



February 4, 2010

SCC Alameda Point LLC  
c/o SunCal Companies  
300 Frank H. Ogawa Plaza, Suite 342  
Oakland, CA 94612  
Attn: Pat Keliher

Re: Default Notice under the Exclusive Negotiation Agreement dated July 18, 2007 by and between the Alameda Reuse and Redevelopment Authority ("**ARRA**"), the Community Improvement Commission of the City of Alameda ("**CIC**") and the City of Alameda ("**City**") (collectively, "**Alameda**") and SCC Alameda Point LLC ("**SunCal**"), as amended (the "**ENA**")

Dear Mr. Keliher:

Under Section 7.1.6 of the ENA, Alameda hereby provides notice that SunCal has defaulted under the ENA for failure to achieve a Mandatory Milestone by the applicable date set forth in the Mandatory Milestone Schedule of Performance. SunCal failed to meet the ENA's Mandatory Milestone requiring SunCal to submit, once it has opted to do so, an Optional Entitlement Application.

The ENA governs the negotiations between SunCal and Alameda concerning the Alameda Point project (the "**Project**"). As permitted by the ENA, SunCal elected to pursue a Ballot Initiative for the Project. That Ballot Initiative was placed before the voters of the City on February 2, 2010, and did not pass.

Under the ENA, where SunCal has decided to pursue a Ballot Initiative, SunCal is provided the option to submit an "Optional Entitlement Application." (Section 3.2.5.2) Whether to submit an Optional Entitlement Application is a decision left to SunCal's discretion. The ENA requires that where SunCal *has* elected to submit an Optional Entitlement Application, however, the Optional Entitlement Application is a Mandatory Milestone and must be achieved by January 15, 2010. (Section 3.2.5.2) Failure to comply with a Mandatory Milestone is an Event of Default under the ENA. (Section 7.1.6)

Here, SunCal has opted to submit an Optional Entitlement Application. SunCal made a submission to the City on January 14, 2010 of two alternative entitlement packages (collectively, the "**Submittal**") The cover letter accompanying the Submittal stated that SunCal "is expressly authorized by the City, the ARRA and the CIC to submit an 'Optional Entitlement Application' to the City for the entitlement of Alameda Point. Developer's Optional Entitlement Application is attached." Cover Letter to Submittal, p.1 Because it opted to submit an Optional Entitlement Application, SunCal was required to achieve the Optional Entitlement Application Mandatory

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Milestone by January 15, 2010. SunCal's Submittal does not, however, meet the requirements under the ENA for an Optional Entitlement Application, for the reasons set forth below. Accordingly, SunCal has not met this Mandatory Milestone.

SunCal's failure to meet this Mandatory Milestone has triggered SunCal's default. Under Section 7.1.6 of the ENA, SunCal shall have thirty days within which to cure this default. If SunCal fails to cure, Alameda has the right to terminate the ENA.

#### **A. The Submittal is not an Optional Entitlement Application Because the Submittal Conflicts with the City Charter**

Article XXVI of the Alameda Charter (also known as Measure A) limits development in Alameda in two ways. First, no multi-family housing is permitted to be constructed in Alameda. See Alameda City Charter, Article XXVI, §§ 26-1, 26-2. The only exceptions to this prohibition allow rehabilitation or remodeling of existing multi-family dwellings and replacement of specific, identified, Alameda Housing Authority and senior citizens' units. Second, the maximum density for residential development within Alameda is one housing unit per 2,000 square feet of land (a density of approximately 21 units per acre), with the only exceptions being the "replacement units" described above and replacement of existing units that are damaged or destroyed.

The development plan included in SunCal's Submittal includes multiple dwelling units. The Submittal also includes dwelling units at a density of more than one unit per 2,000 square feet or 21 units per acre. Indeed, SunCal's Submittal includes land use areas with densities of greater than 70 units per acre. Development of multi-unit housing, and development at densities exceeding 21 units per acre, is in direct contradiction to the City's Charter. SunCal's cover letter acknowledges this. See Cover Letter to SunCal Submittal, p.4 ("The land use plan described in this Optional Entitlement Application seeks the ability to construct, in some locations within the Alameda Point property, multiple dwelling units at a density of more than one unit per 2,000 square feet of land area.")

