

Amended Preliminary Site Development and Use Plan
For CD district at 45, 55 and 65 Hayden Avenue, Lexington, MA

APPENDIX G
TO
AMENDED PRELIMINARY SITE DEVELOPMENT AND USE PLAN

SPECIAL TOWN MEETING
NOVEMBER, 2009
ZONING AMENDMENT TO COMMERCIAL DISTRICT NUMBER 9

45, 55 and 65 HAYDEN AVENUE

MEMORANDUM OF UNDERSTANDING

**Memorandum of Understanding between Cubist Pharmaceuticals, Inc. (“Cubist”) and the
Town of Lexington, Massachusetts (“Town”)**

October 30, 2009

Cubist has filed, in conjunction with Realty Associates Fund VI, LP, for a zoning amendment to the PSDUP which was previously approved by the Town of Lexington Special Town Meeting in November 1997 (hereinafter, the “Original PSDUP”) for the property known as “55 Hayden Avenue” located at 45, 55 and 65 Hayden Avenue (collectively, the “Property”). This proposed zoning amendment to the Original PSDUP and Definitive Site Development and Use Plan (hereinafter as amended referred to as the “Amended PSDUP”) has been placed on the warrant for the 2009 November Special Town Meeting as Article 3.

The Original PSDUP created a new zoning district on the Property called the CD-9 District. Currently the CD-9 District is comprised of two lots, one owned by Cubist consisting of approximately 11.6 acres (Assessor’s Map 17, Parcel 20B) (the “Cubist Property”) and the second owned by Realty Associates Fund VI, LP consisting of approximately 25.8 acres (Assessor’s Map 17, Parcel 21A) (the “RAF Property”). All proposed additional development that may be authorized under the Amended PSDUP may only be located on the Cubist Property, and therefore all additional obligations and liabilities hereunder shall be the sole responsibility of Cubist.

Spaulding & Slye Hayden Woods LLC, as owner of the Property, which included the Cubist Property and the RAF Property, committed to specific traffic mitigation measures as part of the Original PSDUP and subsequent Definitive Site Development and Use Plan (as set forth in Exhibits D and E of the Original PSDUP). These obligations shall continue (as supplemented, amended and restated by the Amended PSDUP) and are incorporated herein and made a part hereof by reference (See Exhibits 1 and 2 annexed hereto). Cubist is the successor owner of the Cubist Property, and Realty Associates Fund VI, LP is the successor owner of the RAF Property, and both Cubist and Realty Associates Fund VI, LP have joint and several responsibility for the obligations that are set forth in the Original PSDUP and subsequent Definitive Site Development and Use Plan, as supplemented, amended and restated.

The Amended PSDUP details mitigation measures in Appendix E entitled “Traffic Mitigation & Transportation Demand Management Plan.” The purpose of this Memorandum of Understanding (hereinafter, the “MOU”) is for Cubist and the Town, acting by and through the Board of Selectmen, to execute a contract setting forth mitigation measures to be completed by Cubist as provided in, as well as in addition to, those detailed in Appendix E to the Amended PSDUP to be voted on by Special Town Meeting and, if approved, to be submitted to the Attorney General of the Commonwealth of Massachusetts for approval. Cubist is assuming sole responsibility for the \$4,000.00 annual contribution to the LEXPRESS transportation fund as provided in Section 3.5.4 of Exhibit E of the Original PSDUP (this obligation will be replaced by Cubist’s obligations under Section VI(d) of this MOU). This obligation was previously the joint and several obligation of Cubist and Realty Associates Fund VI, LP under the Original PSDUP and subsequent Definitive Site Development and Use Plan for the Property.

Except as specifically set forth otherwise herein, this MOU shall in no way negate the obligations and commitments of Cubist or Realty Associates Fund VI, LP as previously approved by Town Meeting in the Original PSDUP and as established by the Amended PSDUP.

I. Traffic Related Obligations

- (a) Financial Contribution toward Traffic Mitigation Stabilization and Transportation Demand Management/Public Transportation Stabilization Funds.

Cubist shall pay to the Town for deposit into the Town's Traffic Mitigation Stabilization Fund and/or the Transportation Demand Management/Public Transportation Stabilization Fund mitigation fees in accordance with the following sections.

