ARLINGTON COUNTY, VIRGINIA

County Board Agenda Item
Meeting of July 21, 2008

SUPPLEMENTAL REPORT

DATE: July 21, 2008

SUBJECT: SP#297 SITE PLAN: PL Pentagon LLC c/o Kimco Realty Corporation, construct approx. 489,911 sq ft office, approx. 33,495 sq ft retail, retain approx. 325,300 sq ft retail; modification of use regulation for height, parking; 1201 S. Hayes St., (RPC #35-004-001)

DISCUSSION: This supplemental report omits condition #61 as not applicable, provides a copy of the community benefits letter identified in Condition #84, revises language in Condition #87 to clarify the intent, and revises Condition #89 (incorrectly numbered as Condition #80) to finalize the agreement between staff and the applicant with respect to the Commuter Store.

Maintenance of Residential Common Areas

61. Intentionally Omitted.
~~If the project includes a residential component, then the developer agrees that the maintenance of the common area, walkways, private drives and parking areas which are tied to condominium units shall be provided for by the condominium's, cooperative's or homeowners association's bylaws or agreements consistent with Section 2.D.6 of the Zoning Ordinance.~~

Contribution for Community Amenities

87. The developer agrees to a make a $500,000 contribution to be allocated by the County Manager for community amenities. Such funds may be used ~~use~~ for but not limited to construction of a water park at the adjacent Virginia Highlands Park, improvements to the community recreation center, subsidies to reduce the rent for an Urgent Care Facility, contributions toward WMATA Pentagon City Metro Plaza improvements, and/or provision of new bus shelters. The developer agrees that the first contribution of $200,000 would be made prior to the first Certificate of Occupancy for the office building C at the corner of 15th and S. Hayes and the remaining $300,000 would be contributed prior to the first Certificate of Occupancy for the office building A at the corner of 12th and S. Hayes.

County Manager: _____

County Attorney: _____

Staff: Samia Byrd, DCPHD, Planning Division
Robert Gibson, DES, Division of Transportation

PLA-5005

Pentagon Center Commuter Store

89. Prior to the issuance of any certificate of occupancy for any portion of the properties included in this site plan, the Developer shall execute, deliver to the County Manager, and obtain the approval of the County Board of Arlington County, Virginia (the "County Board" or the "County"), of a Lease Agreement (the "Lease"), using the County's standard lease form as the base for the Lease. The County's rights under the Lease shall be conditioned upon the completion of construction and the issuance of a certificate of occupancy for the Phase I improvements. All terms of the Lease shall be acceptable to the County Manager, the County Attorney, and the County Board.

The terms of the Lease shall include, at a minimum, the following:

A. Demised Premises: Approximately 1,200 rentable square feet of net rentable ground floor retail space (the "Demised Premises") in Building A, as said Building A is shown on the plans dated February 22, 2007, revised April 26, 2007, revised June 1, 2007, revised July 13, 2007, revised August 2, 2007, revised June 23, 2008, revised June 27, 2008 (the "Building"). The Demised Premises shall be located along the main interior walkway into Pentagon Centre Shops, and shall be situated approximately 200 feet from the Pentagon City Metro Station escalators (located on the corner of South Hayes Street and 12th Street South). The interior entrance of the storefront shall be not less than 15 feet wide. The Demised Premises shall also have an entrance at the rear of the Demised Premises. This rear entrance shall lead to a corridor within the Building, which corridor shall not be less than 5 feet wide, to an entrance/exit door leading directly to the 12th Street South sidewalk.

B. Initial Lease Term: Ten (10) years commencing upon the occupancy of the Demised Premises by the County ("Initial Term"), which date of commencement shall be conclusively memorialized in a Statement of Lease Commencement executed by both the Landlord and the County, the form of which Statement of Lease Commencement shall be attached as an exhibit to the Lease.

