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COUNCIL OF THE DISTRICT OF COLUMBIA

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MEMORANDUM

To: Hon. Tommy Wells, Councilmember
From: V. David Zvenyach, General Counsel
Date: August 23, 2012
Re: Hine Junior High School site development project

QUESTION PRESENTED:

Whether the Hine Junior High School site development project would have to be rebid if the project is substantially different than at the time of award to the selected developer.

SHORT ANSWER:

Neither statutory law, the land disposition and development agreement, nor the zoning regulations provide for a rebid due to changes in design or construction. Rather the District's legal framework for land development anticipates changes and provides procedures for changes to be approved or disapproved throughout the development process.

Firstly, the Mayor is required to transmit to the Council for approval any substantive change made in a term sheet after the Council's initial approval of a development. To date, no substantive change has been transmitted and, based on available documents, no change has been made to the term sheet.

Secondly, under the agreement between the District and the developer for the Hine site, material changes require approval of the Deputy Mayor for Economic Planning and Development, the Mayor's delegate; non-material changes do not require approval.

Thirdly, pursuant to its statutory powers, the Zoning Commission, which must approve a planned unit development, has the

authority to grant or deny requests for relief from the requirements of its zoning regulations.

Termination of the agreement, by either party, would end the current developer's development of the project. Only then might a rebid be necessary.

I. LEGAL FRAMEWORK

In 2010, the District disposed of the Hine Junior High School property pursuant to section 1 of An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes (Disposition Act)¹ and the Hine Junior High School Disposition Approval Resolution of 2010.² The stated purpose of the disposition was for development of the site in to a mixed-use residential, office, and retail area (Development Program) in accordance with agreed to terms (Term Sheet),³ a land disposition and development agreement (LDDA) between the District and Stanton-Eastbanc LLC (Developer),⁴ planned unit development (PUD) procedures,⁵ zoning regulations,⁶ and the District of Columbia Comprehensive Plan.⁷

II. DISCUSSION

A. **The Disposition Act sets forth the roles of the Mayor and the Council in the disposition and development of District property.**

The Disposition Act authorizes the Mayor, "in his discretion, for the best interest of the District of Columbia"⁸ to dispose of

¹ Approved August 5, 1939 (53 Stat. 1211; D.C. Official Code § 10-801).

² Effective July 13, 2010 (Res. 18-963; 57 DCR 7628).

³ Executed June 10, 2010.

⁴ Executed October 27, 2010.

⁵ 11 DCMR 2400 *et seq.*

⁶ 11 DCMR 100 *et seq.*

⁷ 10 DCMR A001 *et seq.*

⁸ D.C. Official Code §10-801(a)(1).

property that the Council has found is no longer needed for a public purpose. The Disposition Act requires the Mayor to attempt to dispose of the property for a use with a direct public benefit as described in a government plan that has been adopted by the Mayor or Council,⁹ such as the District of Columbia Comprehensive Plan.

If a property is to be disposed of for the purpose of development, the Disposition Act requires the Mayor to submit a proposed approval resolution to the Council, along with an executed term sheet between the District and the selected developer and, in the most current form available at the time of the submission of the proposed resolution, a copy of (1) the LDDA, (2) any community benefits agreement, and (3) a Certified Business Enterprise Agreement. The Disposition Act requires that all three agreements be consistent with the proposed resolution."¹⁰

Once the Council finds that the property is no longer required for a public purpose and the Mayor has submitted a proposed disposition resolution, the Council has the authority to approve or disapprove the disposition. If the Council does not approve the proposed disposition resolution within a 90-day period of review, the proposed resolution, and the disposition, is deemed disapproved.

After Council approval of the disposition of a property, the signatories to the LDDA, the District and the Developer, proceed with the Development Program in accordance with the terms of the LDDA. Unless the Mayor determines that a substantive change, as defined in the Disposition Act, will be made to the Term Sheet and submits the proposed substantive change to the Council

⁹ D.C. Official Code § 10-801(a-2).

