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BRICKLIN & NEWMAN LLP

lawyers working for the environment

Reply to: Seattle Office

July 11, 2019

Shoreline Planning Commission
17500 Midvale Avenue North,
Shoreline, WA 98133

Re: Planning Commission Special Meeting July 11, 2019: MGP Development Agreement

Dear Chair Montero and Members of the Planning Commission:

We represent Retail Opportunities Investments Corporation (ROIC). ROIC owns and manages two large parcels at Shoreline Place located immediately to the north and south of MGP's holdings. ROIC's tenants include Central Market, Marshall's and Pier 1. As described in ROIC's April 24, 2019 letter to the Planning Commission, ROIC has spent much of the last year trying to work with MGP, but that collaborative process came to an abrupt end earlier this year when MGP stopped communications with ROIC and misrepresented to the Planning Commission that ROIC supported the proposed Development Agreement. We are seeking to revive that collaborative effort, but for the time, we will need to participate in the City's permitting process to assure that our interests – and the City's interests – are adequately protected.

ROIC SUPPORTS THE RENEWAL PLAN

ROIC is anxious to see the City's plans for Shoreline Place to come to fruition. ROIC strongly supports the City's redevelopment goals and, in particular, the adopted Aurora Square Community Renewal Area (CRA) Renewal Plan. That plan calls for a public-private partnership that nurtures sustainability in a 21st Century "eco-district;" creates multiple, internal pathways and a true "center" where shoppers' line of travel intersect; assures connectivity within the entire site; eliminates much of the surface parking; and catalyzes an entertainment district with a variety of entertainment and dining options. ROIC supports this vision.

ROIC interests are aligned with the City's. ROIC's concern is that the draft Development Agreement falls far short of assuring that the goals of the Renewal Plan will be met. If the new development falls short, both the City and ROIC will suffer. We seek redevelopment that adheres closely to the Renewal Plan and the various City and State laws that support development consistent with that plan. Those are the City's objectives, too.

ISSUES OF CONCERN

As outlined in Jeremy Eckert's memorandum sent to the City on behalf ROIC, our concerns with the current draft agreement fall into five categories:

1. MGP project phasing is contemplated in Section 5 of the DA, but no assurances are provided that specific phases will be constructed by specified dates.

2. Sears building demolition, which is not contemplated in the DA.

3. Access, circulation, and loading are not clearly addressed.

4. Business protections, such as parking, are not clearly addressed.

5. Open space and non-motorized vehicle connectivity are not adequately addressed.

ROIC has been raising these issues with MPG and city staff for months, but our concerns have fallen on deaf ears. The latest draft development agreement continues to ignore these issues. We hope the Planning Commission will serve its oversight role and not recommend approval of the agreement until all of these issues are addressed.

AN OVERARCHING PROBLEM: LACK OF SPECIFICITY

A common problem infecting each of these issues is a lack of specificity in the draft agreement. Some flexibility is necessary, of course. But, on the other hand, too much flexibility eliminates any assurance that the goals of the Renewal Plan will be achieved.

A comparison of the draft agreement's provisions that benefit MGP with the provisions that are intended to address the City's objectives is telling. The draft is very specific when it addresses issues that matter most to MGP, like MGP's vested rights, expedited permitting, and relaxing code requirements. But when it comes to addressing issues that matter most to the City, the draft agreement provides few sideboards. In the name of "flexibility," virtually no requirements are established. The agreement references the Conceptual Guide Plan, but that "is not intended to require specific uses, square footages, building massing, building design, or specific buildings on specific parcels. Depictions of building footprints, bulk and scale drawings, and number of stories in the Conceptual Guide Plan are illustrative only." Draft DA, Section 4. Anything goes. The City is buying a pig in a poke. The developments it gets may not be anything like what it seeks – and the city will be powerless to do anything about it because of the "flexibility" granted to MGP if the draft agreement is approved.

Under the terms of the draft agreement, the City does not even know the identity of the ultimate developer. Per the draft, MGP would retain the right to assign its interests with no review or approval by the City. Presumably, the City is interested in entering into an agreement with MGP because of the relationship the City has developed with MGP. The agreement should include a clause that provides the City with an opportunity to review the bona fides of any proposed successor so that the City can be assured that its partner in this undertaking shares the City's interests and has the credibility to deliver on its promises.

