


CITY OF CORAL GABLES

- MEMORANDUM -

TO: MAYOR & COMMISSIONERS

DATE: July 21, 2014

FROM: CARMEN OLAZABAL
INTERIM CITY MANAGER



SUBJECT: Proposed Government
Settlement

Mayor & Commissioners, please find attached an additional analysis of the proposed Settlement Agreement documents. As you will see from this analysis, as well as the staff comments attached to the City Attorney's Request for City Commission's Approval of Government Settlement dated July 8, 2014, we have numerous unresolved issues that I am concerned will not fully resolve this complex matter. Therefore, I recommend that the City Commission instruct the City Attorney and ask the attorneys for the Developer to petition the court to extend the stay order of our pending litigation for at least two or more months to allow your administration an opportunity to resolve important matters of concern.

In addition, I asked our management consultant Merrett Stierheim to review this matter and share his observations with the Commission during tomorrow's public hearing.

CO

Cc: Craig Leen, City Attorney

ASTOR SETTLEMENT AGREEMENT ANALYSIS

Development Proposal (Exhibit B) and Revised Building Permit

- Has only received a cursory review from staff. The agreement requires on July 22, 2014, that the Commission either grant, grant with modifications or reject the plans. Conceptual plans were received for review by the City Attorney on July 8, 2014.
- Astor has 90 days to prepare the alternate plans for the bigger building. The City has 60 days to review to approve or provide comments. Astor has 30 days to address comments. The City must respond to revisions within 30 days. There is not a provision for multiple comments/revisions on this large, complex project.
- Staff really cannot address all regulatory issues at the level of design that has been provided.
- According to planning, the Board of Architects has reviewed the project on June 12, 2014, but has not approved it. They were concerned with the façade along Lejeune as well as the general massing of the building. They were also concerned about the ground floor pedestrian areas.
- The proposed building area is 354,252 sf or 5.38 FAR, which exceeds what is allowed by code without a determination that such variance is appropriate. The maximum allowed is 229,974 or 3.5 FAR. The number of units allowed by code is 180, and the proposed project has 283. The allowed height on Lejeune is 72 feet, and the project proposes 110.33 feet, and the maximum height on Laguna is 100 feet, and 130.33 is proposed.
- The pedestrian arcade along Lejeune was removed to address the City's trolley operational needs. A five foot wide sidewalk remains between traffic and the building's masonry wall.
- The pedestrian paseo through the block was removed. It had lined up with other developments, and made more sense from a planning perspective.
- The code requires 18,398 sf for mixed use, and only 14,896 is provided.
- It is not clear if Fire has reviewed the plans.

The Settlement Agreement is very one-sided and could be tightened up:

- The Astor Parties continue to have numerous options to terminate in their "sole and absolute discretion" throughout the process. If Astor terminates, we return to litigation, with each party paying their own attorney fees.
- Astor can terminate if there is a legal challenge to the Commission's decision. This is even if the challenge is spurious, or easily resolved on a Motion to Dismiss.
- Astor may elect to have the City undertake defense of a challenge to the Commission's decision, and is able to terminate until the legal challenge is "fully resolved." "Fully resolved" is not defined, so presumably the Astor parties could terminate even if the City prevailed at trial, if it is still within an appeal period. This also is regardless of how much money the City has spent to defend the action.

