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MEMORANDUM

TO: **Members of the City Council (P&D/COTW)**

FROM: **Andrew R. Port, Director of Planning & Development**

CC: **Sean R. Reardon, MAYOR**

RE: **Update Regarding ODNC164_10_30_2023**
Zoning Amendment Global R3 Multi-Family (COTW)

DATE: **February 8, 2024**

The purpose of this memorandum is to provide a brief response to several questions or concerns that have been raised regarding the above referenced matter, either at or since the Planning and Development (P&D) Committee meeting held this week. That meeting concluded with a unanimous committee recommendation to bring this zoning amendment out of committee for a Council vote Monday night. I will be in attendance and also understand that our City Solicitor, Karis North from MHTL, will be available on Zoom should there be any questions for her in relation to this matter. Please note that the following responses are informed by my exchange with Karis regarding a few particulars. Primarily in the interest of time, I am summarizing the salient points here, but she can elaborate or speak to these areas further if desired/requested Monday night.

Deadline for Council Action

Pursuant to the Zoning Act the Council has until Tuesday (2/13/2024) to vote on the proposed zoning amendment (*i.e. 90 days since the closed joint public hearing*). We are approaching this deadline primarily because it took longer than anticipated to secure the Global agreement relative to a deed restriction for residential use only. After speaking with Karis, we both agree and recommend that if the Council wishes to adopt the proposed zoning amendment, it should do so at Monday night's meeting (2/12/2024) using a waiver of rules to address the Council's now conflicting requirement that the same matter also be voted a second time ("*second reading*") at the subsequent Council meeting on 2/26/2024. While an argument could be made that the Council acted on first reading at the 2/12 meeting, within the 90-day statutory timeframe (*thus still reasonably "informed" by the Planning Board's advisory report, as intended by the statute*) we recommend that the entire Council adoption process be completed within the 90-day timeframe.

Process for Review and Approval of Development Agreements

While a Development Agreement (DA) was executed between the Mayor and local developer in advance of Council review of the proposed zoning change(s), this was in no way intended to diminish the role and authority of the Council to adopt or reject proposed zoning amendments. The City Council still ultimately determines whether or not to adopt proposed zoning ordinances or amendments. Rather, all parties are looking to ensure the best

possible outcome for residential development at the so-called "Global" gas station site at the intersection of State Street and High Street. The terms of the DA, and the more recent Agreement with Global, are merely intended to memorialize minimum standards for the nature and scope of development at this site as a *first* "layer of protection" for the City and abutters.

There is an "order of magnitude" difference between the scope of a DA appropriate for this project and site (*smaller and less complicated*) as compared to "Waterfront West." I would anticipate significantly more Council involvement to reach a mutually agreeable arrangement on the terms for overall development there. Having said that, Karis herself reviewed the form of the DA and confirmed that the Mayor has sufficient authority to execute such an agreement. While these agreements may have commitments or contingencies identified on the City or developer side, this does not override the Council's definitive authority to either adopt or reject the zoning amendment contemplated therein. Accordingly, Section 6 of the DA specifically acknowledges this.

The DA with Grossi, and the related agreement with Global, both function as contracts with various terms and limited scope, rather than a real estate conveyance per se. As such, while a Council vote is required to accept a property Deed, Easement, Preservation Restriction (PR) or Conservation Restriction (CR), and the Global agreement includes *reference* to a pending deed restriction (*to allow only residential uses*), the City is not holding the subject restriction. The developer is simply agreeing to place the restriction on record, as requested by some of the abutters, if the Council also adopts the zoning amendment both Grossi and Global believe are necessary to facilitate the desired residential redevelopment of this site.

While the Mayor could consider approving changes to the DA or agreement with Global, again, this latitude does not and cannot unilaterally limit the authority retained by the City Council relative to the adoption of zoning ordinances or otherwise. The Executive and Legislative Branches are still "staying within their lanes" as it were. Contingent agreements are just that. In this instance, while the related agreements point to the same draft zoning change, with "*if this then that*" commitments, the zoning amendment itself is still squarely in front of the City Council. If the Council wishes to reject the arrangement presented, an alternative path can be proposed. However, it is not clear if an alternative approach to zoning changes, or an extended timeframe for all parties involved, would produce any better outcome. At the P&D meeting earlier this week, there did not appear to be any substantive objections to the underlying development plan represented within the DA, and which is the basis for terms agreed to by the parties to this point.

I defer any remaining debate over the process for future Development Agreements to the Executive and Legislative branches, respectively. We will continue to assist as necessary, irrespective of the preferred process.

Multiple Constraints & Layers of Protection

Added to terms outlined in the DA are other layers of protection in the City's favor, including: (a) the recently obtained Agreement from Global to impose a deed restriction for residential use, pending Council adoption of the zoning change which contains two elements necessary to facilitate a viable residential development for this site; and (b) subsequent review of detailed project plans by the Zoning Board of Appeals (ZBA).

Discretionary Special Permit Approval Required for Multifamily Use

Please note that the use in question (*four units is considered "multifamily"*) is only permitted via a *discretionary* Special Permit. Neither the use, nor allowance of multiple structures (*in lieu of a single larger massing*) would be permitted "as of right." Aside from any parameters defined within the DA, the ZBA will have adequate time and opportunity to address any concerns, whether as expressed by abutters or board members themselves, through the review of more detailed building elevations and plans for the site. The Board is also able to require consultant

"peer review" if it feels that additional resources are required to evaluate what is submitted by the developer. The cost associated with any such review would be paid for by the applicant.

