



**Via E-Mail**

July 20, 2016

SuzanneL@TakomaParkMD.gov

Ms. Suzanne R. Ludlow  
City Manager  
City of Takoma Park, Maryland  
7500 Maple Avenue  
Takoma Park, MD 20910  
(301) 891-7230

Re: Mediation to Advance a Partially-Binding Letter of Intent

Dear Ms. Ludlow:

The Takoma Park Silver Spring Cooperative, Incorporated (the “Co-op”) would be willing to participate in mediation overseen by a neutral third party that would be intended to advance the negotiations of a Letter of Intent (“LOI”) between the Neighborhood Development Company (“NDC”) and the Co-Op for a space lease at the Takoma Junction Redevelopment (the “Redevelopment”).

Expanding upon NDC’s comments in its July 15, 2016 letter to you, before the Co-op would start such mediation, we, too, would need more specific information regarding:

- (1) the proposed timeline;
- (2) number of meetings and the expected participants;
- (3) the mediation costs and how they would be allocated; and
- (4) a list of preliminary issues for mediation (on May 4, 2016, our outside counsel had already emailed NDC’s counsel a list of 12 very specific LOI issues for discussion between NDC and the Co-op)

201 Ethan Allen Ave • Takoma Park • MD 20912

Tel: 301-891-2667 • Fax: 301-891-2695

[www.tpss.coop](http://www.tpss.coop)

However, as you know, the Co-op's primary existential concern is our long-demonstrated and understandable need for an efficient method of receiving our goods during and after construction of the Redevelopment. As you also know, after nearly two years of its negotiations with the City of Takoma Park (the "City") over the Redevelopment, NDC's proposed project would now **not** contain a loading dock which could accommodate the 18-wheel delivery trucks that arrive daily and are vital to the Co-op's continued operation. It is highly unusual for an anchor tenant, especially a grocery store, to be unilaterally and wholly responsible for all costs arising from a developer's deficient design elements such as a commercially inadequate loading dock. Therefore, NDC and we will need to negotiate the extent to which NDC will fund the costs incurred by the Co-op in implementing plans for deliveries during construction and thereafter.

In addition to NDC's guaranteeing us in some binding manner (preferably before the Council executes the Development Agreement and/or the Ground Lease) that we would have a reasonably acceptable loading solution at the Redevelopment after its construction, we also need NDC to legally obligate itself to provide us with:

- (A) unimpeded access to a loading area that can accommodate 18-wheel trucks and directly connect to Co-op occupied space, trash and recycling collection, compost bins;
- (B) guaranteed designated parking for Co-op patrons and staff;
- (C) the exclusive right to sell beer and wine within the Redevelopment (*bona fide* restaurants and bars as our co-tenants would not constitute violations of that exclusive right); and
- (D) access to and use of the lot for shoppers during the period between the consummation of any such agreements between the City and NDC and the actual start of construction.

As is usually the case in many landlord-tenant lease negotiations, an LOI would be non-binding upon both NDC and the Co-op. However, in some development/leasing circumstances such as this one involving the sole anchor tenant for a retail redevelopment, some portions of a letter of intent are legally binding upon the parties thereto. The City's outside counsel, Doug Bregman can so advise you as to the accuracy of our preceding statement.

Therefore, in order for the Co-op and NDC to make any true progress during such mediation, NDC and we need to decide whether we would each be willing to be legally bound by our resolution, if any, of certain issues *before* we each commit to or commence mediation. Otherwise, we're all just wasting our time and money if the LOI is totally non-binding.

Depending upon one's point of view, some of our counsel's 12 listed issues that he emailed to NDC's counsel on May 4, 2016 as noted in paragraph (4) above, all of the items (A) through (D) identified three paragraphs above, and the following issues might be considered questions or

pre-conditions, but either way, we would need to have them resolved in a reasonably satisfactory and binding manner before mediation starts:

1. During its July 13, 2016 public meeting, the Council repeatedly mentioned the phrase “good faith” in the context of its not really knowing what’s going on between the Co-op and NDC and who’s been negotiating in good faith or not. As one example, Councilmember Seamans asked a general question, rhetorically or otherwise, that we paraphrase as follows: “*How is the Council supposed to know who is operating in good faith and who isn’t?*”

The Co-op would therefore appreciate having a member of the Council present during all mediation sessions solely as an observer and for no purpose other than to report back to the Council her or his observations about who’s acting in good faith. By having one of its members sitting in on such sessions, the Council will know first-hand who is acting in good faith.

In lieu of or in tandem with Council presence, we respectfully suggest that all mediation sessions should be recorded and made promptly available to the Council for its viewing.