- Astor may terminate if the City provides a material comment to their revised plans for the larger building. "Material" is not defined.
- If there is an administrative appeal of the issuance of the revised building permit for the larger building, Astor may terminate. Defense of the permit will be by Astor, if any. The City may not want to have Astor leading the defense of its administrative and regulatory processes. In addition, Astor can terminate until there is a "final resolution", again not defined.
- Notwithstanding the express time frames set forth for review of plans, the settlement agreement also provides that the City must expeditiously act upon submissions, committing "all plan reviewers" to give the plans their "highest priority" by advancing the submittals to the first position of any queue. This language is not necessary given the express time frames, and the developer should probably not be dictating the administration of the regulatory process of the City provided it meets the contractual timeframe. (Note there is some overall flexibility if the City does not use all initial 60 days, it can use the days not used on subsequent review.) Also note, there is no provision for more than one round of comments.
- Astor is paying a Settlement Amount of \$3,513,954. This Amount is for less than all the fees they are otherwise required to pay, including all building, impact and permit fees. Preliminary estimates for permitting fees would be \$2,772,131.88 for their original plans of 174 units, and \$4,021,386.24 if they are allowed to have 283 units. This is a loss of approximately \$500,000 in fees to the City if the larger building is constructed, and does not reimburse the City any of its attorney or third party costs (other than \$77,000 already paid under the original Land Exchange Agreement).
- While Astor agrees to designate \$300,000 of the settlement amount towards Art in Public Places, the agreement provides that Astor, at Astor's option, may use that \$300,000 of the Settlement Fee by incorporating works of art within the improvements of the project. It is not clear whether they will be required to follow the City's Art in Public Places process of board approvals, and if the art will be required to be in the public realm as required by the ordinance. In addition, it undermines the Art in Public Places program, which allows the City to use the funds for City art projects if a Developer elects to make the payment rather than going through the approval process prior to pulling a building permit. Normally the Art in Public Places 1% amount would not be calculated until we had firmer estimates for hard and soft costs of construction, so the \$300,000 is only a rough estimate.
- The Settlement Amount is not paid unless the City is ready to issue the Revised Building Permit for the larger building with no other condition than paying the Settlement Amount.
- In the event that the Developer exercises one of their numerous termination rights, the City has to refund to them \$300,000 of the Settlement Amount for attorney fees and third party costs incurred by the City. The City may deduct from this any amounts that have been paid or are pending payment for work-in-progress per Section 3(b)(iv) of the Land Exchange Agreement. "Work-in-

progress" is not defined. These amounts include attorney fees and third party fees during litigation. So far, no attorney fees related to the litigation incurred by the City have been reimbursed by Astor – so it is not clear if we can use costs prior to the settlement agreement against this cap. See attached excerpt for the Land Exchange Agreement language. Note, Astor was originally to pay all of the City's third party and attorney fees for the project – including normal post closing fees. Also, they were to pay \$10,000 toward staff time for the deal. In the amended Land Exchange Agreement, these provisions have been modified. It appears the \$10,000 has been removed. Also, the \$77,000 already paid is not included in the \$300,000 cap.

- In addition, if Astor terminates the Settlement Agreement, it may also see from the City portions of the Settlement Amount, which represent unearned payments for the Development Fees associated with the Development Proposal. This is a fairly broad statement, although it is to be administrated in accordance with City codes, rules and regulations.
- The Mutual Release is only effective if the City issues the Revised Building Permit for the larger building, and all appeal periods have expired with no challenge being filed. The release provides that it does not waive any claims under the settlement agreement, the amended land exchange agreement, or the declaration of condominium. Therefore, the only issues waived are those prior to issuance of building permit. We have many operational issues to resolve throughout construction – including inspection of work, operation of our trolleys, etc.

The Amended Land Exchange Agreement:

- The City will own a condominium for its trolley operations within the residential condominium project, along with 18 vehicular parking spaces in the adjacent parking garage. Planning has noted that there may be compatibility problems with the uses.
- The Declaration of Condominium has not been fully written yet. Only some main points have been included in this amendment. These include that the City may sell its unit without board approval, they may operate a trolley facility without restrictions from the Condo association, the City's use of its unit may not be deemed a nuisance to the other condo owners, and the condo association must grant access to and from the trolley parcel onto a publicly dedicated right of way. The City will be required to pay an annual condominium fee, which will be its portion of fees that directly benefit the City's unit, discounted by 50%. The City shall also be responsible for its pro rata share of special assessments for structural repairs or similar matters concerning this building and attached buildings. This all highlights the fact that there may be tension between the City and the Association, as well as other condominium units, and that the City is not in full control of its annual or special condominium assessments.
- The City is still required to complete the City Streetscape Improvements per Section 3(a)(ii) of the original LEA. (See attached excerpt). Astor remains

obligated to the Undergrounding and Off-Site Improvements (see attachment).

