CITY OF FORT LAUDERDALE

Memorandum No: 18-115 **City Attorney's Office**

To: Honorable Mayor and Commissioners

From: Alain E. Boileau, Interim City Attorney
Lynn Solomon, Asst. City Attorney

Date: July 3, 2018

Re: Proposed Development Agreement with Tavistock Development Co.

In response to the City Commission's request at the first public hearing held on June 19, 2018 regarding the proposed Development Agreement between Tavistock Development Company and the TS entities (hereinafter collectively "Developer Parties") and the City of Fort Lauderdale, this memorandum is intended to provide analysis targeting the predominant legal issues of the Agreement which this office believes warrant the consideration of the City Commission, and those issues whereupon the City Commission is seeking clarification within the proposed Agreement, as well as to provide recommendations.

I. Development Agreements generally

Under Florida law, Local Government Development Agreements are permitted and encouraged by the Florida Legislature under the stated premise that:

> The lack of certainty in the approval of development can result in a waste of economic and land resources, discourage sound capital improvement planning and financing, escalate the cost of housing and development, and discourage commitment to comprehensive planning . . . Assurance to a developer that upon receipt of his or her development permit . . . he or she may proceed in accordance with existing laws and policies, subject to the conditions of a development agreement,

Furthermore, a Development Agreement:

> [S]trengthens the public planning process, encourages sound capital improvement planning and financing, assists in assuring there are adequate capital facilities for the development, encourages private participation in comprehensive planning and reduces the economic costs of development.

§163.3220(2)(a),(b), Fla.Stat. The foregoing legislative intent is "effected by authorizing local governments to enter into development agreements with developers, subject to the procedures and requirements delineated in §§163.3220 – 163.3243."

Without replicating herein the entirety of the statutory requirements for inclusion in a development agreement, as more specifically provided in §163.3227, Fla.Stat., certain general conditions merit mentioning. ***First***, the development agreement, as well as the authorized development therein must be consistent with the local government's comprehensive plan and land development regulations." §163.3231, Fla.Stat. Notably, the development agreement must contain "[a] finding that the development permitted or proposed is consistent with the local government's comprehensive plan and land development regulations."§163.3227(1)(g), Fla.Stat. ***Second***, the City's laws and policies governing the development of the land at the time of the execution of the development agreement must govern the development of the land for the duration of the development agreement." §163.3233(1), Fla.Stat. ***Third***, a development agreement can be amended or canceled by mutual consent of the parties or by their successors in interest. §163.3237, Fla.Stat.

II. Tavistock / Pier 66 Development Agreement

As expressly stated in the Development Agreement, its general purpose is: (1) "to outline the manner in which the Pier 66 Parcels will be developed and the conditions that will govern the Pier 66 Parcels' development;" (2) "to satisfy concurrency for the Pier 66 Parcels for the term" of the Agreement; and (3) "to establish the respective rights and obligations of the Developer Parties and the City."

More specifically, the following are the key principal agreements the Developer Parties seek from the City:

1. The ability to transfer development rights between the various Pier 66 parcels described and defined more fully in the Agreement. This will effectively permit the Developer Parties to share and distribute traffic flow, parking calculations, landscape, open space, signage, liquor licenses, residential density, and other densities, intensities, or uses between the parcels (i.e., to and from the north and south side of 17th Street).

2. Vesting of the currently constructed improvements and the approved but unconstructed improvements, including the allocation of 58 residential units, for purposes of water and sewer capacity and vehicle trips.

3. In the case of destruction, the ability for the Developer Parties to rebuild the current improvements and buildings, as is, whether or not they comply with the City's current ULDR's.

4. The reservation, but not the allocation, of 750 flex units prior to any site plan submission or approval.

5. The City's consent to the creation of a Community Development District ("CDD").

6. The City's agreement that it will seek a future text amendment to the landscaping requirements of its ULDR's for properties subject to CDD's.

III. Analysis and Recommendations

The following provides analysis and recommendations with regards to some key provisions of the proposed Agreement.

