

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIA TECH FOUNDATION REAL
ESTATE HOLDING CORPORATION

Plaintiff/Petitioner,

v.

CITY OF ATLANTA, GEORGIA AND
CITY OF ATLANTA BOARD OF
ZONING ADJUSTMENT, by and
through its members, HENRY BRYANT,
JOHNNY EDWARDS, NAOMI WARD,
DAVID DORSEY, AND TAD
CHRISTIAN,

Defendants/Respondents.

CIVIL ACTION FILE NO.
2009-CV-167390

AMENDED CONSENT ORDER

This matter having come before the Court on the parties' Joint Motion to Amend and Correct the Consent Order entered by this Court on September 26, 2012, and all parties having agreed;

The Court having considered the pleadings, the submissions of the parties, and the entire record, including counsel's stipulations and representations regarding the need for the entry of this Amended Consent Order; and

The Court having been advised by the undersigned counsel of record that they are fully authorized to execute this Consent Order on behalf of their respective clients, that such clients have expressly authorized the execution of this Consent Order on their behalf, and that all parties agree the Consent Order is valid and the parties are fully bound by its terms;

IT IS HEREBY ORDERED that the Consent Order entered by this Court on September 24, 2012, is amended by striking the contents in their entirety and substituting the following language *nunc pro tunc*:

The Court having considered the submissions of the parties and the entire record;

IT IS HEREBY ORDERED as follows:

After considering the evidence and the stipulations and representations of counsel for the parties, the Court finds as follows:

1.

Plaintiff, Georgia Tech Foundation Real Estate Holding Corporation (“GTF”) is the owner of certain real property located at 771 Spring Street, N.W., Atlanta, Georgia (the “Property”). The Property currently consists of an unused parking lot (the “Parking Lot”) and a three-story building known as the Crum & Forster building (the “Building”). GTF purchased the Property in 2007 in furtherance of the university’s Master Plan, and specifically, to expand the development known as Technology Square. At the time of GTF’s acquisition of the Property, it was not the subject of any historic designation.

2.

On or about April 2, 2008, GTF submitted to Defendant City of Atlanta’s Bureau of Planning (the “BOP”) its application for a Special Administrative Permit (“SAP”) allowing the demolition of the Building (the “Application”). (Record Ex.1, p. 1.)

3.

The SAP proposed demolition of the Building and to use that area as green-space. Importantly, the narrative portion of the Application never discussed using any part of the Property for parking or that parking would be a proposed use. (Record Ex. 2, p. 13.)

4.

On May 8, 2008, the Midtown Development Review Committee (the "Review Committee") submitted its comments and recommendations regarding the Application, and indicated its understanding that GTF intended to add an interim lawn in place of the Building after demolition. (Record Ex. 7, p. 20.)

5.

The Review Committee must have concluded that GTF did not intend to use the Property for parking following the demolition of the Building. If the planning staff inferred or interpreted GTF's papers to reflect parking as a principal use, staff would have raised the issue at this time because parking as a principal use is prohibited on that Property. (Record Ex. 7, p. 20; Zoning Ordinance of the City of Atlanta, Georgia, Section 16-18P.005 or 16-18P.028.)

6.

On May 20, 2008, GTF submitted amended plans, which established GTF's intention to establish "green space" after the Building's demolition in the place where the Building stood. (Record Ex. 11.)

7.

Taken as a whole, the record of the Application created confusion as to whether parking was an intended use after demolition of the Building.

8.

At no point did GTF expressly indicate that it intended to make parking the principal use of the Property.

9.

In fact, GTF never intended for the Property's principal use to be parking after the Building was demolished.

10.

The BOP received and reviewed the Application and all related documents and information. The BOP, relying upon the representations contained in the original plans and the proposed streetscape plan, concluded that GTF intended parking as the principal use for the Property.

11.

Given the confusion as to whether parking as an intended principal use after demolition of the Building, the BOP had a duty and obligation to confer with GTF and resolve such confusion.

12.

The BOP did not confer with GTF to resolve the confusion created by the original and amended plans as to whether parking would be a principal use after the Building was demolished.

13.

The BOP denied the Application on July 11, 2008. The sole basis for denial of the BOP was an alleged failure to satisfy code requirements relating to parking as set forth in the July 11, 2008 denial letter, which was arbitrary and capricious for the reasons

stated herein. The BOP did not determine that the Application failed to satisfy any other code requirements, and therefore there was no other legal or factual basis for the BOP's denial of the SAP as sought by GTF.

