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PUBLIC HEARING/WORKING SESSION MEMORANDUM

DATE: July 17, 2015
MEETING DATE: July 21, 2015
TO: Land Use Committee of the Board of Aldermen
FROM: Alexandra Ananth, Chief Planner for Current Planning
CC: Austin Street Partners
City Clerk
Law Department
Executive Department

PETITION #119-15

28 AUSTIN STREET

Request for Special Permit/Site Plan Approval to redevelop a municipal parking lot with a mixed-use building and 127 public parking stalls

The Land Use Committee (the "Committee") held public hearings on this project on June 2 and June 9, 2015, which were held open. In response to questions raised at the public hearings and/or staff technical reviews, the Planning Department is providing the following information for the upcoming public hearing/working session. This information is supplemental to staff analysis previously provided at the public hearing. Additional public hearings will be scheduled as necessary, but are anticipated for September 24, October 6, October 20, October 27 or 29, November 10 and November 12, 2015.

Framework for How the Committee Will Approach This Project

Earlier in the summer the Planning Department, in consultation with the Chairman of the Land Use Committee, sent out a proposed public hearing schedule for this project (**Attachment A**). The intent is to help break down the larger topics to specific dates so that the Board of Aldermen (Board) and public could digest information and ask follow up questions in order for the Board to make the necessary findings and conditions so that they can vote on this project later this fall. It should be noted that the Chairman intends to set aside up to 45 minutes for public comments at every meeting.

It is anticipated that the July meeting will focus on the framework for how the Committee will approach this project, as well as a discussion on many of the legal questions that have been asked to date. There will be opportunity for additional Board questions.

The September 24th meeting will focus on many of the design questions and the October 6th meeting will focus on parking, traffic and infrastructure. Two additional meeting dates in October are reserved for discussion of other topics as well as any additional information requested as a result of earlier meetings. It is expected that two days in early November will be reserved for drafting and review of a Board Order, with the hopes that this project will reach the Board on November 16th. Additional dates will be added if necessary. This project requires a 2/3 majority vote of the Board (16 out of 24) for approval.

Special Permit Criteria

The Board may grant a special permit (subject to conditions it may impose) when, in its judgment, the public convenience and welfare will be served. The Board must find that the application meets all the following criteria:

1. The specific site is an appropriate location for the proposed use and structure;
2. The use as developed and operated will not adversely affect the neighborhood;
3. There will be no nuisance or serious hazard to vehicles or pedestrians;
4. Access to the site over streets is appropriate for the types and numbers of vehicles involved;
5. The site planning, building design, construction, maintenance or long-term operation of the premises will contribute significantly to the efficient use and conservation of natural resources and energy; and
6. Literal compliance with the parking requirements of the Newton Zoning Ordinance is impracticable due to the nature of the use, or the location, size, width, depth, shape, or grade of the lot, or that such exceptions would be in the public interest or in the interest of safety or protection of environmental features.

Whenever an application for a special permit is required, site plan approval is also required, and may be made concurrently. The Board may consider the application in light of the following site plan approval criteria:

1. Convenience and safety of vehicular and pedestrian movement within the site and in relation to adjacent streets, properties or improvements, including regulation of the number, design and location of access driveways and the location and design of handicapped parking. The sharing of access driveways by adjoining sites is to be encouraged wherever feasible;
2. Adequacy of the methods for disposal of sewage, refuse and other wastes and of the methods of regulating surface water drainage;
3. Provision for off-street loading and unloading of vehicles incidental to the servicing of the buildings and relates uses on the site;
4. Screening of parking areas and structures on the site from adjoining premises or from the street by walls, fences, plantings or other means. Location of parking between the street and existing or proposed structures shall be discouraged;
5. Avoidance of major topographical changes; tree and soil removal shall be minimized and any topographic changes shall be in keeping with the appearance of neighboring developed areas;

6. Location of utility service lines underground wherever possible. Consideration of site design, including the location and configuration of structures and the relationship of the site's structures to nearby structures in terms of major design elements including scale, materials, color, roof and cornice lines; and
7. Avoidance of the removal or disruption of historic resources on or off-site. Historical resources as used herein include designated historical structures or sites, historical architectural elements or archaeological sites.

Additionally, the Board must make the following findings that are required for the Mixed Use 4 District:

1. That the proposed use will encourage an active, pedestrian-oriented streetscape throughout the day and week;
2. That the proposed use fills a demonstrated need for the use within the vicinity; and
3. That the proposed use is not inconsistent with the purposes of Section 30-13(h)(1) of the Revised Ordinances or the Newton *Comprehensive Plan*.

