



MIAMI BEACH

OFFICE OF THE CITY MANAGER

NO. LTC # 039-2007

LETTER TO COMMISSION

TO: Mayor David Dermer and Members of the City Commission

FROM: Jorge M. Gonzalez, City Manager

DATE: February 9, 2007

SUBJECT: Update on New World Symphony Amendment to Development Agreement

This is to advise you of the latest developments in our negotiations with New World Symphony regarding their requested First Addendum to their Development Agreement dated January 5, 2004.

Background

On September 8, 2004, pursuant to the Development Agreement between the New World Symphony (NWS and/or Developer) and the City, dated January 5, 2004, the Mayor and City Commission approved Concept Plan #4 presented by the NWS; referred the issue of a Park design to the Finance and Citywide Projects Committee; recommended to maximize the number of parking spaces in the proposed public parking garage adjacent to the NWS Project; and requested the Design Review Board to conduct a preliminary design review of the Project (including the Garage) and send it back to City Commission for review and approval.

Concept Plan #4 provides for Soundspace and related support structures, including the Garage, to be situated on the City surface parking lot west of a realigned Drexel Avenue and for a public Park and function space area to occupy the lot to the east. The main entrance lobby and drop-off area for Soundspace would be on the west side of the realigned Drexel Avenue, with support and classroom space occupying the south side of the west lot. The Garage would be located on the western-most portion of the west lot, with entrance and egress locations to be determined. The Plan also calls for a realigned Drexel Avenue to meander eastward into the Park between Lincoln Lane and 17th Street, which provides a unique opportunity to integrate Drexel Avenue into the design of the Project site, creating a true public plaza feel and providing the ability to close the street during certain park-related events. As part of Concept Plan #4, an integrated Park component was incorporated in the Project site.

Pursuant to the direction of the City Commission on September 8, 2004, and consistent with the Planning Board's August 24, 2004 recommendation that the entire two (2) blocks, including the proposed Park, be designed as an integrated site, Gehry Partners LLP (Architect and/or Gehry Partners) was asked to submit a proposal and cost estimate to undertake design services for the proposed Park. A proposal was submitted for review by the Finance and Citywide Projects Committee at its meeting on October 26, 2004. The Committee recommended amending the Development Agreement between the City and NWS to expand the NWS' scope of responsibilities to include the design, development and construction of the Park; and Drexel Avenue between North Lincoln Lane and 17th Street and improvements adjacent to the new Garage, at the City's cost and expense, not to exceed \$10,000,000; an area comprising the Jackie Gleason Theater of the Performing Arts ("JGT")

entry landscaping at the City's cost and expense, not to exceed \$1,150,000; and an area comprising North Lincoln Lane improvements, at the City's cost and expense, not to exceed \$500,000.

The City Manager emphasized the fact that even though Gehry Partners was engaged by NWS, the City would retain discretion over the design of the Park Project. Furthermore, NWS committed to using a Basis of Design (BODR) process, to include community design workshops in developing the plans for the Park, and requiring City Commission approval of the final Park Project design.

On December 8, 2004, the Mayor and Commission held a duly noticed public hearing to consider, on first reading, a First Addendum to the Development Agreement relative to the City and NWS' respective responsibilities regarding the design and construction of the Park Project. At such time, the Mayor and City Commission discussed the proposed First Addendum and expressed concerns with proceeding with the Park Project, and the City's corresponding commitment of expenditure of funds for design services, without ensuring NWS commitment to proceed with its Soundspace project.

The item was officially opened and continued. The sentiment of the City Commission was that language should be provided in the Addendum that would protect and make the City whole in the event that NWS chose not to proceed with the Soundspace Project.

