SMCLC

Santa Monica Coalition for a Livable City

March 26, 2012

By U.S. Mail and Email
Mr. Rod Gould
City Manager, City of Santa Monica
1685 Main Street, Room 209
Santa Monica, CA 90401

Dear Mr. Gould:

The Santa Monica Coalition for a Livable City ("SMCLC") writes this letter to express our significant concerns with the draft Development Agreement ("Draft DA") for Hines' so-called Bergamot Transit Village Center Project sent to the City of Santa Monica ("City") under cover of a letter dated May 20, 2010, from Hines' Colin P. Shepherd to the City's then Planning Director Eileen Fogarty. We have seen no other Draft DA and, after making a recent inquiry, we were told that there are no others. Therefore, SMCLC makes its initial comments to this Draft DA.

Overview

The Draft DA is so one-sided on behalf of the developer and bereft of protections for the City's legitimate rights that it is embarrassing even for a first draft. Parties who send out such one-sided first drafts in negotiations typically do so hoping that by using their biased draft as a starting point in negotiations they will gain an important advantage. Unless the other side, in this case the City, is in a very weak bargaining position, it will typically reject such a first draft in its entirety and insist on creating a NEW one without any reference to the first. Since the City, in fact, is in a very STRONG bargaining position, this Draft DA should be rejected completely.

The City Is In a Very Strong Bargaining Position and Must Negotiate from Strength

In negotiating this Draft DA, it is vital that the City act with the

knowledge that it is in a very strong bargaining position. Development in Santa Monica is and should be coveted, and needs to be limited and controlled to ensure the quality of life and experience for those who live, work and visit here. Santa Monica is unique and a prime location, much sought after. The City and its staff must understand this and do what is best for its residents. Developers have tremendous resources and will look after themselves. Residents look to the staff and the City to be tough in negotiations and protect them.

We discuss below just SOME of the places in the Draft DA that exemplify its fatal deficiencies. Using Development Agreements time and again in place of zoning and area and regional plans, as the City seems bent on doing, is an inferior and piecemeal way to plan, and one which greatly favors the developer. Placing this massive Project in the heart of the gridlocked 26th Street and Olympic traffic corridors, before any area and regional plans are in place, is city planning at its worst.

SMCLC opposes the use of a DA for this Project and this Memo is written without waiving any rights whatsoever in law or equity, as to that strongly held position.

Hines' Obligations Are Ephemeral On Key Points; The Draft DA Ties the City's Hands for 20 Years

Ø One of the issues which is most striking with the Draft DA is how the City is repeatedly locked in and legally bound on vital points while Hines' seeming agreements and obligations are often completely and totally ephemeral.

Ø Hines' "right to develop" the Project is vested. This vested right is for a minimum of 15 years, which can be extended to 18 years and ground does not have to be broken for 20 years. (*e.g.*, Para. 3.1)

Ø The City specifically "has no further discretion." (*e.g.*, 3.1(d))

Ø Hines, on the other hand, can decide not to develop the project at all. Or, it can develop it in phases "in its [Hines'] sole and absolute discretion." Indeed, Hines specifically has "no obligation to develop"

or construct the Project "or any portion thereof." (*e.g.*, 3.1(c); 3.3)

Ø Adding to the practical possibility of phased development, or no development of parts of the site, is Hines' admission that it is considering the possibility of separate financing for each building and for obtaining subdivision approval. (2.7)

Ø Moreover, for this Project the Draft DA purports to nullify any change in Santa Monica codes that would limit the rate or timing of its development or sequencing of phases. (6.4) It further holds that the project shall at times be governed by existing regulations, notwithstanding that they may change over the next 5, 10, or 20 years and before the Project is built. (1.23; Article 6)

Ø What does all this mean? Many things, and unfortunately, none of them are good for Santa Monica:

§ Hines would be within its rights to build just the largely commercial buildings and not the residential.

§ Hines could build the commercial now and the residential in 5, 10, 15 years or more.

