SCC Alameda Point, LLC
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March 17, 2010

Ms. Ann Marie Gallant
Interim City Manager
City of Alameda
2263 Santa Clara Avenue, Room 320
Alameda, CA 94501-4477

Re: Notice of Default Letter dated February 4, 2010 ("NOD") under Exclusive Negotiation Agreement dated July 18, 2007 by and among the Alameda Reuse and Redevelopment Authority ("ARRA"), the Community Improvement Commission of the City of Alameda ("CIC"), the City of Alameda ("City"; the City, ARRA and CIC collectively, "Alameda") and SCC Alameda Point LLC ("SunCal"), as amended (the "ENA").

Dear Ms. Gallant:

On behalf of SCC Alameda Point LLC ("SunCal"), I am writing as a follow up to the remarks of Mr. Frank Faye, Chief Operating Officer of SunCal Companies, at the Special Meeting of the ARRA, City and CIC in the early morning hours of March 17, 2010 (pursuant to Agenda Item 3 on the March 16, 2010 agenda). We appreciate the opportunity afforded to us to comment on this item, which addressed SunCal's requested 60 day tolling of the notice of default. As Mr. Faye mentioned in his appearance, SunCal is submitting a supplement to its January 14, 2010 Optional Entitlement Application in order to provide the "cure" demanded by the City in the Notice of Default. This supplement will be filed with the City Planning Department on March

22, 2010,[1] and, in the interest of full transparency, we encourage the City to post this submittal on its website.

As Mr. Faye also mentioned during his presentation, our only goal in seeking the" tolling" was to maintain every positive effort with the City and its sister agencies and to avoid the unnecessary introduction of "legal arguments" relating to who was right and who was wrong regarding the City's decision to send a Notice of Default.

At the hearing, Mr. Faye made it clear that SunCal was withdrawing its "tolling request" given the discussion among the Board members, along with the tone set by the staff recommendations and wanted to proceed with a timely and good faith effort to develop a consensus plan for Alameda Point. He also mentioned because of this approach, SunCal would reluctantly be sending a "reservation letter" which sets forth its disagreement with the City's position regarding the Notice of Default, which is set forth below.

As such, we disagree with the contention in the NOD that SunCal has failed to meet a Mandatory Milestone in its submittal of an Optional Entitlement Application, and we have listed below a number of substantive and procedural concerns with the NOD. Although we are expressing our concerns by way of this letter, we wish to emphasize that we continue to desire to work together in furtherance of the agreed-upon 2008 plan for development of Alameda. The submittal of the Optional Entitlement Application provided a tool for all of us to work together to further the plan that the City Council had endorsed in 2008. In that context, and with written assurances from City staff that they were intending to set up a meeting schedule with us for continued negotiation of the DDA and the Optional Entitlement Application, we were surprised to receive the NOD without any discussion or warning whatsoever.

One of the most troubling assertions of the NOD is that the City has removed any potential cure for the purported default that would allow construction of a plan consistent with the Master Plan and Business Plan accepted by the City in 2008. We have been working under the ENA for over two years now and have expended millions of dollars in paying our own and City consultants and staff in reliance on the City's good faith in moving forward with us on this agreed-upon plan. As indicated by Mr. Faye at the public hearing, we have spent an additional $100,000 in "curing" the alleged default.

We continue to remain actively engaged in this pursuit and request the opportunity to resolve any concerns that the City may have with respect to our submittals in order to move forward with

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[1] We acknowledge receipt of email correspondence on February 18, 2010 from the City Attorney confirming that the correct cure period under Section 7.1.6 of the ENA is 30 business days terminating on March 22, 2010.

developing the plan. We request that the City set up a workshop or a City Council task force to review the City's concerns with the plan and to allow us to move forward jointly with implementation efforts, including negotiation of further outstanding business terms.

