

Memorandum of Understanding between Borough of Somerville and JSM at Somerville

Recently the Borough has negotiated a revised Memorandum of Understanding (MOU) with JSM at Somerville, LLC.

A Memorandum of Understanding is a document that outlines the major elements of a more detailed agreement between two or more parties, in this instance the revision of the Redeveloper's Agreement between the Borough of Somerville and JSM at Somerville, LLC.

The reason for entering into an MOU is to allow work to proceed while the more detailed Redevelopers Agreement is negotiated and finalized.

In October of 2008, the Redeveloper (and property owner) advised the Borough that obtaining financing for the project "as approved" by the Borough Planning Board was not possible in the current economic climate. Further, the redeveloper asked if the Borough would consider a financial contribution to the project as that could make a significant positive change in their ability to obtain finance.

The Borough was faced with a series of alternatives to consider, and the decisions made would have a significant impact on the Borough, its residents, Main Street and the Borough economy as a whole, long term.

Those alternatives and the potential outcomes were:

<u>Alternative</u>	<u>Potential Outcome</u>
1. No longer support the project	Property could remain vacant for an unknown time Owner would file tax appeal reducing Borough income Borough would have no say in final project
2. Allow repopulation of existing buildings	No Davenport Street extension Lower value, lower taxes
3. Find another "willing" developer	Owner does not want to sell Problem finding buyer in today's market Cannot force owner to sell property
4. Build project "as approved"	Developer states cannot obtain finance Project could be delayed indefinitely
5. Put project "on hold"	Owner would file tax appeal reducing income Eye-sore remains on Main Street No guarantee of when project would start

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| 6. Condemn Project | Borough would have to bond for cost of property
Owner would contest condemnation in court
Cost to Borough unknown but high
Potential of being in court for years |
| 7. Negotiate a Modified Project
Potential Borough Financial
Contribution | Phase the project to allow early start
Redeveloper maybe able to finance in stages
Maintains value of property
Creates economic stimulus to Main Street |

The objective of the Borough has remained unchanged; the objective is to create redevelopment opportunities within the Borough that enhance the economic vitality of the Borough without adding to the tax burden of residents or property owners.

The following Bullet Points highlight the major elements of the MOU including changes made by the Council at the November 17 meeting.

- Both parties agree to work diligently to revise the Redeveloper’s Agreement, Redevelopment Plan (if necessary) and the Site Plan.
- Sets strict deadlines for the completion of all aspects of the project leading to construction
- Has provisions for remedies if the parties do not reach agreement or miss deadlines
- Redeveloper agrees to pay all Boroughs professional costs relating to the review and approval process
- Commits the Redeveloper to maintaining a positive balance in the Developers Escrow Account held by the Borough to pay professionals
- Details the proposed Phasing of the project, including in Phase 1,
 - construction of the residential portion of the project,
 - building the Davenport Street extension at the developers cost,
 - refurbishing and re-tenanting the supermarket building,
 - possible construction of a new retail building on the site and
 - refurbishing and repopulating of the remaining Main Street buildings.
- Addresses possible future parking needs in the South Street Parking area, stipulating a parking study will be undertaken prior to any Borough decision with no commitment from the Borough at this time. Adds language describing alternatives for Borough and/or redeveloper to finance, build and operate deck.
- Details the proposed project financing, the timing, timing extensions, what happens if financing cannot be obtained and the Boroughs contribution to the project as an economic stimulus

- Details the Payment in Lieu of Taxes (PILOT)
The Redeveloper agrees to continue the current (2008) full tax payments to the Borough. Adds escalator clause to redeveloper payments details to be defined in the Revised Redevelopers Agreement
- Redeveloper will pay the total debt service for the Borough contribution to the parking structure.
- The Borough will continue to fund the School system from Redeveloper PILOT payments
- States that the Phase 2 financial agreements will be separate and not part of this agreement.
- Sets very short due dates for specific activities including a revised Redevelopers Agreement being presented to Council for review December 15th

Next Steps

Revise the Redevelopers Agreement based on this MOU, revision to be presented to Council on December 15, 2008.

Included in the Redevelopers Agreement language describing the Borough's position on the project in return for the financial commitment made.