SunCal's cover letter to the Submittal indicates two theoretical approaches that SunCal might use to achieve compliance with the Charter. Specifically, SunCal indicated, "[t]his may be achieved either through an amendment to Article XXVI of the City Charter of the City of Alameda or through application of the City's density bonus ordinance." Thus, the cover letter suggests that SunCal will pursue either an amendment to the City's Charter or application of the City's Density Bonus Ordinance. But the Submittal does not do anything more than hypothesize about how SunCal *might* comply with Alameda law in developing the Project. The Submittal does not commit to undertaking one or both of these two approaches for the Project. Nor does it explain how either of these theoretical approaches might be implemented. Section 3.2.5.2 of the ENA requires an Optional Entitlement Application to meet the criteria of an Entitlement Application. Thus, an Optional Entitlement Application "shall include the following: (a) an application for all land use entitlements and approvals it will seek from the City . . ." (Section 3.2.5.1) SunCal's Submittal does not commit to an approach and thus is unable to include all necessary approvals. On its face, the Submittal is not an Optional Entitlement Application within the meaning of the ENA.

#### **B. The Submittal is Not an Optional Entitlement Application Because SunCal Does Not and Cannot Comply with City's Density Bonus Ordinance**

##### **1. SunCal's Submittal Contains No Application for a Density Bonus**

As provided above, in order for the Submittal to be considered an Optional Entitlement Application it must include "an application for all land use entitlements and approvals it will seek from the City." To the extent SunCal seeks, as it stated in its cover letter it may, to apply the City's Density Bonus Ordinance to the Project, SunCal requires specific approvals from the City and it failed to apply for those approvals in the Submittal.

The City's Density Bonus Ordinance, adopted as City Ordinance No. 3012 on December 2, 2009 ("**Ordinance**"), sets out numerous specific requirements for projects that seek to receive concessions or waivers under the Ordinance. First among these is the requirement that an applicant submit a Density Bonus Application. (Ordinance 30-17.4.a) Not only has SunCal not formally applied for the approvals it would need to utilize the City's Density Bonus because the Submittal included no Density Bonus Application, SunCal's Submission does not contain the specific information required in a Density Bonus Application.

Perhaps more significantly, the Density Bonus Ordinance requires that an applicant for a Density Bonus must first present a "base" project that complies with existing general plan and zoning requirements. (Ordinance 30-17.4.b.1.) A "base" project would be one that is fully compliant with the City's Charter and, specifically, with the provisions of Measure A. For example, Alameda's Preliminary Development Concept ("**PDC**") provided for the development of 1,735 new units, at densities and dwelling unit types consistent with Measure A. Here, the Submittal does not contain a "base" project development plan, and significantly exceeds the density permitted by Measure A. For example, the PDC project contains a Measure A-compliant "base" of 1,735 units, where the Submittal, at 4,831 units, contains a far greater number of units.

The Submittal also lacks other required features of a Density Bonus Application, including a Project description providing affordable housing unit counts (Ordinance 30-17.4.b.2); a description of what specific concessions or incentives SunCal would request from the City (as described in Ordinance 30-17.10); and justifications for why concessions of increased density to the Project would be necessary to provide for affordable housing cost (Ordinance 30-17.4.b.6). The Master Plan attached as part of the Submittal states only that "When an applicant seeks a density bonus for a housing development within the Plan Area, the City shall provide the applicants with incentives or concessions for the production of housing units and child care facilities as described in Government Code section 65915." (Submittal Attachment "I", Alameda Point Master Plan, p.9-15.) This does not meet the requirements of the Density Bonus Ordinance.