The City's Planning and Law Departments will draft a Board Order including any necessary findings and conditions for the approval or denial of this project later this fall for the review of the Committee and Board.

Relationship between the City and the Developer

After a lengthy Real Property Reuse process, in 2013 the City issued a Request For Proposals (RFP) for the sale or lease of the Austin Street parking lot to be developed as a mixed-use project. Austin Street Partners, LLC, was selected in May 2014 as the developer. A team of City officials from different departments including the Director of the Planning Department, the Economic Development Director, and representatives from the Law and Executive Offices then worked with Austin Street Partners to propose a special permit project that is responsive to both the RFP and to input from a series of community meetings what were held on the redevelopment of the Austin Street parking lot. The Planning Department (not including the Acting Director or Economic Development Director) is performing the technical review of this project as it would for any other special permit project, as staff to the Land Use Committee, and is coordinating with other departments as necessary. The City is considered a co-applicant for the special permit, so the Planning Department has been very careful to keep a firewall between those working with the development team and those performing the technical review of this project. At this point the developer has signed a Memorandum of Intent and Ground Lease Preliminary Term Sheet with the City to lease the property contingent upon the receipt of a special permit.

MOI and Ground Lease Preliminary Term Sheet

The City signed a Memorandum of Intent (MOI) to Negotiate a Land Disposition Agreement (purchase and sale or lease) in June of 2014. Because the scope of the mixed use project had not been fully determined to the satisfaction of the City at that time, the MOI allowed the City and Austin Street Partners to undertake additional study, planning, and analysis to determine the feasibility and scope of the proposed Project and to negotiate the terms of a Land Disposition Agreement.

In May 2015, the City signed a Ground Lease Preliminary Term Sheet (Term Sheet) for the Austin Street parking lot. The Term Sheet is intended to be a further step towards the Land Disposition Agreement that will be negotiated while the special permit application is pending before the Board. The Term Sheet describes the project as filed with the Board, and includes a facility for public parking consisting of 127 spaces to be controlled and operated by the City, as well as public access through Philip Bram Way. The project includes 68 dwelling units of which 17 units will be income restricted to tenants with incomes not to exceed 80% of the applicable Area Median Income (AMI). The Lease Term is for 99 years from the Commencement Date and the tenant has an option to extend the Lease Term for up to an additional 99 years. A single payment of rent in the amount of \$1,050,000 is due from the developer on the Commencement Date. Additional terms such as further payment can be negotiated if the parties exercise the option to extend the Ground Lease.

The Term Sheet anticipates a typical landlord/tenant relationship in the context of a ground lease, with the tenant assuming the responsibilities of maintaining the building and the parking associated with the building as well as paying all real estate taxes and assessments. The 127 municipal parking spaces will be maintained and managed by the City, which will also collect all parking fees generated by the parking spaces. The City will be responsible for maintaining Philip Bram Way.

A copy of the Ground Lease Preliminary Term Sheet as well as a response from the Law Department to several questions raised regarding the Term Sheet is attached to this memorandum (**Attachments B and C**).

Role of the Law Department in This Project

The Law Department has prepared a memo on this issue dated July 17, 2015 (**Attachment D**).

Special Permit vs. 40B Project

The Planning Department was asked to compare this project to a Massachusetts General Law (MGL) Chapter 40B Comprehensive Permit Project, commonly known as "40B". Chapter 40B is a state statute, approved in 1969, to increase the stock of affordable housing in municipalities where less than 10% of their housing stock is defined as "affordable," or serves households at or below 80% of the area's median income. The statute was designed to encourage the development of multi-family housing where it is often not allowed by right, and allows developers to override local zoning bylaws and barriers to the production of affordable housing created by local approval processes. It enables local Zoning Board of Appeals to approve multi-family housing development that otherwise would not be allowed under local zoning bylaws if at least 20-25% of the units have long-term affordability restrictions.

In 2010, 58% of voters in Massachusetts and 72% of Newton voters supported keeping Chapter 40B as a tool for providing affordable housing production. In most cases, Chapter 40B developments are communities with a mix of market rate and affordable units and can be either rental or home ownership communities. Market rate units often serve middle income singles, seniors, and families who make between 100% - 150% of the area median income. Affordable units are reserved for households who make less than 80% of the area median household income.