Mr. Eckert identified a host of questions unanswered by the draft agreement in his April 24, 2019 memo. They bear repeating:

- MGP intends to phase its development as specified in Section 5 of the Development Agreement (titled "Phasing"; also see Section 14). When and where will this phased development occur during the 20-year timeframe?
- How does MGP propose to complete the mandatory zone buffer and transition on Block A and Block B when ROIC has recorded vehicular easement rights over this property?
- Will MGP demolish the Sears site? If so, when? What precautions will be taken so MGP does not leave the City with a vacant Sears building in the heart of Shoreline Place or leave the City and Shoreline Place with a partially demolished Sears structure?
- Does the proposed construction or demolition require temporary closures of public roads or internal circulation roadways and sidewalks?
- How will trucks with shipments for Central Market and other businesses access Shoreline Place during construction or demolition?
- How will customers access the local businesses during construction or demolition?
- Will the City condition new development to prohibit tenants of new residential buildings from poaching existing Shoreline Place parking? If so, what is the parking plan and who is responsible for enforcing that plan?
- Will MGP construct the circulation plan contemplated in the FEIS or in MGP's submitted plans?
- When will MGP construct the circulation?
- Will the interior circulation become dedicated public right-of-way or will it be privately owned?
- If the interior circulation is privately-owned, will there be any obligation on MGP or its successors to provide repair and maintenance? How will this obligation be enforced?
- Will the City require a bond for these interior roadways?
- The Open Space will be privately-owned, although it will be open for public enjoyment. Will the City impose any ongoing obligations on MGP for the maintenance and upkeep of the open space system? How will the City enforce these conditions?
- The proposed residential units exceed the planned residential units analyzed in the FEIS. The City has focused its approval of these residential units by counting PM peak trips. Has the MGP and City contemplated impacts to other elements of the environment with the increase of residential units? Where has the City documented this analysis?

- MGP has provided no architectural plans or renderings for the proposed residential development. At best, MGP has provided a "departure request example", showing one facade of a building. What does MGP intend to construct?

Mr. Eckert raised these issues in his memo ten weeks ago. These questions largely remain unanswered today. They need your attention.

Because the draft agreement is so vague, it is impossible to determine what project(s) will follow in its wake. A project that meets all of the City's objectives (and ROIC's) might take shape. But it is also possible that a project at odds with the City's objectives is proposed – and would have to be approved by the City, because the agreement, as currently drafted, is so vague in its requirements.

We are aware that MGP submitted a new draft agreement last week. Unfortunately, the new draft fails to provide answers to questions like those above. The uncertainty inherent in the earlier draft pervades the new draft, too. The Planning Commission should recommend against approval of this overly vague agreement. Greater specificity is needed, if the City's interests are to be served.

PHASING: LACK OF CATALYST

MGP's proposal – if built – is important to the City, in its own right and also as a catalyst for other, complementary projects. But if MGP's plans never move off the drawing board, the City will not get any of the benefits it hopes to achieve, on this site or as a catalyst for other nearby development. While phasing is a normal part of a development agreement, the phasing provisions need specificity to assure the phases actually will be built. The last thing the city wants is to be tied up with a partner that has put the project on hold indefinitely. If that were to occur, not only would this site sit fallow, but the catalyst effect the city seeks would not materialize, dampening development options on other nearby parcels, too. [1]

In ROIC's earlier comments, it noted the absence of any commitments or timelines to assure this project gets off the ground. One of the few issues addressed in the new draft is phasing, but the new phasing language provides no assurances for completion of any phase. The new language provides that when any given phase is completed, the developer will assure that the utilities, public facilities, paths, and open space for that phase will be completed simultaneously. That "concurrency" provision (which one might have expected as an essential provision in the initial draft) is useful, it does not address the more fundamental problem that the site could sit fallow for

[1] These are not trivial concerns. If you are not aware, a prime site in downtown Seattle has sat empty for 15 years and the City of Seattle, for a variety of reasons, has not been able to do anything about it. While the particular details there are different, it demonstrates that even with tremendous market forces driving robust growth in Seattle, poorly drafted agreements can result in an albatross that strangles development opportunities on even prime development parcels. Shoreline needs to be careful. *See* https://www.seattletimes.com/seattle-news/politics/tower-plaza-planned-for-pit-across-from-seattle-city-hall-slips-behind-schedule/.

20 years and the City would have no recourse. As the draft states, "the timing of each phase and its final configuration will be at the sole election of Developer . . ." Draft DA, Section 5.

Worse, the new draft actually makes the phasing provision worse than it was in the earlier draft. Previously, there was language about a "shared intent and motivation" to complete some elements within the first ten years. That language probably was not enforceable, but, regardless, it is now gone. The new draft deletes it. *Id.* So, now, there is not even a whiff of any requirement that any phase of the project be developed -- ever. Yet MGP, whether it has constructed anything or not, retains it full suite of vested rights for twenty years. This is not a good deal for the City or my client.

LOSS OF PLANNING COMMISSION OVERSIGHT

In the name of flexibility, the draft agreement also strips the Planning Commission, the City Council and the public of important oversight roles throughout the next twenty years. As drafted by staff and MGP, changes to the (already vague) plan can be made without any public input and with no review by the Planning Commission and City Council. Virtually any change is shielded from review simply by staff characterizing the change as "minor." That determination is absolutely final. No review by the Planning Commission or City Council is allowed, even if they disagree with the staff's claim that the change is "minor." Nor is the public provided any opportunity to comment, be heard, or appeal.

