

To: Planning Commissioners and
Members of the City Council
Subject: Planning Commission Study Session September 15, 2016
From: Bob Cushman, Foster City resident

My purpose in writing the following is to set forth some new information and some ideas that might create leverage to strengthen the City's negotiating position with Sares Regis.

- Since purchasing the property Sares Regis has basically put compliance with the Development Agreement "on hold." It has not executed its portion of the Development Agreement
- I have learned through a third party that Sares Regis spent nine months of 2015/16 in negotiations to sell Pilgrim-Triton, Phase C but the sale fell through.
- Sares Regis was tardy in submitting its Annual Review, missing the October 3^{1st} deadline to "...provide documentation of its compliance with the Agreement during the previous calendar year" as required in the Development Agreement.
- For unknown reasons, the required Annual Review was not presented to the Planning Commission until May 2016.
- Despite inaction by Sares Regis, the City staff recommended the Planning Commission make a determination that the developers, including Sares Regis, have made a good faith effort to comply with the Agreement.
- One member of the Planning Commission expressed concern about the lack of progress. Note that Section 5.2.2 of the Development Agreement states: "...if the Planning Commission has any doubts concerning a Developer's performance, the Planning Commission shall direct the Community Development Director to prepare a written report and refer the matter to the City Council...". To my knowledge the doubts expressed by the Planning Commission have not been acted upon.

Goals and Objectives:

A good starting place is to go back to the original purposes: What the City Council was trying to achieve in 2008. According to the staff report:

“The objectives of the change in land uses as approved by the City Council for the Pilgrim Drive/Triton Drive area were to:

- Promote the retention and expansion of businesses already operating within the City;
- Promote new business development within the City, especially high technology companies;
- Promote and accommodate a more efficient use of land, a more interesting and diverse array of land uses, and increase the opportunities for small, resident serving businesses to remain in or locate in the City, by allowing mixed use developments, as well as housing opportunities (in the Pilgrim Drive/Triton Drive Area only); and
- Help meet the unmet and growing need for workforce housing by allowing housing to be mixed in with new buildings/projects in the Pilgrim Drive/Triton Drive Commercial-Industrial Area. “¹ [underlining added to emphasize concerns]

The Ordinance No 546 [Approval of the Pilgrim Triton Master Plan] expresses outcomes that must now be questioned.² “The Total development in each development phase will be able to exist as an independent unit ...and the establishment of up to 296,000 square feet of commercial/industrial office and up to 730 residential units will not be detrimental to present and planned surrounding uses.” ...”On-site circulation is suitable and adequate to carry anticipated traffic and the proposed project density will not generate traffic in such amounts as to overload the street network outside the development beyond acceptable City levels...”³ [underlining added to emphasize concerns]

The current view is also expressed in the staff report:

“The Pilgrim Triton Master Plan envisioned this 20-acre area as a mixed use development with housing, commercial/services and office uses. The inclusion of 296,000 square feet of commercial uses in the Master Plan ensured there would be no net loss of commercial space. The Pilgrim Triton Master Plan incorporates the Triton Park as a hub of activity for the development, surrounded by ground floor commercial and personal services. The mix of uses was based on the anticipated synergy of the uses;

¹ Pilgrim Triton Master Plan History as set forth in staff report of 1 August 2016, Pilgrim Triton Phase C – Preliminary Review (PR-15-003), page 3

² I don’t think it is generally known that this Ordinance was approved by a slim 3-2 vote of the Council, with Kiramis and Wykoff voting “No”. Wykoff is now on the Planning Commission.

³ City Ordinance No 546 adopted 5 May 2008.

in other words, the office uses would provide a customer base for the ground floor commercial and personal service uses during the day and the housing units would provide a customer base during the evening hours. In addition, the mix of uses would enable people to walk to their destination instead of using a vehicle."⁴. [underling added to emphasize concerns]⁵

Discussion:

The Council needs to either reaffirm these original objectives or realign them.

The stated objectives emphasized no net loss of commercial space. They also emphasized retention and expansion of existing businesses, and an increase in the opportunities for small, resident serving businesses to remain here. These are two areas in which the stated vision is not being realized. Approval of the new Sares Regis proposal will take the original concept further off course by decreasing the office/retail space and increasing housing density in the already dense 20 acre area of the City.

The Council must assess how the planned synergy of mixed uses can be achieved. They will be sacrificed if this new Sares Regis plan is approved.