JSM will commence revising the site plan drawings and detail of the project Phasing for presentation to the Planning Board in January 2009.

The MOU is attached in its entirety for review with major items underlined.

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (“MOU”) is entered into this _____ day of November, 2008, between the **Borough of Somerville**, New Jersey, a body corporate and politic of the State of New Jersey whose address is 25 West End Avenue, Somerville, New Jersey 08876, Somerville, New Jersey (the “**Borough**”) and **JSM at Somerville, LLC**, a New Jersey limited liability company with offices located at 1260 Stelton Road, Piscataway, New Jersey 08854 (“**Redeveloper**”) (the Borough and the Redeveloper are each a “**Party**” and, collectively, the “**Parties**”).

WITNESSETH

WHEREAS, on February 17, 2004, the Council adopted Ordinance No. 2155, which approved the Redevelopment Plan for the West Main Street Area, dated February 12, 2004 (the “**Redevelopment Plan**”), which Redevelopment Plan was amended on December 20, 2004; and

WHEREAS, on May 27, 2005, the Borough and the Redeveloper entered into a Redevelopment Agreement (as amended hereby and by the Original MOU (defined below), the “**Original Agreement**”); and

WHEREAS, the Redeveloper is the owner of Block 117, Lot 1, comprising 13.553 acres and currently known as the Landmark Shopping Center (the “**JSM Property**”) and the Borough currently owns Block 118, Lot 21, comprising approximately .46 acres and currently being used as portion of a municipal parking lot #4 (the “**Borough Property**”); and

WHEREAS, on April 13, 2005, the Borough Planning Board granted Preliminary and Final Major Site Plan Approval (“**Site Plan Approval**”) to construct a Mixed Use, Transit Oriented Development (the “**Approved Project**”) on the Property; and

WHEREAS, by Memorandum of Understanding, dated July 12, 2007 (the “**Original MOU**”), as extended, the Borough and Redeveloper revised certain terms of the Original Agreement;

WHEREAS, the Original MOU expired on or about March 3, 2008; and

WHEREAS, by way of this MOU, the Borough and Redeveloper desire to further revise the terms of the Original Agreement, as amended; and

WHEREAS, the terms of this MOU that conflict with the Original Agreement shall supersede the terms of the Original Agreement, with all other terms and conditions of the Original Agreement remaining in full force and effect until such time as the Amended and Restated Agreement is executed, without materially waiving any contractual rights of either party; and

WHEREAS, the Borough and Redeveloper acknowledge that the mutual promises contained in this MOU are good and valuable consideration for the binding execution of this MOU.

NOW, THEREFORE, for and in consideration of the promises and of the mutual representations, covenants and agreements herein set forth, the Parties, and their successors and assigns, promise, covenant and agree as follows:

SECTION 1. EXCLUSIVE NEGOTIATIONS From the date of the execution of this MOU until its termination, as set force in section 3 below, the Parties shall diligently and in good faith negotiate to complete an Amended and Restated Redevelopment Agreement to incorporate the terms of this MOU.

SECTION 2. THE PROPOSED PROJECT

The Approved Project encompasses a mixed use transit oriented development plan as outlined in Redeveloper's Site Plan Approval and the resolution adopted by the Borough Planning Board. However, since the date of the Redevelopment Plan, the Redevelopment Agreement and the Site Plan Approval, the real estate and financial markets have been adversely affected. Additionally, labor and construction material costs have increased significantly during the same time period, the retail market has softened and retail rents have decreased. The deteriorating lending market and increased construction costs have extensively affected the ability to finance and construct the Approved Project. Therefore, the Parties have agreed to revise the Approved Project as provided herein.

SECTION 3. TERM - This MOU shall be effective upon execution by the Borough and Redeveloper and shall continue in full force and effect until the earlier to occur of: (a) execution of an Amended and Restated Redevelopment Agreement for the Project, or (b) the Parties are unable to successfully negotiate an Amended and Restated Redevelopment Agreement by December 12, 2008. If an Amended and Restated Redevelopment Agreement cannot be negotiated by this date, the Parties acknowledge that the Redeveloper can, subject to any required approvals, re-populate the existing buildings or modify the existing improvements, as the Redeveloper deems necessary, provided that any such modifications are in conformance Borough Code and any development criteria permitted under the Redevelopment Plan.