The Submittal also failed to include an Affordable Housing Unit Plan, another required element of a Density Bonus Application. (Ordinance 30-17.15.) An Affordable Housing Plan is required to include, for the dwelling units required to be made available at specific levels of affordability ("**Affordable Units**") specific information about the Affordable Housing Units including unit location, type and size; floor plans; target income levels; phasing plans, marketing plans, and a financial pro forma. *Id.*

Even had SunCal submitted a Density Bonus Application with all required elements, securing bonus units awarded under the Density Bonus Ordinance ("**Density Bonus Units**") requires the project to adhere to many specific rules, none of which SunCal has demonstrated that it will be able to adhere to. Affordable Units must be constructed concurrently with market-rate units and with comparable infrastructure, construction quality and exterior design, and must be "integrated within the project" (Ordinance 30-17.8.) The statement appearing in the Alameda Point Community Plan attached to the Submittal that "New affordable housing units should be

reasonably dispersed throughout the phases of development . . ." and "Affordable housing should be constructed so that it is coordinated with the overall residential construction program." (Submittal Attachment "F", Alameda Point Community Plan, p.15) do not provide any information as to *how* SunCal would comply with this requirement.

In addition, all projects for which Density Bonus Units are granted are required to be the subject of an "Affordable Housing Unit Agreement." (Ordinance 30-17.16.) Additional conditions are required for the Affordable Housing Unit Agreement where the Affordable Units are for sale (Ordinance 30-17.17), and where the Affordable Units are for rent (Ordinance 30-17.18). The Submittal contains no information as to how SunCal would comply with this requirement, either.

SunCal has failed to show in its Submittal a sufficient application for the approvals that would be required under the Density Bonus Ordinance.

## 2. Even Were SunCal to Submit a Density Bonus Application Based on the Submittal, the Project in the Submittal Would Not Qualify for a Density Bonus

The City's Density Bonus Ordinance requires submittal of a development plan illustrating the that the "base " project meets all existing general plan and zoning development standards, which includes compliance with Measure A. See Ordinance 30-17.4.b.1, cited in Section B.1 above. The Project as presented in SunCal's Submittal does not comply with Measure A. Thus, even if SunCal were to submit a Density Bonus Application based on the Submittal, the Project would not be eligible for a Density Bonus. There are numerous aspects of the Submittal which do not comply with Measure A. For example, the Submittal contemplates very high density development at levels of up to 40, 50 and 70 units per acre. (Submittal, Attachment "O", Alameda Point Specific Plan, p.7-4) Measure A, however, limits density to approximately 21 units per acre, as described above. The high density units provided for in the Submittal appear to represent a significant portion of the Project. Elsewhere, the Submittal contemplates multi-family housing in all five of its residential land use categories (Preservation Mixed Use, Mixed Use, Residential Medium, Residential Medium High, and Residential High), and multi-family housing appears to represent a significant portion of the Project. (*Id.* at 7-5) Accordingly, without a Measure A-compliant base plan, there can be no Density Bonus.

## **C. The Submittal is Not an Optional Entitlement Application Because SunCal is Not Seeking to Amend the Charter in Accordance with the ENA**

The ENA does not permit an Optional Entitlement Application that does not comply with the City's Charter. Rather, the ENA provides that if and only if the Ballot Initiative is successful, an Optional Entitlement Application may be submitted containing only the approvals and entitlements necessary to permit development of the Project consistent with the Ballot Initiative. (Section 3.2.5.2) If the Ballot Initiative was not successful, the Optional Entitlement Application was required to be complete and thus in compliance with the City's Charter. (*Id.*)

This structure is fully consistent with the RFQ process, the initial ENA, and the ENA amendments. As you know, SunCal's involvement with Alameda Point dates back to its Response to the RFQ for a Master Developer for Alameda Point, dated December 4, 2006 ("**RFQ Response**"). The RFQ Response emphasized the importance of developing a project in accordance with the strict development standards imposed by the citizens of Alameda: "These standards are designed to preserve the history of NAS Alameda and many existing structures, *limit the number of units and the density of development*, provide affordable housing even beyond the statutory redevelopment requirement, and promote mass-transit and transit oriented

development, all while maintaining revenue neutrality for the City.” RFQ Response, p.5 (emphasis added). SunCal’s RFQ Response stated in plain terms that SunCal’s plan would “meet[] all of the policy goals and objectives contained in the PDC and other policy documents” and that SunCal was “fully confident [the] policy goals and objectives contained in the PDC will be successfully met.” RFQ Response, p. 8. In other words, SunCal’s initial commitment to the Project was a commitment to develop in accordance with Measure A.

