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August 3, 2010

Don Buch
BRAC 133 Advisory Group
VIA EMAIL: dnbuch@hotmail.com

RE: BRAC 133 Questions regarding Open Space and Plaza Areas

Dear Mr. Buch:

I have recently become aware that in the course of the discussions regarding the BRAC 133 project at Mark Center, questions have arisen involving the open space and plaza areas that were included within the 2004 Development Special Use Permit for Mark Center (DSUP 2002-0038) ("DSUP"). I write today to provide you with a written response to the questions you have submitted.

Question #1: Why selling the property to the Federal Government releases the property owner from the requirements of the DSUP.

The Virginia State Code Section 1-248 states: "[t]he Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth." As you know, BRAC is the Base Realignment and Closure ("BRAC") Act which is the act of Congress that dictates how the Department of Defense (DOD) must periodically realign federal military bases in order to meet updated standards for operations and security of the Armed Forces. As BRAC is a Federal law, this law preempts any local law or ordinance. Therefore, the City's Zoning Ordinance which requires the approval of a Development Special Use Permit before proceeding with development of a certain size is preempted by the Federal law that requires the base realignments.

Duke Realty owned the property and sold the property to the DOD for the DOD to develop. Duke Realty is still involved in the project, but as part of the construction contracting team for the DOD, not the developer themselves. As the owner and developer of the property, the DOD as the Federal Government is not required to comply with local

regulations; therefore, the Development Special Use permit that was approved on this property is no longer applicable to the development of the property. Therefore, the open space amenities shown on the DSUP site plan are no longer required.

Question #2 of 7/30 email: Definition of Open Space

The Alexandria Zoning Ordinance defines "Open Space" as the following:

2-180 *Open and usable space.* That portion of a lot at ground level which is:

- (A) Eight feet or more in width;
- (B) Unoccupied by principal or accessory buildings;
- (C) Unobstructed by other than recreational facilities; and
- (D) Not used in whole or in part as roads, alleys, emergency vehicle easement areas, driveways, maneuvering aisles or off-street parking or loading berths.

The purpose of open and usable space is to provide areas of trees, shrubs, lawns, pathways and other natural and man-made amenities which function for the use and enjoyment of residents, visitors and other persons. That single-family, two-family, townhouse and multi-family dwellings on lots for which emergency vehicle easement areas were counted as open space in the site plan or special use permit approval therefore, existing on March 1, 2000, or for which a building permit application or preliminary site plan application was filed, and was pending or had been approved on March 1, 2000, shall not be subject to the provisions of Section 2-180(D) as amended by this subsection, shall not be characterized as noncomplying structures, and shall be characterized as structures grandfathered under prior law, pursuant to Section 12-500 of this Code.

This definition is used for the Open Space that is required by the Zoning Ordinance in particular zones. For example, if a zone has a requirement for a certain percentage of open space, the open space designated to meet that requirement must comport with the above definition. A development may also provide additional open space above and beyond that required by the Zoning Ordinance. Any such additional open space does not necessarily have to comply with the above definition but rather is considered to be an additional amenity.

Question #3 of 7/30 email: Open Space Obligations included in the 2004 Mark Center Plaza I DSUP

The legal requirement to provide Open Space is typically included in the regulations in the Zoning Ordinance for the zone where the property is located. The Mark Center office complex is zoned Coordinated Development District (CDD) #4 and the zoning regulations for that zone were included in the CDD Concept Plan #99-01 approved by the City Council on September 18, 1999. The Open Space required for this zone is satisfied by the 43 acres known as the Winkler Preserve. In fact, the Winkler Preserve satisfies the Open Space requirement for the entire CDD #4 which includes all of the Mark Center residential areas as well as the Mark Center office complex. Therefore, the DSUP approved by the City Council for the development of Plaza I of Mark Center included additional open space that was not strictly required by the Zoning Ordinance.