This 20 acre site is already attracting attention as a major problem area for the City...architecturally, heights, density, traffic, school problems, public service demands, etc. We do not want to make matters worse.

Review of the Master Development Agreement

I have gone through the legalize of this lengthy document and found a few places where the language seems to provide the City with leverage. I could be wrong but the following items deserve your attention and review.

1. Annual Review: Evidence of default may arise in the course of the regularly scheduled annual review of the Agreement. Section 5.2 (page 35) requires the developer to provide documentation of its compliance with the Agreement⁶ and progress during the previous calendar year. It must complete an Annual Review Form (provided as Exhibit J in the Agreement⁷) and such other information as my be requested by the Community Development

⁴ Same Staff Report, p. 5

⁵ Same Staff Report, p. 3

⁶ This annual review is a requirement set forth in California Government Code section 65865.1 and Resolution 80-73. The City may modify or terminate the Agreement in accordance with California Government Code section 65865.1

⁷ A copy of this form is attached for your review.

Director, by October 31st of each year. ⁸ If the Planning Commission is not satisfied that a developer is performing in accordance with the terms and conditions of the Agreement, or if the Planning Commission has any doubts concerning a Developer's performance the PC shall direct the Community development Director to prepare a written report and refer the matter to the City Council. [underlining added for emphasis]. Review of the Video of Planning Commission meeting of June 16, 2016 clearly shows Commissioner Dyckman has reservations concerning lack of development of commercial space. ⁹,

Discussion: Sares Regis may have difficulty successfully navigating their October 2016 Annual Review unless they present a plan to move ahead on long-delayed plans. The fact that they want to switch to a new plan leaves them vulnerable to a finding that they have delayed implementing the approved plan, and are continuing to do so. This should provide the City with leverage to urge Sares Regis to develop the property in a manner that is best suited for the City.

The Annual Review Form (Exhibit J of the agreement. [See attached] requires the developer to establish it has used good faith efforts to obtain financing, process required approvals, and/or construct and sell the remaining undeveloped properties and reach allocated commercial/retail/densities and/or residential unit maximums allocated under the Development Agreement. It must provide a summary of all effort made in the past year and summarize specific strategies to be followed in the coming year to facilitate the processing of permits and/or actual project construction. It must describe compliance with the phasing plan, and compliance with many other detailed requirements that Sares Regis has simply not even initiated.

Their request for another Preliminary Review at this time should not be surprising. They simply do not want to take the risk of having another annual review without taking any action.

Planning Commissioners and City Council Members should review the 2015 Annual Review Form. The staff recommended that the owners of Pilgrim Triton, Phase C be found to have exercised good faith efforts to comply with

⁸ The owners of Pilgrim-Triton, Phase C did not submit by the deadline.

⁹ The Planning Commission vote was 3-1-1. Commissioner Dyckman had doubts, reservations and questions. In the end he abstained instead of voting "no".

the terms of the Master Development Agreement. The Planning Commission approved the staff recommendation 3-1-1.¹⁰

2. Time of Commencement of Construction and Completion:

Section 2.4, at page 17, states: "...the Developers shall have the vested right to develop the Project in such order and at such rate and at such times as Developers deem appropriate in the exercise of their business judgment, so long as each Phase of construction can operate independently, consistent with the Phasing Plan, as determined by City in its reasonable discretion. The Developers from time to time may propose revisions to the Phasing Plan ... Any such Phasing Plan revisions shall be subject to review and approval by the City in its reasonable discretion based on factors including, with out limitation, any potential consequences related to the provision of the park land and improvements and public infrastructure described in Article 3 below. The Developers shall develop each Phase and size public infrastructure so as to accommodate other Phases. Further, Phases described in the Phasing Plan may be developed in any order so long as it can be demonstrated that each Phase can operate independently, that uses proposed in a particular Phase will be compatible with the Master Plan, and to the extent feasible, adjacent existing uses, and will result in the overall Project meeting its obligations with respect to the provision of park land and improvement and other public infrastructure, as further described in Article 3 below. .." [underlining added to emphasize areas of concern]

Discussion: There is a requirement that each phase be able to operate independently. The retail there continues to struggle. It is having trouble operating independently. This existing condition will be aggravated if housing is allowed to be substituted for office space. The developers promised to develop in ways that would accommodate other phases. They also agreed that uses in a particular Phase will be compatible with the Master Plan. Swapping out commercial space for additional residential space in this already dense 20 acres of housing violates that principle. Further, the parties have not come to an agreement to provide and complete the park land.