§ Hines could decide not to build anything now and wait to see what the market is like in the future (as for example, what happened with the Civic Center Village Project), all the time retaining its "vested rights" to build.

§ The City and those who might want to see more beneficial projects on the Project site and in the surrounding area might be precluded from having them because the City must factor in all of the negative traffic impacts of the Hines Project in determining what else can be built in the area. This would also hold true for surrounding communities.

§ While the calculus in deciding on development in the area could alter over time--for example future decisions based on future traffic--the City would be bound for 5, 10, indeed 15-20 years with "no further discretion."

§ It's a bad deal for the City and its residents, even if the Project were

desirable and made Santa Monica more livable. It is, however, a great deal for Hines. The time period must be drastically reduced. Moreover, the developer must build the housing element at the same time as, or before, any other part of the project.

The Proposed Public Benefits Are Woefully Insufficient and Cannot be Used to Justify Approval of this Project

Most all of the benefits listed in the Draft DA are already required by code or are tenant inducements to maximize rental income. They are not considered, nor does the City consider them to be community benefits that would enable a project to exceed existing zoning. The remainder, as discussed in the following sections are ephemeral as drafted and therefore cannot be construed as conferring real public benefits justifying the massive proposed project.

The Traffic Demand Measures ("TDM") Are Mere Aspirations with Little or No Enforceability that Will End When the Draft DA Term Ends

The LUCE establishes "a bold goal" of no net new evening peak hour trips. (LUCE, p. 4.10-11.) The LUCE promises that the City will "[m]eet our own regional responsibility by reducing our own vehicle trips to the greatest extent practical, with the goal of No Net New Evening Peak Period Vehicle Trips." (Id., at p. 4.0-10.) To achieve this, the LUCE promises that "[f]or every new vehicle trip generated in Santa Monica — either as an origin or destination — the City commits to eliminating an existing trip by providing current residents and employees with better transportation choices." (Id., at p. 4.0-11.)

The LUCE states that the City will require strong TDM requirements and "keep closer track of program results," to generate the trip reductions it requires in order to permit new development to take place while meeting the "no net new trip" goal. (Ibid.) The LUCE specifically states that the Bergamot Transit Village area "offer[s] significant potential for further trip reduction," and thus the LUCE has "a higher goal for demand management." (Id., at p. 4.0-58.) The LUCE has specific policies designed to achieve this goal, including the imposition of TDM requirements (T19.2), the encouragement of local-serving retail uses (T19.5), and the use of LUCE performance standards to govern TDM programs (T21.3). (See LUCE, pp. 4.0-63-

64.)

Ø Notwithstanding this, the City's TDM measures in the Draft DA are shockingly vague and unenforceable. There are no penalties, and no enforceable consequences that follow, for the developer's failure to meet specific traffic reduction goals; nor is it in breach of the draft DA for any failure, year after year to meet them.

Ø All that Hines or its successor has to do is collect data and attend city workshops to work towards compliance in "good faith."

Ø Additionally, even this inadequate and largely unenforceable "commitment" expires at the Term of the DA.

Ø LUCE requires a real program to obtain no new net p.m. trips that achieves the goals, that has measurable results, and that is enforceable to achieve the targeted goals.

Ø This is all greatly compounded by the traffic studies in the DEIR which demonstrate that the Project and Alternative Three have massive, non-mitigatable traffic impacts and would add over 8,000 daily vehicle trips. Taken together, these figures would conflict with TDM requirements in the LUCE and cannot be reconciled with LUCE.

Ø The Draft DA;s recitation that the Project is consistent with LUCE is incorrect.

The Draft DA Must Include Calculation of the Transportation Impact Mitigation Fees and Their Use

At long last, the City apparently is going to enforce a law on its books since 1991 – the requirement that developers pay a traffic impact mitigation fee tied to the impacts impact generated by their projects. (SMMC Section 9.16.050(b) Developer Transportation fee, Commercial development). http://www.smdp.com/pdf/092508.pdf (9/25/08 "Dropping the Ball - City staff to study if millions in fees should have been collected.")