Since the NOD is crafted in legal terms, we feel compelled to preserve our rights by responding in similar fashion. However, this letter does not contain an exhaustive list of our legal rights and remedies nor should it be read as a pre-cursor to litigation. Our goal is to return to the negotiating table to complete the project.

DISCUSSION

There appears to be agreement by the City that SunCal made an Optional Entitlement Application submittal ("OEA Submittal") on January 14, 2010 that was received by the City Planning Department, and that it included each of the six required submittal items specified under the ENA (see ENA Section 3.2.5.1 cited in full below).[1]

In light of the fact that a submittal was made, a default notice is not the proper remedy to address the City's concern that the application was incomplete. The ENA contemplates that a submission may not be complete in Section 3.2.5.1, where it states "Developer shall use Best Efforts (as defined in Section 15.5 below) to submit all required supplemental information sufficient for the Entitlement Application to be promptly deemed complete by Alameda."[2] Because supplemental information may be furnished, the language of the ENA specifies that normal planning procedures would apply, i.e., that the City would respond to the submittal with a letter detailing items required to make the application complete. No such letter or statement of

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[1] The OEA Submittal included (a)(i) general plan amendments, (a)(ii) a master plan, (a)(iii) zoning amendments, (a)(iv) a development agreement, (b) an application for environmental review pursuant to CEQA and (c) a request for expedited processing of land use entitlement applications. The right to submit applications for (a)(iv) subdivision approvals or (a)(vi) other entitlements and approvals was not exercised by SunCal. [bold subsection references are to ENA Section 3.2.5.1].

[2] "Best Efforts is defined in Section 15.5.3 of the ENA as follows: "'Best Efforts'" shall mean the commercially reasonable expenditure of time and effort on the part of the representative of the Parties to accomplish a specified task, but shall not mean the expenditure of funds by ARRA, the City or the CIC which are not recoverable under the cost recovery mechanism set forth in Section 6 above nor shall 'Best Efforts' require either Party to incur liabilities unless such act is otherwise explicitly required by this Agreement or by State of California or federal law."

incompleteness of the application was ever issued to SunCal nor in any other way transmitted to SunCal at the time of the OEA submission or subsequently. Instead, we received the NOD. [3]

The NOD asserts that the OEA Submittal does not constitute a complete Optional Entitlement Application (and therefore that SunCal failed to meet a Mandatory Milestone) because (1) its OEA Submittal is inconsistent with the City Charter, (2) additional applications and submittals (specifically, a Density Bonus application and attendant submittals) not specifically identified for submittal in the ENA were required to be included in the OEA Submittal and were not, and/or (3) that under no circumstances, including through legal and appropriate use of the density bonus ordinance, is SunCal authorized by the ENA to seek a project under the ENA that contains multifamily housing inconsistent with the "Measure A" provisions of the City Charter. We disagree strongly with each of these contentions and our specific responses to each are below.

1. The contention that the OEA Submittal was required to be consistent with the "Measure A" provisions of the City Charter is not supported by the facts. The NOD fails to cite support for this contention because there is no such requirement contained in the ENA. In fact, the words "charter" and "Measure A" do not appear in the ENA. To the contrary, the ENA states that the Developer may include General Plan amendments, zoning amendments to MX zoning and "such other entitlements and approvals Developer may request for the Project Site." The inclusion of General Plan and zoning amendments is conclusive evidence that the development does not have to meet existing requirements. Under established law, once the 2008 plan was accepted by the City, the City is bound in good faith to proceed to carry out its terms.

   The requirements for an OEA are clearly specified in the ENA and, again, do not mention Measure A or the City Charter. Section 3.2.5.1 of the ENA states:

   > "The entitlement application (the "Entitlement Application") shall include the following: (a) an application for all land use entitlements and approvals [developer] **will seek** from the City , including (i) a General Plan amendment, if required, (ii) a master plan (the "Master Plan") pursuant to Section 30-4.20(f) of the Alameda Municipal Code for the development of the Project Site, which pertains to MX District development, provided however, pursuant to Section 30-

[3] The ENA requires that Alameda (i.e., the City, the ARRA and the CIC) issue a notice of default. There is no indication in the NOD that these entities have authorized the sending of the NOD or instructed the Interim City Manager to send the NOD on their behalf.