Alternative Approaches to Rezoning Suggested this Week

Suggested Alternative One – Creating a Small Overlay District

Generally speaking, a small zoning or overlay district could be justified, without running afoul of "spot zoning" (*even one covering just two parcels, like the Brown School Overlay District*) where there is a reasonable basis for distinguishing the subject property from surrounding area. While an overlay district for the subject property could be considered in the alternative, as suggested Tuesday night, and need not be considered "spot zoning," it is not clear that this level of complexity, or an entirely new approach, and longer process for all parties involved, is necessary to ensure the desired outcome for redevelopment of this site. In either event, changing the Council's desired approach to an overlay district which is unique to this lot would undoubtedly necessitate a new joint public hearing with the Planning Board, given the substantive change in scope.

Suggested Alternative Two – Using Two Definitions for Multifamily Use

At the P&D meeting this week, it was also suggested that the Council may wish to address the notion of "unintended consequences" by limiting the scope of the change to our "multifamily" definition such that it applies only within the R3 District. Both the Director of Planning and Zoning Administrator recommend against this unusual suggestion. This would likely cause confusion for anyone looking for clarity in our already long and complicated ordinances. Having different definitions here, with finer grain details for one or more districts, would seem to bring unnecessary complexity into our baseline "Table of Uses," and without sufficient rationale for having different requirements between those districts. After further discussion, neither Karis nor I consider such a "floor amendment" (*i.e. facilitating the use of two definitions, one applying to the R3 District only*) to trigger the threshold necessitating a new joint public hearing with the Planning Board. This is largely because the scope of the change would be a reduction in impact rather than an enlargement of impact or scope, which might be of greater concern. Having said this, we strongly recommend against this approach, absent a better articulated rationale.

Claims of "Spot Zoning"

Consistent with comments earlier herein, reverting the subject Global parcels back to the R3 designation they had just a few years ago – consistent with the other three corners of this intersection – is in no way "spot zoning." Relevant case law can substantiate this.

Appropriate Zoning Designation for the Subject Parcels

It has been suggested that reverting the subject Global parcels back to the R3 designation , which they had just a few years ago, would be inconsistent with the purposes of the High Street Residential District within which they are now located. While I was not the author or sponsor of the subject High Street Residential District, I disagree with suggestion that the zoning map change here would be inconsistent with the intent of this zoning district. The High Street Residential Districts were established primarily to protect larger estate size lots along High Street from further subdivision or development. This small corner lot is in no way representative of those larger lots which extend back from High Street further to the east. In fact, this lot is so much smaller than the minimum area required in the District (*roughly one third*) that it is now effectively dimensionally ineligible for even a single family home. For this reason, I question whether this lot should have originally been included within the High Street Residential District, and believe the R3 designation to be more appropriate in context. Please consider the form of development on the other three corners of this intersection. From a land use and urban design perspective, I

believe these are more appropriate reference points for the scale and form of development which would be appropriate and reasonable for this site. Resident Jim McCarthy, a former Planning Board Chair, addressed this point well during public comment at the P&D meeting this week.

Origins, Purpose & Benefits of Proposed Zoning Change(s) and Potential "Unintended Consequences"

It is understandable that zoning changes brought forward in parallel with a specific development project may cause some skepticism regarding the origins, purpose, benefits and beneficiaries of such changes. However, this does not necessarily mean that the proposed change is without merit. In fact, it is not uncommon for problems with zoning regulations to be identified or illustrated through consideration of specific development concepts and reviewing how any existing regulations would apply.

I can assure you that we did not consider the proposed use definition change only in relation to the Global site. While the development team did identify problems with the High Street Residential District that would preclude viable residential development of the site at present, and suggested that both elements of the pending amendment would be necessary in some format to facilitate a viable residential redevelopment of this property, we conducted our own evaluation of the potential pros and cons to making such changes. We believe that both the zoning map change for this lot, and the change to allow smaller structures rather than mandating larger ones, are beneficial to the City overall.

I do not view the pending zoning amendment as something that has the potential to adversely encourage density or "infill" in our denser neighborhoods so much as it allows the **architectural massing** on any given **individual site** to be **broken up**. This is often an urban design "best practice." Putting the developer aside entirely for a moment, why preclude our own permitting boards from considering a better architectural massing plan for a given site "in context"?

Zoning Ordinances and maps are not static land use regulations. They are constantly evolving through amendments and additions based on the ebb and flow of community needs and preferences. No set of regulations can possibly anticipate every scenario or permutation we might encounter in a community with land uses and property configurations as diverse as Newburyport. It is important to balance any appropriate rigid requirements with simplicity, clarity, efficiency and streamlining of overall processes. A substantial portion of development or "infill" in Newburyport triggers some form of board review (*Planning Board or ZBA*). As such, while it is understandable that abutters may want a rigorous review of proposed development plans, I continue to think that the project and plans we have before us now would facilitate a positive and welcome change to conditions at the Global site for the immediate abutters, neighborhood, and community at large. Additionally, allowing our boards to consider smaller massing of structures seems to me a logical and beneficial latitude (*not so much for developers as for our volunteer boards, in their capacity to ensure the protection of Newburyport's relative scale and community character*). If you have not already done so I encourage you to review the Planning Board's advisory report and recommendation for adoption of the proposed zoning change "as amended in committee." The Board did consider the relationship between this amendment and Section VI-C as well as other factors, and ultimately recommended adoption of the proposed zoning change late last year. The Office of Planning & Development also respectfully recommends adoption of the version "as amended in committee."