14.

On the same day, the Urban Design Commission of the City of Atlanta filed its Notice of Intent to Nominate the Building to the zoning category of Landmark Building/Site.

15.

On August 8, 2008, GTF filed its Appeal Application with the City's Board of Zoning Appeals (the "BZA"). (Record, Ex. 1.)

16.

The BZA received the BOP's entire file, including the amended plans, which evidenced GTF's intent to replace the Building with green space. (See Record submitted to the BZA.) In addition, at the hearing, conducted on March 12, 2009, counsel for GTF explained the BOP's apparent confusion over the intended use for the Property.

Now, tab five is the decision for appeal. That is the letter that we got from the Bureau of Planning finding that the application proposed the principal use as parking which is not allowed by SPI-16. We agreed that parking is not allowed as a principal use in SPI-16. What we disagreed about is that we proposed that parking would be the principal use if this building were demolished. The narrative of the special administrative permit never says that parking is the proposed use.

(Record, BZA Transcript, at 7:7-17). GTF maintained that it had no current plans for redevelopment of the Property, except that it intended to put green space in the space previously occupied by the Building.

17.

The BZA denied the Appeal Application. (Record, Ex. 8.)

18.

On or about August 25, 2009, the City designated the Property as a Landmark Building/Site pursuant to Section 16-20.006 of the Zoning Ordinance of the City of Atlanta.

19.

Based on the Record before it, the BZA erred in denying the Appeal Application when there was evidence that the BOP and BZA acted arbitrarily and capriciously. Specifically, the BOP and BZA acted in an arbitrary and capricious manner by failing to require GTF to resolve on the Record the apparent ambiguity in GTF's intended use of the Property. The failure by BOP and BZA to clarify this point is contrary to their normal practice when such a question arises. Had the BOP and/or the BZA followed normal procedure, GTF could have clarified and confirmed it had no intention of using the Property for parking.

20.

Moreover, the recent designation of the Property as a Landmark Building/Site cannot be considered in connection with the Application, as the Application was filed prior to the designation, and such designation will therefore be inapplicable to the ~~Property if the Appeal is granted.~~ → SAP for demolition. (RR) [initials]

21.

The cause is hereby remanded to the BZA which shall review and decide the Appeal Application at its next regularly scheduled meeting (following any necessary

advertising requirement) consistent with the findings contained herein, including Paragraph 19. The BZA is authorized to hear and decide the Appeal Application consistent with such findings, and shall have all the powers conferred upon it by the applicable code provisions, including all powers of the administrative official from whom the Appeal Application was taken, to direct the issuance of the SAP. In addition to the applicable code requirements of Special Public Interest district 16, Subarea 1 (to which classification the Property is zoned), GTF and the BZA agree that leaving approximately one-third (1/3) of the existing Building facing Spring Street in place (as more particularly shown on Exhibit "A" attached hereto) and prohibition of parking as a principal use would be sufficient and the only reasonable conditions to issuance of the SAP.

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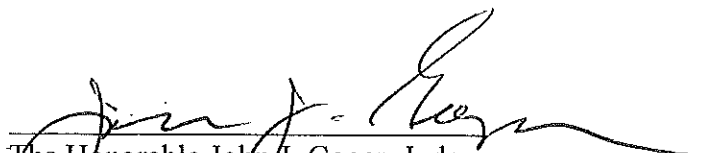
In light of the foregoing, the Court rules as follows:

(1) This matter is hereby REMANDED to the BZA for further consideration at its next regularly scheduled hearing, and the BZA is directed to render a decision consistent with the findings contained herein. In the event that the BZA does not consider the Application within sixty (60) days of the date of this Order, GTF shall within thirty (30) days file its objections thereto, and the Court shall set the matter for hearing and shall have all remedies available to it for enforcement, including its contempt powers;

(2) The claims against Defendant City of Atlanta are DISMISSED from this action, except that the City shall remain a party solely to ensure that the terms and intent of this Order are carried out; and

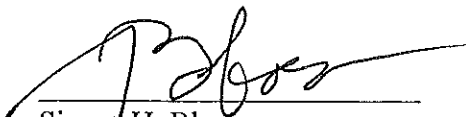
(3) This action is otherwise DISMISSED, without prejudice, provided that this Court shall retain jurisdiction for the enforcement of this Consent Order.

SO ORDERED, this 8 day of January, 2013.