On January 26, 2005, a meeting was held in which NWS informed the City that it was not prepared to formally announce the status of its capital campaign, pending the formalization of its funding commitments. Following the City's request for assurances that Soundspace would proceed, the parties discussed the importance of developing the Project as one integrated site and, as such, the importance of continuing the planning process without delay. The City further requested that the Gehry Partners provide a not-to-exceed cost estimate to prepare schematics of the Park, culminating in a Basis of Design Report (BODR). NWS clarified its position that, to the extent the Soundspace Project failed to proceed, the City's only commitment, at risk, would be limited to the funding of the costs to prepare and present the BODR, which at that time was estimated to be approximately \$400,000.

A follow-up meeting was held with NWS on March 15, 2005, during which NWS announced the engagement of Hines Interests Limited Partnership (Hines) as its Project Manager. NWS also advised that it was still not ready to make any formal fund-raising announcements or proceed with an amendment to the Development Agreement. The First Addendum was subsequently put on hold until such time that NWS was prepared to proceed, and the Architect's scope could be defined relative to the Park and surrounding infrastructure improvements.

In a further development, the principals of 420 Lincoln Road Associates, Inc., offered to incorporate NWS' required parking, totaling 175 spaces, into its project located at 1601 Drexel Avenue and 1600 Washington Avenue at no cost to NWS or the City. Accordingly, the Mayor and City Commission adopted a resolution on December 7, 2005, authorizing the execution of a Covenant in Lieu of Unity of Title between the NWS, 420 Lincoln Road Associates, and the City, thereby satisfying NWS' parking requirements under the City's Land Development Regulations and allowing for off-site parking by NWS.

On January 9, 2006, in accordance with the timeline specified in the Development Agreement, NWS submitted preliminary plans and specifications for the Soundspace and Garage portions of the Project for review and comment by the Administration. Since the plans did not deviate from the Concept Plan that was approved by the City Commission on September 8, 2004, the City Manager authorized NWS to proceed with design development, subject to comments and concerns submitted by Planning and Zoning and other departments which reviewed the plans.

Update Since the City Commission Meeting of December 6, 2006

Since that time, NWS and the City have been working together to define the processes and refine the scope for implementing NWS' plans, as well as the City's overall vision for developing the Park and the areas surrounding the entire development site. This process has involved "redefining" the zones that were initially presented at the October 26, 2004 Finance Committee meeting, to better address the phasing and inter-relation of the various components, (i.e., the Garage, Soundspace, the Park, Lincoln Lane and Pennsylvania Avenue; defining the City's and NWS' respective scope and responsibilities relative to surrounding infrastructure and streetscape improvements; re-valuing the "build-to" cost estimates for the Garage, the Park Project and related infrastructure components; determining the not-to-exceed cost estimate to develop schematics and the BODR for the Park Project; and establishing terms and conditions relative to the development of the Park Project). In order to memorialize the results of these discussions, the City and NWS are finalizing a revised First Addendum, which generally provides for the following proposed amendments to the Development Agreement:

Zone Designations

As indicated previously, during the initial discussion at the Finance and Citywide Projects Committee on October 26, 2004, the zone designations were used to define certain add alternate components involving the Park and surrounding street and landscaping improvements, including the entry way to JGT, which on account of a separate proposal process for permanent use of JGT, was removed from the scope of this Project. However, in consideration of Cirque Du Soleil's recent withdrawal of its proposal for TOPA, the Finance and Citywide Projects Committee, at its meeting on November 30, 2006, concurred that the entry way landscaping be added back into the scope for the Park.

The new proposed Zones correlate the three primary Project components (Parking Garage, Soundspace – now referred to as Symphony Campus and the Park), with their respective contiguous street and/or landscape improvements that would need to be permitted and phased concurrently. The two additional Zones, identified as Zone 4 – Lincoln Lane, and Zone 5 – Pennsylvania Avenue, are currently planned to be undertaken by the City as part of the City Center Right-of-Way Improvement Project, and are not within NWS' scope of work. The three (3) Zones within NWS' proposed scope of work and their respective sub-zones are summarized as follows and are illustrated in the attached Zone diagram, included as Exhibit 2 to this memorandum:

Proposed Zones

Zone 1

Zone 1.1
Zone 1.2*

Zone 1.3*

Parking Garage Zone

Parking Garage
Garage landscaping along Lincoln Lane and Pennsylvania Ave
17th Street and Lincoln Lane streetscape and landscaping improvements contiguous with Zone 1.1

Zone 2

Zone 2.1
Zone 2.2*
Zone 2.3*

Symphony Campus Zone

Symphony Campus (also referred to as the Developer's Improvements)
Drexel Ave Realignment
17th Street and Lincoln Lane streetscape and landscaping improvements contiguous with Zone 2.1

Zone 3

Zone 3.1
Zone 3.2
Zone 3.3

Park Project Zone

City Center Park
Washington Ave Streetscape Improvements
17th Street and Lincoln Lane streetscape and landscaping improvements contiguous with Zone 3.1

*Zones 1.2, 1.3, 2.2, and 2.3 are defined as "Additional Improvements," and no part of Zone 3 is included in this definition.

Funding Considerations

One of the main objectives of the proposed First Addendum is to clearly define NWS' scope of responsibilities relative to surrounding/abutting infrastructure and streetscape improvements that will implement the City's overall vision for developing the Park Project and the surrounding area, and that need to be addressed as part of the regulatory review and permitting process pursuant to the existing Development Agreement. The City's anticipated share of costs associated with the respective Zone improvements is as follows:

Zone 1.1 – Parking Garage

Pursuant to the existing Development Agreement, the City was to fund an amount not to exceed \$12,250 per parking space for all hard costs (\$3.9 Million based on 320 spaces and \$7.5 million based on 608 spaces) plus 12.5% of the hard cost per space for soft costs. While there is also a provision for a CPI adjustment (not to exceed 5%) at the time the Building Permit is issued, it should be noted that these numbers were based on comparable garage facilities that were built pre-2004. Pursuant to the City Commission's mandate noted above, the Garage is planned to maximize the number of parking spaces and to also contain certain space on the ground floor for retail uses, which makes the currently estimated parking spaces number 608.

However, since the Development Agreement was executed, the area has seen considerable escalation in the cost of construction and construction materials. These cost increases, combined with the anticipated doubling in size of the Garage's original number of spaces, together result in a significant increase in the overall cost. The current cost of the Garage is estimated at \$15,210,000. Based on the current required City contribution (with contractually allowed escalation) of \$13,505 per space or \$8,211,040, NWS would need to pay out of their funds the remaining difference of approximately \$7 million plus any cost overruns. NWS has advised the City that they do not have the financial resources to meet this requirement and that if the City does not alter this requirement, then the entire project cannot proceed. Since the Garage has always been intended to be a City responsibility and will also be wholly owned and operated by the City, the City Administration recommends that the City assume the whole cost of the Garage, currently estimated at \$15,210,000 (approximately \$25,016 per space) for the design, development and construction of the Garage (which amount is reflected in the Capital Plan that was adopted by the City Commission on September 21, 2006). If this recommendation is accepted, the City would also be responsible for any and all cost overruns associated with the Garage.

It should also be noted that the Development Agreement currently provides for the City to pay NWS the Garage Costs in sixteen (16) equal monthly installments, beginning on the first day of the second month following commencement of construction on the Garage. The basis for this provision is to afford protection to the City in the event construction of the Garage does not occur. This position is also consistent with the City's standard public/private development agreements wherein the City does not put funds at risk until construction begins.

However, NWS has pointed out that the original payment schedule does not accurately reflect the timing of required expenditures, and is requesting that in the event of approval of the First Addendum, at that time, the City would reimburse the NWS, in a lump sum, payment all of the costs, fees and expenses related to Zone 1 (that amount currently is approximately \$41,000) incurred through and including the execution date of the Addendum and that, going forward, beginning with the execution date, NWS would be reimbursed monthly for hard and soft costs on a percentage of completion basis.