- The City will transfer fee ownership of the existing trolley building to Astor within 15 days of the Settlement Agreement (July 22), and will lease it back. It would be preferable to transfer the property into escrow with the City's attorney, so that in the event that the Settlement is terminated by Astor, the documents can be released from escrow, rather than relying on Astor to transfer title back to the City. Also, the lease has not been fully written (hopefully one can be fully agreed upon within the 15 days [although it is not clear how this correlates with 13(a) that says closing within 5 days of the effective date of the amendment] prior to closing on the fee ownership), only key points are included in Exhibit F.
- Exhibit F provides that the City will lease the original facility until the new unit is ready, and the City has 10 days to relocate. There is no security deposit or rent, but the City has a triple net lease, so it must pay all operating and maintenance costs for the facility, and must maintain insurance. The lease must be subordinate to Astor's loan, so if Astor defaults on their loan, the lender will be the City's landlord, and will step into the shoes of Astor. The City will have a non-disturbance agreement with Astor's lender. Exhibit F does not address any specific operational issues or coordination with construction issues. It will be a challenge for the City to operate in the original location, and in the new condo unit while Astor is constructing the rest of the project.
- Once the City's unit is ready (the first Phase of the project), they will move into the facility, and Astor may demolish the existing facility. The City will have to operate its trolley throughout construction of this project, which will be extremely challenging. Astor has to deliver the new unit within 24 months or the agreement is terminated. The deal also may be terminated if Astor has not received the Revised Building Permit within 12 months of its obtaining fee title of the existing trolley facility.
- The City has the obligation to obtain approval of the FTS for the new location.
- For the City to move to the new facility, Astor has to reach Substantial Completion, and receive a temporary certificate of occupancy.
- Astor no longer will pay the City's relocation costs.
- The City has the right, with the reasonable discretion of Astor, to affix artwork to the exterior of the Trolley condo under its art in public places program. Note, that any such artwork would not be able to use the \$300,000 allocated from this project, as Astor retained full control of that portion of the Settlement Amount.
- If the deal is terminated, Astor must re-convey title to the original trolley facility to the City, and the parties would return to litigation.
- Other than those required by State law for condominiums, Astor is not making any representations and warranties as to the construction of the Trolley Station Condo, and the City may only look to the General Contractor for warranty claims.

Building Permit for the original plans

- The Settlement Agreement requires that the City issue a conditional building permit for the original plans within 5 days of the effective date of the Settlement. This is not possible. The term “conditional building permit” is not defined, and the City does not have a conditional permit process currently. We presume staff will set the conditions.
- There are many outstanding comments on the original plans from staff that have not been resolved by Astor, as well as approvals from outside agencies such as DERM, WASA and the Health Department. Some staff concerns include compliance with the Americans with Disabilities Act, payment of impact fees, addressing structural issues, equipment enclosures, and landscape fees. According to Development Services, they believe the developer could address the comments within 30 days (structural being the most significant) and staff could review in the following 30 days.
- We have concerns that it would be irresponsible to issue a permit for plans that do not meet all staff comments, and that we could have our regulatory function questioned by the state or other certifying bodies.
- We are also concerned that all life/safety issues may not be fully vetted.
- Astor is requiring that the City issue a building permit on the original plans in case they choose to terminate the Settlement Agreement and return to the litigation. Then, if they prevail in the litigation (including any appeals), they would be able to immediately start construction. The only exigent reason to issue the permit now is for them to be able to tell their lender and contract holders that they have a permit in hand – even if it cannot be used unless the aforementioned contingencies are met.