¹⁰ D.C. Official Code § 10-801(b-1)(2) and (5).

for its review and approval, the Council has no further formal role in the Development Program.¹¹

If a substantive change¹² is made to the term sheet after the Council's initial approval,¹³ the Mayor is required to submit a subsequent proposed resolution to the Council for a 30-day period of review describing the change, accompanied by an amended term sheet in redline format, showing the deletions with a line through them and the additions underlined. If the Council does not approve or disapprove the proposed amendment to the term sheet, in whole or in part, by resolution within the 30-day review period, the proposed amendments shall be deemed approved.¹⁴

B. The Mayor is responsible for the proper execution of District law and for coordinating the planning activities of the District.

The Mayor is responsible for carrying out District law, including the requirements of the Deposition Act. Section 422 of the District of Columbia Home Rule Act¹⁵ vests the executive power in the Mayor and provides that the Mayor "shall be responsible for the proper execution of all laws relating to the District, and for the proper administration of the affairs of the District coming under

¹¹ It still has, of course, the oversight responsibilities of the relevant standing committees. In this case, the Committee of the Whole, which has oversight of the Zoning Commission, the Board of Zoning Adjustment, and the Office of Zoning, and the Committee on Economic Development and Housing, which has oversight of the Deputy Mayor Planning and Economic Development and the Department of Housing and Community Development.

¹² D.C. Official Code §10-801(b-1)(6)(A substantive change is "a change that makes the [LDDA] inconsistent with the executed memorandum of Understanding or term sheet transmitted with the proposed resolution.").

¹³ Effective July 13, 2010 (Res. 18-963; 57 DCR 7628).

¹⁴ D.C. Official Code §10-801(b-1)(6).

¹⁵ Approved December 24, 1973 (87 Stat. 774; D.C. Official Code § 1-204.22).

his jurisdiction or control”¹⁶ and “shall, through the heads of administrative boards, officers, and agencies, supervise and direct the activities of such boards, offices, and agencies.”¹⁷ It further authorizes the Mayor to delegate his functions “to any officer, employee, or agency of the executive office of the Mayor, or to any director of an executive department who may, with the approval of the Mayor, make a further delegation of all or a part of such functions to subordinates under his jurisdiction.”¹⁸ In this instance, the Mayor delegated the responsibility for developing the Hine site to the Deputy Mayor for Planning and Economic Development (DMPED).

DMPED, as the Mayor’s delegate and a signatory to the LDDA, the Historic Preservation Review Board,¹⁹ the Historic Preservation Office,²⁰ and the Zoning Commission each have legal obligations under the LDDA and relevant law and regulation that include providing for, and sometimes requiring, making changes to the Development Program. For example, in response to the Historic Preservation Review Board, the Developer made design changes to the buildings, plaza, and landscape to improve “the project’s compatibility with the character of the Capitol Hill Historic District.”²¹

¹⁶ Id.

¹⁷ Id.

¹⁸ D.C. Official Code § 1-204.22(6) (Other than the function of approving or disapproving acts passed by the Council or the function of approving contracts between the District and the Federal Government under section 731 (D.C. Official Code § 1-207.31).

¹⁹ Established by Mayor's Order 83-119, issued May 6, 1983 (30 DCR 3031), in accordance with section 4 of the Historic Landmark and Historic District Protection Act of 1978, effective March 3, 1979 (D.C. Law 2-144; D.C. Official Code § 6-1103).

²⁰ Established by section 2 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D. C. Official Code § 6-623.01).

²¹ PUD application at pp. 7,8 (May 25 2012).

C. The term sheet is the initial document to govern the development process and is the template for the LDDA.

The term sheet is the initial document in a development project. It contains the basic terms set forth in the request for proposals and serves as the foundation of the more detailed LDDA. Once the project has been awarded, the District and the winning bidder execute the term sheet, which is then incorporated in to the LDDA.²²

The Term Sheet for the disposition of the Hine Junior High School site defines what the Development Program will contain. It sets forth the anticipated number of residents, provides estimated dates of performance, and provides that “[t]hroughout the PUD process, changes in the Development Program may be made with the consent of the District.”²³ It states that “upon execution of the LDDA, the Developer and DMPED shall proceed in accordance with the terms of the LDDA; provided, however,²⁴ the Developer and DMPED acknowledge and agree that any substantial [sic]²⁵ change in the terms set forth in this Term Sheet shall be subject to further Council review and approval in accordance with D.C. [Official] Code 10-801(b-1)(6).”²⁶ To date, no proposed resolution describing a substantive change and amended term sheet have been transmitted by the Mayor to the Council and in reviewing the Term Sheet, no substantive change appears to have been made that would require such a transmission.