In considering this request, and as noted above, the City traditionally does not put its funds at risk until construction has commenced. This request would put these funds at risk if for some reason NWS makes the decision not to proceed with the project. In exchange for this preliminary outlay of funds, NWS is willing to make the City whole in the event that the Symphony Campus Project does not proceed, by reimbursing the City for its share of the costs incurred through commencement of construction of the Garage.

NWS has two qualifications of this guarantee of reimbursement by exempting its obligation to reimburse the City under the following circumstances: 1) if the City Commission imposes requirements that make the Project infeasible; and/or 2) if the City does not commit to a \$15 Million grant-in-aid. Although a right of assignment was requested by the City in lieu of the guarantee of reimbursement, NWS has reported that Gehry Partners will not provide this right of assignment prior to construction commencement. This represents considerable movement on the part of NWS since the December 6, 2007 Commission Meeting.

Finally, NWS has agreed that the City contribution for the Garage will be drawn no earlier

than October 1, 2008.

Additional Improvements: Zones 1.2 – Garage Landscaping along Lincoln Lane and Pennsylvania Avenue; Zone 1.3 -- 17th Street Streetscape contiguous with Zone 1.1; Zone 2.2 – Drexel Avenue Realignment; and Zone 2.3 – 17th Street Streetscape contiguous with Zone 2.1

Following the directive to create an integrated Project site, the City, as described below, has budgeted \$20,210,000 towards the Park Project ("Park Project Budget"), which as in the case of the Garage, is also reflected in the Capital Plan that was adopted by the City Commission on September 21, 2006. Included within the Park Project Budget is funding for the Additional Improvements to be designed, developed and constructed concurrently with the Symphony Campus and the Garage. The City estimates, and is budgeting an amount not to exceed \$6,400,000 for completion of the Additional Improvements; (this cost is included in the not-to-exceed Park Project Budget of \$20,210,000). In the event the actual cost of the Additional Improvements is less than the budgeted amount, the excess of such funds shall be available to be used for the design, development and construction of the Park itself (Zone 3).

Zone 3.1 - City Center Park

Based on comparable park projects throughout the City and taking into consideration the additional scope of work involving the abutting streetscape improvements along Washington Avenue (Zone 3.2) and along 17th Street, contiguous with Zone 3.1 (Zone 3.3), the City, as part of its adopted Capital Plan, has established a not-to-exceed Park Project Budget in the amount of \$20,210,000 for the Park Project (which amount includes the Additional Improvements in Zones 1 and 2 as noted above). Using this build-to number as a basis, included within the Park Project Budget is a not-to-exceed cost estimate to develop schematics and the BODR for the Park Project (which includes all components within Zone 3) in the amount of \$1,110,000. This \$1,110,000 includes approximately \$29,600 to reimburse the NWS for costs, fees and expenses that NWS has already incurred in connection with Zone 3.

At the December 6, 2006 City Commission Meeting, the City Commission determined to add JGT's entry way landscaping back into the scope for the Park, at an estimated additional cost of \$1,150,000. This decision increased the cost for the Park from \$20,210,000 to \$21,360,000. Based on funding commitments for the City Center RDA, NWS and the City have agreed that funding for the Park will be available no earlier than October 1, 2009.

As shall be memorialized in the proposed First Addendum, the process for review and approval of the Park Project Design will generally provide for two (2) Community Design Workshops, and for appropriate review and approval milestones (of the concept plan and plans and specifications, respectively) for the City Manager and the City Commission. The NWS, upon approval of the BODR by the City Commission, shall have the opportunity to price labor and materials and establish a final GMP, within range of the numbers presented in the BODR. If the final construction numbers exceed the range established in the BODR, the City will have the following options to bring the Project within budget: fund the higher amount; and/or, value engineer the Project; and/or, delete scope to bring the Project within budget. The City is also responsible for any cost overruns for the Park and Additional Improvements.