The Honorable John J. Goger, Judge
Superior Court of Fulton County

Consented to by:

BLOOM, SUGARMAN EVERETT LLP



Simon H. Bloom
Georgia Bar No. 064298
Stephanie A. Everett
Georgia Bar No. 253075

977 Ponce de Leon Avenue
Atlanta, GA 30306
Tel: (404) 577-7710

Attorneys for The City of Atlanta

**ROBBINS ROSS ALLOY BELINFANTE
LITTLEFIELD LLP**



Richard L. Robbins
Georgia Bar No. 608030
Jason S. Alloy
Georgia Bar No. 013188

999 Peachtree St., Suite 1190
Atlanta, GA 30309
Tel: (678) 701-9381

Attorneys for Petitioner

WILLIAMS TEUSINK, LLC



Kyle Williams
Georgia Bar No. 763910

125 E. Trinity Place, Suite 300
Decatur, Georgia 30030
Tel: (404) 373-9351

Attorney for Board of Zoning Adjustment



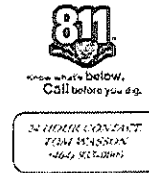
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Project Definition
771 SPRING STREET
 A Development By
TECHNOLOGY SQUARE, LLC
 14600 BRIDGEWAY, SUITE 200
 ATLANTA, GEORGIA 30341

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| Plan | Change | Date |
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| Project Number | 201204 | |

Sheet Title
DEMOLITION PLAN

CD



DEMOLITION NOTE:

1. THE CONTRACTOR SHALL ACCEPT THE SITE IN ITS PRESENT CONDITION AND DO ALL DEMOLITION NECESSARY TO COMPLETE PROJECT AS SPECIFIED AND DRAWN. WORK INCLUDES REMOVAL OF STRUCTURES ABOVE AND BELOW GRADE, AND ALL APPURTENANCES, UTILITIES, PIPES, CONDUITS ETC.
2. THE DEMOLITION PLAN IS PROVIDED FOR THE CONTRACTOR'S USE. IT WAS PREPARED FROM A SURVEY BY METRO ENGINEERING & SURVEYING CO., DATED 04/16/08. IT IS THE CONTRACTOR'S RESPONSIBILITY TO VISIT THE SITE AND VERIFY THE ACCURACY AND COMPLETENESS OF THE EXISTING CONDITIONS DEPICTED TO BE REMOVED. THERE MAY BE ADDITIONAL STRUCTURES, UTILITIES OR PIPING THAT ARE NOT SHOWN WHICH REQUIRE REMOVAL.
3. UTILITIES SHOWN ON THIS PLAN HAVE BEEN LOCATED FROM SURVEY INFORMATION.
4. CONDUCT DEMOLITION OPERATIONS WITHOUT INTERFERENCE TO VEHICLE AND PEDESTRIAN TRAFFIC ON ADJACENT ROADWAYS OR PARKING AREAS.
5. MAINTAIN EXISTING UTILITIES INDICATED TO REMAIN, AND PROTECT AGAINST DAMAGE DURING DEMOLITION OPERATIONS. UNRAVE AND TIE OFF FOR DISCONNECTING, RIGGING, CAPPING AND PLUGGING OF OTHER EXISTING UTILITIES.
6. OBTAIN NECESSARY PERMITS AND NOTICES AUTHORIZING DEMOLITION. WORK SHALL BE PERFORMED IN COMPLIANCE WITH THE CITY OF ATLANTA AND ANY OTHER GOVERNING AUTHORITIES HAVING JURISDICTION. PERMITTING AND TRAFFIC ROUTE APPROVAL SHALL BE THE SOLE RESPONSIBILITY OF THE CONTRACTOR.
7. CONTROLLER OF HAZARDOUS MATERIALS ENCOUNTERED SHALL BE REMOVED AND HANDLED IN ACCORDANCE WITH ALL LOCAL AND FEDERAL LAWS.
8. DEMOLISH STRUCTURES AND APPURTENANCES REQUIRED IN AN ORDERLY AND CAREFUL MANNER.
9. DEMOLISH CONCRETE AND MASONRY IN SMALL SECTIONS.
10. REPAIR DEMOLITION PERFORMED IN EXCESS OF THAT REQUIRED, AT NO COST TO THE OWNER.
11. BURSTING OF MATERIALS ON SITE IS NOT PERMITTED.
12. BADGILL AREAS EXCAVATED AS A RESULT OF DEMOLITION.
13. ROUGH GRADE AREAS AFFECTED BY DEMOLITION, AND LEAVE LEVEL MAINTAINING GRADES AND CONTOURS OF SITE.
14. PREVENT MOVEMENT, SETTLEMENT OR COLLAPSE OF ADJACENT DRIVEWAYS, SIDEWALKS AND DRIVEWAYS. ASSUME LIABILITY FOR SUCH MOVEMENT, SETTLEMENT OR COLLAPSE. PROMPTLY REPAIR DAMAGE AT NO COST TO OWNER.
15. MATERIAL RESULTING FROM DEMOLITION OPERATIONS SHALL BECOME PROPERTY OF THE CONTRACTOR AND SHALL BE REMOVED FROM OWNER'S PROPERTY. CONTRACTOR TO MAINTAIN GOOD DRAINAGE ON THE SITE THROUGHOUT ALL PHASES OF DEMOLITION. CONTRACTOR TO INSTALL TEMPORARY FENCING OR OTHER APPROVED MEANS FOR PEDESTRIAN SAFETY PRIOR TO COMMENCING ANY DEMOLITION/CONSTRUCTION.
16. ANY EXISTING IMPROVEMENTS THAT ARE TO REMAIN AND BECOME DAMAGED SHALL BE RESTORED TO THEIR ORIGINAL CONDITION AS ACCEPTABLE TO PARTIES HAVING JURISDICTION AT NO COST TO OWNER.