In addition to closing requirements, the Term Sheet requires the Developer to, among other things, provide:

²² “Understanding the Land Deal With the District of Columbia,” Pipeline (June/July 2010), p. 7.

²³ Executed Term Sheet (June 10, 2010), p.2. Emphasis added.

²⁴ Emphasis in the original.

²⁵ The reference should be to a “substantive change,” which is the defined term. See D.C. Official Code § 10-801(b-1)(6)(B)(ii).

²⁶ Id. at 3.

(1) Non-monetary consideration for the property in the form of reconstruction of former C Street, S.E., affordable housing for individuals/families at 60% AMI²⁷ and 30% AMI, and age-restricted for persons 55 or older, and community requested design upgrades to the improvements;²⁸

(2) Receipt of PUD approval by the Zoning Commission; and

(3) That construction be in accordance with the Green Building Act of 2006.²⁹

The executed LDDA contains these same requirements.³⁰ The Term Sheet also describes the anticipated elements of the project as two multifamily residential buildings, retail space, office space, and below-grade parking necessary to support the project.³¹ As shown in the PUD applications, these are the elements of the project.

While a substantive change, as defined by the Deposition Act, to the Term Sheet must come to the Council for review and approval, other types of changes do not.

D. The LDDA sets forth the terms for the design and construction of the project, including providing for changes in the design or construction, and for termination of the agreement.

The parties also agree that changes may be necessary to the approved construction drawings because of unanticipated situations that arise.³² The LDDA provides that District approval is

²⁷ "AMI" means the area median income for the Washington area.

²⁸ E.g. Response to the Zoning Commission Questions from June 14th Hearing, dated June 21, 2012, p. 3 ("....office area was changed to residential use in response to community concerns about office windows facing their 8th Street residences.").

²⁹ Executed Term Sheet (June 10, 2010), pp. 1, 2.

³⁰ See, e.g. LDDA (executed October 25, 2010), sections 4.7.2, and 7.

³¹ Executed Term Sheet (June 10, 2010), p.2.

³² LDDA (executed October 25, 2010), section 4.2.3.

not required for non-material changes. Only a change or modification that constitutes a material change requires District approval.³³ The LDDA defines a material change as any change:

- (1) In size or design from the Approved Construction Drawings substantially³⁴ affecting the general appearance or structural integrity of the exterior walls and elevations, building bulk, coverage or floor area ratio;
- (2) In exterior finishing materials substantially affecting architectural appearance from those shown and specified in the Approved Construction Drawings;
- (3) In the number of parking spaces by 10% or more from the Approved Construction Drawings ;
- (4) Substantial in nature to the landscape planning and design or in size or quality of exterior lighting or other features from the Approved Construction Drawings;
- (5) That affects the number of affordable dwelling units (ADU);
- (6) That affects the number of residential units by more than 15%;
- (7) That affects the unit mix of ADU's or unit size of an ADU by 10% or more;
- (8) In unit size by 5% or more;
- (9) That reduces the level of interior finish from the Approved Construction Drawings as it relates to the ADU's;
- (10) In design and construction in the Project from the Approved Construction Drawings requiring approval by a governmental authority; and
- (11) In square footage of retail space by 15% or more from the Approved Construction Drawings.³⁵

³³ Id.

³⁴ The meaning of the terms "substantially" or "substantial" is generally a factor test, one dependent on the circumstances necessitating the deviation from the specific requirements.

³⁵ LDDA (May 25, 2012) section 1.1 at p. 11.

