April 21, 2010

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

RE: SunCal Response to Notice of Default dated February 4, 2010 ("NOD") under the Alameda Point Exclusive Negotiation Agreement by and among the City of Alameda (**City**"), the Community Improvement Commission of the City of Alameda ("**CIC**"), and the Alameda Reuse and Redevelopment Authority ("**ARRA**") (collectively, "**Alameda**"), and SCC Alameda Point LLC ("**SunCal**"), as amended (the "**ENA**")

Dear Ms. Freilich:

On January 14, 2010, SunCal submitted an "Optional Entitlement Application" to the City (the "**Original OEA**"). The City determined that the Original OEA was not an Optional Entitlement Application within the meaning of Section 7.1.6 of the ENA and that SunCal was thus in default under the ENA for failure to achieve a Mandatory Milestone by the applicable date set forth in the Mandatory Milestone Schedule of Performance. Accordingly, Alameda issued a Notice of Default on February 4, 2010. On March 22, 2010, SunCal submitted a "Modified Optional Entitlement Application" to the City (the "**Modified OEA**"). The cover letter accompanying the Modified OEA explained that the Modified OEA was intended to "respond to [the City's] concerns and to cure the alleged default" associated with the failure to submit an Optional Entitlement Application within the meaning of Section 7.1.6 of the ENA. Simultaneously, SunCal submitted a "reservation of rights" letter to Alameda dated March 17, 2010 (the "**March 17 Letter**") setting forth SunCal's disagreement with the issuance of the Notice of Default ("**NOD**").

Alameda has reviewed the Modified OEA and acknowledges that SunCal has cured its default under the ENA. Separate correspondence details Alameda's questions about the Modified OEA. Alameda also has reviewed the March 17 Letter. Alameda disagrees with a number of the points raised by SunCal in the March 17 Letter, and is compelled to respond to SunCal's statements in order to set the record straight.

A. The Original OEA was not an Optional Entitlement Application within the meaning of Section 7.1.6 of the ENA; SunCal was thus in default under the ENA for failure to achieve a Mandatory Milestone by the applicable date.

City Attorney
2263 Santa Clara Avenue, Room #280
Alameda, California 94501-4477
510.747.4750 • Fax 510.747.4767 • TDD 510.522.7538

After reviewing the Original OEA, Alameda determined that the Original OEA was not an Optional Entitlement Application for three reasons.

1. The Original OEA conflicts with the City Charter.

Article XXVI of the Alameda Charter, also known as Measure A, has been existence since 1973. The Charter prohibits the construction of multi-family housing in Alameda, with limited exceptions, and caps the maximum density for residential development in Alameda at one housing unit per 2,000 square feet of land, or approximately 21 units per acre. Alameda's density cap and the prohibition on multi-family housing are well known to SunCal. SunCal's December 4, 2006 Response to the RFQ for a Master Developer for Alameda Point ("**RFQ Response**") described SunCal's commitment to developing a project in accordance with the strict development standards imposed by the citizens of Alameda. In SunCal's January 14, 2010 cover letter accompanying the Original OEA, SunCal stated, in a section entitled "Alameda City Charter," that the planned construction of "multiple dwelling units at a density of more than one unit per 2,000 square feet of land area . . . 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." (Original OEA Cover Letter, p.5) This reference to potential methods of achieving the planned project, albeit without a commitment by SunCal to adopt any particular strategy, suggests that SunCal was well aware of the need for an Optional Entitlement Application to be consistent with the City Charter.

SunCal suggests the Original OEA was not required to be consistent with Article XXVI of the Charter because the words "charter" and "Measure A" do not appear in the ENA. This suggestion defies common sense and is inconsistent with the structure of the ENA. The ENA allowed SunCal to process a Ballot Initiative that would amend the Alameda Charter. In the event a Ballot Initiative was not approved by a majority of the Alameda electorate voting on the Ballot Initiative, then the ENA required that an Optional Entitlement Application achieve the required consistency with the Alameda Charter.

SunCal suggests that because the ENA allows the inclusion of General Plan amendments, zoning amendments, and such other entitlements and approvals Developer may request, that is evidence that the proposed development "does not have to meet existing requirements." The City disagrees. All development approvals must be consistent with the Charter. The fact that certain land use applications may be filed does not mean their approvals are not subject to the requirements of the Charter.

As a collateral matter, SunCal contends that the CIC and ARRA are state law entities and are not authorized to reject an Entitlement Application based on its failure to meet the requirements of Alameda's Charter. The City again disagrees. Under Section 33331 of the Health & Safety Code, a redevelopment plan must be consistent with the

applicable General Plan, and a city's General Plan must also be consistent with its Charter. None of the Alameda entities have the authority to approve an application that conflicts with the Charter.

2. The Original OEA was not an Optional Entitlement Application because the Original OEA required approvals from the City, but SunCal failed to apply for those approvals.

The Original OEA was deficient in that it lacked a Density Bonus Application. Moreover, the project described in the Original OEA would not be eligible for a Density Bonus. SunCal asserts in the March 17 Letter that under ENA Section 3.2.5.1, "[t]he right to submit applications for (a)(iv) subdivision approvals or (a)(vi) other entitlements and approvals was not exercised by SunCal." However, the language of Section 3.2.5.1 of the ENA is mandatory, not permissive:

> The entitlement application (the "Entitlement Application") ***shall*** include the following: (a) an application for ***all land use entitlements and approvals it 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 30-4.20(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 . . .