4.20(f)(1) a market analysis will not be required as part of the Master Plan submittal because the Project Site is within a redevelopment area, (iii) a zoning amendment(s), (iv) subdivision approval to the extent requested by Developer, (v) a development agreement (the "Development Agreement") prepared pursuant to California Government Code Section 65864 et seq. **vesting in Developer the right to develop the Project to the scope, uses, densities and intensities described in the Master Plan and other implementing regulatory documents, and necessary to implement the Development Plan and (vi) such other entitlements and approvals as Developer may request for the Project Site**; (b) application for environmental review pursuant to CEQA; and (c) an agreement between Developer and Alameda to provide for expedited processing by the City of all land use entitlement applications including all environmental review required under CEQA and funding thereof by Developer. Subsequent to submittal of the Entitlement Application, Developer shall use Best Efforts (as defined in Section 15.5 below) to submit all required supplemental information sufficient for the Entitlement Application to be promptly determined to be complete by Alameda." *[emphasis added]*

The contention that the above provision, or any other provision of the ENA, requires that the application be consistent with the Charter because "it was required to be complete and thus in compliance with the City's Charter" (NOD page 4) is not contained in the ENA. This language does not provide authority to the City, or to the CIC and ARRA which as state law entities are not subject to these charter restrictions, to reject an Optional Entitlement Application based on its failure to meet Charter or code provisions.

2. A density bonus application is not the only appropriate means by which to achieve the densities described in the Master Plan and there is no requirement that a density bonus application be submitted at this time. Despite the assertions in the NOD to the contrary, the submittal of an OEA need not include each and every land use entitlement required for development of the property. The key language cited over and over again in the NOD is the phrase "for all land use entitlements and approvals it will seek from the City." Yet, while cited for its reference to the word "all", this phrase read in its entirety is permissive, allowing the developer to determine which entitlements and approvals **to seek**. The remainder of the section allows developer to submit in its application a request for "such other entitlements and approvals as Developer may request for the Project Site." The permissive intent is further underscored by Section 3.2.5.3 of the ENA entitled "Subsequent Approvals", that states:

> "Subsequent approvals will be necessary in order to develop the Project, which may include, without limitation, development plans; master demolition, infrastructure, grading and phasing plan; design review approvals; demolition permits, improvement agreements; infrastructure agreements; grading permits; building permits; site plans; sewer and water connection permits and other similar requirements."

Each of the listed approvals is more similar to the density bonus application (which requires submittal of project plans, a site plan showing all building and structure footprints or locations, drive aisles and parking layouts, phasing plans, floor plans, architectural elevations and the like) than to a general plan or zoning submittal. Yet each of these is also a "land use entitlement and approval", clearly negating the City's contention that "all" applications are required to be submitted concurrently with the OEA Submittal. Further, none of these submittals is reasonably feasible prior to City approval of subdivision maps, which were made discretionary under the provisions of Section 3.2.5.1.

Read in its entirety, Section 3.2.5 is clearly intended to provide flexibility to the Developer to determine which additional entitlements, if any, would be considered at the first stage of project approval and which at a later stage. As such, a density bonus application was both not required and not required at the time of OEA submission.

Finally, at the time that the ENA provisions were drafted in 2007 and 2008, the City had not initiated or approved a density bonus ordinance, thus it could not under any circumstances have been in the contemplation of the parties at the time the ENA amendment was executed that a density bonus application be submitted as part of the OEA.

