

ORDINANCE NO. 20120802-037

**AN ORDINANCE APPROVING THE NEGOTIATION AND EXECUTION OF A
MANAGED GROWTH AGREEMENT FOR DEVELOPMENT OF THE EAST
AVENUE PARCEL 3 SITE PLAN.**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. The Council finds that the East Avenue Parcel 3 site plan described in SP-2008-0071C(XT2).MGA is a large, long-term project under Section 25-1-540 (*Managed Growth Agreements*).

PART 2. The Council authorizes the City Manager to negotiate and execute a Managed Growth Agreement ("MGA") between the City of Austin and Up-32nd Street, L.L.C., in substantially the same form as the agreement attached and incorporated into this ordinance as Exhibit A. The MGA is limited to the East Avenue Parcel 3 site plan as approved in SP-2008-0071C(XT2).MGA, subject to any minor revisions approved in accordance with the MGA. To the extent the MGA conflicts with the City Code, the MGA shall be controlling.

PART 3. This ordinance takes effect on August 13, 2012.

PASSED AND APPROVED

_____, August 2, 2012

§
§
§ _____
Lee Leffingwell
Mayor

APPROVED: _____
Karen M. Kennard
City Attorney

ATTEST: _____
Shirley A. Gentry
City Clerk

MANAGED GROWTH AGREEMENT
BETWEEN THE CITY OF AUSTIN AND
UP-32nd Street, L.L.C.

This Managed Growth Agreement ("Agreement") Between the City of Austin, Texas ("City") and UP-32nd Street, L.L.C. ("Up – 32nd Street") is made and entered into by the City, a home rule municipal corporation acting by and through its duly authorized City Manager and Up 32nd Street. Up-32nd Street and the City may be referred to jointly as "Parties" or singly as "Party" in this Agreement.

RECITALS

1. On February 12, 2008, East Avenue IG, LP, the previous property owner, filed an application for a consolidated site plan for the construction of mixed use building on property described in Exhibit A, which is attached hereto and incorporated herein ("the Property").
2. On August 8, 2008 the City approved Site Plan No SP-2008-0071C, authorizing the construction of a mixed use building, which will include retail, restaurant, office space, and infrastructure on 0.834 acres, "the Project". Portions of the Project, including some infrastructure improvements, have been completed.
3. Up-32nd Street desires to obtain building permits for the project, realizing that due to the current economic conditions, it could take 10 years obtain building permits and construct buildings.

NOW, THEREFORE, for and in consideration of the mutual covenants, and conditions contained in this Agreement, and other good and valuable consideration, the City and Up-32nd Street agree as follows:

A R T I C L E I
PURPOSE & LEGAL AUTHORITY

Section 1.01 Purpose.

The purpose of this Agreement is to provide certainty that the Project will not be required to undergo design changes as a result of changes to City regulations over a long period of time required for Up-32nd Street to obtain building permits and complete the Project.

Section 1.02 Legal Authority.

Section 25-1-540 of the City Code authorizes the execution of managed growth agreements for planning and developing large projects, long term projects, or any project having special benefits that are in the public interest. The Project is a long-term project because it is a mixed-use project and the design and construction will

exceed five years.

Section 1.03 Expiration Date

Section 25-1-540 provides that a managed growth agreement may specify the time period during which a project may comply with the regulations in effect when the first application for the project is filed and establish an expiration date for each application necessary to complete the project. By Resolution No. _____, the City Council directed that the expiration date for the Project is to be August 8, 2022.

ARTICLE II **TERMS**

Section 2.01 Original Regulations; Expiration Date

Subject to Section 2.03 below, Up-32nd Street may construct the Project to comply with City regulations in effect on February 12, 2008. The expiration date of Site Plan No. SP-2008-0071C for purposes of Chapter 25-5 of the City Code and the expiration date of the Project for purposes of Article 12 of Chapter 25-1 of the City Code shall be August 8, 2022.

Section 2.02 Revisions to the Site Plan; Change in Ownership

Minor revisions to the Project shall be permitted in accordance with the City Code and City regulations. However, Up-32nd Street may not construct any improvements on the Property that the City Manager determines to vary substantially from the Project as defined by Site Plan No. SP-2008-0071C without forfeiting the rights granted under this Agreement to develop the Project under Original Regulations. This Agreement does not abridge the rights of Up-32nd Street or its successors (including homebuilders who acquire one or more condominium units for resale to third parties) to sell and convey condominium units within the Project. However, if, without the City's written consent, title to the remaining unsold inventory of condominium units within the Project is conveyed or assumed by an entity other than Up-32nd Street, or an entity that directly or indirectly controls, is controlled by, or is under common control with Up-32nd Street, the City Manager may terminate the rights granted under this Agreement to develop the Project under Original Regulations, in which case the Project and Site Plan No. SP-2008-0071C will expire on its original expiration date of August 8, 2012.