SECTION 4. RETENTION OF PROFESSIONALS/ADMINISTRATIVE COSTS. Redeveloper acknowledges that the Borough has retained the services of professionals to provide advice or support in undertaking its obligations under the Original Agreement and shall continue the use of such professionals (legal, financial, planning and parking) pursuant to this MOU and any actions related thereto. The professionals are identified on Exhibit A attached hereto. The Borough reserves the right to retain additional professionals as necessary and shall advise the Redeveloper of any additional professionals to be retained. Redeveloper and Borough shall continue to follow the invoice review and comment procedures that were previously implemented. Redeveloper shall continue to pay the Borough all costs incurred by the Borough with respect to the Project in accordance with the terms and conditions of the Original Agreement and this MOU, including maintaining a positive balance in the Borough escrow account to cover anticipated Borough professional costs. Subject to the obligation of the parties to negotiate diligently and in good faith under Section 1 hereof, the Redeveloper shall pay all costs even if an Amended and Restated Redevelopment Agreement is not executed. Borough agrees not to expend more funds than are in the escrow account (i.e., no deficit spending). Redeveloper shall maintain at least \$10,000 in the account at all times until final Planning Board approval is obtained.

SECTION 5. MINIMUM TERMS AND PRINCIPLES IN AMENDED AND RESTATED REDEVELOPMENT AGREEMENT

A. Development Plan

- maximum of 350 residential units, provided that this maximum could be increased by an additional 60 residential units if the Redeveloper determines that it is not economically feasible to develop the office space in Phase II and the Redeveloper elects to replace some or all of the Phase II office space with residential units;
- maximum of 150,000 square feet of retail space;
- maximum of 80,000 square feet of office space;
- Phased construction:
 - Phase I shall consist of
 - the development of the residential building (and retail space that is physically part of the residential building) consisting of a maximum of 350 units and approximately 44,145 square footage of retail space;
 - the Davenport Street extension (with no Borough contribution and the street being dedicated to the Borough upon completion of the extension);
 - refurbishment of the exterior, and re-tenanting, of the supermarket building;

- rehabilitation, refurbishment and re-tenanting the remaining buildings fronting on Main Street and South Street after the completion of the Davenport Street extension (the “L-Shaped Building”);
- at Redeveloper’s election, the construction of the retail building across the parking field from the supermarket building, identified on the original approved site plan as Building #6 and referred to as the “pad site”.
 - Phase II shall consist of the re-development of the refurbished L-Shaped Building into office/residential and retail space, per the approved “revised” site plan. Phase II shall be contingent upon favorable financial and market conditions and the potential construction of the South Street Parking Deck. Phase II shall be approved as part of the pending amended redevelopment application.

B. South Street Parking Structure

- Borough acknowledges that it has been using a portion of the JSM property for public parking, known as the “South Street Parking Lot” (officially known as parking lot #4). The Redeveloper has verbally provided a license to the Borough to use and continue to use such spaces. The Redeveloper may, upon written notice to the Borough, utilize up to one-third of the actual number of spaces in the South Street Parking Lot as reserved parking at no cost.
- Construction of the proposed South Street parking structure (the “Parking Deck”) shall be deferred until the Redeveloper elects to commence the development of Phase II, unless the Borough elects to construct the Parking Deck earlier. The determination of whether the Parking Deck is required will be based on a parking study following the completion of Phase I and prior to the commencement of Phase II construction. The construction of the Parking Deck by the Borough is also dependent on the availability of funding.
- Timing of the construction of the Parking Deck (if needed) shall be coordinated with the Redeveloper’s construction of Phase II to ensure the availability of parking for Phase II tenants. The Borough and Redeveloper shall agree to a schedule for commencement of construction of the Parking Deck.
- If the Borough elects to solely finance and construct the Parking Deck, the Borough shall convey title of the South Street Parking Lot property owned by the Borough to the Redeveloper for \$250,000 and the Borough and Redeveloper shall enter into a ground lease for the property. The Borough shall own and operate the Parking Deck and provide parking to the Redeveloper to support Phase I and Phase II on terms to be negotiated as part of the Amended and Restated Redevelopment Agreement.
- If the Borough (i) notifies the Redeveloper that the Borough will not construct the Parking Deck or (ii) fails to commence construction of the Parking Deck in accordance with the agreed upon schedule, the Redeveloper may finance, construct, own and operate the Parking Deck. If the Redeveloper elects to finance and construct the Parking Deck, the Borough shall convey title of the South Street Parking Lot property owned by the Borough to the Redeveloper for \$250,000. The Parking Deck shall include, at a minimum, the number of parking spaces currently available in the South Street Parking Lot, which minimum spaces shall be available to the public at reasonable rates established by the Redeveloper. The Borough reserves the right to purchase the Parking Deck from the Redeveloper on terms to be negotiated as part of the Amended and Restated Redevelopment Agreement. Such terms shall include the Borough providing parking to the Redeveloper in the Parking Deck to support Phase I and Phase II.
- If (a) Phase II of the Project generates sufficient revenues for the Borough to contribute to the financing and construction of the Parking Deck, which determination and election shall be at the sole discretion of the Borough, and (b) the Redeveloper consents to the construction of