Sections C and D

Sections C and D identify and define the existing and approved development permits for the "Blackstone Pier 66 North Approval" and the "Sails Parcel Approval," respectively. Although the Blackstone site plan expires November 5, 2024, and the Sails site plan expires on September 23, 2021, these sections expressly provide that the City "agrees that any units allocated through site plan approval, together with any approved capacity as to trips, water and sewer and other services are hereby reserved notwithstanding that the improvements were not constructed." Normally, these units and capacities would expire with the site plan. Through this Agreement, the City is thereby agreeing to extend the units allocated, as well as trip, water and sewer capacities, and "other services," for the Sails and Blackstone development beyond their expiration dates of 2021 and 2024. The foregoing should be clarified not to include any extension of the actual site plans.

Sections E, 4.1, and 5.2

Consistent with Sections C and D, Section E also seeks to vest flex units, water and sewer capacity, and vehicle trips for the existing Pier 66 Improvements, including those allocated pursuant to the unconstructed Sails and Blackstone site plans. The Agreement should be amended to clarify that any reservation or vesting of capacity is limited to the existing development or "Vested Improvements" and does not include any future proposed development. Without a specific site plan, it is difficult, if not impossible,

for the City to project and certify adequate capacity if there is an increase in density, intensity, or use resulting from the contemplated development generally referenced in the Agreement.

Section E further provides that "to the extent that any act of god or other event causes the destruction of any of the currently constructed Vested Improvements, City agrees that they may be built or rebuilt in their current form as of the date of this Development Agreement subject only to compliance with the Florida Building Code, South Florida Edition together with Broward County Amendments in effect at the time of their reconstruction . . ." Similarly, Section 4.1 provides, in part, that "[t]o the extent that any act of god or other event causes the destruction of any of the Vested Improvements, City agrees that said improvements may be rebuilt in their current form as existed on the date of this Development Agreement and that reconstruction shall be subject only to the Florida Building Code South Florida Edition, together with any Broward County Amendments, in effect at the time of their reconstruction."

However, the foregoing may be problematic if there is more than a fifty percent (50%) destruction of a non-designated historical landmark building. Pursuant to Section 8.1 of the proposed Agreement, "Historic Designation will be sought on the exterior envelope of the tower portion of the building only, as the current building at the base of the Tower was added many years after the Tower and is not considered historic." ULDR §47-3.6(B)(3) mandates as follows:

> If more than fifty percent (50%) of the total gross floor area of the building or more than fifty percent (50%) of a structure or more than fifty percent (50%) of its replacement value is damaged, destroyed or removed for any reason the entire building, structure or use thereof shall be required to meet the ULDR.

Currently, the existing Pier 66 structures are nonconforming and do not meet the ULDR. As such, if there is 50% or more destruction of any building that does not meet the historical landmark designation exception of ULDR §47-3.6(C)[1] (which pursuant to this

[1] Section 47-3.6(C) express provides that:

> A nonconforming structure in an historic district or designated as an historic landmark, may be replaced, altered or an addition made if it meets the following criteria and is approved as part of the issuance of a certificate of appropriateness as provided in Sec. 47-24.11.C:
>
> 1. The original exterior elevations and materials of a structure are maintained; or proposed exterior elevations and material types of a structure are restored to be compatible with its historic character, according to the guidelines provided by Sec. 47-24.11.

Agreement would tentatively only be the Tower building), the remaining buildings could not, as agreed, "be rebuilt in their current form as existed on the date of this Development Agreement."

Additionally, based upon the comments and representations made at the June 19, 2018 public hearing, we recommend adding clarifying language to Section 4.1 which references improvements contemplated for the Pier 66 Parcels, including a maximum of 750 Residential Units, as well as to Section 5.2 of the Agreement, which also states that "[t]he combined Pier 66 parcels authorize a total of 750 residential units, which may be used anywhere within the Pier 66 Parcel." The foregoing sections can be drafted to more clearly establish that, as represented by counsel for the Developer Parties at the June 19 hearing, despite the payment for reservation of flex units, the City has no requirement to allocate such units, and that the Developer Parties are required to seek approval for those flex units through the regular site plan approval process.