With respect to the design costs for the Park itself, the NWS has also agreed that, in the event it elects not to proceed with Symphony Campus Project, it will reimburse the City for its share of costs associated with providing schematics and a BODR for the Park, which is estimated at \$1.1 million. However, as in the case of the Garage, NWS qualifies this guarantee of reimbursement by exempting its obligation to reimburse the City under the following circumstances: 1) if City Commission imposed requirements make the Project infeasible; and/or 2) if the City does not commit to a \$15 Million grant-in-aid. Although a right of assignment was requested by the City in lieu of the guarantee of reimbursement, NWS has reported that Gehry Partners will not provide this right of assignment prior to construction commencement.

It should also be noted that Section 2.11 of the Development Agreement provides NWS with the right to terminate the Development Agreement and the Ground Lease prior to the Possession Date, in the event of any conditions that would render the Project economically unfeasible, including, but not limited to regulatory agency requested design changes, concurrency requirements and/or environmental remediation costs without liability or further obligation. As noted above, in the event of such termination by NWS, the proposed First Addendum revises this section of the Development Agreement to provide for reimbursement to the City of all design costs incurred in connection with the Park and the Garage.

Funding Request Summary

Zone Description	Original Budget	Total Budgeted Cost
Zone 1.1 Parking Garage	\$4,410,000 (320 spaces @ \$12,250/space + 12.5% soft costs)	\$15,210,135 (Est 608 spaces @ \$25,016/space + soft costs)
Zones 1.2, 1.3, 2.2, 2.3 – Additional Improvements	\$ 500,000 – (Lincoln Lane Imp)	\$ 6,400,000
Zones 3.1, 3.3 - Park: BODR	\$ 400,000	\$ 1,110,000
Park Improvements	\$9,600,000	\$12,700,000
Total	\$16,060,000	\$35,420,000
Proposed New item – TOPA entrance landscaping	\$1,150,000	\$0

Grant-in-Aid

Initially, the NWS requested a \$30 Million Grant-in-Aid for the Soundspace Project. However, in subsequent discussions, the NWS has since revised its request to \$15 Million. NWS has indicated that this grant is critical to the Project proceeding at this time, and as noted earlier, is unwilling to guarantee return of any City soft costs in the event the Project fails, unless this grant is funded.

It should be noted that between actual expenditures to date (including land value, studies and appraisals) and future commitments (direct and indirect capital appropriations), the City

already anticipates contributing more than \$70 Million towards and in support of the NWS Project, estimated as follows:

Est. Land Value – NWS footprint, including planned service alley and green space (73,200 sqft @ \$200/sqft)	\$ 14,640,000
Zyscovich Study, land appraisal and related analyses (incurred cost)	280,757
Est. 644-space Garage component (budgeted cost as amended)	15,210,135
Est. Park and Additional Improvements (budgeted cost as amended)	20,210,000
Multi-Purpose Municipal Parking Garage, excluding office space (appropriated)	<u>20,573,000</u>
Total Est. City Contributions:	\$ 70,913,892

During the December 6, 2006 City Commission Meeting, sentiment was expressed by the Commission for the City Manager to continue negotiations regarding how and when this \$15 million Grant-in-Aid would be made available to NWS. NWS has continually represented that the funds needed to be available prior to the end of the project and regardless of the form of the grant, the effective yield of the funds needed to be \$15 million (in effect, if City funded this amount over a period of years, then the total amount would need to exceed \$15 million in order to make up for the cost of funds incurred by NWS to borrow money to build the project).

