COMMON COUNCIL COMMITTEE MEETING

PLANNING, ECONOMIC DEVELOPMENT AND LAND USE COMMITTEE
Cathy M. Fahey, Chair

DATE: Thursday, January 2, 2020
PLACE: City Court Room 209 – 2nd Fl. City Hall
TIME: 6:00 PM (Following Caucus)

TOPICS OF DISCUSSION:

RESOLUTION NUMBER 90.122.19R (MC)

A RESOLUTION OF THE COMMON COUNCIL AUTHORIZING AND DIRECTING THE CITY CORPORATION COUNSEL TO ENFORCE THE DECLARATION OF COVENANTS AND RESTRICTIONS DATED MAY 1, 2017, FOR 20 PARCELS LOCATED ON NEW SCOTLAND AVENUE, SOUTH ALLEN STREET, AND ONDERDONK AVENUE

PUBLIC COMMENT PERIOD: Yes
Council Member Doesschate introduced the following:

RESOLUTION NUMBER 90.122.19R (MC)

A RESOLUTION OF THE COMMON COUNCIL AUTHORIZING AND DIRECTING THE CITY CORPORATION COUNSEL TO ENFORCE THE DECLARATION OF COVENANTS AND RESTRICTIONS DATED MAY 1, 2017, FOR 20 PARCELS LOCATED ON NEW SCOTLAND AVENUE, SOUTH ALLEN STREET, AND ONDERDONK AVENUE

WHEREAS, the following 20 parcels within the City of Albany commonly owned by FM Promontory Capital, LLC are subject to a Declaration of Covenants and Restrictions dated, and duly filed with the Albany County Clerk’s Office on, May 1, 2017: 64.81-1-37; 64.81-1138; 64.81-1-39; 64.81-1-40; 64.81-1-47; 64.81-1-48; 64.81-1-49; 64.81-1-50; 64.81-1-51; 64.81-1-52; 64.81-1-53; 64.81-1-554; 64.81-1-55; 64.81-1-56; 64.81-1-63; 64.81-1-64; 64.81-1-65; 64.81-1-566; 64.81-1-67; and 64.81-1-70; and

WHEREAS, in 2017, the Common Council of the City of Albany adopted the Unified Sustainable Development Ordinance (“USDO”) through Ordinance Number 26.31.17, which also repealed former Chapter 375, “Zoning” of the City Code of Albany, adopted in 1993; and

WHEREAS, the USDO rezoned the 20 parcels listed above into Mixed-Use-Neighborhood Center (MU-NC) and Multi-Family Residential (R-M) from Neighborhood Commercial (C-1) and Multi-Family Low-Density Residential District (R-3A); and

WHEREAS, pursuant to former Chapter 375, “Zoning” of the City Code of Albany, buildings in the Neighborhood Commercial District (C-1) were limited to a maximum height of 35 feet, or roughly three and a half (3.5) stories and buildings in the Multi-Family Low-Density Residential District (R-3A) were limited to two and a half (2.5) stories; and

WHEREAS, the USDO authorizes buildings in the MU-NC district to be a maximum height of three and a half (3 ½ ) stories, or, four and a half (4 ½ ) stories if certain incentive requirements set forth in the USDO are met, and buildings in the R-M district to a maximum of four (4) stories; and

WHEREAS, prior to the passage of Ordinance Number 26.31.17, members of the general public and members of the Common Council objected to rezoning the 20 parcels listed above based, in part, on the proposed increased height allowed for buildings on the parcels as a result of the proposed new zoning; and

WHEREAS, the USDO, as proposed, did not have another appropriate zoning classification that would allow three (3) story apartment buildings that would be acceptable to residents and Council Members and was desired by the owner of the above-listed 20 parcels, FM Promontory Capital, LLC; and
WHEREAS, in an effort to address those concerns, the Commissioner of Planning and Development, Chris Spencer, recommended that FM Promontory Capital, LLC, execute a restrictive covenant to address the concerns and objections that would also allow the 20 parcels listed above to be rezoned to allow three and a half (3.5) and three (3) story buildings; and

WHEREAS, pursuant to Mr. Spencer’s recommendation, FM Promontory Capital, LLC, executed and filed, in May 2017, a Declaration of Covenants and Restrictions affecting the 20 parcels listed above, which is set forth in Attachment “A,” and such Declaration identified the 20 parcels list above as “New Scotland Village;” and

WHEREAS, the Declaration of Covenants and Restrictions provides:

“FM Promontory Capital, LLC, for itself and its successors and/or assigns, covenants that…building height is limited to a maximum of 3 stories plus subsurface parking or basement with the exception of the area fronting on New Scotland Avenue and extending 210 feet from the right-of-way line of New Scotland Avenue and an area extending 198 feet from the right-of-way of South Allen Street which may be 3.5 stories plus subsurface parking or basement area;”

and

WHEREAS, the Declaration of Covenants and Restrictions further provides:

“…this Declaration is and shall be deemed a covenant that shall run with the land and shall be binding upon all future owners of …[the 20 parcels a/k/a New Scotland Village], and shall provide that the owner and its successors and assigns consent to enforcement by the City of Albany;”

and

WHEREAS, in October 2018, Jankow Companies applied for Major Development Plan Review, Area Variance, Lot Consolidation, and Demolition Review for the 20 parcels listed above for a “mixed use development of the property includes a 5 story building with sub-surface garage for 75 parking spaces and a 26,602+/- SF footprint” including commercial facilities and apartments, …[and] 2 four story buildings with a total of 76 apartments with 64 subsurface parking and a 2 story building with 18 apartments…,” which was also referred to in application documents as “New Scotland Village” and the City assigned such project Case File Number 00238 (Case File # 00238); and

WHEREAS, FM Promontory Capital, LLC authorized the application; and

WHEREAS, on August 27, 2019, the Planning Board of the City of Albany approved with conditions the Major Development Plan Review and Demolition Review for Case File #00238; and
WHEREAS, Case File #00238 provides for the construction of a 5 story building in the MU-NC district fronting New Scotland Avenue, and two (2) four (4) story buildings in the R-M district in violation of the restrictive covenant set forth in the Declaration of Covenants and Restrictions that limits the building heights to 3.5 and 3 stories respectively; and

WHEREAS, FM Promontory Capital, LLC executed a new Revision of Declaration of Covenants and Restrictions dated September 10, 2019, attempting to invalidate and remove the Declaration of Covenants and Restrictions filed in May 2017; and

WHEREAS, the Declaration of Covenants and Restrictions grants the City of Albany the authority to enforce the restrictive covenants therein;

NOW, THEREFORE, BE IT RESOLVED, the Common Council authorizes and directs the City of Albany Corporation Counsel to take any and all steps necessary and appropriate to enforce the Declaration of Covenants and Restrictions; and

BE IT FURTHER RESOLVED, that the Common Council authorizes and directs the City of Albany Corporation Counsel to institute an action or proceeding in the Supreme Court of the County of Albany or other appropriate jurisdiction if necessary to enforce the restrictive covenant within the Declaration of Covenants and Restrictions, and obtain injunctive relief; and

BE IT FURTHER RESOLVED, the Common Council authorizes and directs the City of Albany Corporation Counsel to take any and all steps necessary and appropriate to have the Revision of Declaration of Covenants and Restrictions declared invalid, and to have the Declaration of Covenants and Restrictions declared valid and enforceable; and

BE IT FURTHER RESOLVED, the City of Albany Corporation Counsel shall provide updates to the Common Council on a regular basis and upon request regarding the actions taken and outcomes and shall obtain the approval of the Common Council before settling any action or proceeding initiated to declare the Declaration of Covenants and Restrictions valid and/or to enforce the same.
Attachment A
DECLARATION of COVENANTS and RESTRICTIONS

THIS COVENANT is made the first day of May, 2017, by FM Promontory Capital, LLC and having an office for the transaction of business at 18 Locust Street, Albany, NY 12203.

WHEREAS, FM Promontory Capital, LLC owns property at New Scotland Avenue and South Allen Street which includes the following 20 parcels:
64.81-1-37
64.81-1-38
64.81-1-39
64.81-1-40
64.81-1-47
64.81-1-48
64.81-1-49
64.81-1-50
64.81-1-51
64.81-1-52
64.81-1-53
64.81-1-54
64.81-1-55
64.81-1-56
64.81-1-63
64.81-1-64
64.81-1-65
64.81-1-66
64.81-1-67
64.81-1-70, together to be known as New Scotland Village;

WHEREAS, the Common Council of the City of Albany is considering Ordinance No. 26.31.17 which REPEALS CHAPTER 375 OF THE CODE OF THE CITY OF ALBANY (ZONING) AND REPEALS THE EXISTING CORRESPONDING ZONING MAP, AND ADOPTS A NEW CHAPTER 375 OF THE CODE OF THE CITY OF ALBANY (CITY OF ALBANY UNIFIED SUSTAINABLE DEVELOPMENT ORDINANCE) AND CORRESPONDING NEW ZONING MAP;

Page 1 of 4

C.D. Frank McCloskey
Hershberg Hershberg
18 Locust Street
Albany, New York 12203
WHEREAS, the Ordinance No. 26.31.17 proposes to rezone the Area of New Scotland Village into two areas which are to be Mixed Use – Neighborhood Center (MU-NC) and Multi-Family Residential (R-M);