- (b) Projects to be funded through Traffic Mitigation Stabilization and Transportation Demand Management/Public Transportation Stabilization Funds.

The aforesaid financial contributions shall be utilized to enhance future traffic operations and benefit the Town, the neighborhood, and the Property, at certain locations and via certain improvements that are related to Cubist's use of the Property, which may include, but are not limited, to the following:

Design/Construct a traffic signal at Spring Street/Hayden Avenue intersection;

Design/Construct a traffic signal at Spring Street/Concord Avenue intersection;

Design/Construct sidewalks along Hayden Avenue and/or Concord Avenue;

Design/Construct improvements/signal at Waltham Street/Hayden Avenue intersection; and

Create corridor pedestrian plan for pedestrian movements in the area.

The Town shall determine in its sole discretion the traffic and transportation mitigation improvements and/or services for which the funds shall be expended.

II. *Measures commencing within thirty (30) days of approval of the Amended PSDUP by the Attorney General of the Commonwealth of Massachusetts*

Cubist shall, within thirty (30) days of approval of the Amended PSDUP by the Attorney General, contribute Twenty-Five Thousand (\$25,000) Dollars to the Town of Lexington to be deposited in the Traffic Mitigation Stabilization Fund (subject to the approval of Lexington Town Meeting) to allow the Town, acting by and through the Board of Selectmen and their designees, to undertake the preparation of a traffic plan of the Spring Street and Hayden Avenue Corridors (hereinafter, the "Traffic Plan"), both of which corridors will be affected by the development that is contemplated under the Amended PSDUP. The Town will expeditiously engage a qualified Traffic Engineering firm to undertake this plan. The results of this plan shall be provided to Cubist upon its request.

If within three (3) years of the receipt of the funding for the Traffic Plan, the Town neglects to engage a qualified Traffic Engineering firm to commence the analysis, the Town shall use diligent efforts to reimburse said funds to Cubist (subject to due authorization by Town Meeting), and the obligation under this provision shall cease and shall no longer be in effect unless extended by the mutual written agreement of the parties. Cubist shall not unnecessarily withhold its agreement to any extension of the three-year time period that is requested by the Town.

III. *Measures to be Completed Prior to Issuance of Initial Building Permit*

The Cubist Property currently contains 79 parking spaces. Cubist may add up to 227 additional parking spaces, and these parking spaces must be located in a parking structure that is to be constructed on the Cubist Property (the "Parking Structure") as permitted under the Amended PSDUP. Cubist shall contribute an amount equal to One Thousand Nine Hundred (\$1,900.00) Dollars multiplied by any additional parking spaces created or for which capacity has been created in the Parking Structure to fund traffic and transportation mitigation related to the development that is contemplated under the Amended PSDUP. The contribution shall be credited Twenty Five Thousand Dollars (\$25,000) for the payments made in Section II above. The first payment for the creation of capacity for all or any portion of the first 127 spaces in the Parking Structure or the capacity therefore shall be in an amount of not less than Two Hundred Sixteen Thousand, Three Hundred (\$216,300.00) Dollars (the "First Payment" \$1,900 x 127 spaces less the aforementioned \$25,000), and it shall be due and payable prior to the issuance of any building permit for the construction of any additional square footage of net floor area in accordance with the Amended PSDUP in excess of 218,496 sf, the amount approved under the Original PSDUP. The contributed amount identified above shall be contributed to the Traffic Mitigation Stabilization Fund or Transportation Demand Management/Public Transportation Stabilization Fund, at the Town's discretion.

IV. *Measures to be Completed Upon the Creation of Capacity for Additional Spaces*

If Cubist creates or creates the capacity for all or any portion of up to an additional one hundred (100) spaces in the Parking Garage in connection with the development (in addition to the 127 spaces identified in Section III above), Cubist shall make an additional payment of \$190,000.00 (\$1,900 x 100 spaces, herein being referred to as, the “Second Payment”). The Second Payment shall be paid to the Town in five (5) equal yearly installments of Thirty-Eight Thousand (\$38,000.00) Dollars due and payable on the yearly anniversary date of the payment of the First Payment; provided, however, that if the number of parking spaces that are striped and created on the due date for any yearly payment exceeds the percentage of the Second Payment that has been paid, Cubist will make a per space payment of \$1,900 per space to make up the difference (in such a case, future yearly payments will be reduced accordingly). For example, if Cubist has striped and created 50 parking spaces at the time that the second yearly payment is due, Cubist shall make its second yearly payment of \$38,000 so that 40% of the \$190,000 sum has been paid, and Cubist shall also pay an additional \$19,000 (or \$1,900 per space for the 10 spaces over the forty percent [40%] threshold that have been striped and created).