C. Renewal Term: Provided the County gives written notice to the Landlord not later than twelve (12) months prior to the expiration of the Initial Term, the County shall have the right, but not the obligation, to renew the Lease for one (1) additional ten (10) year term (the "Renewal Term") under the same terms and conditions as the Initial Term, except Base Rent and Additional Rent as hereinafter described.

D. Base Rent and Abatement: The base rent for the entire Initial Term of the Lease shall be ~~abated in full~~ One Dollar ($1). The base rent for the Renewal Term (to the extent exercised) shall be fifty percent (50%) of the then prevailing fair market value rental rate (the "FMV Rental Rate"). The FMV Rental Rate shall be agreed to by the Landlord and the County. In the event the parties are unable to agree on the FMV Rental Rate within thirty (30) days of Landlord's receipt of

County's notice to exercise County's option to renew, the FMV Rental Rate shall be determined by a commercial real estate broker selected by the County. Such broker shall have a minimum of ten (10) years of retail commercial real estate leasing experience in Arlington, Virginia.

E. Pass Throughs: The County shall pay any pass throughs for any real estate taxes or Operating Expenses (as hereinafter defined). ~~The term "Operating Expenses" shall contain carveouts for those services of the building not used by the County, including its programs, subtenants, assignees, licensees, or invitees (including, by way of example and not limitation, elevator and escalator maintenance costs). Operating Expenses shall also exclude, among other things: 1) debt service; 2) costs of improvements of common areas; 3) costs to work on space leased to other tenants/occupants; 4) costs of capital improvements, alterations or building systems replacements; 5) costs of casualty repairs; 6) costs of any additions to the Building; an 7) costs and expenses solely associated with space leased to other tenants/occupants.~~ Such proportionate share of real estate taxes and operating expenses shall be determined by dividing the gross square footage of the Demised Premises by the total gross square footage of the entire Building.

F. County Improvements: The County shall, at its own cost and expense, pay for and perform any and all County improvements in the Demised Premises. The County improvements shall be made by County in accordance with plans and specifications provided by the County. The plans and specifications for all planned County improvements shall be subject to the review and approval of the Landlord, which review and approval shall not be unreasonably withheld, conditioned, or delayed. If the Landlord fails to reasonably approve or disapprove (and provide comments to) the County's plans and specifications within sixty (60) days of receipt thereof, the Landlord shall be automatically deemed to have approved the plans and specifications submitted to the Landlord by the County.

Landlord shall ~~ensure that all necessary~~ deliver the Demised Premises to the County with conduits/connections for utilities, including electricity, water, sewer, heating, ventilation, and air conditioning, telephone lines, cable lines/fiber optic cable~~, are brought to the Demised Premises and are accessible from within the Demised Premises~~. All such utility "stub-ins" shall be in the locations designated by the County. The Landlord shall install all fire suppression components/fire sprinklers, fire detection, and fire alarms in the Demised Premises. Upon the expiration or termination of the Lease, the County shall not be obligated to remove any County improvements in the Demised Premises, and shall not be required to restore the Demised Premises to its condition prior to the beginning of the Initial Term, except that the County shall restore any slab cuts and other structural changes. Landlord shall ensure that all electrical, mechanical, utilities, transportation, and life safety systems for the Building that are either included in (e.g., inter alia, fire alarms and sprinklers) or stubbed to (e.g., inter alia, water) the Demised Premises are in working condition prior to the beginning of the Initial

Term.

G. Landlord shall deliver the Demised Premises to the County ~~ensure that the building is~~ free of all hazardous materials~~, and that all electrical, mechanical, utilities, transportation, and life safety systems are in working condition prior to the beginning of the Initial Term~~.

H. Use: The County shall be permitted to use the Demised Premises for all retail and service uses permitted under applicable codes, laws, ordinances, and regulations.