Section 2.03 Exceptions from Right to Develop Under Original Regulations

In this section, Up-32nd Street agrees to comply with City regulations adopted after February 12, 2008, as they pertain to:

- a. erosion and sedimentation controls;
- b. uniform building, fire, electrical, plumbing, or mechanical codes adopted by recognized national code organizations or local amendments to those codes enacted to address *imminent threats of destruction of property or injury* to persons; and
- c. regulations to prevent the imminent destruction of property or injury to persons that do not affect landscaping, tree preservation, open space, or park dedication, lot size or dimensions, lot coverage, building size, residential or commercial density, or timing of the project, or that change development permitted by a restrictive covenant required by the City.

A R T I C L E I I I **MISCELLANEOUS PROVISIONS**

Section 3.01 Notice.

It is contemplated that the Parties will contact each other concerning the subject matter of this Agreement. However, any formal notice or communication required to be given by one Party to another by this Agreement ("Notice") shall be given at the addresses below for the Parties.

Notice may be given by: (1) delivering the Notice to the Party to be notified; (2) by depositing the Notice in the United States Mail, certified or registered, return receipt requested, postage prepaid, addressed to the Party to be notified; or (3) by sending the Notice by telefax with confirming copy sent by mail to the Party to be notified.

Notice deposited in the United States mail in the manner hereinabove described shall be deemed effective after the earlier of the date of actual receipt or three days after the date of the deposit. Notice given in any other manner shall be effective only if and when received by the Party to be notified or purposes of Notice, the addresses of the Parties shall, until changed as provided in this section, be as follows:

City of Austin: City Manager
 P.O. Box 1088
 Austin, Texas 78767

with required copy to: City Attorney
 P.O. Box 1088
 Austin, Texas 78767

Owner: UP-32nd Street, L.L.C.
301 Congress Ave. Suite 500
Austin, TX 78701
Attention: Tim Clark

The Parties may change their addresses for Notice purposes by providing five days written notice of the changed address to the other Party.

If any date or period provided in this Agreement ends on a Saturday, Sunday, or legal holiday, the applicable period for calculating Notice is extended to the first business day following the Saturday, Sunday, or legal holiday.

Section 3.02 Severability.

The provisions of this Agreement are not severable. If any word, phrase, clause, sentence, paragraph, section, or other part of this Agreement, or the application of the word, phrase, clause, sentence, paragraph, section, or other part of this Agreement to any person or circumstance is held by a court of competent jurisdiction to be invalid or unconstitutional for any reason, the Parties agree and understand that the omission of the word, phrase, clause, sentence, paragraph, section, or other part of this Agreement would frustrate the purpose of this Agreement, and, therefore, in that event, this Agreement shall terminate.

Section 3.03 Waiver.

Any failure by a Party to the Agreement to insist on strict performance by the other Party of any provision of this Agreement shall not be deemed a waiver of the provision or of any other provision of the Agreement. A Party has the right at any time to insist on strict performance of any of the provisions of this Agreement.

Section 3.04 Applicable Law and Venue.

The construction and validity of this Agreement shall be governed by the laws of the State of Texas (without regard to conflict of laws principles). Venue shall be in Travis County, Texas.

Section 3.05 Incorporation of Exhibits.

All Exhibits attached to or referred to in this Agreement are incorporated into this Agreement by reference for the purposes set forth in this Agreement.

Section 3.06 Assignability, Successors, and Assigns.

This Agreement is not assignable by Up-32nd Street or the City without the prior written consent of the City Council or Up-32nd Street.

The Agreement shall be binding on and inure to the benefit of the Parties and their respective representatives, successors, and assigns.

Section 3.07 Amendment.

This Agreement may be amended only in writing on the approval of the City Council and Up-32nd Street.

ARTICLE IV
DEFAULT AND REMEDIES FOR DEFAULT

Section 4.01 Default.

On the occurrence, or alleged occurrence, of an event of default, the non-defaulting Party shall send the defaulting Party notice of its default or alleged default. Except as otherwise specifically provided in this Agreement, the defaulting Party must cure its default within 30 days following the receipt of the notice of the default, or, must begin to cure the default within 14 days following receipt of the notice of default and diligently pursue the cure to completion within 50 days of receipt of the notice of default. If the defaulting Party fails to abide by these deadlines, the non-defaulting Party shall have all rights and remedies available in law and equity and all rights and remedies provided in this Agreement. All of these rights and remedies shall be cumulative.

This Agreement shall be effective on the date it has been signed by both Parties.

UP-32nd Street, LLC

By: _____
Name: M. Timothy Clark
Title: President
Date: _____

Approved as to form:

City of Austin

Brent Lloyd
Assistant City Attorney

Sue Edwards
Assistant City Manager
Date: _____

EXHIBIT A

"The Property"

Lot 3, Block A of East Avenue Subdivision, Doc. No.: 200800152