V. *Additional Traffic Mitigation Obligations*

(a) Transportation Coordinator

Cubist, as part of the Original PSDUP, has appointed a site transportation coordinator who is responsible for implementing a variety of employee-based transportation demand management opportunities. Cubist agrees that the coordinator shall annually (on the first of June) submit to the Town Planning Director and Transportation Safety Advisory Council (TSAC) for their review and comment reports as to the strategies employed and their effectiveness to ensure compliance with the requirements of the Original PSDUP. This report shall, at a minimum, set forth the various modes of transportation utilized by employees.

(b) Grant Application Assistance

Cubist shall reasonably cooperate with and support the Town in its application(s) to obtain grant financing or public monies for public infrastructure improvements in South Lexington (including those listed above), which may include applications to the Massachusetts Opportunity Relocation and Expansion (MORE) Program, Public Works and Economic Development (PWED) Program, Infrastructure Investment Incentive (I-Cubed) Program, and other programs offered by the Commonwealth.

VI. *Additional Provisions*

(a) Consumer Price Index Adjustment.

Cubist agrees that, beginning three (3) years from the date of the Attorney General approval of the vote of Special Town Meeting on the Amended PSDUP (the "Initial CPI Adjustment Date"), the \$1,900 figures identified in Sections III and IV above shall be adjusted annually for inflation or deflation based upon changes in the Consumer Price Index for all Urban Consumers, Boston-Brockton-Nashua, All Items (1982-1984 =100), published by the Bureau of Labor Statistics, U.S, Department of Labor ("CPI"); provided, however, that these figures shall never be reduced below the \$1,900 base established herein. The first such adjustment shall be completed on the Initial CPI Adjustment Date based on changes in CPI for the preceding year. If the Bureau of Labor Statistics should cease to publish the CPI in its present form and calculated on the present basis, a comparable index or an index reflecting changes in prices determined in a similar manner shall reasonably be designated by the Town in substitution therefor. The CPI for any year relevant to the application of this definition shall be that published by the Bureau of Labor Statistics for such year.

(b) Binding Effect.

This MOU shall be binding on and inure to the benefit of Cubist and its successors and assigns as owners of the Cubist Property and shall run with the Cubist Property as an encumbrance thereto. This MOU shall also be binding on and inure to the benefit of successors and assigns of the Town. This MOU may be enforced by any remedy provided at law or in equity. This MOU and the Lexington Zoning Bylaws shall be construed in such a way as to harmonize any conflicting provisions to the greatest extent reasonably possible, but in the event of any irreconcilable conflict between this MOU and any provision in the Bylaw, the provisions of the Bylaw shall control (subject always to the provisions of General Laws, Chapter 40A, as amended) as denoted in the Original and Amended PSDUP. Cubist shall promptly record a notice of this MOU with the Middlesex South Registry of Deeds.

(c) Cubist's Existence and Authority.

Cubist is a Delaware corporation duly formed, validly existing, in good standing under the laws of the State of Delaware and duly registered to do business in the Commonwealth of Massachusetts. This MOU constitutes a valid and legally binding obligation of Cubist, enforceable against Cubist in accordance with its terms, and neither the execution, delivery or performance of this MOU nor compliance herewith conflicts with or will conflict with or results or will result in a breach of or constitutes or will constitute a default under (i) the organization documents of Cubist, (ii) any law or any order, writ, injunction or decree of any court or governmental authority, or (iii) any agreement or instrument to which Cubist is a party by which it is bound.

(d) Continuing Financial Obligations.