I. ADA: The Landlord shall deliver the Demised Premises to the County with ~~provide~~ barrier free accessibility to the common areas of the Building and to the Demised Premises, and adhere to the requirements of the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG"), per American National Standard Institute ("ANSI") standards, on an ongoing basis as Building modifications are undertaken by the Landlord. The County shall adhere to the requirements of ADAAG, per ANSI, for all County improvements for alterations. The Landlord shall, during the term ~~represent and warrant that~~ cause the Building common areas to ~~and the Demised Premises~~ comply with the ADAAG, per ANSI standards.

J. Assignment and Subletting: The County shall have the right to assign, sublet, and license all or a portion of the Demised Premises to County-related entities performing County services without the Landlord's prior approval. The County shall also have the right to assign, sublet, and license all or a portion of the Demised Premises to non-County-related entities not performing County services, subject to the prior written approval of the Landlord, which approval shall not be unreasonably withheld, conditioned, or delayed. For the purposes of such Lease, the terms "County" or "Tenant" shall be construed to include permitted subtenants, assigns, and licensees, except to the extent that such terms apply to the County as a Virginia local government.

K. Signage: The County shall have the right to install, at the County's sole cost and expense, interior signage within the Demised Premises and on or adjacent to the retail front of the Demised Premises. The county shall also have the right to install way-finding signage within the common areas of the Building, in the locations determined by the Landlord, subject to reasonable review and approval of the County. The County shall also have the right to install, at the County's sole cost and expense exterior signage, in the locations and dimensions consistent with the Comprehensive Sign Plan. The Landlord, at the Landlord's sole cost and expense, shall cause the County program(s), and/or the County's permitted subtenants, assigns, or licensees, occupying the space, to be included in all Building directories and information signs/kiosks (including ongoing updates for any future changes in occupancy/County program) in the same style and manner that all other Building tenants appear and are identified.

L. Security Deposit: None.

M. Building Security: The Landlord shall provide first class Building perimeter security equipment procedures and systems.

N. Default. A default of this Lease by the Landlord shall constitute a violation of this condition of the site plan. In addition, the County also shall be entitled to exercise all remedies available under law to recover all other damages it may be entitled to as a result of the Landlord's default.

O. Special County Provisions: The Lease shall include (by way of example and not limitation) special provisions applicable to the County's status as a County government addressing the following issues:

(1) Appropriation of Funds: All obligations under the Lease shall be fully subject to the appropriation of funds by the County Board for the specific purpose of satisfying the payment obligations and other lease obligations of the County at tenant. A termination of the Lease as a result of a non-appropriation of funds by the County Board shall not result in the Landlord being held in violation of this site plan condition.

(2) Indemnification and Hold Harmless: The Lease shall not contain any provisions by which the County, explicitly or implicitly, agrees to indemnify or hold harmless the Landlord or any third party or parties from liability of whatever nature.

(3) No Rights in Third Parties: The Lease shall not create in the public, or in any person or entity other than those signing the Lease, any rights as a third party beneficiary.

(4) No Waiver: No waiver by the Landlord or the County of any breach of any covenant, condition or agreement specified in the Lease shall operate as an invalidation or as a continual waiver of such covenant, condition or agreement itself, or of any subsequent breach thereof.

(5) Operating Expenses: The term "Operating Expenses" shall mean all operating expenses of any kind or nature which are necessary, ordinary or customarily incurred in connection with the operation, maintenance or repair of the Building as determined by Landlord.

(a) Operating Expenses shall include, but not be limited to:

(i) costs of supplies, including, but not limited to, the cost of relamping all Building standard lighting as the same may

be required from time to time;

(ii) costs incurred in connection with obtaining and providing energy for the Building, including, but not limited to, costs of propane, butane, natural gas, steam, electricity, solar energy and fuel oils, coal or any other energy sources;

(iii) costs of water and sanitary and storm drainage services;

(iv) costs of janitorial and security services;

(v) costs of general maintenance and repairs, including costs under HVAC and other mechanical maintenance contracts and maintenance, repairs and replacement of equipment and tools used in connection with operating the Building;