3. To state that "no multi-family housing is permitted to be constructed in Alameda" (NOD page 2) is to articulate a clear violation of state and federal housing law. All negotiations with the Developer from the date of acceptance of the 2008 plan to the present had to be conducted contemplating construction of multifamily housing. . The concept that only a Measure A compliant plan would suffice to meet the Optional Entitlement Application contradicts the entire framework of the ENA, which permitted the developer to pursue a non-Measure A compliant plan either through Ballot Initiative or through a subsequent

Entitlement Application submittal.[4] As the Entitlement Application submittal and Optional Entitlement Application submittal requirements are one and the same (see ENA Section 3.2.5.1), there can be no added requirement implied by the occurrence of a vote on a ballot initiative that a Measure A compliant plan is required.

The Development Concept and all other related documents accepted by the City over the last two years were not Measure A compliant. In addition, the Project Pro Forma jointly prepared by "Alameda and Developer" per ENA Section 3.2.4 that has been controlled and maintained by Alameda and its financial consultant, has been the basis for negotiations between the United States Government and the ARRA and does not contain a Measure A compliant plan. The OEA Submittal is consistent with the plan that the City Council agreed to study under CEQA in a unanimous vote and the City has accepted and expended SunCal's funds for purposes of furthering the CEQA evaluation of that plan. These acts constitute complete affirmation by Alameda and the City of the clear intent and purpose of the contract to develop the property with a range of uses and densities that are beyond the restrictions of Measure A. Alameda and the City are bound by municipal estoppel from raising any such assertion to the contrary at this late date.

Indeed, the NOD itself acknowledges that the only way for Alameda to avoid the unconstitutional effects of Measure A is to grant density bonuses through state law, which clearly preempts Measure A. This self-contradiction reveals that all parties understood that Measure A was never contemplated to be enforced and if the City asserts Measure A as a bar to the processing of an application that is otherwise fully compliant with the ENA, the City would place itself in full violation of state law by its own acts. Further contradiction is evidenced by the fact that the City's own density bonus ordinance permits a waiver of Measure A. Finally, the use of bonus densities under state law is not the only way to achieve the project's fulfillment. The City can simply grant rezoning, issue a variance, introduce a charter amendment by initiative or utilize the bonus and incentive provisions of state law. These options can be carried out by the City under its own regulatory powers and are not required to be requested by the applicant.

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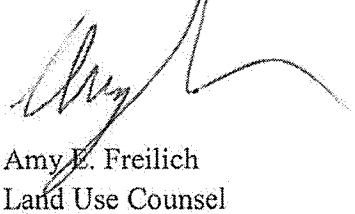
[4] The NOD's contention on this point is clearly flawed. The Second Amendment to ENA was executed by the parties on October 7, 2008, after the submittal of the Development Concept, Infrastructure Plan and draft Business Plans on September 19, 2008. The Second Amendment states "Alameda acknowledges that Developer satisfied the Mandatory Milestones for submittal" with respect to each of these items and "as of the Effective Date of this Second Amendment, is in compliance with the terms of the Agreement." None of these submittals was consistent with Measure A and yet, the developer was not asked to make its election regarding Ballot Initiative or Entitlement Application submittal until April 2009.

REQUEST

SunCal respectfully requests that we work collaboratively in developing and implementing plans to entitle the project consistent with the objectives set forth in the ENA. It is our goal to meet with the leadership of the City to address outstanding issues forthrightly so that we may proceed with entitling the Master Plan.

During those discussions, the parties can determine which items should be processed through the City using its own regulatory powers, sua sponte, and which the applicant should process through further application. We would request that a task force of Council members participate directly in discussions with us so that we may focus directly on any issues and concerns with the plan and the pro forma that the City Council may have. Failing this, SunCal requests that the City agree to mediation or that it provide a proper hearing on this matter before there be any further legal steps taken.

Very truly yours,



Amy E. Freilich
Land Use Counsel

Cc: Mayor and Members of the City Council
Ms. Teresa Highsmith, Esq., City Attorney
Mr. Bruce Elieff
Mr. Steve Elieff
Mr. Frank Faye
The Honorable Robert Hertzberg