the Parking Deck, the Borough and Redeveloper shall negotiate in good faith to execute a mutually beneficial arrangement to finance, construct, own and operate the Parking Deck. It being acknowledged by the Borough and Redeveloper that such mutually beneficial arrangement shall be consistent with the financial contribution made by each to the Parking Deck.

- If the Borough and Redeveloper jointly finance, construct, own and/or operate the Parking Deck, the Borough shall consider the Redeveloper or a professional management company operating the Parking Deck to maximize the operational and financial capacity of the Parking Deck. The terms and conditions of such arrangement shall be negotiated as part of the Amended and Restated Redevelopment Agreement.

C. Project Financing

- Redeveloper shall use good faith efforts to obtain financing for Phase I within 90 days of receipt of final, non appealable Planning Board revised site plan approval and all other approvals for Phase I. Redeveloper will keep Borough advised of progress in obtaining financing for project. If Redeveloper is unable to obtain such financing within 90 days, and upon advising the Borough of this inability, the time to obtain such financing shall automatically be extended by 90 additional days. Redeveloper and Borough may further agree to extend such time period. Redeveloper shall provide Borough with evidence of such financing upon receipt.
- If Redeveloper is unable to obtain financing for Phase I by the required date, as extended, the Amended Redevelopment Agreement will terminate and the Redeveloper may proceed to repopulate the existing center and the parties shall have no further liabilities or obligations, with the exception of each party's obligations related to the Pathmark condemnation as referenced in section E below.
- In addition to seeking approval of a Revenue Allocation District ("RAD"), the Borough will seek the maximum amount of Redevelopment Area Bond ("RAB") financing based upon the revenues from the Project. The RAD/RAB proceeds (up to a maximum of \$13,000,000) shall be applied towards the construction of structured parking for Phase I ("**Structured Parking**"). Any financing shall include capitalized interest for the period from issuance of the RAD/RAB bonds to issuance of a certificate of occupancy for the residential building. If there is any unexpended capitalized interest when the certificate of occupancy is issued, the Borough shall use such unexpended capitalized interest to reduce the debt or shall make such funds available to the Redeveloper for Project costs. The Borough shall close on any project financing no later than the Redeveloper's closing of financing for Phase I.
- The Borough shall pay for the costs of the Structured Parking up to a maximum of \$13,000,000, including capitalized interest on any debt. Such payments shall be made to the Redeveloper on a "pay-as-you-go" basis and within thirty (30) days of receipt by the Borough from the Redeveloper of an invoice for work completed or costs incurred, which invoice shall be certified by a licensed architect/engineer.
- If possible and subject to adequate security precautions, the Structured Parking shall be used to provide parking for retail workers in the Project and such others as may be agreed to by the Borough and Redeveloper.
- Provided that the tax revenues at completion of construction of Phase I and the projected Phase II tax revenues are sufficient to satisfy the total of:
 - the Phase I PILOT payments to the Borough, as defined in section D; and
 - the Phase II PILOT payments to the Borough, as defined in section D;

then the Borough shall finance, construct, own, operate and manage the Parking Deck. Such financing by the Borough may be through the issuance of general obligation bonds, RAD financing, RAB financing, use of the Somerset County Improvement Authority or some other means of public financing.