(vi) costs of maintenance and replacement of landscaping;

(vii) insurance premiums, including fire and all-risk coverage, together with loss of rent endorsements, the part of any claim required to be paid under the deductible portion of any insurance policies carried by Landlord in connection with the Building (where Landlord is unable to obtain insurance without such deductible from a major insurance carrier at reasonable rates), public liability insurance and any other insurance carried by Landlord on the Building, or any component parts thereof (all such insurance shall be in such amounts as may be required by any holder of a Mortgage or as Landlord may reasonably determine);

(viii) labor costs of persons engaged in the management of the Building, including wages and other payments, costs to Landlord of worker's compensation and disability insurance, payroll taxes, welfare fringe benefits, and all legal fees and other costs or expenses incurred in resolving any labor dispute (to the extent that persons are engaged with respect to more than one building, wages and salaries relating to such persons shall be equitably apportioned between all such buildings based upon Landlord's reasonable estimate of the time spent by each such person on each building relative to their total time on all buildings);

(ix) professional building management fees (which shall not exceed market rates for comparable fees in similar buildings in the Arlington, Virginia area) required for management of the Building;

(x) legal, accounting, inspection, and other consultation fees (including, without limitation, fees charged by consultants retained by Landlord for services that are designed to produce a reduction in Operating Expenses or to reasonably improve the operation, maintenance or state of repair of the Building) incurred in the ordinary course of operating the Building or in connection with making the computations required hereunder or in any audit of operations of the Building;

(xi) the costs of capital improvements or structural repairs or replacements made in or to the Building in order to conform to changes, subsequent to the date of this Lease, in any applicable laws, ordinances, rules, regulations or orders of any governmental or quasi-governmental authority having jurisdiction over the Building (herein "Required Capital Improvements") or the costs incurred by Landlord to install a new or replacement capital item for the purpose of reducing Operating Expenses (herein "Cost Savings Improvements"). The expenditures for Required Capital Improvements and Cost Savings Improvements shall be amortized over the useful life of such capital improvement or structural repair or replacement (as determined by Landlord). All costs so amortized shall bear interest on the amortized balance at the rate of twelve percent (12%) per annum or such higher rate as may have been paid by Landlord on funds borrowed for the purpose of constructing these capital improvements.

(b) Operating Expenses shall not include the following:

(i) debt service, including interest, financing costs and amortization of mortgages, late fees or interest on overdue payments;

(ii) painting or decorating other than in common or public areas of the Building, parking garage or parking areas;

(iii) any tenant work performed to or alteration of space leased to tenants or occupants of the Building whether such work or alteration is performed for the initial occupancy by such tenant or occupant or thereafter;

(iv) with the exception of Required Capital Improvements and Cost Savings Improvements, the cost of alterations, capital

improvements and replacements which under generally-accepted accounting principles are properly classified as capital expenditures;

(v) any cash or other consideration paid by Landlord on account of, with respect to, or in lieu of tenant work or alterations described in clause (iii) above;

(vi) ground rent;

(vii) depreciation or amortization, except as set forth above;

(viii) repairs or replacements (a) necessitated by the negligence or willful misconduct of Landlord or its employees or agents, (b) required to cure violations (as opposed to compliance) of governmental laws, ordinances, rules and regulations applicable to the Building as of the Commencement Date or (c) necessitated by design flaws, construction defects, and/or structural defects in the Building or any Building system;

(ix) costs of enforcement of leases and reserves for bad debts;

(x) salaries, commissions, fringe benefits and other compensation paid to officers or executives of Landlord or Landlord's property management company (but it is understood that the manager and other employees below the grade of building manager may carry a title such as vice president and the salaries and related benefits of these officer/employees of Landlord would be allowable Operating Expenses);

(xi) leasing commissions, advertising and promotional expenses and any other comparable expenses directly related to leasing or procuring tenants or negotiating with prospective tenants;