Over the past two months, the City Manager and NWS have come to the following tentative agreement with regard to the \$15 million Grant-in-Aid. This is offered for the City Commission's consideration:

- City will provide \$15 million in supplemental funding for the Soundspace project as it is needed.
- NWS must expend \$135 million towards the project before the City will release any funds. Qualifying expenditures include A/E fees, Hines fees, permits, related engineering tests and borings, construction costs.
- NWS must demonstrate to the City that the project is fully funded and in balance before the City will release any funds, i.e., if the project cost exceeds \$150 million, then NWS will need to show the source of the funding above the \$150 million.
- Funds for the Grant-in-Aid will be available no earlier than October 1, 2009 and will be provided on an "as-needed" basis.
- City and NWS will split 50/50 any unspent funds, if any.
- NWS will provide the City with a 180 day advance notice to City of NWS intent to draw on the Grant. NWS will follow-up with a second 60 day advance notice so that City internal processes may begin.
- City contribution is subject to availability of funds in accordance with Florida Statutes and considers the potential effect of pending bills in the State Legislature.
- NWS has agreed to provide the City an Option to purchase the Lincoln Theater at a price to be determined through a comparison of the City appraisal, a NWS appraisal, and a negotiation. This option will be valid through December 31, 2007.
- Public Benefits for this Grant-in-Aid will follow, but have yet to be fully defined.

NWS Required Parking

A final outstanding issue for the project concerns the City Code required parking for the Soundspace project. Currently, the Soundspace building's required parking is satisfied by the future development of the 420 Lincoln Road project. The Commission expressed concern regarding whether or not there was a contingency provision to address NWS' parking requirement, in the event the 420 Lincoln Road Project failed to proceed. Since the Covenant-in-Lieu-of-Unity-of-Title does not address this condition, in the event that the 420 Lincoln Road Project were not to proceed, the NWS would still have to comply with its parking requirement under the Zoning Code (175 spaces) and it is anticipated that 1) NWS would either request an Ordinance change that would then allow a request for a Waiver of Development Regulations from the City, or 2) NWS would be required to purchase, lease, or provide some similar interest for 175 spaces in the Garage or other property. If this issue is not resolved by the time the project is constructed, then the project will not receive legal occupancy.

During the discussions between the City and NWS, NWS has indicated that it would prefer to resolve this issue prior to their commencement of construction. Guidance from the City Commission is being sought as to whether there is any preference by the Commission as to how this requirement is addressed.

Conclusion

Attached is the latest draft of the proposed First Amendment for your review. There are final elements that are still being finalized for the February 20th City Commission Meeting, so some of the language in this draft may change, although the main sentiments and deal points are properly represented in the attached draft.

The City Commission expressed a desire to discuss the draft noted above and to also resolve the questions that were remaining as of the end of the December 6, 2006 meeting. Those specific issues, which have been specifically dealt with above, were:

- The specific conditions and timelines for the requested \$15 million Grant-in-Aid; and,
- the NWS' requested increase in the Garage Costs, to a not to exceed amount of \$15,210,185; and,
- as an alternative to the proposed language in the First Addendum which requires NWS to "reimburse" the City for its "soft" costs for the Park Project and the Garage, in the event NWS deems not to proceed with its Project and exercises its right to terminate the Development Agreement, providing for language in the First Addendum (to be finalized by second and final reading) which would give the City a "right of assignment" in the event (i) NWS does not proceed (pre commencement of construction) with its Project, or (ii) (post-construction) if NWS defaults prior to completion of the Project, and which would allow the City to utilize NWS' Architectural Consultant, Gehry Partners LLP's, designs, plans, etc., and proceed on its own to build the Park and the Garage.

With respect to these outstanding items, the Administration is recommending that the City fully fund the Garage costs and the Grant-in-Aid. As noted above, NWS was not able to secure the requested Right of Assignment, but has agreed to refund the City's soft costs in

the event NWS decides not to proceed with the project (with the qualifications noted above).

Also attached for your benefit and information is a comparison of the most substantive proposed changes in this Proposed First Amendment from the Development Agreement and the Initial amendment originally considered by the City Commission in December 2004.

A current schedule for the project is the final attachment.

There is scheduled a City Commission Workshop on Monday, February 12, 2007 at 6:00 PM to discuss these specific issues, as well as the total project in general. Please feel free to call me should you require any additional information with regard to this issue.

Attachments:

- 1) Draft Proposed First Amendment
- 2) Crosswalk of Substantive Proposed Changes
- 3) Schedule