SMCLC raised the City's ongoing failure to enforce this fee on development projects with the City Council 3 ½ years ago.

Afterwards, the City commissioned a nexus study, which finally has been completed, and includes fees of up to $30/sq. ft. depending on the use involved.

Ø The DA must include a calculation of the fee and also specify that the developer must pay the fee in full before an occupancy permit can be issued, as required by Santa Monica law.

Ø Since this is a Traffic Impact Mitigation Fee, the DA should also state how the fees will be used, when and where they will be used and exactly what traffic mitigations they will be used for in or around the Project area.

Ø The DA must also make clear that the fee is not in lieu of all of the other Traffic Demand Management Measures and requirements of LUCE, and the public benefits and other required fees that the developer must otherwise pay for.

The Project Is Not Consistent with LUCE as to Housing and the Housing is Also Ephemeral

Ø The Project is not consistent with LUCE contrary to what the Draft DA specifically states. ("B" on p. 4) LUCE calls for housing to be 40% of the Bergamot Transit "Village" District ("BTVD"), while the Project plans, if fully built out, would be only 29% housing on its site -- a very significant 27.5% shortfall.

Ø Hines contends that the figure is higher than 29% because it should somehow be given "credit" for the existing manufacturing buildings on the site. This is incorrect and finds no support whatsoever in the LUCE. (No one, not the City nor Hines has been able to pinpoint any language in LUCE justifying such an offset). This plant has long been empty and will be demolished and replaced with five very large, new buildings with heights of up to 81 feet. Rather, LUCE encourages correction of the jobs/housing imbalance through the required housing to commercial ratio.

Ø Given that the Draft DA seemingly permits Hines to only partially develop the project in its "sole and absolute discretion," and at any time over 15-20 years, while the City gives up its discretion, Hines' Draft DA would permit it to develop much less than even the deficient 29% housing (or any higher figure in a reconfigured project). It could decide to develop commercial only, or commercial now and

residential later, and the City and its residents would bear the burden.

Ø Another scenario could happen, as it did in two other recent projects (St. John's Hospital Project and the Civic Center Village Project). In both cases, the length of the leases allowed the developers to later come back to the City and renegotiate an even better deal; in one case (St. John's) not building the underground parking facility at all, and in the other (Civic Center) threatening not to build the housing project unless it received further concessions. In short, the City has already fallen for such a gimmick and caved to developers' later demands. It must not fall for it again.

Ø Instead of 29% or even 40% housing, given the lack of housing in this District, the housing figure for this project should be well over 50%, with the overall project reduced in size due to the serious traffic impacts disclosed in the DEIR as to the Project and Alternative Three, the under-studied and so-called "Residential" Alternative.

The Draft's "Workforce Housing" Terms Are Window Dressing and Do Not Constitute a Public Benefit

As to workforce housing, the Draft DA does not provide for a single unit to be set aside exclusively for workforce housing, any reduction in rent for city workers or even a period of time where housing is only available to city workers. All that is proposed is an unspecified marketing plan (which one would expect in any event), and apartments that apparently are generally not sized for families or couples. The housing appears sized mainly for a relatively short-term population that will not create an ongoing Santa Monica neighborhood or community of stakeholders.

Ø The Draft DA discusses "workforce housing," making it appear that Hines' Project will really be a meaningful part of housing for City workers and those living near the Project. But this too is ephemeral.

Ø No housing will be set aside for such workers. Not a single unit. (1.60)

Ø No price adjustment or income level test shall apply. Many City

workers or first responders could not afford the housing in the Project. Those with families with children or partners could not live in the small-sized apartments as projected for most of this Project. (1.60) It appears that many or most are aimed at short-term leases with frequent turnover.

Ø There is not even an exclusive period when only City workers can apply before others.

Ø Under the guise of providing "workforce housing," Hines will claim it is a good corporate citizen, while limiting its obligations to a routine marketing program that would be expected of a landlord and which confers no benefit to Santa Monicans or reductions in traffic. To use the loaded term "workforce housing" is little more than a crafty turn of phrase.