D. PILOT

- Redeveloper and Borough shall enter into a financial agreement for a PILOT for Phase I (the “**Phase I PILOT**”) that provides:
 - From the execution of this MOU and until the completion of Phase I the Redeveloper shall continue to pay the amount of real estate taxes being paid for the JSM Property, as of October 1, 2008 (\$652,959.41).
 - Provided that the Borough is acting in good faith and is not in breach under this MOU or the Amended Redevelopment Agreement, Redeveloper agrees not file a tax appeal during the period commencing upon execution of this MOU through completion of Phase I.
 - Upon the completion of Phase I, the Redeveloper shall pay (i) the amount of real estate taxes being paid for the JSM Property, as of October 1, 2008 (\$652,959.41) with an escalation over the term of the PILOT to be negotiated as part of the redevelopment agreement, plus (ii) the debt service payments on any Borough financing of the Structured Parking.
- If the Redeveloper proceeds with Phase II, the Borough and Redeveloper shall agree to negotiate in good faith on an additional annual PILOT payment (the “**Phase II PILOT**”), which shall be based on the final, approved Phase II configuration. The Phase II PILOT shall be subject to a separate financial agreement between the Borough and the Redeveloper.

E. Condemnations

- Pathmark’s appeal of the Condemnation Commissioner’s valuation decision is the only remaining pending action. The Borough shall continue to pursue the settlement or final judgment of this action.

F. Redevelopment Plan Amendments

- Within (10) days of the execution of this MOU, the Parties shall review the current Redevelopment Plan, determine if any amendments are required and agree upon any necessary amendments, consistent with the terms and conditions of this MOU. The Borough shall then commence the review and approval process for such amendments in accordance with the Local Redevelopment and Housing Law, which shall be completed within the minimum time allowed by the law.

G. Amendment to Site Plan Approval

- Within (30) days of the execution of the Amended and Restated Redevelopment Agreement or the effective date of the amendments to the Redevelopment Plan, whichever is later, Redeveloper shall submit an amended site plan application to the Planning Board in accordance with the terms and conditions of the Amended and Restated Redevelopment Agreement and the amendments to the Redevelopment Plan.
- Upon adoption by the Planning Board of a resolution approving the Redeveloper’s amended Site Plan; Redeveloper shall submit all applications for any required Governmental Approvals for the Project. The Parties shall identify and agree upon all necessary Governmental Approvals, which shall be included in the Amended and Restated Redevelopment Agreement. The Parties shall also agree upon a reasonable timeframe for the Redeveloper to submit for the Governmental Approvals.

25 West End Avenue
Somerville, New Jersey 08876

cc: Francis X. Regan, Esq.
DeCotiis, FitzPatrick, Cole & Wisler, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, New Jersey 07666

SECTION 9. BINDING EFFECT - This MOU constitutes a binding commitment between the Parties; however, the Parties' respective rights and obligations are subject to and remain to be fully defined in the Amended and Restated Redevelopment Agreement. If, after diligent and good faith negotiations, the Parties do not execute the Amended and Restated Redevelopment Agreement or if this MOU is terminated, then this MOU shall be void and without recourse, and neither Party shall have any further obligation to the other as set forth herein. This MOU may only be changed, modified or amended by a written instrument signed by the Borough and Redeveloper.

SECTION 10. GOVERNING LAW - This MOU shall be governed by and construed in accordance with the laws of the State of New Jersey and any actions arising from this MOU shall be commenced and prosecuted in a Court of the State of New Jersey.

This MOU is executed as of this _____ day of November, 2008.

WITNESS/ATTEST:

BOROUGH OF SOMERVILLE

Kevin Sluka, Borough Clerk

By: _____
Brian Gallagher, Mayor

LLC

JSM AT SOMERVILLE, LLC
By: **SOMERVILLE TOWN CENTER MANAGER,**
Managing Member

By: _____
Jack Morris, Managing Member