3. Parking:

¹⁰ For some unknown reason the owner did not submit the Annual Review form by the due date. (It carries an execution date of November 13, 2015) and the Planning Commission did not consider the Annual Review until their meeting of June 16 016.2016. Three Commissioners voted to approve, one abstained (Dyckman) and one was absent (Pattum). I have a copy of the DVD of the video of the meeting (\$25!!!)

Section 2.1.1.b.1v states; land uses must not regularly generate a parking requirement that cannot reasonably be accommodated on-site or in contiguous private and public parking areas.

Discussion: The Planning Commission and City Council need to make sure there is enough parking space. This is a very dense set of four developments. Parking is already a problem there and along adjacent streets and especially for the retail outlets.

4. Term of Tentative Map: Section 4.4 of the Master Development Agreement, page 33, states: “The term of any Tentative Maps obtained by the Developers over the Property shall be for a period of five (5) years. An additional two (2) year extension..shall be granted by the City Council upon a showing of the applicable Developer’s good faith and diligent efforts to obtain final map approval, as reasonably determined by the City Council.”

Discussion: Sares Regis is proposing a change in the existing map. The question here is whether Sares Regis has obtained final map approval and whether their seven years has expired.

The Existing Entitlements

I sat down with Curtis Banks and Leslie Carmichael on Wednesday, August 10th to better understand the exact entitlements of Pilgrim Triton, Phase C. After our meeting I went through the four documents they provided¹¹

Discussion: The only reference to building heights contained in any of these documents appears on a single page – a Land Use Diagram which appears as Exhibit A, of City Ordinance No. 546 adopted on the 5th day of May 2008, titled Amended General Development Plan for Pilgrim-Triton (RZ-06-002). A copy of it can be accessed at:

<http://www.fostercity.org/departmentsanddivisions/communitydevelopment/CDDReports/upload/2008-02-18-Master-Plan-Final.pdf>

This diagram shows one structure 35-95 feet and 3-7 floors; and another structure 35-80 feet and 3-6 floors.

¹¹ Ordinance No 546; a fresh color-coded copy of Exhibit A of Ordinance No 546, which provided a more easily read map of the Land Use Diagram; a copy of the Master Development Agreement for the Pilgrim-Triton dated 11 February 2010, and a revised copy of Exhibit E of the Agreement, “Permitted Density and Intensity of Use” which shows the minor transfer of units and square footage between two of the developers.

According to the latest Staff Report on Pilgrim Triton, Phase C:¹²

“The Pilgrim Triton General Development Plan (Master Plan) includes the following major provisions that relate to Phase C:

Allowing up to 172,943 square feet of commercial and 17 multi-family units
Allowable building heights shown on the Master Plan Use Diagram for Phase C include: 30-35 feet, 3 floors along East Hillsdale Boulevard; 35-80 feet, 3-6 floors behind the buildings facing East Hillsdale Boulevard; and 35-95 feet, 3-7 floors at the northern portion of the site near Triton Drive and Triton Park. ¹³...”

I have checked with Curtis to see if there is more detail, more documentation. This is the only mention or description of these height entitlements that exists, outside of staff reports. Seems to me these entitlements are much weaker than represented. And, I think even these maximum building height entitlements can be restricted during design review by the Planning Commission. If this is the case, it gives the City much more leverage to negotiate changes with Sares Regis.

This thinking needs to be communicated to the Planning Commission.

The EIR – Traffic

On April 21, 2008 the City Council Certified the Pilgrim Triton Master Plan Environmental Impact Report (EIR) and adopted findings regarding significant environmental impacts, including a Statement of Overriding Considerations and adoption of a Mitigation Monitoring and Reporting Program; ¹⁴

That report acknowledges there is terrible traffic at that location and at nearby intersections and the entrance to highway 92. The “Statement of Overriding Considerations” already acknowledges that there are additional impacts that cannot be reasonably mitigated. This was many years ago and we suspect the situation is much worse today.