The LDDA provides that “approval [of a material change] shall not be unreasonably withheld, conditioned or delayed provided such Construction Drawings are consistent with the information exchanged in Progress Meetings and are in accordance with the requirements of the terms [of the LDDA] and Applicable Law.”³⁶

The District can also terminate the LDDA in event of default by the Developer. If the Developer fails to perform or comply with the requirements of the LDDA, the Developer has 30 days to cure the default. If the default cannot be cured within 30 days, the Developer is entitled to up to 60 additional days to cure the default, as long as the Developer starts the cure within the initial 30-day period and diligently pursues completion of the cure.³⁷

If, before closing, the Developer defaults, and does not cure, the District may elect to terminate the LDDA and draw on the deposits as liquidated damages. With some restrictions, upon termination, all the plans, specifications, and other submissions shall be automatically assigned to the District. The District, and the Developer in the event of a District default, may elect to waive, in writing, a default.³⁸

Thus, the LDDA provides for non-material changes to be made without approval and for material changes to be made with the approval of DMPED, and for termination of the agreement if either party fails to perform or comply with the LDDA.

³⁶ Id. at sections 4.3.1 and 1.1 (“Applicable Law” means all applicable District of Columbia and federal laws, codes, regulation, and orders, including, without limitation, Environmental Laws, laws relating to historic preservation, and law relating to accessibility for persons with disabilities, and, if applicable, the Davis-Bacon Act.).

³⁷ Id. section 8.1.

³⁸ Id. section 8.4

E. The Zoning Commission must approve the PUD application.

The Zoning Commission, which consists of 5 members, was created in 1920 to protect the public health and safety and to protect property.³⁹ The Commission is authorized to exercise all the powers and perform all the duties with respect to zoning in the District as provided by law, including issuing zoning regulations,⁴⁰ granting relief from the regulations, and assuring that development is consistent with the District of Columbia Comprehensive Plan.

The PUD process was “designed to encourage high quality developments that provide public benefits”⁴¹ and to provide “for greater flexibility in planning and design than may be possible under conventional zoning procedures”⁴² “The overall goal is to permit flexibility of development and other incentives, such as increased building height and density; provided that the project offers a commendable number or quality of public benefits and that it protects and advances the public health, safety, welfare, and convenience.”⁴³

A PUD application details the essential elements of a Development Program, including the public benefit and project amenities, its compliance with the LDDA, PUD procedures, zoning regulations, and the Comprehensive Plan. It also contains requests for relief from certain zoning requirements. In light of the overall goal of flexibility, the Commission can and does approve relief.

³⁹ Section 1 of AN ACT To regulate the height, area, and use of buildings in the District of Columbia and to create a Zoning Commission, and for other purposes, approved March 1, 1920 (41 Stat. 500; D.C. Official Code § 6-621.01).

⁴⁰ 11 DCMR 100 *et seq.*

⁴¹ 11 DCMR 2400.

⁴² *Id.*

⁴³ *Id.*

The Commission requires an applicant for PUD approval that is seeking relief from a zoning requirement to state the “specific relief that the applicant requests from the matter-of-right standards and requirements [under the zone district classification of the site . . .]; and if the applicant requests a map amendment, the extent of compliance with, and requested relief from, the matter-of-right standards and requirements of development under conventional zoning.”⁴⁴

Under existing regulation, the Commission may approve a 5% increase in the maximum allowable height or floor area ratio, occupancy greater or lesser than the normal requirement, yards and courts greater or lesser than the normal requirement, fewer or more parking spaces and loading berths, and so on, including any use that is permitted as a special exception that would normally be approved by the Board of Zoning Adjustment.⁴⁵

Pursuant to the zoning regulations, when deciding on a PUD application, “the Commission shall judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case.”⁴⁶

The Commission must “find that the proposed PUD is not inconsistent with the Comprehensive Plan and with other adopted public policies and active programs related to the subject site.”⁴⁷ In regard to the Comprehensive Plan, the Commission must “also evaluate the specific public benefits and project amenities of the proposed development, which features may in some instances overlap [with the Comprehensive Plan].”⁴⁸

⁴⁴ 11 DCMR 2403.

⁴⁵ 11 DCMR 2405.

⁴⁶ 11 DCMR 2403.

⁴⁷ Id.

⁴⁸ Id.

