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MEMORANDUM

To: Burlington City Council
Parks, Arts and Culture Committee

From: David G. White

Date: October 21, 2010

Re: Outline Development Agreement and Lease Terms

This memorandum provides an outline of some of the key proposed terms of the lease and development agreements for the prospective tenants of the Moran Center. The agreements will vary to some degree for each tenant due to their specific needs and circumstances. The negotiations are in progress and some of the terms are not yet final, so there will undoubtedly be variations from this outline.

It may be useful to understand the overall project schedule as you read this memo. What follows is an ideal schedule. In any development project such as Moran there are innumerable factors that could cause delays. But what follows is the approximate schedule as I currently envision it.

It is my hope that we can complete negotiations on the development agreements and leases by the end of November and that the tenants' boards will approve the agreements by the end of December. This will allow City Council approval and final execution by the end of January.

Following execution of the development agreements, between February 1st and April 15th each party will proceed with any remaining "due diligence" research, analysis and project planning it may deem necessary or prudent. For the City this will be the period during which it will seek construction bids for the Moran Project and Waterfront North and firm up its preliminary financing commitments. For the Community Sailing Center this will be the period during which it will conduct the "feasibility study" of its capital fundraising campaign. Ice Factor will do final business planning and finalize its financing.

At the end of this period, on or about April 15th, each party will report on the results of the tasks it has undertaken and whether all contingencies have been fulfilled. If all such contingencies have been fulfilled the project will proceed as specified by the terms of the development agreements. However, if one or more material contingency has not been fulfilled (for example if construction pricing comes in too high, or one or more tenant fails to obtain its minimum required financing) we will evaluate the circumstances to determine whether the project remains viable, whether it needs any substantial modification or delay, or other adjustment. If any such change requires amending the agreements, we will bring it back to the City Council for review and approval.

If all material contingencies are either fulfilled or waived by the affected party, the City will issue a notice of its "Intent to Proceed". In turn, this will lead to closing on the City's Project Financing 30 to 90 days later. The Intent to Proceed notice will specify what actions are expected of each tenant prior to or concurrent with closing. The notice will allow a certain time period for each tenant to respond and either (a) accept and agree to the terms of the Intent to Proceed or (b) indicate that it is not prepared to proceed and provide the specific reasons for requiring any delay or rescheduling of the closing. In the event that a tenant accepts the Intent to Proceed, it shall, on or before the scheduled closing date, execute the lease and complete the actions set forth in the Intent to Proceed that are required of it. In the event that a tenant objects to the Intent to Proceed, it will be obligated to cooperate with the City and use its good faith efforts to satisfy any conditions that may be required in order for it to accept the Intent to Proceed. If any such objections are so provided, the City may, when it believes such conditions have been satisfied, resubmit an Intent to Proceed.

One of the conditions of closing required of each tenant is expected to be a substantial financial guarantee to secure its performance. The precise size and type of financial guarantee from each is under negotiation.

If all proceeds according to this schedule, construction will begin in July, 2011. Tenant fit-up will commence around December, 2011 and the premises will open around March, 2012.

With that background, here is an outline of some of the proposed key terms applicable to the development agreement and lease:

- 1) Landlord: City of Burlington or its assigns
- 2) Tenant: Lake Champlain Community Sailing Center, Inc., or Ice Factor (Burlington), as may be applicable
- 3) Premises: Size and location of premises to be specified as applicable for each tenant.
- 4) Use: Permitted use to be specified as applicable for each tenant.

- 5) Initial Term: Thirty (30) years.
- 6) Renewal Term: Up to Thirty (30) years
- 7) Occupancy: Each tenant will take occupancy upon notification by City of Substantial Completion of “City’s Work” (as defined below). “Substantial Completion” means that City’s Work relative to Tenant’s Space is completed, ready for Tenant to commence Tenant’s Fit-Up, notwithstanding any minor “punch list” items remaining to be completed by City that do not materially interfere with Tenant’s ability to commence Tenant’s Fit-Up.
- 8) Rent Commencement: Tenant shall pay rent commencing on the day it opens for business, or ____ days after the occupancy date, whichever comes first.
- 9) Rent: Rent for each tenant will be specified.
- 10) Good Faith Deposit: Upon execution of the Development Agreement, each tenant will pay to the City (non-refundable) its share of costs to date as specified in each tenant’s existing Memorandum of Understanding.
- 11) Tenant’s Project: The scope of each tenant’s project will be specified. For the Community Sailing Center it will be described in phases allowing them to undertake either their entire project from the beginning or a more limited project initially and other phases in the future as their financial capacity allows.
- 12) Intent to Proceed: Each development agreement will contain provisions that specify in detail the “Intent to Proceed” process described above, including each tenant’s specific obligations.
- 13) NMTC Asset Management Fee: Each tenant will pay a pro rata share of any and all NMTC Asset Management Fees assessed by the NMTC Allocatee(s) involved with the NMTC financing. This will cease after the expiration of applicable holding periods required for the tax credits (expected to be 7 years).
- 14) Moran Operating costs: Each tenant will pay a pro rata share of operating costs of Moran and such costs that are solely (or substantially) related to its operations (such as, for the Community Sailing Center, all maintenance of the waterfront area associated with their boat docks, or for the Ice Factor all costs associated with their seasonal use of the splash park as an ice skating facility).
- 15) Property Taxes: For profit tenants are expected to pay property taxes and personal property taxes. Non-profit tenants may not pay real estate taxes to the extent they apply for and receive a tax exemption as a non profit 501(c)(3) organization. Commercial use would, like similar properties, could be subject to taxes.