2. We respectfully observe again that, as we have previously noted in our public meeting comments before the City Council and in our July 8, 2016 email to the City Council, NDC's May 28, 2014 response to the City’s RFP contained a site plan in which the 18 wheelers making deliveries to the Co-op would enter the property as they do now, head for the rear of the lot, and back into a loading dock directly connected to the expanded area of the Co-op. As that July 8<sup>th</sup> email also noted, the Co-op endorsed NDC’s May 28, 2014 site plan for the Redevelopment because it specifically and adequately addressed our operational needs.

However, NDC’s new May 23, 2016 site plan shows the 18 wheel trucks instead making deliveries to our Co-op by unloading out in the open in a traffic cutout off Carroll Avenue seven days a week. According to NDC, its May 23<sup>rd</sup> site plan’s lack of a loading dock is its permanent plan for the Redevelopment, not just a temporary absence during construction. After we objected to that May 23<sup>rd</sup> plan, NDC told us that it cannot afford to include a loading dock with accessibility for large trucks at the proposed development. Our July 8<sup>th</sup> email further detailed the impracticalities and infeasibility of NDC’s May 23, 2016 site plan.

We also ask you to consider the fact that NDC has simply said to us (and presumably to your staff and/or you) that it cannot now afford to provide the loading dock which it *promised* to the City as part of its May 28, 2014 bid submission. At no time during our extensive discussions over the last two years with NDC about the Redevelopment’s containing a loading dock suitable for the Co-op (which would presumably also be suitable for a different anchor tenant) has NDC ever said or disclosed, at least to the Co-op, why it can’t afford such a loading dock or by *exactly how much NDC’s profit from the project would be reduced*. Nor has NDC ever expressed, at least to the Co-op, any willingness to have a discussion with the Co-op about our jointly “value engineering” the

cost of an NDC-built loading dock that might be suitable for the Co-op's needs (or those of another anchor tenant); as you may know, value engineering is a construction process by which a design element's costs are reduced while still resulting in an acceptable end product as built.

We believe that, as part of any mediation and as part of its disclosures to your staff and you, NDC should therefore be required to disclose its costs analysis of a loading dock suitable for the Co-op's needs and how it concluded that it couldn't afford such a dock. At that point, perhaps NDC and we can jointly do some value engineering or even negotiate some cost-sharing arrangement.

We also respectfully ask the Council and you to note that NDC's May 23, 2016 site plan directly contradicts NDC's May 28, 2014 site plan that it submitted as part of its response to the City's RFP procurement/disposition process. The City chose NDC's proposal over several other bidders, including the Co-op, based in part upon NDC's 2014 site plan which contained a loading dock suitable to the Co-op.

Unless NDC is legally obligated by the City to provide as part of the Redevelopment, a suitable loading dock as was shown in its May 28, 2014 submission, whether or not the Co-op is the future anchor tenant, how can NDC (and the City) be *sure* that it can attract an anchor tenant without a loading dock that can accommodate large vehicles? If all of our LOI's elements are non-binding, what would prevent NDC from reneging on its obligation, if any, to provide a loading dock in the future?

Equally important to both of us, how are the City and the Co-op protected from any of the losing bidders protesting the Development Agreement's and/or the Ground Lease's execution and/or implementation if such actions eventually lead to a redevelopment *without* the loading dock as shown in NDC's May 28, 2014 proposal?

The Co-op presumes that, like us, NDC and the City don't want to spend their respective time, money, and hard work on a development process only to have it be subject to a subsequent administrative "protest" of some sort (such as an allegation of a procurement or disposition violation arising from a material change from NDC's bid previously accepted by the City). By our all agreeing on a loading dock configuration now, we can all avoid that possibility.

The Co-op would also need some binding assurances from NDC and the City of Takoma Park that the Development Agreement and the Ground Lease between them would definitely include access to and use of the adjacent parking lot that the Co-op presently uses for its customers' parking and other business purposes, even after any documents between NDC and the City are signed up until the point where construction is about to actually begin. We also need unimpeded access to loading dock, trash and recycling collection, compost bins and guaranteed designated parking for Co-op patrons during this period.

In the current draft of the Development Agreement, under certain circumstances, the City has "authorized the Developer to provide reasonable accommodation to the Co-op for the continued operation of its business." However, NDC also has the right to switch to another anchor tenant

in certain circumstances – we interpret that latter right to mean that such “accommodation” could be terminated at any time by NDC in its sole discretion. Moreover, the Co-op is not presently a third-party beneficiary of the Development Agreement or the Ground Lease. How could we enforce NDC’s “obligation,” such as it is, to provide such accommodation if NDC defaults?

In other words, Section 4 of the Development Agreement should not merely authorize NDC to provide such reasonable accommodations; it should *require* NDC to do so. In addition, its Section 6 should be revised to include, as required elements, the above-described loading dock, adequate parking, and our other business continuity needs.

As we have repeatedly stated publicly and otherwise, we, too, are committed to the redevelopment of Takoma Junction and look forward to working with the City and NDC. Please feel free to contact me with any questions you might have.

Very truly yours,

Marilyn Berger

Expansion Project Manager