In Newton a special permit is required for development projects that are allowed but require review for special circumstances. The Board of Aldermen acts as the Special Permit Granting Authority in Newton. In comparison, the Austin Street project is located in a district of Newton that is zoned to allow for mixed-use development (including multi-family housing) appropriate to Newton's village commercial centers. The Mixed Use 4 zone encourages pedestrian-oriented development with a diverse mix of residences and amenities, allows for projects of sufficient density to promote a lively pedestrian environment, and expands the diversity of housing options available in the City. Nevertheless, portions of the Austin Street project as proposed are subject to the special permit process in Newton because it deviates from the by right development controls and contains some uses that require a special permit. Austin Street Partners must seek a special permit from the Board (not the Zoning Board of Appeals) for some of the proposed uses, such as a restaurant with more than 50 seats, and for street-level office use. An additional special permit is required to allow the construction of a building in excess of 20,000 square feet. Although the Mixed Use 4 district allows for buildings of up to 60 feet in height, buildings greater than 36 feet require a special permit. The building as proposed is 48 feet in height. A special permit for the west side setback is also required. Finally, Austin Street Partners must seek a special permit to waive 80 parking stalls as well as for waivers for various requirements of the dimensional and design controls of the parking section of the Newton Zoning Ordinance.

Affordable Housing Component

The Project proposes that 25% of the units (17 of the 68 proposed units) will be affordable to households earning up to 80% of Area Median Income (AMI), in compliance with the City's Request for Proposals. All of the units in this project will be eligible for listing on the State's Subsidized housing Inventory (SHI). The deed restricted units will be required to comply with state and federal accessibility laws and the Department of Housing and Community Development's guidelines for local preference. The Law Department will respond to a question raised regarding the application of the City's inclusionary zoning requirements (sec. 30-24(f)) to the Project under separate cover. It should be noted that the Project does not require an increase in the by-right density permitted on this site in a Mixed Use 4 district and is not requesting an increase in residential density that would be available by special permit pursuant to sec. 30-15(w)(3).

Additional Information

The Planning Department and Austin Street Partners are working together to provide additional information and to answer questions raised at the public hearings to date. A separate memorandum dated July 17, 2015, attempts to provide responses to many of the questions raised thus far. Please note that this is not a complete list of responses and that additional information will be provided for future public hearings.

ATTACHMENTS:

- Attachment A:** Proposed Public Hearing Schedule
Attachment B: Ground Lease Preliminary Term Sheet
Attachment C: Law Department Memorandum Regarding Austin Street Ground Lease Term Sheet
Attachment D: Law Department Memorandum Regarding Conflict of Interest

MEMORANDUM

TO: Aldermen
Members of the Public
Petitioners

FROM: Marc C. Laredo, Land Use Committee Chairman
Alexandra Ananth, Chief Planner for Current Planning

RE: SP #119-15, Austin Street Public Hearing Schedule

DATE: June 30, 2015

The following is an overview of the intended public hearing schedule and topics for this project. Please note this schedule is subject to change. If you have questions please email the Committee Clerk, Linda Finucane, at lfincane@newtonma.gov to confirm dates as we get closer to the anticipated meetings. Additional meetings will be added if necessary.

#119-15	28 Austin Street	Project Planner: Alexandra Ananth
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To redevelop a municipal parking lot with a mixed-use building and 127 public parking stalls

This project has already had public hearings on June 2nd and June 9th, 2015. The anticipated schedule going forward is as follows:

July 21st - Layout and discuss the framework for how the Committee will approach this project. Discussion of the legal questions that have been raised to date. Answers to many questions raised at the June public hearings will be posted on the webpage for this project (http://www.newtonma.gov/gov/aldermen/special_permits/special_permits_2015.asp) and will be distributed in a memo in advance of this meeting but will not necessarily be discussed on this evening. There will be opportunity for additional Committee/Aldermen questions and public comments.

September 24th – Discussion of the Planning Department’s vision for Newtonville and how this project fits within that vision. Design of the building, the plaza, Bram Way and the new municipal parking lot. Answers to some of the financial and economic questions raised may also be answered. There will be opportunity for additional Committee/Aldermen questions and public comments.

October 6th – Discussion of the design for Walnut Street and how this project fits within that design. Parking, traffic and infrastructure. There will be opportunity for additional Committee/Aldermen questions and public comments.