Cubist shall satisfy the continuing monetary obligations with respect to the CD-9 Zoning Provisions as set forth in Section 3.5 of Appendix E of the Original PSDUP, by making four lump-sum payments as follows: (i) The first such payment, in the amount of Fifty Thousand (\$50,000.00) Dollars, shall be due and payable within thirty (30) days of the approval of the Amended PSDUP by the Massachusetts Attorney General; (ii) the second such payment, in the amount of Twenty-Five Thousand (\$25,000.00) Dollars, shall be due and payable upon the earlier of (a) the issuance of a certificate of occupancy for any additional building square footage on the Cubist Property or (b) two (2) years after the first payment (the earlier of these two occurrences is referred to herein as the “Second Payment Date”); (iii) the third such payment, in the amount of Twenty-Five Thousand (\$25,000.00) Dollars, shall be due and payable two (2) years after the Second Payment Date; and (iv) the fourth such payment, in the amount of Forty Thousand (\$40,000.00) Dollars, shall be due and payable four (4) years after the Second Payment Date. Any and all payments under this paragraph may be prepaid at any time. Upon payment of all of said amounts, all traffic demand management obligations established in Section 3.5 of Appendix E of the Original PSDUP shall be deemed satisfied in full and upon request, and the Town shall provide a Certificate to Cubist confirming such payment and satisfaction of obligations.

(e) Cooperation.

Cubist hereby agrees to continue to work cooperatively with the Town on an ongoing basis to implement both the specific provisions and the intent and purposes of this MOU.

(f) Time is of the Essence.

Time shall be of the essence of this MOU.

(g) Permitting.

The execution and delivery of this MOU does not constitute an agreement by the Town that any necessary permit or approval for Cubist’s project will in fact be granted. Any provision of this MOU may be incorporated into, and made a condition of any permit or approval granted by the Town.

(h) Amendment of MOU.

This MOU may not be amended, modified or terminated except by a written instrument executed by Cubist and by a majority of the Board of Selectmen.

(i) Enforcement; No Waiver.

The failure of the Town or Cubist to enforce this MOU shall not be deemed a waiver of the Town or Cubist’s right to do so thereafter.

(j) Severability.

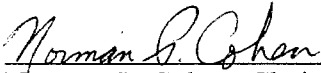
The invalidity of any provision of this MOU as determined by a court of competent jurisdiction shall in no way affect the validity of any other provision hereof. If any provision of this MOU or its applicability to any person or circumstances shall be held invalid, the remainder thereof, or the application to other persons shall not be affected.

(k) Applicable Law.

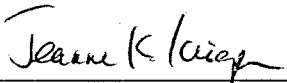
This MOU shall be governed by and according to the laws of the Commonwealth of Massachusetts, as amended from time to time. Any action brought by the Town hereunder may be brought in the Superior Court in and for the County of Middlesex, and Cubist hereby agrees to the jurisdiction of such court.

Executed under seal as of the date first set forth above.

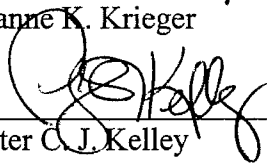
TOWN OF LEXINGTON
BOARD OF SELECTMEN



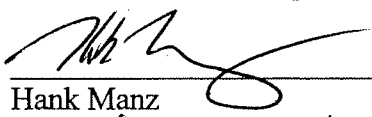
Norman P. Cohen, Chairman



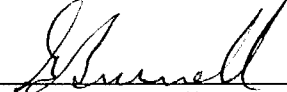
Jeanne K. Krieger



Peter C. J. Kelley



Hank Manz



George A. Burnell

CUBIST PHARMACEUTICALS

David McGirr, Chief Financial Officer
or

Michael Bonney, Chief Executive Officer

Executed under seal as of the date first set forth above.

TOWN OF LEXINGTON
BOARD OF SELECTMEN

Norman P. Cohen, Chairman

George A. Burnell

Peter C. J. Kelley

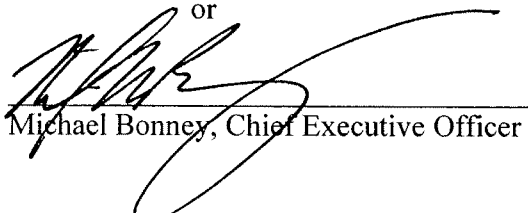
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