Further clarification may also be warranted with respects to the reservation fees being paid by the Developer Parties. Section 9.2 provides that if the Developer Parties terminate the Agreement during the defined Termination Period, or upon written notice to the City, the Developer Parties are able to request a release of any of the Reserved Residential Units, and thereupon receive "a credit for any unused Reservation Fees to apply to any fees charged by the City in the future for development on the Pier 66 Parcels." It is uncertain what would occur with any unused Reservation Fees upon any other scenario, such as a default or upon the natural expiration of the Agreement.

We would also recommend the addition of the following language with regards to the payment for reservation of flex units:

> Upon payment of the fees set forth in Paragraph 9.2, the City shall reserve the flex units in favor of this Project only. However, such reservation shall not be deemed an allocation of the flex units or a guarantee that the flex units shall be available when the Developer Parties makes application. Developer Parties must apply for flex units in accordance with the City's then current policy, procedures and standards for allocation of flex units.

Lastly, the Trip Generation Use Equivalency Table and the methodology derived therefrom need further elaboration and explanation in the Agreement as it is difficult to understand and is unduly convoluted to the reader and thereby subject to confusion.

---

2. The alteration, replacement or addition will support the continuation of a structure which is determined to be in character with the original historic designation.

Moreover, it is unclear as a result for the need to amend the Table, whether the Agreement would have to be amended in conjunction with any updates to the ITE Trip General Model.

Section G-Permits from other governmental authority.

Section G specifically provides that "[t]he City has no objection to any permits and approvals issued by any other governmental authority for the Vested Improvements." Such a provision is not required under state statute for development agreements, and the City may be unnecessarily waiving its discretion to object to permits from other governmental authorities as it relates to the Vested Improvements.

Section J – Community Development District

In light of the City Auditor's Memorandum regarding CDD's, we do not discuss herein the advantages and potential disadvantages of CDD's. However, the City Commission should decide whether the City should have any involvement in the supervision of the CDD, particularly with respects to ensuring proper financing strategy and maintenance standards, or retain only its statutory role in the approval process. Currently, the Agreement provides for the City Manager or his designee to have a seat on the Board of Supervisors, representing one vote.

Notwithstanding, we do recommend some clarifying language, as well as additional language, to assuage any potential concerns that may exist with regards to the proposed creation of a CDD. ***First***, as represented by the Developer Parties' counsel at the public hearing on June 19, 2018, the Agreement does not obligate the City to create or otherwise agree to the formation of a CDD. However, the Agreement's language is arguably ambiguous on this point since it expressly provides that the "City concurs in the creation of a Community Development District . . ." and "City further agrees that it is appropriate to grant any community development districts that may hereafter be established with respect to the Pier 66 Parcels . . ." ***Second***, as previously stated, the Agreement further provides that "the City Manager or his designee may have a seat [on the CDD] representing one vote." However, based upon some of the concerns pertaining to revenue sufficiency, governance, and potential responsibility to the taxed residents, raised by the City Auditor's Memorandum, it may be more prudent to not have the City be involved or to retain any vote on the Board of Supervisors of the proposed CDD. ***Third***, we would recommend language that nothing within the Agreement is to be construed as the City pledging its full faith and credit.

Finally, if the City Commission is inclined to participate in the supervision of the CDD, the City should consider approval rights over the selection of members appointed to the Board of Supervisors based on clearly defined qualifications, skills and experience along with the Developer Parties providing satisfactory details regarding the financing plan, scope of infrastructure improvements and plans for governance and maintenance of the improvements.