- 16) Other Tenant Costs: Each tenant shall be responsible at its sole expense for all costs of its fit-up, as described below under “Tenant’s Work”, as well as for all costs for installing fixtures, equipment and other startup and operating costs for its business. Tenant will keep the premises free of liens.
- 17) Assignment and subletting: Tenants may assign or sublet their premises or any portion thereof subject to the City’s prior approval which will not be unreasonably withheld. Any proposed assignment or subletting must: i) be consistent with the public trust doctrine, ii) be an allowed use under City zoning as may be in affect at the time, iii) be family oriented, iv) create no conflict with other tenants, v) the proposed assignee or sub-tenant shall have adequate financial capacity & strength, vi) will cause no nuisance, vii) will cause no conflict regarding compliance with financing covenants, including but not limited to financing covenants related to Certificates of Participation, New Market Tax Credits and Reinvestment Tax Credits and use of tax increment financing. Any assignment or subletting of the lease or portions thereof shall not relieve Tenant of its responsibilities and obligations under the terms of the lease.
- 18) The Community Sailing Center currently operates from the Moran Project site and anticipates continuing to do so throughout construction. It is in the best interests of both the City and CSC for construction to proceed in an efficient, timely and cost-effective manner and for CSC to be able to operate reasonably. Both parties acknowledge this will require accommodations and compromises on the part of the City and its construction contractor(s) as well as on the part of CSC. The City and CSC agree to work cooperatively in good faith to create and implement a plan that addresses these shared interests.
- 19) Obligations of City: City, through it and its designees, will be responsible for the following:
- a. City shall be the entity responsible, in its discretion, to negotiate and cause to be executed architectural, engineering, testing and consulting services for the project. The terms of such contracts shall be within the City’s discretion. City shall be responsible for managing the design process and having prepared for the Project all plans, designs, specifications and similar documents as may be prudent and typical for such projects. Upon request by Tenant, the City will provide the Tenant with copies of all documents relevant to design and construction relative to or impacting upon the Tenant Space. The City will consider and seek input from the Tenant regarding construction and design, with final determination of design and construction residing with the City.
 - b. The City will participate cooperatively in project meetings during the design and construction process.
 - c. The City will be the entity responsible for seeking construction bids for City’s Work and selecting any and all construction contractors at its sole

- d. The City will supervise and be responsible for the management and maintenance of the project, and shall perform the services and carry out the responsibilities with respect to the project as described herein, and such additional duties as are reasonably within the general scope of such services and responsibilities.

20) Obligations of Tenant: Each tenant will agree to undertake the following responsibilities and obligations:

- a. To cooperate with the City, and its designees, and to participate cooperatively in project meetings during the design and construction process for the project.
- b. To cooperate with the City or its designees, to ensure that necessary permits are secured for the project.
- c. To obtain all financing necessary and appropriate for its costs for Tenant Work as well as for start-up costs and ongoing costs for operating its business.
- d. To provide City with evidence of sufficient financing for capital costs, fit-up costs, start-up costs and operational costs.
- e. To provide such documentation, before and after closing, as may be required for the purposes of Tenant's participation in New Market Tax Credits, Reinvestment Tax Credits and other Moran Project financing.
- f. To comply with all terms and conditions applicable to the City or the project contained in (i) any governmental permit or approval required or obtained for the lawful construction and operation of the project, (ii) any surety bonds or other similar guaranties (e.g., completion guaranties) obtained in connection with the projects, (iii) any applicable project documents, or (iv) any applicable law, order or regulation. The Tenant will be responsible for any obligations under any zoning, land use or similar permits of any applicable Governmental Authority with respect to the Tenant's premises.
- g. To coordinate and administer the design and construction of all Tenant Work to the extent required to be constructed; Tenant is responsible, subject to City's review and approval, for conducting and managing the design and construction requirements of its own fit-up, including developing necessary bid documents and construction plans as well as securing any additional permits relative to the fit-up.
- h. To keep the City fully informed on a regular basis of the progress of the design and construction of the fit-up to Tenant's premises or as may reasonably be requested by the City.
- i. Prior to any construction or fit-up within Tenant's premises, to provide evidence of insurance of Builder's Risk and liability. Tenant shall assist the City in obtaining, maintaining, and complying with insurance coverage for the Moran Center and shall not use or operate any business in tenant's premises in a manner that would cause cancellation of insurance or

