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MEMORANDUM

To: Council, City of Takoma Park

Via: Brian Kenner, City Manager

From: Susan Silber and Linda S. Perlman, City Attorneys

Subject: Takoma Junction Development Proposals

Date: May 29, 2014

On January 22, 2014, the City of Takoma Park issued a Request for Proposals (“RFP”) soliciting proposals for the development of the Takoma Junction site with a commercial or mixed use project. The submission deadline for proposals is May 28, 2014, at 4:30 pm.

Please note also that the technical evaluation of proposals and preliminary negotiations are to be carried out by the City Manager and City staff, not by the Council. This technical review will include evaluating the overall feasibility of the proposed project; assessing the experience of the development team in previous projects of similar size and scope; and reviewing the developer’s financing structure and resources to execute the proposed project at Takoma Junction. During this technical evaluation process, it is important for Councilmembers to avoid any appearance that he or she favors or opposes any particular development proposal or developer.

In particular, Councilmembers are cautioned to avoid individual discussions or meetings with potential developers about the Takoma Junction site development, as such individual Councilmember action could prejudice the City’s negotiation and selection process. Councilmembers should expect to be lobbied by developers seeking the support of the Councilmember for their particular development proposal. If approached by a developer who has submitted a proposal, we recommend that the Councilmember inform the developer that City staff is in the process of evaluating the Takoma Junction site development proposals and that it would be unfair and prejudicial to the selection process for the Councilmember to receive outside information relating to a specific development proposal.

Here, it is the Council who will be selecting a development proposal and making the contract award. Premature disclosure of the details of an individual developer’s proposal for the Takoma Junction site and/or discussion of the pros and cons of a specific development proposal is unfair to other developers who have submitted proposals. It also may create the appearance that the Councilmember has a bias and/or will be basing his or her selection decision on criteria not set forth in the RFP.¹

¹ Takoma Junction Site Development Proposals will be evaluated on the following criteria: A. Overall Vision and Concept 50%; B. Ability to Implement 25%; and Financing Structure 25%.

In addition, the RFP states that the successful developer will be required to warrant and represent that no employee or official of the City, or his or her immediate family member, is directly or indirectly financially interested in the Takoma Junction development. *See also Takoma Park Code §7.12.030² & Chapter 3.04 (Ethics).*

Councilmembers should be careful to avoid conflicts of interest or creating the appearance of a conflict of interest in connection with the Takoma Junction development. Generally, the Ethics Chapter prohibits City officials from accepting gifts from persons bidding on a City contract. Although the Ethics Chapter allows City officials to accept certain categories of gifts from persons seeking City contracts (e.g., meals consumed in the presence of the donor, and food, travel, and lodging in return for a speaking engagement), such gifts are prohibited when it would tend to influence the official, create the appearance that it would influence the official, or reasonably appear to be intended to influence the person. Therefore, even seemingly permissible gifts, such as having dinner with a representative of a developer at the developer's expense, may give rise to an ethics complaint.³

According to the process outlined in the RFP, following City staff's technical evaluation of proposals, selected developers will be invited to present their proposals to the community. After such presentation, the Council will review the proposals and select a developer/make a contract award. Proposals then will be made available for public review (with the possible exception of any information contained in a proposal that the developer has identified as proprietary, a trade secret or confidential).

If the guidelines for Councilmembers, as set forth in this Memorandum, are not followed, then the potential consequences might include a bid protest or legal action by one or more of the unsuccessful developers, a perception that the City did not fairly deal with the developers who submitted proposals for the Takoma Junction site development, and/or a delay in implementation of the Takoma Junction site development project.

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² 7.12.030 Ethics of City officers and employees—Violations of competitive bidding regulations declared misdemeanor.

A. The provisions of Chapter 3.04, Ethics, shall be applicable to this chapter.

B. In addition to the provisions of Chapter 3.04, no contract shall be let or awarded in which any official or employee of the City is financially interested and through which the official or employee may individually profit financially, nor shall any official or employee of the City, in any capacity whatsoever, represent any person where such representation involves an appearance before the City Council or before any department of the City. Any contract in violation of the provisions of this subsection shall be void, and any person responsible for the making of a contract in willful violation of the provisions of this subsection shall be guilty of a misdemeanor.

³ "Permissible" gifts from bidders, such as meals consumed in the presence of the donor, still must be reported on Councilmembers' annual financial disclosure statements if they exceed \$20.00 in value or if a series of gifts exceeds \$100.00.