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HEARTLAND

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MEMORANDUM

TO: Shoreline Planning Commission

COPY: Client

FROM: Doug Larson, Principal, Heartland LLC

DATE: July 11, 2019

RE: Planning Commission Special Meeting July 11, 2019: Concerns and Recommended Changes to DRAFT MGP-City Development Agreement

I am a principal at Heartland LLC, a local land use and real estate economics firm. For the last 13 years, I have advised both public and private clients on a variety of real estate issues, including the negotiation of several public-private partnerships such as that contemplated by this draft Development Agreement. I represent Retail Opportunities Investments Corporation (ROIC), which owns and manages two large parcels at Shoreline Place located immediately to the north and south of Merlone Geier Partners' (MGP) holdings. ROIC's tenants include Central Market, Marshall's and Pier 1 Imports.

ROIC strongly supports the City's redevelopment goals and, in particular, the adopted Aurora Square Community Renewal Area (CRA) Renewal Plan. ROIC's interests are aligned with the City's in seeing the former Sears property put to more productive use that activates the broader CRA, creates a community gathering place with a mix of uses that generate 18-hour-a-day activity, and increases the City's tax revenues. ROIC's concern is that the draft Development Agreement (DA) falls far short of assuring that the goals of the Renewal Plan will be met.

This memorandum focuses on the following specific concerns, many of which have previously been voiced by ROIC:

1. The Development Plan Lacks Certainty
2. Lack of Certainty as to Development Timing Risks Orphaning Public Investment
3. Lack of Certainty as to Development Entity
4. Lack of Certainty as to Enforcement Provisions
5. Inadequate Protections for Anchor Tenant and Adjacent Uses
6. Inconsistency between CRA and DA

I hope the Planning Commission will serve its oversight role and not recommend approval of the agreement until all these issues are addressed. 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.

1. The Development Plan Lacks Certainty

Section 4 of the DA states that the “depictions of building footprints, bulk and scale drawings, and number of stories in the Conceptual Guide Plan (CGP) are illustrative only” and that while the CGP is intended as a general guide to how development will occur, it does not necessarily guide location and type of uses, square footage, building design, or which buildings will go on which parcels.

This is problematic, as this language suggests the actual development could vary from the CGP substantially, including types of uses, location of uses, building scale, and circulation pattern. Further confusion is created by Section 17 which states that “Developer shall be entitled to develop Conceptual Guide Plan projects under the Vested Code Provisions.” It is unclear to us how MGP can vest to a plan that is “illustrative only.”

Given that the City is using this DA to achieve the Vision outlined in the CGP, it is crucial that the CGP be more specific and binding, so that it can ensure intended outcomes. Assuming the CGP represents the upper boundary of what MGP anticipates building, the City should expect the eventual development to represent something close to this given the level of public investment involved in facilitating this development.

Currently, there is nothing to prevent MGP from building out the site to a level substantially below what is contemplated in the CGP, such as: (i) retaining the Sears building as-is and either continuing to re-lease it to other tenants over the life of the DA or leave it vacant once the existing leases expire; or (ii), constructing apartment buildings that are all surface-parked and only two or three stories in height, as this is permitted by the underlying code.

This need for greater certainty on behalf of the City can be balanced with MGP’s desire for flexibility to adapt the CGP to changing market conditions by stipulating a minimum and maximum range of intended development. Modifications below or above the range should constitute a major decision, requiring Planning Commission review and Council approval. Additionally, the inclusion of additional parcels within the DA as contemplated in Section 34 should constitute a major amendment given inevitable implications on access, circulation, phasing, and total square footage by use.