October 20th – Hold for left over topics from September as needed (design). There will be opportunity for additional Committee/Aldermen questions and public comments.

October 27th or 29th – Hold for left over topics from October 6th as needed (transportation). There will be opportunity for additional Committee/Aldermen questions and public comments.

November 10th and 12th – Final presentation, final public comments, close public hearing. Draft Board Order.

November 16 – Target date for Board of Aldermen.

GROUND LEASE PRELIMINARY TERM SHEET

DATE: May 12 , 2015

LANDLORD: City of Newton, a municipal corporation with an address of c/o City Solicitor, 1000 Commonwealth Avenue, Newton, MA 02459.

TENANT: Austin Street Partners LLC a Massachusetts limited liability company with an address at c/o Oaktree Partners, 84 Sherman Street, Cambridge MA 02140.

LEASE PARCEL: Approximately 74,480 s.f. of land known as Section 24 Block 9 Lot 15, 28 Austin Street Newton, MA 02460.

DISPOSITION AUTHORITY: Landlord wishes to enter into a Ground Lease for the Lease Parcel pursuant to Board of Aldermen Order #150-09 (6) and Request for Proposals #13-51 and a Memorandum of Intent to Negotiate signed by Tenant June 19, 2014. This Ground Lease Preliminary Term Sheet is intended to be a further step towards the Land Disposition Agreement referred to in the Memorandum of Intent to Negotiate.

PROJECT: The Tenant wishes to lease the Lease Parcel in order to develop and construct a mixed use development of approximately 5,000 s.f. of commercial space and 68 dwelling units in a single building (the "Building") to be owned by the Tenant plus appurtenant parking within and under the Building and a facility for public parking consisting of 127 public parking spaces to be controlled and operated by the Landlord as well as public access through "Bram Way" so-called (the Building, the facility for public parking and "Bram Way" collectively the "Project").

The Project is currently conceived and will be submitted to the Board of Aldermen for approval of a special permit (the "Special Permit") to include 68 total dwelling units of which 17 units will be income restricted to tenants with incomes not to exceed 80% of the AMI applicable to Newton as determined by applicable HUD or DHCD regulations. 51 units will be rented at market rates calculated in the Tenant's feasibility pro forma projections to reflect rents comparable to market rate rents at Newton's other mixed income housing developments, including for example as of the date hereof AvalonBay and Arborpoint.

DOCUMENTS: Landlord and Tenant shall use commercially reasonable efforts to enter into a mutually satisfactory Development Agreement within 180 days of

execution of this Preliminary Term Sheet. The Development Agreement will provide (i) terms for planning, permitting and financing of the Project, and (ii) a form of Ground Lease to be executed on the Commencement Date. Tenant shall provide Landlord with the first draft of the Development Agreement and of the Ground Lease. The Development Agreement will be the Land Disposition Agreement contemplated by the Memorandum of Intent to Negotiate.

LEASE TERM: Ninety Nine (99) years from the Commencement Date. Tenant shall have an option to extend the Lease Term for up to an additional Ninety Nine (99) years.

COMMENCEMENT DATE: The earlier of (i) the date on which Tenant closes on construction financing for the Project; or (ii) the date on which Tenant enters into possession of the Lease Parcel. In the event that the Commencement Date has not occurred by December 31, 2018 then the Landlord in its sole discretion and without cost shall be entitled under the Development Agreement to terminate the Development Agreement unless the Tenant is effectively prevented from exercising its right on account of pending litigation.

RENT: A single payment of Rent in the amount of \$1,050,000 shall be payable by Tenant to Landlord on the Commencement Date.

RESERVED RIGHTS: The Landlord in its municipal capacity shall maintain reserved rights (the "Reserved Rights") to operate, maintain and repair a currently proposed 127 space municipal parking facility on the Lease Parcel. The Reserved Rights may, as determined by the Landlord and Tenant be either a reservation by Landlord in the Lease or a sublease back from Tenant to Landlord or an easement granted with the Ground Lease. Public access over "Bram Way" as well as access to and from the rear of commercial properties abutting "Bram Way" shall be included in the Reserved Rights.

Tenant will construct the parking area and improvements to "Bram Way" to the extent required by and consistent with the plans approved by the Special Permit.

REAL ESTATE TAXES AND OPERATING EXPENSES: Tenant shall be responsible for all real estate taxes, assessments, utilities and operating expenses associated with the Building and its appurtenant parking during the term of the Ground Lease. Landlord shall be

responsible for any real estate taxes, assessments or similar charges affecting the Reserved Rights.