The DSUP as approved by the City Council included amenities such as plazas and open areas that became a requirement by the terms of the DSUP (although not necessarily a requirement under the Zoning Ordinance itself) once it was approved by the City Council. As you have noted, the DSUP included approximately 6.5 acres of open space areas (as differentiated from Open Space as defined above) for the entire Plaza I. It is important to note that Plaza I includes more than the area currently being developed by the DOD. Plaza I contains approximately 27.5 acres in total. The portion that was owned by Duke Realty and subsequently sold to the DOD comprises approximately 15.914 acres. The 6.5 acres in open space amenities was required for the entire site. Therefore, when looking at just the DOD development, the 6.5 acres of open space amenities must be prorated downward in order to make a valid comparison between the current development and the original development approved pursuant to the DSUP.

However, as described above, the DSUP is no longer applicable to the property because the property is being developed by the DOD. Therefore, there is no requirement for Open Space that the City can enforce on this property.

Question #4 of 7/30 email: This section posed two questions: 1) How has the 2.425 acres been determined? and 2) What open space was the City legally due and not due? I will take the second question first.

As discussed above, the DSUP approved for development on this site is not enforceable against the DOD. Therefore, none of the requirements for open space amenities that may have been required of a private developer by DSUP 2002-0038 are applicable to the site currently and as such, there is no legal requirement for open space to be provided on the site. Therefore, your quotes from the DSUP are no longer applicable and cannot be enforced as to the current DOD development.

I understand that despite the lack of legally required open-space amenities for the site, Duke Realty provided the City with an estimate of open space proposed to be included in the DOD development. Duke Realty provided the information with graphics showing general areas considered open space but did not show a detailed calculation of the proposed open space area. The graphics show that under the 2004 DSUP there would have been approximately 7.955 acres of open space in the area currently being developed by the DOD. The same graphics show that now the DOD's proposed development contains approximately 5.535 acres of open space (a difference of 2.425 acres). I understand, however, that these graphics were done simply for discussion purposes to determine the order of magnitude of the difference. In order to calculate the exact open space using the definition of Open Space under the Alexandria Zoning Ordinance, Duke Realty would need to do a more detailed analysis that would be both time consuming and costly. Clearly, the graphic included more area than would have been considered open space because the calculation used for the 2004 DSUP is significantly more than what was shown in the original DSUP which was a portion of the 6.5 acres discussed above. However, since Duke Realty appears to have made a valid head to head comparison, it should be a fair representation of the difference in open space areas between the two plans.

Question #5 of 7/30 email: Site Plan used for Calculations.

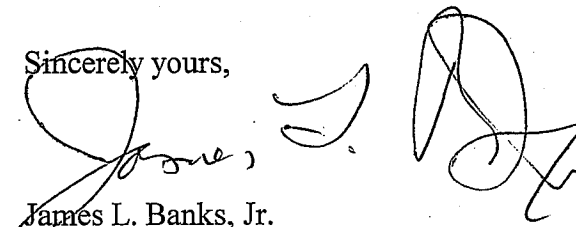
As described in #4 above, the site plans used to calculate the potential difference in open space were conceptual and not required to be detailed. There may be some areas that would not be considered to be open space that were included in the calculation here, however the conceptual nature of the calculation was performed the same way for both the DSUP site and the current development site so I believe it is a fair comparison. Again, the open space that the Duke Realty graphic shows for the 2004 DSUP is significantly more than what was proposed in the actual DSUP therefore, Duke Realty was likely being overly inclusive in this conceptual comparison.

Question #6 of 7/30 email: How is open space valued?

You raised an additional question regarding how the property will be valued for any monetary payment that Duke and/or the DOD may provide to the City. The City Manager's office in consultation with real estate valuation experts continues to work on this issue in order to justify a City open space mitigation payment request to DOD.

I hope that this information is helpful to you. Please let me know if you have additional questions regarding this matter. I remain

Sincerely yours,



James L. Banks, Jr.
City Attorney

cc: James K. Hartmann, City Manager
Mark Jinks, Deputy City Manager
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