As negotiations between the City and SunCal progressed, the ENA was amended to allow SunCal an option to submit a development application that was not in accordance with Measure A. Specifically, SunCal was permitted to put a Ballot Initiative before the voters of Alameda. (Section 3.2.5) As it was expected by all that an election would be held in November 2009, the Optional Entitlement Application was anticipated as a safeguard so that should the Ballot Initiative fail, SunCal could then submit a Measure A-compliant plan by January 15, 2010 (Section 3.2.5.2). The election was actually held on February 2, 2010 and the Ballot Initiative, which contained an amendment to the Charter, was rejected by the voters. The January 15, 2010 deadline remained in place, however, and when SunCal elected to submit an Optional Entitlement Application, the ENA required it to be in compliance with the City Charter.

SunCal’s January 14, 2010 Submittal is not in compliance with the City Charter. The Submittal Cover Letter’s listing of the contents of the application includes item P, “Charter Amendment,” which in the “Purpose of Submittal” column cross-references Section 3 of the Cover Letter. This section acknowledges that the Submittal is not in compliance with the City’s Charter, stating that the land use plan “may be achieved either through an amendment to Article XXVI of the City Charter of the City of Alameda or through application of the City’s density bonus ordinance.” Submittal Cover Letter, p.4. Thus, the Submittal is not an Optional Entitlement Application. Again, SunCal has failed to meet the Mandatory Milestone of submitting an Optional Entitlement Application on or before January 15, 2010.

The City wishes to further note that SunCal had one route to submit a non-Measure A-compliant development application, and it has been unsuccessful. It appears SunCal may now be seeking another option: another election. As described above, the Submittal does not include any direct provisions for a Charter amendment; it appears SunCal is contemplating a future Charter amendment, perhaps initiated through a ballot measure to be placed before the voters of Alameda in some future election. (“This may be achieved either through an amendment to Article XXVI of the City Charter of the City of Alameda . . .”). Submittal Cover Letter, p.4 To the extent SunCal seeks yet another election on a non-Measure A compliant project, such further election is simply not permitted under the terms of the ENA.

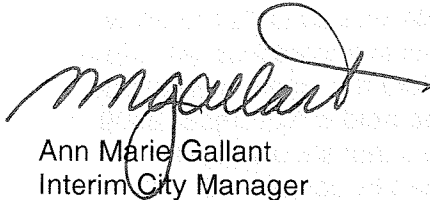
The City of Alameda has strict development standards pertaining to development density, as evidenced by Article XXVI of the City Charter and as acknowledged by SunCal in its RFQ Response. The ENA was clear in its terms that SunCal had one and only one way in which to present a development plan relying on a Charter amendment, and only one of those was an opportunity to present a plan directly to the voters of Alameda. SunCal has had its chance at the ballot box on February 2, 2010 and was not successful. SunCal may not rely on any future election to extend the ENA, which expires on its terms on July 20, 2010.

## **Conclusion**

SunCal opted to submit an Optional Entitlement Application, thereby requiring SunCal achieve the Optional Entitlement Application Mandatory Milestone by January 15, 2010. However, SunCal’s Submittal does not fulfill the requirements of an Optional Entitlement Application under

the ENA. The City's Charter and the ENA together require either submission of a non-Measure A compliant plan that has been approved by the City's voters, or submission of a Measure A-compliant Optional Entitlement Application. SunCal has provided neither, thereby defaulting under the ENA for failing to comply with a Mandatory Milestone. If SunCal does not cure this default within thirty days, Alameda will have the right to terminate the ENA.

Sincerely,



Ann Marie Gallant  
Interim City Manager

**Copies as provided in ENA:**

SCC Alameda Point LLC  
c/o SunCal Companies  
2392 Morse Ave  
Irvine, California 92614  
Attention: Marc Magstadt

SCC Alameda Point LLC  
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Attention: Bruce Cook

Cal Land Venture, LLC  
c/o D.E. Shaw & Co., L.L.C.  
120 West 45th Street  
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New York, New York 10036  
Attention: Chief Financial Officer

**Courtesy copies:**

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