**COMMON AREA
MAINTENANCE
EXPENSES:**

The area comprising (i) Tenant's access ways to its appurtenant parking under the Building and (ii) other areas of the exterior of the Property subject to public access ("Common Areas") excluding the Landlord's Reserved Rights will be maintained and repaired, as necessary by Tenant including without limitation pavement repairs, maintenance of landscaping and lighting and insurance against loss from property damage or personal injury.

Installation, maintenance, repair and replacement of parking meters or other payment equipment related to the Reserved Rights as well as maintenance and repair of Bram Way shall be undertaken and paid for by Landlord.

FINANCING:

Tenant may mortgage Tenant's leasehold interest in the Lease Parcel.

**APPROVAL
PERIOD:**

Tenant at Tenant's sole cost and expense, shall use commercially reasonable efforts to obtain all necessary Federal, State and local permits and approvals necessary to construct and operate the Project including without limitation a building permit (the "Permits and Approvals"). Tenant shall have until June 30, 2016 (the "Initial Approval Period") to obtain the Permits and Approvals for the Project. Landlord agrees to cooperate with Tenant in this effort in all reasonable respects including without limitation execution of applications for permits to be made by the owner of the Property but without any requirement that it expend its own funds to do so.

So long as Tenant is proceeding diligently to obtain the Permits and Approvals, the Initial Approval Period may be extended by Tenant for up to 4 (4) additional six (6) month periods (each, an "Extension Period"). The Development Agreement shall provide for the Approval Period to be further extended beyond the four (4) Extension Periods to resolve or defend any and all appeals.

If at any time during the Approval Period as it may be extended (a) Tenant has not yet obtained the Permits and Approvals for the Project, or (b) the Permits and Approvals have been issued with conditions which are not acceptable to Tenant in Tenant's sole discretion, or (c) Tenant determines in its sole discretion that it is unlikely that the Permits and Approvals will be issued or will be issued with conditions that are unacceptable to Tenant, then Tenant shall have the right in its sole

discretion to terminate this Agreement or the Development Agreement by written notice given to the Landlord, in which event this Agreement or the Development Agreement as the case may be shall be of no further force or effect, except for the provisions thereof, such as provisions for confidentiality and indemnification, that the parties agree shall survive any termination of the Development Agreement.

If at the end of the Initial Approval Period prior to any extensions (a) the Tenant has not yet obtained the Permits and Approvals for the Project and (b) the Landlord acting through its Mayor in his sole discretion concludes that continuing with the Development Agreement is not in the best interests of the City of Newton, then the Landlord and Tenant shall enter into good faith but exclusive negotiations for a period not to exceed sixty (60) days in order to determine whether there is common ground between them for amendments to the Development Agreement to allow for further efforts to develop the Project or a different project at the Lease Parcel. In the event such negotiations are not successful within such sixty (60) day period the Landlord shall have the right in its sole discretion and without cost to terminate the Development Agreement by written notice given to the Tenant given within thirty (30) days of the end of the sixty (60) day exclusive negotiation period, in which event the Development Agreement shall be terminated by such notice and of no further force or effect, except for the provisions thereof, such as provisions for confidentiality and indemnification, that the parties agree shall survive any termination of the Development Agreement.

In the event the Landlord shall not give any such notice of termination then the Development Agreement shall remain in full force and effect without amendment.

**CONDITIONS
OF
COMMENCE-
MENT:**

Occurrence of the Commencement Date shall be subject to such conditions of permitting, title, condition of the Property, authority of the parties, representations and financing as shall be mutually determined by the parties and set forth in the Development Agreement. The Development Agreement shall be subject to termination upon the failure of the conditions precedent for occurrence of the Commencement Date.

**THIRD-PARTY
EXPENSES:**

Each Party shall be responsible for its own legal, advisory and other expenses associated with completion of this transaction.

EXCLUSIVITY: During the period of negotiation of the Documents and thereafter in accordance with the Development Agreement, Landlord shall not solicit or accept any other offers for purchase or lease of the Lease Parcel.

OTHER PROVISIONS: The Ground Lease will contain mortgagee protective covenants in favor of Tenant's mortgagees from time to time, including the right to cure any default by the Tenant under the Ground Lease, a right to obtain a new Ground Lease on the same terms and conditions and with no additional payment of rent in the event of any termination of the Ground Lease without the consent of the Mortgagee, and such other protections as will allow the Tenant to obtain financing substantially similar in form and terms as would be available for a fee purchase of the Property. The financing will also include a non-disturbance agreement allowing the Landlord to operate its public parking facility and affording public access through Bram Way as well as access for the commercial properties abutting Bram Way notwithstanding any default by the Tenant.