Section 5.1 – Public Facilities

Section 5.1 provides, in part, that "[t]he City agrees that there are no new transportation facilities required to assure that public facilities are available concurrent with the impacts of the Pier 66 Project, and that the public facilities needed to serve the Pier 66 Project will be available from the City when needed." We recommend modifying or deleting the foregoing sentence for two primary reasons: ***First***, it is ambiguous; and ***second***, the agreement "that the public facilities needed to serve the Pier 66 Project will be available from the City when needed" is predicated upon an unspecified and uncertain future Pier 66 Project that will be subject to site plan review and approval. Such assurances are difficult, if not impossible, without site plan review.

Section 7.1.1 - Landscaping

The Developer Parties seek to include non-ground level and open air landscaping in the landscape calculations required by City's ULDR's. However, ULDR §47-21.2(25) defines landscaping as "[a]ny combination of living plants (such as grass, groundcover, shrubs, vines, hedges, palms, or trees) and non-living landscape material (such as rocks, pebbles, sand, mulch, walls, fences, or decorative paving materials installed for functional or aesthetic reasons ***at ground level and open to the sky***." (emphasis added). As a result, the Developing Parties are requesting, and the proposed Agreement provides, that the City will "propose a text amendment to the ULDR that will permit properties that are subject to a CDD to include all landscaped areas on top of parking decks, parking lot islands, ingress/egress roadways and right of way landscaped areas and rooftops in the calculations used to determine pervious areas, open space and the Developer Parties compliance with these Landscape Requirements." Importantly, the Agreement qualifies the foregoing and adequately states that "while the City agrees to process a text amendment through its normal procedures, such agreement does not guarantee that such a text amendment shall be approved and the City shall not be liable if such a text amendment fails to pass." Therefore, the Developer Parties' ability to include non-ground level and open air

landscaping in the landscape calculations is contingent on future passage of a text amendment to the applicable ULDR's by the City Commission.

Section 7.1.4 - Parking

Section 7.1.4 provides that the parking standards of the ULDR will be complied with "[u]pon final build-out and the City's issuance of the final Certificate of Occupancy for the Pier 66 Parcels . . ." Theoretically, this would permit a complete build-out of all structures on both the north and south parcels, before the Developer Parties are required to provide the parking mandated by the ULDR's. Traditionally, parking requirements would have to be met at each stage of a phased development. In this instance, the City would be agreeing to completion of parking at the end of all phases of development.

Section 12.16 - Default

We recommend the following additional language that would provide for an additional and alternate remedy after the notice and cure period delineated in Section 12.16, which would avoid premature termination: "In addition to the foregoing remedies, in the event of a default, the City may withhold issuance of any development or building permits, orders, consents or approvals related to development of all or any phase or portion of the Project until the default is cured . . . [s]uch remedy shall be binding on any transferee or successor of the Developer Parties."

Section 12.19 – Joinder and Consent

We recommend the addition of Section 12.19, regarding a joinder and consent from a holder of any existing liens or encumbrances. We propose the following language: "[a] holder of any existing liens or encumbrances on the Property shall execute and deliver in recordable form a joinder and consent, in form and content acceptable to the City, to the terms of this Development Agreement as a condition to the validity and effectiveness of this Agreement." If, for example, under the proposed scenario to create parking facilities (or any other development element), parking is not provided for the commercial and residential uses until the end of the project and if during the interim, the interest of the Developer Parties are terminated through foreclosure by a lien holder, such existing lien holder is not bound by the terms of this Development Agreement. Only liens which attach after the recording this Development Agreement in the public records of Broward County, Florida are bound by its terms and conditions. A joinder and consent would alleviate this concern.

Section 12.20 – Lack of Agency Relationship

We would also recommend the addition of Section 12.20, which provides clarity that nothing in the Agreement would create an agency relationship between the City and the Developer Parties. We propose the following language: "[n]othing herein shall be construed as establishing an agency relationship between the City and the Developer Parties and neither Developer Parties nor their successors, assigns employees, agents, contractors, subsidiaries, divisions, affiliates or guests shall be deemed agents, instrumentalities, employees or contractors of the City for any purpose thereunder, and the City, its contractors, agents and employees shall not be deemed contractors, agents or employees of Developer Parties or their subsidiaries, divisions, affiliates, successors and/or assigns."