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MEMORANDUM

TO: Chair Lance Davis and the Members of the Board of Aldermen Land Use Committee of the Whole

FROM: Michael Glavin, Executive Director, Office of Strategic Planning & Community Development; George Proakis, Director of Planning

RE: Vested Rights, Multi-Step Development and Development Covenant Updates

DATE: June 6, 2017

A key question has arisen during our discussion about the Union Square Overlay District: how do we balance the need for flexibility to pursue evolving policy goals around issues such as affordable housing and sustainability with the need for the requisite level of predictability in our zoning laws to encourage developers to invest in Somerville. The proposed zoning amendments contained in Exhibit D and the addition of Paragraph 29 to the Development Covenant respond to this question. This memo provides some background on the proposed amendments laid out in Exhibit D and explains how Paragraph 29 in the Covenant relates to these zoning amendments.

Beyond the provisions of Paragraph 29, there are four additional updates to the Covenant that address 1) contributions to the Green Line Extension, 2) the Community Benefits Agreement negotiations process, 3) commercial development phasing, and 4) ownership of the Neighborhood Park and the Civic Spaces. This memorandum summarizes and explains these additional changes to the Covenant.

Background on Vesting Rights

The Zoning Act in Massachusetts (MGL c. 40A) provides the framework under which local government is permitted to act through new zoning. Under this framework, changes in a local

zoning ordinance typically do not apply to a project that has already been granted a special permit or a building permit, unless those permits expire without construction beginning within a period of time. This concept is commonly known as “grandfathering.”

Most multi-phased developments are created using a zoning mechanism that permits key development rights to “vest” when the developer’s master plan is approved. After that time, any new zoning changes only affect the vested rights if the developer seeks to undergo a major edit to the plan. A notable exception to this is Somerville’s Assembly Square, as further explained below.

For the Union Square development, vested rights are particularly important because the project will be competing for commercial tenants with regional projects that have been developed using zoning mechanisms that permit rights to vest at the issuance of a master plan approval. Having project-wide, fully vested rights is considered essential by these developers and their lenders and investors because it allows them to compete for commercial tenants and to invest capital to implement the whole plan with the certainty of their development entitlements. The long-term entitlement predictability afforded by fully-vested rights is essential to attract investors, lenders and tenants.

Regional Examples

Cambridge zoning uses a Planned Unit Development (PUD) special permit tool pursuant to the Cambridge Zoning Ordinance. The three most significant projects underway in Cambridge (at Northpoint, Binney Street and Kendall Square) all have existing PUD special permits that vest rights under the state zoning act. The forthcoming project at the Volpe Center will likely follow this same strategy. Recently, when Cambridge increased inclusionary housing, the Cambridge City Council requested a legal review. That review concluded that the Northpoint PUD would not be subject to zoning amendments that occur after it was approved.

In Boston, there are 11 major projects that have been permitted over the past decade that are currently in the midst of a multi-phase development. The list is as follows:

- 1) Brighton Landing (New Balance)
- 2) Seaport Square
- 3) 100 Acres (Fort Point/South Boston – note: this includes the new GE headquarters)
- 4) Christian Science Center
- 5) Fan Pier
- 6) Pier 4
- 7) Millennium Tower/Burnham Building (Filene’s site)



- 8) Channel Center
- 9) Edens/South Bay Plaza
- 10) Millennium Ritz
- 11) Government Center Garage

Each of these projects has been permitted as a Planned Development Area (PDA). A PDA in Boston requires approval of the Boston Planning & Development Agency, the Zoning Commission and the Mayor. This initial approval typically sets allowed uses, density, basic dimensional and mitigation requirements, etc. Boston provides explicit grandfathering for PDA projects once a permit has been issued for any project component.

Regionally, the exception to this certainty of entitlements rule is Assembly Square. The PUD regulation in Somerville is unique because it offers no special permits (and therefore no vesting of rights) until the final step of review. This approach creates two challenges:

1. It leaves projects open to any zoning change, even after the PUD is approved; and,
2. It does not allow the applicant to be as nimble with commercial tenants because the applicant would need to do a special permit review for each new building and would not have certainty around their ability to execute the entire mixed-use project and vision. Prior to this review, a commercial building cannot be guaranteed to a potential tenant nor could the entire proposed vision be implemented with certainty.

The USQ “CDSP” Strategy

The Union Square Overlay District anticipates the issuance of a Coordinated Development Special Permit (CDSP) at the start of the USQ development plan process. This approval does not permit any development to begin, but it sets up the ability for the applicant to seek Site and Design Plan Review. While Site and Design Plan Review still requires a public process (with four opportunities for public review), the uses, development standards and design guidelines will already be set by the zoning and the plan. This creates certainty in the development process, and allows a developer to finance projects, engage investment partners and seek tenants with a basic understanding of the anticipated outcomes.