The staff report tells us:¹⁵

¹² Same Staff Report, p. 5

¹³ Same Staff Report, p. 5

¹⁴ Same Staff Report, p. 3

¹⁵ Same staff report, p. 7

“An Initial Study will be required to assess potential environmental impacts of the proposed change to the Pilgrim Triton Master Plan. If there is no potential for new significant environmental impacts, then the information in the Pilgrim Triton Master Plan Environmental Impact Report (EIR) can be updated with an Addendum to the EIR. If there is potential for a significant environmental impact, a Subsequent or Supplemental Pilgrim Triton EIR will be required to evaluate environmental impacts.”

Discussion: Members of the Planning Commission and Council need to carefully consider how the assessment of traffic conditions will be handled. Will this be done through an addendum, which assumes no potential for new significant environmental impacts; or, will a Subsequent or Supplemental EIR be required?

We are reminded of the approach the Planning Commission used in the latest Housing Element where they concluded in a 4-1 vote that the traffic was already so bad and conditions could not be mitigated so therefore, there would be no significant additional impacts. We would hate to see that logic being used, again.

Section 4.3 [CEQA] of the Master Development Agreement describes the responsibilities of the developers and the City with respect to EIRs. It specifically states: “To the extent supplemental or additional review is required in connection with Subsequent Project Approvals, Developers acknowledges that City may require additional mitigation measures necessary to mitigate significant impacts that were not foreseen at the time this Agreement was executed.”¹⁶

Finally, we are concerned about the increase in the use of “Statements of Overriding Considerations” as a maneuver to avoid facing up to the results of an EIR.

¹⁶ Section 4.3 at page 33, of the Master Development Agreement.

EXHIBIT J

ANNUAL REVIEW FORM

This Annual Review Evaluation Form is submitted to the City of Foster City ("City") by [Developer] [Note: each Developer to submit separately] pursuant to the requirements of California Government Code section 65865.1 and Resolution No. 80-73 regarding [Developers] good faith compliance with its obligations under the Development Agreement between the City and AMB Institutional Alliance Fund III, L.P., Foster City Executive Park Partners and The Northwestern Mutual Life Insurance Company ("Developers") having an Effective Date of _____ ("Development Agreement"). All terms not otherwise defined herein shall have the meanings assigned to them in the Development Agreement:

Annual Review Period: _____ to _____.

In order to establish: (1) that Developer has used good faith efforts to obtain financing, process required approvals, and/or construct and sell the remaining undeveloped properties and reach allocated commercial/retail densities and/or residential unit maximums allocated under the Development Agreement and (2) whether the term of the Agreement may be extended consistent with the "Duration of Agreement" section, describe the following:

- a. Economic factors relevant to development in City and mid-peninsula region including vacancy rates, construction costs, the availability of financing, market demand and average rental rates for different product types (residential/commercial/retail) within the Master Plan.
- b. A summary of all efforts made in the past year to market, sell and process required permits and/or construct the remaining undeveloped properties and reach allocated commercial/retail densities and/or residential unit maximums.
- c. A summary of specific strategies to be followed in the coming year intended to facilitate the processing of permits and/or actual project construction.

Note that Developers have no affirmative obligation to process permits and construct and sell commercial/retail space and/or residential units under the Development Agreement. Accordingly, the discussion provided in connection with the above may not be used to establish a breach of the Development Agreement. However, the Parties intend that these factors will be taken into account in City's determination of whether to extend the Term of the Development Agreement pursuant to Section 1.3.2.2.

Specify whether Impact Fees, Processing Fees, Connection Fees and/or other fees due and payable have been paid during this annual review period.

Describe whether obligations related to open space dedications, open space improvements and/or open space in lieu fees were satisfied where required during this annual review period.

Describe whether any Shuttle Bus contributions were satisfied during this annual review period.

Describe whether any On-Site Circulation Improvements were completed during this annual review period.

Describe whether any Off-Site Traffic Improvements were paid for during this annual review period.

Describe whether other applicable Development Agreement obligations were completed during this annual review period.

Specify whether Developer has assigned the Development Agreement or otherwise conveyed the Property during this annual review period.

Describe compliance with the Phasing Plan.

The undersigned representative confirms that [Developer] is:

_____ In good faith compliance with its obligations under the Development Agreement for this annual review period.

_____ Not in good faith compliance with its obligations under the Development Agreement for this annual review period, in response to which [Developer] is taking the actions set forth in the attachment hereto.

IN WITNESS WHEREOF, [Developer] has executed this Annual Review Form as of this _____ day of _____, 20__.