(xii) legal fees, accounting fees and other professional and consulting fees (a) incurred in procuring tenants for the Building (including, without limitation, fees incurred in connection with (i) failed negotiations with prospective tenants in the Building, and (ii) the design and construction of tenant improvements for any other tenant or prospective tenant in the Building), (b) incurred in connection with Landlord's negligence or willful misconduct or non-

compliance with any mortgage, deed of trust or ground lease relating to the Property, (c) relating to enforcing any leases or any landlord/tenant proceeding, (d) relating to the defense of Landlord's title to, or interest in, the Property, (e) relating to the refinancing or sale of the Property or any interest therein or sale of any interest in Landlord; or (f) relating to the internal affairs of the ownership entity or entities constituting Landlord;

(xiii) the cost of repairs incurred by reasons of fire or other casualty or condemnation to the extent of any insurance proceeds received by Landlord;

(xiv) any cost representing an amount paid for services or materials to a person, firm or entity to the extent that such costs exceed the reasonable and customary charges for services to comparable buildings in the Arlington, Virginia area;

(xv) all expenses for which Landlord has received reimbursement (such as from insurance and from other tenants of the Building);

(xvi) income or franchise taxes or such other taxes imposed upon or measured by Landlord's net income;

(xvii) costs allocable to properties other than the Building;

(xviii) direct and indirect costs incurred to clean up, contain, abate, remove, or otherwise remedy asbestos or Hazardous Materials from the Building unless the wastes were in or on the Premises or the Building because of Tenant's acts or those of its agents, invitees, or subtenants;

(xix) the cost of performing special services or installations to or for tenants or occupants to the extent such service exceeds that provided by Landlord to Tenant without charge hereunder;

(xx) electricity costs or overtime HVAC costs, if charged separately to any other tenants in the Building;

(xxi) recordation and transfer taxes and transfer gain taxes, including, without limitation, any such taxes incurred if this Lease is recorded by Landlord;

(xxii) the cost of any additions to the Building;

(xxiii) the cost of artwork;

(xxiv) costs or payments associated with Landlord's obtaining air rights or development rights; and

(xxv) rentals and other related expenses incurred in leasing air-conditioning systems, elevators or other equipment ordinarily considered to be of a capital nature subject to Landlord's right to include any of such items as an Operating Expense under Section K, 1.11 above, or as an Operating Expense if such item has been leased by Landlord on a temporary basis and is therefore not considered to be of a capital nature.

(6) Ratification of Lease by the County Board: The Lease shall not become effective unless and until the County Board approves the Lease as provided therein. If the Lease is not approved by the County Board, then no liability whatsoever shall accrue and the Landlord and the County shall have no obligation whatsoever to each other under the terms of the Lease (although the Landlord may still be in violation of the applicable zoning ordinance/site plan).

(7) Recordation: The Landlord shall execute a memorandum of lease, which the County shall be entitled to record among the land records of Arlington County, Virginia, at the County's sole expense.

(8) Role of the County/County Decisions: The County will enter into the Lease in its role as a tenant and not as a governmental authority. The County's execution of the Lease shall not constitute the granting of governmental approval or consent required to be obtained by the Landlord. Nothing in the Lease shall be construed to waive any of the County's powers, rights or obligations as a governing authority or local governmental body, including, but not limited to, its police powers.

(9) Sovereign Immunity: Nothing in the Lease nor any action taken by County pursuant to the Lease nor any documents which arise out of the Lease shall constitute or be construed as a waiver of either the sovereign immunity or governmental immunity of the County, or of its elected and appointed officials, officers and employees.

~~P.~~ ~~For the purposes of such Lease, the term "County" shall be construed to include sublessees, assigns, and licensees, except to the extent such term applies to the County as a Virginia local government.~~

Q. Effective Date. The Lease shall be subject to: acceptability to the County Manager; approval as to form by the County Attorney; and approval by the County Board. Such Lease shall not be effective until it is approved by the County Board and executed on its behalf.