A special permit like the CDSP typically would permit rights to be vested at the start of the process. But, since the residential use also requires a special permit (which is not typical in multi-step projects), and since there was a proposal to withhold those residential special permits until later in the process, the ability for the applicant to ensure that the project receives its full development entitlement remains in question.



The Proposed New CDSP Strategy

The updated Covenant incorporates Exhibit D, which articulates a strategy to address how rights would vest in the CDSP process in the USQ Overlay District. A CDSP applicant will submit a plan showing the buildings that they will construct, the uses in the project, and the phasing.

They will identify the locations of buildings, open spaces and thoroughfares, as they file their application. They can be granted the CDSP special permit after a neighborhood meeting and a thorough review by the Planning Board. The proposed language of Exhibit D will maintain the rights to build this project, as the developer proceeds through the phases. Reducing the risk on the outcome of these priorities will allow the developer to be able to secure commercial tenants and prepare designs for commercial and residential projects. Each project, when it is ready to be developed, will go through the Design and Site Plan Review process (with its four opportunities for input), after which the Planning Board can establish conditions on the project and the developer can proceed to build according to their plans and the conditions.

Exhibit D and the adjusted zoning language establish a few areas where the rights will not be secured. These areas include:

1. Affordable housing;
2. Jobs and housing linkage;
3. Sustainability issues; and,
4. The Mobility Management program

Carving out these four exceptions provides the flexibility necessary to pursue policy changes in these areas as our community's needs and priorities evolve.

Provisions of Paragraph 29

While these provisions have been included in the proposed zoning to preserve the City's flexibility with regard to community benefits associated with the planned development, their impact can impair the developer's ability to proceed with the project with the expectation of a reasonable return on investment required to attract investors and lenders. This uncertainty is particularly difficult with so much of the future phase development dependent on the developer's capacity and willingness to underwrite the significant early costs of the project. While all developers face the risk of possible changes in the economic environment and regional market conditions, in Union Square the master developer will have the added risk that a major discretionary decision in any of the unreserved subject areas could impact the financial footings of the project, threaten the viability of any given phase, and reduce or eliminate the ability of the project to realize a return on investment. Therefore, Paragraph 29 allows for an amendment to



the Covenant to provide the means to off-set any increased costs to the developer resulting from a change in the four unsecured areas of the City Requirements above. The off-set would be accomplished either through a reduction in the contributions required of the developer under other provisions of the covenant or in an adjustment to the purchase price set for the developer's cost of acquiring City-owned properties being transferred as part of the disposition process.

We offer the proposed amendments in Exhibit D, in conjunction with the provisions in Paragraph 29, as a practical solution for achieving the necessary balance between predictability of outcomes and flexibility for the City to adjust to changes in technology and City priorities.

Four Additional Updates

Contribution towards Green Line Extension (page 4)

Under the prior Covenant provision, the City was required to refund US2 with a portion of their GLX Contribution if, for *any* reason, the City received any repayment of its \$50 million GLX payment. This amendment limits the circumstances when the City, having received a repayment of its GLX payment, must refund US2 with a portion of their GLX Contribution to two situations: 1) if the GLX Project is canceled or, 2) if the GLX Project is terminated.

Community Benefits Agreement Negotiations (page 7-8)

In the event that US2 or the Neighborhood Council believes the other party is not negotiating the CBA in good faith, this amendment allows either of the parties to request a meeting with the Mayor, the president of US2 and the president of the Neighborhood Council to discuss a resolution. If, after this meeting, the City concludes that US2 has not negotiated in good faith, the City can pursue the dispute resolution measures under Section 12 of the Covenant. (Section 12 says that if the City or US2 believes there is an issue about performance under the Covenant, then they will try to resolve it, with the help of a third party if necessary, before either of them seeks resolution through the courts.)

Phasing of commercial development (page 12)

This amendment prohibits US2 from starting construction of any residential buildings beyond D2 and the Warren Block (if applicable) until US2 has 1) completed construction of the office/lab phase of D2, and 2) commenced construction of a commercial building on any of the parcels other than D2.4, D4.1, D5.1 and D5.2 (i.e., the four smallest commercial blocks).

Ownership of Neighborhood Park & Civic Space (page 12-13)



This amendment requires US2 to convey ownership of the Neighborhood Park to the City, including responsibility for maintenance and repair. It also requires US2 to convey ownership of the Civic Spaces on parcels D1 and D2 to the City upon their completion and requires that any easements for maintenance, programming and outdoor seating be agreeable to both parties and laid out in writing. These conveyances of the Neighborhood Park and the Civic Spaces will occur at no cost to the City.