WHEREAS, FM Promontory Capital, LLC desires to develop New Scotland Village into commercial buildings and multi-family residential buildings;

WHEREAS, if Ordinance No. 26.31.17 is adopted to rezone the Area of New Scotland Village into two areas which are to be Mixed Use – Neighborhood Center (MU-NC) and Multi-Family Residential (R-M), FM Promontory Capital, LLC proposes to restrict development as per covenants listed herein;

NOW, THEREFORE, FM Promontory Capital, LLC, for itself and its successors and/or assigns, covenants that:

First, building height is limited to a maximum of 3 stories plus subsurface parking or basement with the exception of the area fronting on New Scotland Avenue and extending 210 feet from the right-of-way line of New Scotland Avenue and an area extending 198 feet from the right-of-way of South Allen Street which may be 3.5 stories plus subsurface parking or basement area.

Second. No commercial uses will be allowed on the site beyond an area extending 210 feet north of the north right-of-way line of New Scotland Avenue

Third, along the northerly and easterly boundary, if the multi-family residential building height exceeds 2 stories above the subsurface parking or basement area (if any) shall be a minimum of 50 feet from the boundary of adjoining lots, excepting lot known as Tax Map Parcel No. 64.81-1-16 (lands now or formerly Goodman) where a setback of 30 feet would be allowed.

Fourth, if the multi-family residential building does not exceed 2 stories in height above the subsurface parking or basement area (if any) the minimum offset from the northerly or easterly boundaries shall be 15 feet.
Fifth, this Declaration is and shall be deemed a covenant that shall run with the land and shall be binding upon all future owners of New Scotland Village, and shall provide that the owner and its successors and assigns consent to enforcement by the City of Albany;

Sixth, this Declaration shall be filed in the Office of the Clerk of Albany County;

Seventh, any deed of conveyance of the Property, or any portion thereof, shall recite that said conveyance is subject to this Declaration of Covenants and Restrictions;

Eighth, this Declaration shall be applicable to New Scotland Village only if Ordinance No. 26.31.17 is adopted to rezone the Area of New Scotland Village into two areas which are to be Mixed Use – Neighborhood Center (MU-NC) and Multi-Family Residential (R-M);

Ninth, this Declaration shall expire 75 years after the adoption of Ordinance No. 26.31.17.

IN WITNESS WHEREOF, the undersigned has executed this instrument the day written below.

By: 

Print Name: Francis McClosky

Title: MEMBER Date: May 1, 2017
STATE OF NEW YORK

) s.s.: 

COUNTY OF

On the 15th day of May, in the year 2017 before me, the undersigned, personally appeared [Person's Name] personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

DANIEL R. HERSHBERG
Notary Public State of New York
Qualified in Albany County
Commission Expires June 30, 2019

Notary Public State of New York

Page 4 of 4
TO: Danielle Gillespie, City Clerk
FROM: Judy Doesschate, Member, Albany Common Council
RE: Supporting Memorandum
DATE: December 6, 2019

RESOLUTION NUMBER 90.122.19R (MC)

TITLE
A RESOLUTION OF THE COMMON COUNCIL AUTHORIZING AND DIRECTING THE CITY CORPORATION COUNSEL TO ENFORCE THE DECLARATION OF COVENANTS AND RESTRICTIONS DATED MAY 1, 2017, FOR 20 PARCELS LOCATED ON NEW SCOTLAND AVENUE, SOUTH ALLEN STREET, AND ONDERDONK AVENUE

GENERAL PURPOSE OF LEGISLATION
To enforce the Restrictive Covenant that was executed and filed on May 1, 2017 and had been prepared and executed for the purpose of eliminating residents and Council Members concerns regarding the proposed zoning of the subject parcels in the USDO and map that was then adopted by the Common Council in reliance of the covenants and the assurances made in the Restrictive Covenant regarding the potential development of the subject properties.

NECESSITY FOR LEGISLATION AND ANY CHANGE TO EXISTING LAW
The Restrictive Covenant expressly authorizes the City of Albany to enforce the terms of the covenant and the Common Council needs to assure the terms and conditions of the Restrictive Covenant are adhered to as was the Council’s intention at the time the USDO was adopted.

EXPLANATION OF DEADLINE OR REQUESTED TIME FRAME FOR PASSAGE
This resolution needs to be acted on as soon as possible as the developer is proceeding with plans to develop the properties in violation of the Restrictive Covenant.

SPECIFICS OF BIDDING OR OTHER PROCUREMENT PROCESS (if applicable)
N/A

SPECIFICS OF REAL PROPERTY SALE OR ACQUISITION (if applicable)
N/A

FISCAL IMPACT(S)
None