"Creative Art Uses" is a Misnomer and Without Teeth

In the Draft DA the definition of "creative office" is so broad it defeats its purpose. Significantly, it encompasses any and all "ancillary," "supportive" or "related" uses. For instance, "creative office" uses include "entertainment related professional services," "creation/manufacturing/distribution of biotechnology," "software production or distribution and other computer-related or technology facilities," "research and development activities for medical testing, technology industries, clean energy, 'green' technologies or industries, and other emerging technologies or industries," "child care centers, health clubs, and gymnasiums," and "all uses relating to, ancillary to and supportive of," all the listed uses.

Ø The Project is promoted as a place for "Creative Art Uses," a positive sounding take on the project, but the Draft DA fails to deliver on this.

Ø There is no actual requirement that the Project can only be used, exclusively, for so-called Creative Uses as to its office space.

Ø The Draft DA uses the extremely loose language that Permitted Uses "generally include…" (2.3(b)) As described above, this non-exclusive Creative Uses definition itself is written extremely expansively (including "all uses relating to, ancillary to and supportive of" a laundry list of uses.) (Exh. L) It is hard to think of too many uses that the developer would argue do not fit this definition. As times change,

and the market changes, Hines or its successor owner, would argue that it can rent to whomever it wishes. Indeed, given that the market changes over time and sometimes quickly, and since the Project can be built over the next number of years, that may happen as soon as the project is built.

Ø Moreover, even if there were a binding exclusive agreement on Uses it would terminate at the **end** of the Term of the Agreement under the Draft DA. (9.1(c)) (The same would happen, by the way, with all sorts of other parts of the Agreement not specifically provided to continue beyond the Term. Given the interplay of a number of provisions, it is possible that the Term would end upon the completion of the building of the project or soon thereafter.)

Ø Finally, importantly, and as discussed elsewhere, there is no real enforcement in the Draft DA if the landlord were to enter into a third-party lease agreement with a tenant who lacks any conceivable connection to Creative Use during the Term. Thus, the term "creative art uses," is aspirational at best.

Parking Is Also Ephemeral

Ø At first it appears that Hines will build 2,000 parking spaces below ground at the very time the Project is first built. (2.2.iv)

Ø At closer review, however, there are a number of provisions that grant Hines considerable wiggle room and the ability to circumvent this. Of course, without sufficient on-site parking, tenants and customers of the site's businesses and residences will look to the neighborhood to park in greater number than they would otherwise, including to avoid the cost of parking on-site. Moreover, depending on where the parking actually is—if it ever comes into being—it might differently impact traffic, streets, neighborhoods and the environment.

Ø Among the relevant provisions is that Hines can instead of on-site parking, provide "off-site parking" in its "sole and absolute discretion." (2.2iv)

Ø Hines can thus build the Project without any or only some of the 2,000 parking spots underground. Instead, it can provide "off-site" spots in "reasonable proximity of the Project," whatever that means. And, the

spots have to be only on a "long-term basis," whatever that means. What happens after the "long term" or if there is a default in the third-party parking agreement or the agreement in some other way fails or ends? It is obviously extremely difficult to build underground parking after the building is up. Is this another situation similar to St. John's Hospital where the Hospital did not build the required parking and the City let them off the hook from their signed promise and agreement? Will the City again fall for this gimmick? Why?

Ø Not building on-site parking and not building parking spaces in sufficient numbers (for example if the 2,000 spaces were significantly reduced) would also seriously impact the shared parking spaces for the Expo line. Either of these could also result in those hunting for parking to circle around, increasing the environmental impacts as to increased traffic and pollution. It could also reduce use of the Expo line.

Ø Moreover, the language of the provision in the Draft DA only requires Hines to obtain a building permit for the parking, not actually build the parking first. Nor does it require that the parking area, if built, be exclusively for parking use in perpetuity.

Ø This Provision, as with others, apparently ends with the "Term" of the DA. What happens afterwards is also apparently up to the owner, with unknown impacts on traffic, congestion and parking.