(emphasis added). While Section 3.2.5.1 does allow SunCal "flexibility" to determine which entitlements and approvals are necessary for a given Entitlement Application, the ENA makes no provisions allowing SunCal to defer that determination until a later date: the application "shall" include "all" approvals SunCal will seek. By failing in the Original OEA to commit to an approach for complying with Alameda law and submitting an application for necessary approvals consistent with that approach, SunCal's submission failed to include "an application for all land use entitlements and approvals it will seek from the City . . ." (Section 3.2.5.1 of the ENA).

SunCal also suggests that at the time the ENA provisions were drafted in 2007 and 2008, the City had not initiated or approved a density bonus ordinance and thus a density bonus application was not contemplated in the ENA. Regardless of what was contemplated in the ENA, since the Original OEA failed to include "an application for all land use entitlements and approvals it will seek from the City . . ." (Section 3.2.5.1 of the ENA), the Original OEA did not qualify as an Optional Entitlement Application.

3.The Original OEA was not an Optional Entitlement Application because the ENA does not allow a non-Measure A compliant submission after an unsuccessful Ballot Initiative.

The terms of the ENA provided SunCal with an opportunity to submit a development application not in compliance with the City Charter, but only in the event the Ballot Initiative was successful. Since the Ballot Initiative was unsuccessful, the terms of the ENA do not permit submission of any other application not in compliance with the Charter. SunCal suggests in the March 17 Letter that the requirements for the Entitlement Application submittal and the Optional Entitlement Application submittal are one and the same; but as described above, that interpretation is contradicted by the structure of the ENA. Without a successful Ballot Initiative amending the Charter, the requirement of ENA Section 3.2.5.1. that an Optional Entitlement Application "shall include . . . an application for all land use entitlements and approvals it will seek from the City," means that any Optional Entitlement Application must include all approvals necessary to comply with the Charter.

SunCal contends that Alameda is bound by "municipal estoppel" from asserting that the project was required to be compliant with Measure A because Alameda has "accepted" certain documents that are not Measure A compliant. Alameda has not, however, "accepted" or in any other manner approved these documents, including the "Alameda Point Redevelopment Concept Plan" submitted in September 2008, the "Draft Redevelopment Master Plan" submitted in December 2008, and the jointly-prepared project pro forma. These documents were merely submitted by SunCal for processing, and City staff provided a list of comments and observations on the documents pending the electorate's consideration of the Ballot Initiative amending the Charter. Additionally, the jointly-prepared project pro forma was never approved by the City; the Project Proforma milestone in the ENA was specifically waived by Alameda.

Further, the City cannot be held under an estoppel theory to have formed a contract with SunCal to approve a non-Measure A compliant plan because a pubic entity, such as Alameda, cannot be bound by estoppel. *First Street Plaza Partners v. City of Los Angeles*, 65 Cal. App. 4th 650, 667-68 (1998).

SunCal suggests that the discussion of density bonuses in the NOD reveals that "all parties understood that Measure A was never contemplated to be enforced." The March 17 Letter describes a number of potential methods for such a project to proceed,

including a density bonus, a City-sponsored rezoning, a City-introduced variance, or a City-introduced charter amendment by initiative. However, the discussion of density bonuses in the NOD explains that SunCal is required under the ENA to submit "an application for all land use entitlements and approvals it will seek from the City", including any applications necessary to comply with, supersede or amend Alameda's Charter.

B. The declaration of SunCal's default under the ENA was the proper remedy to address the deficient Original OEA submission.

The NOD was properly issued. SunCal contends in the March 17 Letter that because Section 3.2.5.1 of the ENA requires SunCal to use Best Efforts to submit all required supplemental information, Alameda should not have issued the NOD. SunCal, however, never submitted an Entitlement Application within the meaning of the ENA that it would be permitted to supplement. As described above, the Original OEA was not an Optional Entitlement Application within the meaning of the ENA. Failure to achieve a Mandatory Milestone was an Event of Default triggering a cure period; SunCal's subsequent submittal of a Measure A-compliant plan is a cure of such Default.

Finally, the NOD was properly issued. SunCal argues in the March 17 Letter that "Alameda" (i.e., the City, the ARRA and the CIC) was to issue NOD under the ENA and that there is no indication these entitles authorized sending the NOD as the NOD was signed by Interim City Manager Gallant. The issuance of the NOD was an administrative function of the City Manager, implementing the terms of the ENA. The ENA provides that should a default occur for failure to comply with a mandatory milestone, a Notice of Default is to be sent via certified mail or similar delivery with record of receipt, thus triggering the 30-day period to "cure." As the NOD complied with these requirements, it was properly issued.

CONCLUSION

SunCal has timely cured its earlier default through the submission of the Modified OEA. As indicated above, under separate cover the City is sending a list of questions raised by the submital of the Modified OEA.

Regards,

Teresa L. Highsmith
City Attorney

TH/cm

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
c/o SunCal Companies
2392 Morse Ave
Irvine, California 92614
Attention: Bruce Cook

Cal Land Venture, LLC
c/o D.E. Shaw & Co., L.L.C.
120 West 45th Street
Tower 45, 39th Floor
New York, New York 10036
Attention: Chief Financial Officer

Courtesy copies:
Alameda City Council
Alameda City Hall
2263 Santa Clara Avenue
Alameda, CA 95401

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