A stated goal of the Comprehensive Plan is “. . . to provide generalized guides for development and conservation decisions.”⁴⁹ For example, where “the densities within any given area on the Future Land Use Map may reflect all contiguous properties on a block—there may be individual buildings that are higher or lower than these ranges within each area. Similarly, the land use category definitions describe the general character of development in each area, citing typical building heights (in stories) as appropriate. It should be noted that the granting of density bonuses (for example through Planned Unit Developments) may result in heights that exceed the typical ranges cited here.”⁵⁰

III. DEVELOPER’S REQUEST FOR RELIEF

According to the PUD applications reviewed for this memorandum,⁵¹ the Developer has made changes in design in response to the Historic Preservation Office (HPO) and the Historic Preservation Review Board (HPRB),⁵² and is requesting that the Commission:

- (1) Approve a 3.4 overall floor area ratio, which is “in excess of the 3.0 overall FAR that is allowed as a matter-of-right in the Capitol Hill Commercial Overlay District . . . ;”⁵³
- (2) Apply the 5% flexibility for height authorized in the regulations,⁵⁴ because the Office Component at 7th and

⁴⁹ 10 DCMR A226 (Comprehensive Plan: Guideline for Using the Generalized Policy Map and the Future Land Use Map).

⁵⁰ Id.

⁵¹ PUD applications dated November 23, 2011, March 26, 2012, and May 25, 2012.

⁵² PUD application at p. 7 (May 25, 2012).

⁵³ Id. at p. 8.

⁵⁴ 11 DCMR 2405.3 (The Commission may authorize the following increases; provided, that the increase is essential to the successful functioning of the project and consistent with the purpose and evaluation standards of this chapter, or with respect to FAR, is for the purpose of a convention headquarters hotel on square 370: (a) not more

Pennsylvania is 94'6," which is 4'6" above the 90' maximum authorized for Mixed Use Commercial Residential Districts;⁵⁵

(3) Grant zoning relief from several specific requirements;⁵⁶ and

(4) Grant special exception relief to allow two buildings on a single subdivided lot that is located within 25 feet of a Residence District.⁵⁷

In regard to the increased FAR, the Developer explains that the increase is the result of an effort to reduce the apparent mass and height of the components of the Development Program in response to community and HPO/HPRB concerns by pushing the mechanical equipment down to the next lower floor from where it had been, making it count as gross floor area.⁵⁸ The Developer argues that the Development Program should not be "penalized" for this change.⁵⁹ In regard to the increase in height, the Developer argues that the "94.5 feet of building height is appropriate [because] it faces onto the very wide 160 foot right-of-way of Pennsylvania Avenue and the even wider Eastern Market Metro plaza".⁶⁰

The foregoing requests, and explanations for the requests, are within the Developer's right to make under the terms of the Term

than five percent (5%) in the maximum height; or (b) not more than five percent (5%) in the maximum floor area ratio.).

⁵⁵ PUD application at p. 9 (May 25, 2012).

⁵⁶ From the size and number of loading berths and service/delivery spaces (11 DCMR 2202.1; that parking spaces in a garage for compact cars be in groups of at least 5 contiguous spaces (11 DCMR 2115); from the size requirement for one of the smaller courtyards ((11 DCMR 776); and from the requirement that a mechanical screen, a rooftop structure, be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located (the North Building) (11 DCMR 770).

⁵⁷ PUD application at p.13 (May 25, 2012).

⁵⁸ Id. at pp. 8, 9.

⁵⁹ Id. at p. 9.

⁶⁰ Id.

Sheet approved by the Council.⁶¹ It is within the Zoning Commission's authority to grant them, or not.

IV. CONCLUSION

Changes in the Development Program are anticipated and procedures for them are provided for in the legal framework of the development process, from a substantive change in the Term Sheet, which requires Council approval pursuant to statutory law, to non-material changes, which do not require any approval, and to material changes, which require District approval pursuant to the LDDA, and relief from zoning regulations, which requires approval of the Zoning Commission. There has been no apparent change in the Term Sheet that would require the Mayor to submit an amended Term Sheet to the Council for its review and approval. The District has the authority to approve material changes, and, presumably, has done so, and the Zoning Commission is the authority to grant or deny zoning relief. Nowhere in the legal framework is a rebid contemplated solely because changes are made to the Development Program.

Pursuant to the LDDA, the District and the Developer have the right to terminate the agreement. Termination by either party would end the Developer's development of the project. The District's selection of a new developer would begin the process anew. In my opinion, only then might a rebid be necessary.

I am available if you have any questions.

VDZ

⁶¹ See also, e.g., 11 DCMR 2403.11(b) (The Commission requires an applicant to state the specific relief sought).