The Remedies and Default Provisions Are Inadequate

Ø The Remedies and Default provisions are written to limit the City and provide unfair advantage to Hines. The City's rights and remedies need to be expanded. The City needs the ability to act more quickly in case of a material default by Hines.

Ø "Material" needs to replace "good faith" in these provisions, as lack of good faith can be difficult to prove and what is critical is whether the breach is "material." "Material" needs to be broadly defined for the protection of the City and its residents.

Ø The City and its residents need to retain all rights and remedies available under law or equity. The City needs to be able to order a

cessation of the Project if it deems that a material breach has occurred and is not promptly cured or is not reasonably capable of cure. (11)

Ø Given the City's extremely poor history of enforcement of DA terms, and indeed, lack of monitoring of DAs, residents need to be given full, specific contractual rights in the DA to bring legal actions in case of default or material breach if the City first fails to act.

The Compliance Reports Need to Be Made Real and Effective

Ø What is to be included in Hines' "compliance report" needs to be delineated in the DA in some detail, along with what constitutes the required supporting evidence. The reports cannot be limited to conclusions of compliance, but must contain sufficient detailed backup for each provision such that the reviewer and the public can fully and independently review compliance or non-compliance with each provision.

Ø These reports and backup should be made available immediately to the public online given the City's dismal record of repeated failures to enforce or even review compliance by developers with DAs until very recently and now only for a brief period.

Ø The City needs to be able to require prompt production of further information, both written and verbal, and additional "compliance reports" if it deems it advisable, all of which should also be made available immediately to the public online. (11) If the City fails to so request, residents should have the contractual right in the DA to seek further information in court if the report contains insufficient information.

The Notice of Default Provisions Is Unfair to the City

Ø A 10-business day period for the City to deliver a notice of default after full knowledge of the default is too short and needs to be at least one year, expanded by any period needed to obtain further information or hold a hearing at which Hines or its successor would be obligated, pursuant to contractual terms in the DA, to appear and answer questions. Non-curable defaults need a separate track. The

developer's time to cure any default needs to be shortened. (11)

The Provisions Should Not End at the "Term"

Ø Many of the provisions should extend beyond the Term, but do not. Provisions should continue after the Term unless specifically permitted to end at the Term, not the opposite as proposed in this Draft DA.

Ø If provisions end at the Term, much of even this weak Draft DA expires, and with it the developer's obligations and the few rights the City has.

Other Provisions Are Also Inadequate and Unfair and Should Be Revised

Ø It is unclear whether the overall size or height of the Project for Residential Uses would constitute a Minor or Major Modification. It seems it would be a Major Modification, but compare 3.2(a) with (b).

Ø As the Draft DA now reads, Hines can sell, transfer or assign this Property or "any portion," as well as the rights and obligations under the DA (while releasing its own obligations), to anyone it wishes to as long as the City is notified. Giving Hines or its successor carte blanche to make this selection would be an abdication by the City.

Ø This project must not go forward without Santa Monicans being assured of who the developer will even be. For example, Santa Monica has had previous experience with a developer who failed to pay the in-lieu fees to build any affordable housing after first building market rate housing and then leaving the country. Under the Draft DA, Hines can turn around and transfer ownership to anyone, and the City then must "look solely" to the new owner for compliance. The City should have the right to reject any sale, transfer, or assignation for good cause upon receiving full information about the buyer and the terms of the deal, and to hold hearings if it deems appropriate. Similarly, the developer's unfettered right to encumber the Property could negatively impact the City. (13)

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Conclusion

For all of the reasons indicated, as well as others, the City should reject the Draft DA and insist on a new first draft, one that the City drafts itself.

These comments are made without waiving any rights. It is our position that a project at this site must first await an area and regional plan, and be greatly reduced in size, mass and traffic impacts based upon the DEIR.

Sincerely,

Diana Gordon

Cc: Marsha Moutrie

David Martin

City Council

SMCLC

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