ONE-SIDED VESTING PUTS THE CITY AND PUBLIC AT RISK

One hallmark of a development agreement is that it locks in (vests) the developer's right to develop in accordance with the rules in effect today. This protects the developer from the risk that regulations are made more stringent in the future. The tradeoff for that is supposed to be that the developer also is locked in if some regulations become less stringent in the future. A developer has a choice between using a development agreement to lock in all of the regulations as they exist today and subsequent amendments do not impact the project or the developer can go forward without a development agreement and have the project judged by the standards in effect when the project is actually built – regardless whether those standards are stricter, less strict, or just different from those in effect today.

Despite that "what's good for the goose is good for the gander" approach, the draft proposes that vesting apply only to shield MGP from future regulations that it does not want to use. But if it likes the new regulations, it can selectively switch to those, while blocking the ones it does not like. "Heads I win; tails you (the City) lose." This is evident in paragraph 17.c (old and new drafts), which allows MPG "in its sole discretion" to request staff to use new, less stringent regulations when reviewing individual projects covered by the agreement.[2]

[2] The only limit on this "one way" ratchet is that the new requirements cannot authorize new uses nor more residential units. Every other project change can be reviewed in a piecemeal fashion – using some of the regulations in effect

ILLEGAL IMPAIRMENT OF PROPERTY RIGHTS: LOSS OF EASEMENT

ROIC has explained to the City and MPG that the current proposal ignores ROIC's property rights inherent in the easement it holds across the western portion of MPG's property. The current draft makes no allowance for ROIC's property rights, proposing, instead, that the easement simply disappear under MPG's new development. This, of course, remains totally unacceptable.

ROIC's easement not only should lead the Planning Commission to recommend rejection of the agreement in its current form, it also should lead the City to stop processing the application immediately. City regulations mandate that a development agreement application be signed by every entity with an interest in the real property. ROIC's easement gives it a substantial interest in the real property. City staff is blatantly violating the city code by processing this application when it has not been submitted on behalf of and signed by all entities with an interest in the real property. We urge you to request staff to abide by the city code and stop work on this application until all entities with an interest in the real property sign the application.

ILLEGAL ATTEMPT TO EXEMPT PROJECTS FROM CITY REGULATIONS

The draft agreement also should be rejected because it violates the state law that prohibits modifying development regulations by changing them or creating exemptions from them in a development agreement. The law that authorizes cities to enter into development agreements mandates that the laws that are locked into place via the vesting provisions are the laws in effect today – no exceptions:

> A development agreement shall be consistent with applicable development regulations adopted by a local government planning under [the Growth Management Act].

RCW 36.70B.170

> Development agreements must be consistent with applicable development regulations adopted by a county or city. Development agreements do not provide means of waiving or amending development regulations that would otherwise apply to a project.

WAC 365-196-845 (17)(a)(ii).

Despite these unambiguous state law mandates, you have been presented with a draft agreement that is not consistent with the "applicable development regulations adopted" by the city. To the

today and other regulations adopted later – as long as traffic concurrency standards are met and staff concludes there is a net public benefit.

contrary, staff and MPG are asking you to recommend approval of an agreement that would be inconsistent with several applicable regulations. *See* Development Agreement, Section 12 (titled "Modifications to Land Use Standards"). They ask you to recommend deviating from the applicable regulations, when state law clearly prohibits any deviation. You should not be part of this illegal activity. The Planning Commission should recommend denial of any development agreement that does not fully incorporate all applicable development regulations in their current form.[3]

CONCLUSION

The current draft is far from a document that is ready for City concurrence. While MPG's interests are protected with ample specificity, the City's are not. The draft falls far short of providing any certainty that a catalyst project will occur or that the goals of the Renewal Plan will be achieved – or even that any phase will ever be built. It would strip the Planning Commission (and the City Council and the public) of review of potentially significant changes to the agreement. The draft disregards ROIC's recorded easement and is not even signed by all parties with an intertest in the real estate. The draft also is plainly illegal, because it seeks to use the agreement to modify city code requirements.

The City will get only one chance to get this right. Once executed, while MPG (or its successor) will have ample maneuvering room, the City will have almost none. The Planning Commission should recommend that the draft agreement be sent back to the negotiating team so that a more balanced agreement protective of the City's interests can be negotiated. A more balance agreement will greatly increase the likelihood that the ultimate development projects fulfill the promise of the CRA Renewal Plan. The current draft falls far short of that goal.

[3] I am aware that the City code purports to authorize using a development agreement to modify code requirements. *See* SMC 20.30.355.A (development agreement "may modify development standards contained in Chapter 20.50 SMC"). This provision conflicts with state law (which requires development agreements to be consistent with the city's code). City codes that conflict with state law are unconstitutional and have no force or effect. *See* Wash. Const. Art. XI, § 11 ("Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws"); *Dep't of Ecology v. Wahkiakum Cty.*, 184 Wn. App. 372, 378 (2014) ("[i]n determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and 'vice versa'"). Because the city code purports to authorize that which state law prohibits (*i.e.*, using development agreements to modify the requirements of development regulations), the city code provision is unconstitutional and void.

Thank you for your consideration of these comments.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

Cc: Client