, and be it further

RESOLVED, that the Department of Parks, Recreation and Forestry is authorized to negotiate a Term Sheet with Precision Park Services and to submit the same as soon as possible to the Erie County Legislature, and be it further

RESOLVED, that the County Executive be authorized to enter into a concession agreement with Precision Park Services pursuant to said Term Sheet, and be it further

RESOLVED, that certified copies of this resolution be forwarded to the Department of Parks, Recreation & Forestry, the Erie County Executive, the Office of the Comptroller, the Division of Budget, Management and Finance, and the Department of Law.

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ERIE COUNTY LEGISLATURE

MS. MARINELLI moved to amend the item. MS. CHASE seconded.

CARRIED UNANIMOUSLY.

DELETE the 10th WHEREAS in its entirety and **REPLACE** with the following:

WHEREAS, the Parks Department will include in contract negotiations with Precision Park Services, a plan to reopen the beach for swimming by funding the cost of lifeguard salaries through the use of concession fees,

MS. MARINELLI moved to approve the item as amended. MS. CHASE seconded.

CARRIED UNANIMOUSLY.

Item 24 – MS. MARINELLI moved to discharge the GOVERNMENT AFFAIRS from further consideration of COMM. 27E-22. MS. CHASE seconded.

CARRIED UNANIMOUSLY.

RESOLUTION NO. 297

RE: Partial Renewal of Lease with DePaul Properties, Inc.

WHEREAS, pursuant to Erie County Local Law No. 4-2001 and a resolution of the Legislature dated July 12, 2001 (Comm. 13E-21), the County leased 3.5 acres of land on Kensington Avenue to DePaul Properties, Inc. ("DePaul") a non-profit corporation, and a residential facility for persons with psychiatric disabilities was constructed by DePaul on the site; and

WHEREAS, the term of this lease was twenty-five years, commencing September 1, 2001, with an option by DePaul to exercise a renewal of the lease for one additional twenty-five year term; and

WHEREAS, DePaul now desires to refinance the tax-exempt bonds that were used to finance construction of the residential facility; and

WHEREAS, the New York State Dormitory Authority, which will refinance the bonds on behalf of DePaul, requires as security for the bonds a twenty-five year lease corresponding with the bond payback period, which will commence on or about November 1, 2005 and terminate on or about October 30, 2030; and

WHEREAS, since the Dormitory Authority requires that a twenty-five year lease shall terminate on or about October 30, 2030, and since the initial lease with the County is scheduled to terminate several years earlier on August 31, 2026, DePaul desires to exercise an early renewal of the lease to cover this gap in time, with the remainder of the twenty-five year renewal term being exercised at the end of the bond maturity date in 2030; and

NOW, THEREFORE, BE IT