This Ground Lease Preliminary Term Sheet is not intended to be and shall not constitute a legally binding agreement to lease the Property, but each party agrees to negotiate exclusively to execute a Development Agreement.

Acknowledged and Agreed To:

LANDLORD:
City of Newton



By: [Signature] Date: 5/12/15
Title: Mayor

TENANT:
Austin Street Partners LLC

By: [Signature] Date: May 13, 2015
Title: Manager

**CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM**

DATE: July 17, 2015

FROM: Ouida C.M. Young, Associate City Solicitor 
Suzanne P. Egan, Assistant City Solicitor 

RE: Questions regarding Austin Street Ground Lease Term Sheet

This memorandum is in response to questions raised by several members of the Board of Aldermen and citizens regarding the Austin Street Ground Lease Preliminary Term Sheet signed by the Mayor on May 12, 2015.

The questions are paraphrased below.

1. What is the Ground Lease Preliminary Term Sheet, and should the Board of Aldermen have had input into the terms of the Term Sheet?

This question raises two issues: a) has a legally binding lease been executed, and b) will the Board of Alderman participate in the negotiation of the lease agreement.

- a) A legally binding document to lease the Austin Street parking lot has not been executed. A term sheet is a non-binding document that sets out the proposed terms of an agreement to be negotiated by the parties. The Ground Lease Preliminary Term Sheet ("Term Sheet") executed on May 12, 2015, memorialized the City of Newton's ("City") and Austin Street Partners', LLC ("ASP") intent to enter into negotiations regarding a Ground Lease and Development Agreement. The Term Sheet specifically states it is not a legally binding agreement to lease the Austin Street parking lot. The Term Sheet sets out the parties' intent to negotiate a Ground Lease and Development Agreement, the timing of the negotiations, the project to be developed, the essential terms of the Ground Lease to be negotiated, and the parties' rights to terminate the Development Agreement.
- b) The Board of Aldermen does not participate in the negotiation of the lease agreement. The policy decision to dispose of land is a legislative function pursuant to G.L. c. 40 § 15A. The Board made that policy decision in February, 2012, when it authorized the Mayor to sell or lease the Austin Street parking lot for a nominal price and made a number of recommendations to include in any sale or lease of the property. The negotiation and execution of the disposition documents are executive functions which belong to the Mayor.

2. Does ASP have an unrestricted option to extend the ninety-nine (99) year lease for an additional ninety-nine (99) years at no additional payment to the City?

The lease is for a ninety-nine (99) year term. ASP has the option to extend the term for an additional ninety-nine (99) years. The Term Sheet states that the City and ASP intend to negotiate the terms of a Ground Lease and a Development Agreement. During those negotiations, the parties can negotiate additional terms regarding the exercise of the option to extend the Ground Lease.

3. Does the Mayor have complete discretion to modify the agreement and allow for a different project from the one granted under a special permit?
 - a. The Term Sheet does not state that the Mayor can modify the Development Agreement and allow a project different than one approved under a special permit. The Term Sheet creates a process for the parties to follow if ASP does not receive the requested special permit within the initial Approval Period (which runs until June 30, 2016) which gives rise to this question.
 - b. The process set out in the Term Sheet includes the right of ASP to extend the Approval Period for up to four (4) six-month periods so long as it is diligently pursuing the necessary permits/approvals, or to terminate the Development Agreement during the Approval Period or any extension thereof, if ASP: i) does not receive all necessary permits/approvals; ii) believes it unlikely to receive all necessary permits/approvals; or iii) believes it likely to receive or does receive permits/approvals with conditions which ASP deems too onerous.
 - c. The City also has the right to terminate the Development Agreement if prior to any extension of the initial Approval Period ASP has failed to receive all necessary permits/approvals and the City acting through the Mayor, concludes that continuing the Development Agreement is not in the best interests of the City. However, prior to termination, the City is required to negotiate with ASP for a 60-day period to see if there is "common ground" to amend the Development Agreement to allow further efforts to develop the Project described in the Term Sheet or to develop a different project.

4. Does the Mayor have authority to negotiate a different project?

See above answer.