21) Contingencies of City: City shall have no obligation to Tenant under this Agreement to proceed with construction of the project if certain conditions are not met:

- a. The City is unable to complete the sale of the Certificates of Participation and/or Tax Credit Financing on such terms and conditions as it shall deem necessary or desirable; or
- b. If the City is unable to utilize incremental tax revenues from its waterfront Tax Increment Financing District or such incremental revenues, after projected payment of debt service on all the outstanding bonds or other financial obligations, is projected to be insufficient to pay principal and interest on City's debt for the Moran Project when due; or
- c. Construction Bids – City fails to receive an acceptable construction bid for the Moran Project; or
- d. Permits – City fails to receive all required environmental, land use and other governmental permits without appeal; or
- e. City fails to enter into Development Agreements with both Ice Factor and CSC or either Ice Factor or CSC withdraws from the Moran Project; or
- f. City Council Approval – City fails to receive approval from the City Council for all Development Agreements and Lease Agreements; or
- g. Tenant fails to participate in the Project Financing as generally described above under "Intent to Proceed"; or
- h. There has been, or there occurs, a material adverse change in the financial condition of Tenant, which change(s) make it substantially more likely, in the reasonable judgment of City, that Tenant will be unable to fulfill its covenants and obligations under this Agreement, the Lease, and the other project documents.

22) Contingencies of Tenant: Each tenant will have a specific list of contingencies. These are being negotiated.

23) City's Work:

- a. Moran Building: Each tenant space within the Moran building will be provided as an empty shell without finishes. This will include a structurally sound building with all basic utilities, exterior finishes, rough plumbing and rough HVAC to each space, unfinished concrete floors, minimum lighting and minimum electric to meet shell building temporary code requirements, and similar. More specifically, Building Shell Space as provided to each tenant includes the following:
 - i. Raw concrete floors unfinished and may require finished floor material prepping.
 - ii. Exterior walls that are insulated to VT Energy Standards without interior fixed finish.

- iii. Interior core "Demising" walls (between tenant spaces, not within tenant spaces) with unfinished Gypsum Sheathing wall board.
 - iv. Insulated glass windows for the exterior shell meeting VT Energy Standards per design elevations.
 - v. Basic entry doors and limited exterior doors to meet code requirements for egress.
 - vi. No finished ceilings within lease space. Structural members and MEP systems are open to above.
 - vii. Building Core Mechanical systems are sized to accommodate typical office tenant fit-up requirements. More info upon request.
 - viii. Electrical infrastructure is sized to accommodate typical office tenant fit-up requirements. More info upon request.
 - ix. Automatic Sprinkler System provided throughout with a standard layout. No complex fire suppression systems are included.
 - x. Air conditioning through lake water cooling will be provided.
 - xi. More details specific to each tenant will be specified.
- b. Site: City shall construct and install all site work per the construction plans for the Moran Project and Waterfront North with the exception of those elements that are specific to Tenant's use as set forth under Tenant's work below. More details specific to each tenant will be specified.

24) Tenant's Work:

- a. Moran Building: Subject to City's review and approval, Tenant is responsible at its sole cost for designing, installing and constructing fit-up of its space within the Moran building to its needs, including, but not necessarily limited to:
- i. Full lighting, electrical, communications and I.T. to support Tenant's program requirements.
 - ii. HVAC distribution within Tenant's premises.
 - iii. Fit-up of the leased space including interior partitions and fixed finishes (floors, walls, ceilings).
 - iv. Plumbing systems within Tenant's premises, including bathrooms and sinks.
 - v. Any and all specialized fit-up, fixtures and equipment required for Tenant's use.
 - vi. Any tenant program spaces requiring additional items that are not "Office Standard" fit-up shall be brought to the City's attention.
 - vii. More details specific to each tenant will be specified.
- b. Site and Other: Subject to City's review and approval, Tenant shall design, install and construct at its own expense:
- i. Details specific to each tenant will be specified.
 - ii. Any and all other site improvements not specifically included in City's construction plans.