2. Lack of Certainty as to Development Timing Risks Orphaning Public Investment

Section 5 states that the “Project may be undertaken over multiple phases and the timing of each phase and its final configuration will be at the sole election of Developer.”¹

This is problematic. The City risks orphaning public investment by not specifying target and outside dates for completion of each phase.² **The DA should include a development schedule that clearly specifies timing, triggers, and requirements for each phase of development.** A detailed schedule is critical to assure that the City receives the intended benefits from this public-private partnership:

- Payment for most of the Off-Site Transportation Improvements (Section 7). (These are indexed to either the first building permit or first residential building permit.)
- On-Site Motorized and Non-Motorized Circulation Improvements (Section 8). (Most of these are not anticipated to occur until the later stages of the Project.)
- Open Space System/City Parks Improvements (Section 9). (Most of the are not anticipated to occur until the later stages of the Project; the DA anticipates the cost of these improvements will count against park impact fees and are thus key public benefits the community is expecting to be delivered.)
- Demolition and redevelopment of the Sears building. (This is crucial since this is a major goal of the CRA and is the critical majority element that successfully weaves the Project in with the broader CRA boundary. Such timing requirements can be balanced with the existing leasehold interest in the Sears property by targeting development to follow the termination of said lease.)
- The City is reserving to MGP vehicle trips on city streets associated with full build out of the project. This allocation is tied up for the life of the DA (Section 20). Should MGP not end up substantially developing the site for some reason, this is a significant orphaning of public investment given these trips could otherwise be reallocated to development on the other 53 acres of land included in the CRA and governed by the Planned Action EIS.

The schedule should be based on existing site constraints and examined market conditions so that it allows for timely completion of all phases of the Project based on reasonably foreseeable market conditions. Understanding market conditions are subject to change, the DA can provide for one administrative extension of the schedule for up to 24 months upon sufficient evidence of reasonable market deterioration; thereafter, additional extension requests should be at the City’s sole discretion, and should constitute a major decision, requiring Planning Commission review and Council approval.

¹ There does not appear to be any specific phasing plan identified in the DA. Exhibit O shows the location of Phase 1 and p. 12 of the CGP shows “Proposed Work Areas.” I surmise these Proposed Work Areas are intended to be the phases but the labeling is not intuitive.

² These public investments include: (i) past efforts on CRA and Planned Action EIS; (ii) current efforts associated with approving the DA, and (iii) future investments into Westminster Way frontage improvements, Westminster Way and N 155th intersection improvements, and Westminster Way stormwater line relocation.

3. Lack of Certainty as to Development Entity

Section 39 appears to give Developer the unilateral right to assign the agreement to another, unaffiliated entity or party without any approval required by the City.

This is problematic. The City should retain approval rights over any assignment to ensure successor party is of equivalent or enhanced capability as MGP given that the City is willing to enter into this DA with MGP specifically because of their experience and expertise redeveloping 'dinosaur' retail centers. A 'not unreasonably withheld' standard is likely sufficient for the City and should be acceptable to MGP.

In some cases, DAs go further to mandate "key-person" provisions that name specific individuals that are considered crucial to the success of the project and any change to the key-person requires the City's approval.

4. Lack of Certainty as to Enforcement Provisions

The DA does not appear to have any provision for defaults and remedies. What constitutes an event of default, what is the process to remedy, and what is the recourse if the default is not cured? These protections are very important for both parties to avoid a potentially messy litigation process down the road. Without a clear stipulation, it could be difficult to settle disputes as anticipated in Section 44.

5. Inadequate Protections for Anchor Tenant and Adjacent Uses

The 16.65 acres owned by MGP and subject to the DA is part of the larger 70-acre CRA, which has several existing uses in place, the viability of which must be maintained. MGP has repeatedly stated that the existing grocer at Shoreline Place – Central Market – is desired to be the anchor tenant for Shoreline Place. This is a prudent planning measure given that grocery stores in general drive tremendous consumer traffic to retail projects and Central Market in particular has been successful differentiating itself from the broader competitive grocer landscape and is generally beloved by the community. A strong anchor tenant is also critical to the City's vision of "one stop convenient shopping solution that provides dining, nightlife, and health-lifestyle options," as described in the CRA Vision. Unfortunately, as currently crafted, the DA lacks adequate protections to facilitate the long-term success of this anchor tenant:

- While the CGP shows retail uses in locations complementary to the anchor tenant and other existing retail uses, per the discussion in #1 above the CGP is "illustrative only" and therefore cannot be relied on at all.
- The DA should stipulate a prohibition on primarily competitive grocery uses by stipulating a size restriction on such uses as long as anchor tenant remains in place

- The DA should have a provision to allow signage along Westminster Way, SR-99, and N 160th St frontages, with premier billing for anchor tenant. This may require location of such signage on property not owned by ROIC.
- Existing visibility from major arterials (Westminster Way, SR-99, N 160th St) should be preserved and enhanced by development contemplated in the DA
- Parking: Any existing parking agreements will need to be updated between MGP and ROIC. The DA should mandate cooperation with other owners, their lessees, and property managers within Shoreline Place with regard to parking rights so that these future agreements can be enforced by affected property owners without dispute.
- Access:
 - Any existing cross-access easements will need to be updated between MGP and ROIC. Success for the anchor tenant, other existing retail tenants, and future retail tenants depends upon adequate circulation within Shoreline Place. Exhibit N of the DA stipulates that the existing upper to lower drive that weaves around the SE edge of Sears is to remain until Street C is constructed. Street C is not required to be constructed until development of Block D, likely the final phase of the Project based on the Areas diagram on p. 12 of the CGP (if it is developed at all). Street C will either need to be publicly dedicated or ROIC will need an easement for access Street C that is of equivalent benefit to the existing. Acknowledgment of these third-party rights should be included in the DA.
 - Several of MGP conceptual plans have shown new improvements located in violation of existing ROIC property rights, namely the loading access easement for Marshalls. Plans associated with the DA must identify existing easements and leasehold rights and avoid infringement of those rights for as long as those rights remain valid.

6. Inconsistency between the CRA and the DA

Recital 5 states that DA is consistent with the CRA, and Recital 7N states that the DA will “implement the Planned Action, CRA, and the City’s Comprehensive Plan.” However, the DA fails to implement the CRA in several key areas. These are highlighted in the matrix below. The “Unknown” scores are largely attributable to the lack of certainty in the DA that various development commitments will happen.

Inconsistency Between CRA and DA				
	CRA Principles	Abbr., Description	DA Compliance	Explanation
1	Transform Westminster	Transform into complete street that is pedestrian oriented	Unknown	Frontage improvements and new anticipated development, but MGP commitments are not guaranteed
2	Create an Eco-District	District energy, storm, wastewater, etc.	No	Planned systems and infrastructure are conventional
3	Integrate into the Context	Invest in signage, sidewalks, and entrances to tie project into surrounding region	Unknown	Planned Investments will better connect superblock to the community, but MGP commitments are not guaranteed
4	Establish a Vibrant Center	Focus activity on family play areas, restaurants, outdoor stage, and public art	Unknown	Open Space subject to MGP follow through. No guarantees new retail will include dining, family gathering, or public art. Outdoor stage not anticipated.
5	Reinvent the Sears Building	Put property in hands of owner with intent to redevelop	Unknown	Plan anticipates demo/redevelopment of Sears into housing and retail, although DA does not actually require it
6	Construct Internal Connections	Develop multiple internal ways for multi-modal interaction	Unknown	Multiple mid-block connections anticipated by DA, but no timing requirement or enforcement to construct
7	Incorporate the College	Provide educational, housing, and performance venues that add collegial vitality	No	Shoreline Community College has no anticipated presence under current plan/DA
8	Build New Homes	Establish MFTE program, add housing	Unknown	Predominant use anticipated by DA, but no requirement or timing to construct
9	Trade Surface Parking for Jobs	Build parking structure for WSDOT to free up land for film industry use	N/app	Expressly doesn't apply to the boundary contemplated by the DA
10	Add Entertainment to the Mix	Create cinema, theater, outdoor stage, restaurants, parking structure	No	Plan anticipates structured parking and restaurants but none of the other desired uses