Section 3(b)(iv) of the Land Exchange Agreement

(iv) Astor shall also reimburse the City the following costs and expenses incurred and to be incurred by the City, to wit:

- (1) A flat fee of \$10,000.00 to cover the City's costs of those City employees which have and will in the future devote time to this transaction; and
- (2) All fees and expenses of outside attorneys and third-party consultants that the City engages (collectively, the "**Reimbursable Expenses**"), in regards to the negotiation and implementation of this Agreement (including, without limitation closings and post closings matters). Astor has provided a retainer to the City in the amount of \$78,057.01 towards the payment of the Reimbursable Expenses and agrees that in no event shall the retainer drop below \$15,000.00 at any time. Astor further agrees to replenish such retainer from time to time so that there is always a retainer balance of at least \$15,000.00. It is understood and agreed that the Reimbursable Expenses shall be limited to expenses incurred by the City in connection with services required to close the transaction contemplated herein (including, without limitation, review, analysis, negotiation and/or resolution of (i) any title and survey matters, (ii) the Construction Contract, and (iii) any issues that may arise during and in connection with the construction of the Trolley Station), such as attorneys fees, architectural consulting fees, engineering consulting fees, and customary post closing expenses incurred within ninety days following Closing such as preparation of the closing binder and review of documents relating to closing conditions. Astor will be provided copies of all monthly invoices to be paid from such retainer as a courtesy to Astor. Any overage remaining in such retainer shall be returned to Astor upon conclusion of the aforesaid services of such outside attorneys and third-party consultants but in no event later than one hundred days following Closing.

(v) Lejeune shall complete the installation of the Undergrounding and Off-Site Improvements in accordance with the City Land Public Approvals (defined below). Lejeune shall be responsible for all costs of installation and permitting for all work it performs that is detailed in this paragraph.

Section 3(a) and (b) of the Land Exchange Agreement

3. Consideration.

- (a) the consideration for the conveyance of the Astor Property to City shall be:
- (i) the conveyance of the City Property to Lejeune, which benefits Astor.
 - (ii) For purposes of this paragraph, "City Streetscape Improvements" shall be defined as curb, gutter, sidewalk, and landscape improvements to the northern right-of-way of Altara Avenue east of the intersection of Laguna Street to the mid-block alley of Block 2, Industrial Section. For purposes of this paragraph, "Undergrounding" shall mean the removal of overhead utilities and the installation of underground utilities from the Merrick Manor Project boundary (located at the northwest corner of Altara Avenue and Laguna Street) along the northern right-of-way of Altara Avenue to the existing utility pole located on the west side of the mid-block alley bisecting Block 2, Industrial Section. "Off-Site Improvements" shall mean curb, gutter, sidewalk and landscape improvements to the northeast corner of Altara Avenue and Laguna Street as described in the City Land Public Approvals (defined below). The locations of the Undergrounding, City Streetscape Improvements and Off-Site Improvements are depicted in Exhibit "H" attached hereto. The City will complete the City Streetscape Improvements after both of the following improvements have been made in accordance with the City Land Public Approvals for the Merrick Manor Project, and accepted by the City:
 - a. Lejeune's completion of the Undergrounding, pursuant to Section 3(b)(v); and
 - b. Lejeune's completion of the Off-Site Improvements, pursuant to Section 3(b)(v).
- City shall be responsible for all costs of installation and permitting for all work it performs that is detailed in this subparagraph. Lejeune shall provide the City with a CD with all "as-built" construction plans in CAD format for the aforesaid Undergrounding and Off-Site Improvements.
- (b) the consideration for the conveyance of the City Property to Lejeune shall be:
- (i) the conveyance of the Astor Property to City;
 - (ii) The construction, at Astor's sole cost and expense, of a new municipal trolley car building pursuant to the Construction Plans as approved by the City pursuant to Section 18(b) hereof (the "Trolley Station") and otherwise in accordance with the terms and conditions set forth in this Agreement upon the Astor Land to be conveyed to the City.
 - (iii) Astor shall reimburse the City for all actual relocation costs of moving the trolley cars and related equipment from the City Land to the new Trolley