TREE PROTECTION PLAN NOTES

1. TREE PROTECTION FENCE SHALL BE INSTALLED AROUND THE TREE PROTECTION AREA PRIOR TO ANY SITE PREPARATION OR CONSTRUCTION WORK AND MAINTAINED THROUGHOUT THE ENTIRE PROJECT.
2. SILT FENCING OR SOIL DIMES SHALL BE INSTALLED PRIOR TO ANY SITE PREPARATION OR CONSTRUCTION WORK AND MAINTAINED THROUGHOUT THE ENTIRE PROJECT TO PREVENT THE BUILDUP OF SEDIMENT WITHIN THE TREE PROTECTION AREA.
3. IN AREAS WHERE CUTS ARE TO BE MADE FOR THE INSTALLATION OF UTILITIES OR RETAINING WALLS ADJACENT TO THE TREE PROTECTION AREA, THE AFFECTED TREES SHALL BE ROOT PRUNED PRIOR TO EXCAVATION. ROOT PRUNING SHALL BE DONE WITH A SAW OR SIMILAR TOOL THAT WILL MINIMIZE DAMAGE TO REMAINING ROOTS.
4. VEHICULAR STORAGE, EQUIPMENT STORAGE, MATERIAL STORAGE, WASHOUT ACTIVITIES, REMEDIATION PLACEMENT OF FILL MATERIAL, REMOVAL OF SOIL, OR ANY OTHER ACTIVITIES THAT MAY BE DETRIMENTAL TO THE HEALTH OF THE TREE ARE STRICTLY PROHIBITED WITHIN THE TREE PROTECTION AREA.
5. PREPARING TO PROVIDE CLEARANCE FOR STRUCTURES, VEHICULAR TRAFFIC, AND CONSTRUCTION EQUIPMENT SHALL BE PERFORMED BY A LICENSED ARBORIST AND SHALL CONFORM TO AND TREE PRUNING STANDARDS.

SITE NOTES

1. ENTIRE SITE CONSISTS OF ASPHALT, BUILDING ON SLAB, AND SMALL GRASSY AREAS.
2. BUILDING DEMOLITION: REMOVE EXISTING BUILDING IN ITS ENTIRETY, INCLUDING BASEMENT WALLS, SLABS AND FOUNDATION.
3. THE DEMOLITION AREA SHALL BE RE-DRAINED TO PROVIDE POSITIVE DRAINAGE AS SHOWN IN EXISTING EXISTING PLAN.
4. ANY WAYS SHALL BE FILLED AND USED AS PART OF GRAVEL/CONCRETE FINISHING AREA.
5. SITE UTILITIES SHALL BE IDENTIFIED AND CAPPED AT THE PERIMETER OF SITE. MARKED AND DOCUMENTED ON AS-BUILT DRAWINGS.
6. CONTRACTOR SHALL BE RESPONSIBLE FOR PROTECTIVE AND MAINTAINING PUBLIC ACCESS AND RIGHT-OF-WAY ADJACENT TO THE BUILDING DURING ALL DEMOLITION ACTIVITIES.

