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TO: North Ogden City Mayor and City Council  
FROM: Jonathan Call, City Attorney  
DATE: April 15, 2014  
RE: IHC Detention Pond and Trail Agreement

After reviewing the IHC agreement and spending some time discussing the various options with their attorney we have reached a point where the administration and I feel that we can move forward with the agreement. All the issues related to the detention pond appear to have been resolved in a way which is agreeable to both parties. Here are some of the highlights on the Detention Pond Agreement

- The City receives an easement for the right to install a storm drain facility on the IHC property and continue to receive storm water in this location for as long as the City would like.
- The property continues to be owned and maintained by IHC (Landscaping), but all storm drain improvements will be maintained by the City.
- The City is legally liable for injuries related to the Detention Basin Improvements
- IHC is able to utilize the detention pond for open space requirements as well as discharge up to 46% of the total pond capacity from the property they own to the east of their existing building.
- The City is able to comply with their agreement with Smith's regarding handling the storm water runoff.

There is one outstanding issue we would like the Council to weigh in on. This issue is how the City would like to approach the trail agreement. There are two options.

- First, the City agrees to a public trail easement
  - The easement continues as long as the city wants it.
  - The trail is maintained by IHC.
  - The City is legally potentially liable for any injury occurring on the trail as well as IHC costs for defending a lawsuit against IHC.
  - IHC cannot close, or exclude anyone from using the trail.
- The second option is that the City installs the trail as a private trail.

- There is no public easement on the trail.
- The trail is maintained by IHC.
- The trail may, or may not be closed by IHC at any time.
- The City is not liable for injuries on the trail, unless they are the result of improper installation of the gravel surface.

The main concern which has been expressed is the liability associated with this portion of the trail. If the City opts for the public trail easement we could have to pay out a substantial settlement in the future if somebody was severely injured or even killed on the trail. If the council would like to assume that risk there are also some great benefits including the fact that the trail is guaranteed to remain open for public use. If the City decides to do the private trail option, the initial indications by IHC's attorneys is that public use will be allowed to occur, but signs will be posted that the trail is used by individuals at their own risk. In addition there is nothing which the City could do to force IHC to keep the trail open should they change their minds in the future.

As a council you must decide whether the benefits of a public trail offset the risks associated with the liability associated with the trail. As the city attorney it is my job to ask questions like this, and bring attention to areas of my concern so that the Council can have the opportunity to discuss and assess the issues surrounding these types of agreements and make an informed decision. My only concern has been the sweeping language of our indemnification of IHC under the public trail option. The City has entered into other similar agreements in the past, which in my opinion were not as strongly worded, including the recent Smith's Trail Agreement. IHC's attorneys have indicated that the indemnification language is what is acceptable to them in order to maintain a public trail across their property. Trying to negotiate further the indemnification is unlikely to succeed.

IHC has not taken a "take it or leave it" stance on these agreements, but as a City our timeline to complete the Detention Basin improvements is pressing hard against the other improvements on the Smith's property. I would recommend the Council take action on one of these options at the April 22, 2014 City Council meeting.