5. Does the Term Sheet mean that once the City receives the payment from ASP and the lease is signed, the developer can do anything he chooses with the site subject to an agreement with the Mayor?
 - a. No. The Term Sheet states that the City intends to enter into a Ground Lease pursuant to Board Order #150-09(6) and the Request for Proposals # 13-51. The Term Sheet does not state that ASP will have complete discretion regarding the project that will be built on the Austin Street parking lot either before or after the Ground Lease and Development are executed and the lease payment received by the City.

CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

DATE: July 17, 2015
FROM: Ouida C.M. Young, Associate City Solicitor
Suzanne P. Egan, Assistant City Solicitor
RE: Conflict of Interest
Land Disposition of the Austin Street Parking Lot

BACKGROUND

Members of the Law Department have worked over the course of the last several years with a number of departments in the City on the Austin Street parking lot redevelopment project (“Austin Street Project”). Currently, this department is working with the Mayor’s office on negotiation of the terms of the Ground Lease and Development Agreement for the Austin Street Project. The Law Department is also staffing the Land Use Committee of the Board of Aldermen, as it always does, during the special permit review of the Austin Street Partnership’s proposed 68 unit mixed use development.

QUESTION

Does the Law Department’s role in negotiating the Ground Lease and Development Agreement give rise to a conflict of interest in terms of the Law Department’s role in advising the Board of Aldermen acting as the City’s special permit granting authority?

ANSWER AND DISCUSSION

No. There is no adversity of interests that would give rise to an ethical conflict of interest. The current situation which finds the Law Department working with multiple City agencies with different oversight responsibilities on the same project is hardly unique to the Austin Street Project. Indeed, the City Solicitor is required by the Revised Ordinances of the City of Newton, §§ 15-1, 15-2(e)&(f) to “act as the legal advisor and solicitor of the city”; give legal opinions to the mayor, board of aldermen, any committee, board or official of the city on subjects within their official responsibilities; and attend meetings of the aldermen committees at the request of the chairmen.

The breadth of those responsibilities, which is not unusual for a city attorney’s office, require that the members of the Law Department be aware of any conflicts of interest that may arise under the Rules of Professional Conduct governing any attorney’s ethical conduct. All attorneys including government attorneys have a duty of loyalty to their client, which duty prevents an attorney from representing another client(s) “... if the representation of that client will be directly adverse to another client...” or “...if the representation of that client may be materially limited by the lawyer’s responsibilities to another client...” although there can be some limited exceptions to that general rule. See Rule 1.7 (a) and (b), Supreme

Judicial Court Rule 3:07 -- Professional Conduct¹. However, the analysis of when a conflict of interest arises, or indeed, who the client is, can be difficult for attorneys representing organizations, especially when those organizations are governments. See Rule 1.13, Comment [9]².

Key to the analysis of a potential ethical conflict of interest is whether the Law Department's representation of the Mayor in negotiating the Ground Lease and Development Agreement is adverse to the quasi-judicial function of the Board of Aldermen acting as the special permit granting authority in its review of Austin Street Partnership, LLC special permit application. The negotiation will certainly take into account that both the Ground Lease and the Development Agreement will need to reflect the special permit-approved project, whatever that project may be. The Development Agreement will also need to take into account the possibility that the Board may not approve the special permit application. Finally, the terms of any Ground Lease or Development Agreement cannot be contrary to the special permit conditions, but must incorporate the special permit conditions as part of the those documents.

It is also important to note that the Board of Aldermen is not acting on the special permit application in its legislative, policy-making role. Rather, the Board is acting in a quasi-judicial role, applying the criteria for the requested special permit relief, set out in Newton's Zoning Ordinance, to the Austin Street project. The Law Department will advise the Board of Aldermen regarding the legal issues pertaining to the special permit application. This is distinct from providing advice and negotiating the Ground Lease and Development Agreement to obtain an advantageous business deal for the City .

Accordingly, the situation presented is not one where the Law Department is advising clients with different policy objectives or in litigation which could give rise to an ethical conflict of interest. There is no need to secure independent counsel at this point to advise the Board of Aldermen in its review of the Austin Street special permit application.

¹ The citation to Supreme Judicial Court Rule 3:07 will be omitted from additional references to the Massachusetts Rules of Professional Conduct.

² That difficulty is specifically acknowledged in Scope [4] of the Massachusetts Rules of Professional Conduct which notes that government lawyers may be "authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients."