

## CITY OF ALAMEDA

### Memorandum

To: Honorable Mayor and  
Members of the City Council

Honorable Chair and  
Members of the Alameda Reuse and Redevelopment Authority

Honorable Chair and  
Members of the Community Improvement Commission

From: Ann Marie Gallant  
Interim City Manager/Interim Executive Director

Date: June 15, 2010

Re: Staff Presentation on Status Report of Finalized Navy Term Sheet  
Mandatory Milestone pursuant to ENA Section 4.2.2.

### BACKGROUND

In 2006, the Alameda Reuse and Redevelopment Authority (ARRA) funded and prepared a Preliminary Development Concept (PDC) for Alameda Point, approximately 918 acres of the former Naval Air Station Alameda. This effort was completed in concert with Alameda Point Community Partners (APCP), the developer with whom the ARRA then had an Exclusive Negotiation Agreement (ENA). In 2006, the Navy and ARRA, in conjunction with APCP, prepared a Draft Summary of Acquisition Terms and Conditions for the Conveyance of the Former Naval Air Station Alameda (Draft Navy Term Sheet), which was based on the PDC. Since this was a draft, the parties never signed or executed the Draft Navy Term Sheet.

The Draft Navy Term Sheet included the following key terms (See Exhibit 1):

- 1) **Property Subject to Agreement.** The PDC's Phases 1 and 2, excluding Phase 3 and the Northwest Territories (Property).
- 2) **Consideration.** \$108.5 million for the value of the Property in both cash and in-kind consideration for environmental services (i.e., privatized clean-up).
- 3) **Payment Schedule for Consideration.** \$40.3 million provided in the form of environmental services and \$68.2 million, plus interest, paid beginning with the close of the escrow for the 550<sup>th</sup> residential unit constructed at \$78,115 per unit through the 1,147<sup>th</sup> unit, and \$89,211 per unit beginning with the close of escrow for the 1,148<sup>th</sup> unit constructed. Any unpaid balance of the consideration is due and payable on June 30, 2015.

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- 4) **Potential Increase in Cash Consideration.** In the event more than 1,390 residential units are constructed on the Property, there is an additional \$78,115 per unit payment.
- 5) **Potential Decrease in Cash Consideration.** The purchase price of the Property could be reduced by specific amounts if restrictions prohibit residential construction in certain areas.

When APCP subsequently elected not to proceed with the redevelopment of Alameda Point, the ARRA decided to select a new master developer through a competitive Request for Qualifications (RFQ) process to provide the expertise, experience, and financial resources to overcome the remaining planning challenges and to entitle and redevelop Alameda Point. SunCal Companies (SunCal) was one of five respondents to ARRA's RFQ. As part of its response dated December 4, 2006, SunCal expressed a willingness to commit to the \$108.5 million purchase price and payment schedule contained in the Draft Navy Term Sheet, as well as committed to entitle the PDC or another Measure A-compliant project. SunCal was selected as party to the ENA for Alameda Point, in part, because of its commitment to fulfill these obligations.

On July 18, 2007, the ARRA, Community Improvement Commission (CIC), and City of Alameda (together "Alameda") approved an Exclusive Negotiation Agreement (ENA) with SunCal, for redevelopment of Alameda Point. SunCal anticipated a 20-25 percent internal rate of return on its investment in the redevelopment of Alameda Point, which is reflected in the ENA. Subsequent to approval of the ENA, SunCal conducted technical infrastructure and engineering analyses and held several community workshops to inform the preparation of their plan for the site. Through this planning process, SunCal decided that a project consistent with Article XXVI of the City's Charter (Measure A), which restricts housing density in the City, would not be financially feasible for SunCal. This decision represented a change from the commitment SunCal made to Alameda in its response to the ARRA's RFQ.

In March 2008, SunCal requested, and Alameda granted, a First Amendment to the ENA to postpone various mandatory performance milestones (i.e., submission of a Development Concept, Infrastructure Plan, Business Plan, and Entitlement Application, including a Master Plan) by six months.

In October 2008, SunCal requested, and Alameda granted, a Second Amendment to the ENA to (1) transfer ownership interest in SCC Alameda Point LLC to a new entity, which is owned by an affiliate of SunCal and an affiliate of SunCal's financial partner, D.E. Shaw; (2) create a process that allowed SunCal to pursue a ballot initiative for a

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non-Measure A-compliant land use entitlement at Alameda Point expected to occur at an election to be held in early November 2009; (3) extend the term of the ENA by one year to July 2010; and (4) add a Finalized Navy Term Sheet as a mandatory milestone to be achieved by July 31, 2009. As permitted by the ENA, at SunCal's request, the Finalized Navy Term Sheet mandatory milestone was subsequently administratively extended by one year to July 20, 2010, the end of the ENA term.

With regard to the ballot initiative process, the Second Amendment to the ENA provided that if the initiative failed at the anticipated November 2009 ballot, SunCal would be permitted to submit an Optional Entitlement Application (OEA) by January 15, 2010, approximately 60 days subsequent to the November 2009 election. This OEA would be for approval of a project consistent with the City Charter (Measure A compliant) that could be processed within the term of the ENA. The amendment did not provide SunCal with the ability to pursue a second ballot initiative, nor did it contemplate extending the term of the ENA for processing of an OEA.

In December 2008, SunCal submitted to Alameda an Entitlement Application, including a Master Plan, Infrastructure Plan and Business Plan (Plans), in accordance with the ENA. The December 2008 Master Plan was reviewed by Alameda, as well as numerous City boards and commissions, but could not be formally accepted because it was not consistent with the City's Charter, and an Environmental Impact Report had not been completed. The Master Plan did not propose specific development standards for the project nor modifications to the City's development procedures, processes or fee structure.

The ENA also required, as a mandatory milestone, that Alameda and SunCal jointly develop a project proforma by December 19, 2008. Because there was no mutual agreement between SunCal and Alameda on the business terms for the disposition and development of the project by that date, the project proforma mandatory milestone was deemed waived by Alameda under the terms of the ENA.

Based on the Plans and a preliminary project proforma, in December 2008, Alameda staff, in conjunction with SunCal, initiated discussions with the Navy regarding the Draft Navy Term Sheet, including potential revisions to it.

On March 26, 2009, SunCal submitted the Alameda Point Revitalization Initiative (Initiative) to the City. The Initiative included a Charter Amendment, General Plan Amendment, Zoning Amendment, Specific Plan, and Development Agreement (DA), the details of which were not negotiated with Alameda. The Initiative was determined to

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have qualified for the ballot on November 2, 2009 and the City Council set the election for February 2, 2010.

There was no agreement among the Navy, SunCal and Alameda regarding project economics or modifications to the Draft Navy Term Sheet. As a result, discussions did not result in a Finalized Navy Term Sheet. Alameda, SunCal and the Navy decided in August 2009 that the results of the election would determine whether to continue negotiating the Finalized Navy Term Sheet based on the project economics of the plan contained in the Initiative or on a different yet-to-be-determined plan.

Prior to the February 2, 2010 election, SunCal submitted an OEA on January 14, 2010 as permitted by the ENA. The OEA submitted by SunCal consisted of substantially the same plan and processes contained in the Initiative. On February 2, 2010, the Initiative failed at the polls with 85 percent of those participating in the election voting against the Initiative. On February 4, 2010, Alameda provided SunCal with a Notice of Default (NOD) stating that the OEA submitted by SunCal did not meet the requirements of the ENA because the OEA conflicted with the City Charter. The only way for the OEA to avoid conflicting with the City Charter was for SunCal to either submit a Density Bonus Application (DBA) for the project in compliance with the City's Density Bonus Ordinance, which SunCal did not do, or to seek an amendment to the City Charter through a second ballot initiative. However, the ENA affords SunCal no further opportunities to amend the City Charter through a second initiative.

Consistent with the terms of the ENA, SunCal had 30 business days, or not later than March 22, 2010, to cure the default. On March 22, 2010, SunCal submitted a Modified OEA in response to Alameda's NOD, which included a Measure A-compliant project (Base Project) that might be modified at a later date through a DBA.

At a meeting with Alameda staff, SunCal stated that they were not going to submit a DBA at this time consistent with the City's Density Bonus Ordinance because the ordinance requires specific information, such as elevations, which SunCal stated it cannot provide at this stage of the planning process. However, SunCal indicated verbally its commitment to developing a higher-density project that will permit the land uses, units, and density similar to the Specific Plan contained in the Initiative (Density Bonus Option), not the Base Project, and that they would like for the Environmental Impact Report (EIR) and Disposition and Development Agreement (DDA) to include the Density Bonus Option. The Density Bonus Option is essentially the same land use program as the Initiative with the exception of an increased amount of commercial development, one acre of additional park and the inclusion of sustainable uses, such as a solar farm, in the Northwest Territories. SunCal also committed to preparing a master-

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planned DBA at a future date to avoid a piecemeal approach to implementation of a higher density project under density bonus law.

As of mid-May, SunCal had provided minimal information on the proposed Density Bonus Option, including the following submittals: (1) an April 13, 2010 project description letter, (2) a project proforma provided on April 26, 2010 (Project Proforma), and (3) a subsequent project description letter dated May 18, 2010. Alameda sent a letter to SunCal on May 19, 2010 stating that the Modified OEA was incomplete and requested that SunCal submit additional documentation on the Density Bonus Option with sufficient detail so that it can be reviewed and analyzed by staff and the EIR consultants, as well as the community, Planning Board, and Alameda at the same time as the Base Project.

On May 27, 2010, SunCal emailed a letter to the City's Planning and Building Department responding to the City's Notice of Incompleteness letter, including supplemental information to be processed as part of the Modified OEA. Staff is reviewing SunCal's response and meeting with SunCal on a weekly basis to address any remaining concerns regarding the completeness of the Modified OEA. Staff will notify SunCal and the governing boards of Alameda as soon as they have determined whether the information provided to date by SunCal regarding the Modified OEA is sufficient to deem the application complete.

While the Modified OEA technically cured SunCal's default, staff continues to have planning, transportation, and economic concerns with the SunCal plan, as to both the Base Project and the Density Bonus Option. On April 20, 2010, the City of Alameda provided SunCal with a letter identifying some of staff's major concerns with SunCal's current submittal. These concerns were also shared with the Planning Board on May 10, 2010 (continued for further discussion to the May 24, 2010 Planning Board meeting), with Alameda on May 18, 2010, and with the Economic Development Commission on May 20, 2010. On May 28, 2010, SunCal emailed a letter to the Interim City Manager responding to Alameda's April 20, 2010 letter. On June 1, 2010, staff responded to questions from the governing bodies of Alameda raised at the May 18, 2010 meeting. Staff concerns and the additional questions asked by the governing bodies of Alameda at the June 1, 2010 meeting are currently being discussed with SunCal at the weekly meetings. A staff report addressing these issues will be provided at the July 7, 2010 ARRA meeting.

Since submittal of the Modified OEA, Alameda, SunCal and the Navy have not resumed discussions regarding a Finalized Navy Term Sheet. This staff report focuses on a

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status report of SunCal's attainment of the Finalized Navy Term Sheet mandatory milestone pursuant to the ENA.

## DISCUSSION

The ENA states that no later than 30 days prior to the date for attainment of the Finalized Navy Term Sheet, staff shall make a presentation to the governing boards of Alameda regarding the status of efforts to attain the Finalized Navy Term Sheet (Section 4.2.2.). Alameda has the right, in its sole and absolute discretion, to extend the milestone for attainment of the Finalized Navy Term Sheet. The Finalized Navy Term Sheet was added to the ENA as a mandatory performance milestone in the Second Amendment to ensure that SunCal diligently pursued agreement with both the ARRA and the Navy on the crucial terms of the conveyance agreement for Alameda Point; which agreement would necessarily be substantially predicated on SunCal and Alameda's agreement on the project proforma. To date, there is no agreement on either the project proforma or the terms of the Navy conveyance.

The Finalized Navy Term Sheet and the DDA are the two remaining mandatory milestones that must be achieved by SunCal before July 20, 2010, according to the ENA. If they are not achieved by such date, the ENA will terminate unless the ENA is extended by Alameda in its sole and absolute discretion. The Navy, Alameda, and SunCal must agree to all of the terms of the Finalized Navy Term Sheet, pursuant to the ENA. Based on the contents of the Draft Navy Term Sheet, the Finalized Navy Term Sheet, in general, should contain terms and conditions related to the amount and timing of payment(s) to be made to the Navy by Alameda (through its master developer,) in exchange for the transfer of land from the Navy; phasing and timing of conveyance; environmental issues, including Navy-retained clean-up obligations, environmental services, if any, environmental insurance, enforceable agreements with regulatory agencies and site management plans; and other key conveyance terms and conditions.

Although SunCal has not presented Alameda with a proposal for land payments to the Navy, SunCal's Project Proforma assumes the following regarding Navy land payments (see Exhibit 2): (1) a \$10 million upfront payment by conveyance of the first phase of land (2012), which includes the \$1 million initial deposit provided by SunCal to Alameda upon execution of the ENA; (2) a per-unit fee of approximately \$52,000 starting in Phase 3 (2017), or the 2,245th unit, for a total land payment of \$108.5 million; and (3) the property conveyed in exchange for the land payment would be the entire 918-acre Alameda Point master development area (i.e., all of Phases 1 through 5 and the Northwest Territories), and not just Phases 1 through 3 as was provided in the Draft Navy Term Sheet. SunCal has not provided Alameda with any other information

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outlining SunCal's proposed changes to the Draft Navy Term Sheet based on the Modified OEA.

Before a Finalized Navy Term Sheet can be achieved, the project description for Alameda Point first must be clearly defined, a realistic phasing plan must be developed and a project proforma based on these project elements must be negotiated between the Navy and Alameda, in conjunction with SunCal. While SunCal has made progress on defining and clarifying its project description in the Modified OEA over the last two months, the Modified OEA has evolved considerably since its submittal and has not yet been deemed complete. SunCal's proposed phasing plan for development and its relationship to the public trust exchange and Navy's environmental remediation schedule for the project has only recently been analyzed and discussed jointly by SunCal and Alameda. Alameda has not engaged the Navy in negotiations of a Finalized Navy Term Sheet related to the Modified OEA in part because of the need for a well-defined project description and thoughtful phasing plan. In addition, Alameda and SunCal have not agreed on the Project Proforma for the Density Bonus Option, which was provided in pdf format to Alameda on April 26, 2010.<sup>1</sup> Alameda has serious concerns with key assumptions in the Project Proforma, as described in greater detail in the June 1, 2010 staff report, and cannot negotiate with the Navy concerning the project's ability to support a significant land payment to the Navy until these issues are resolved. It is unlikely that these issues, in particular, will be resolved and a Finalized Navy Term Sheet agreed to by all parties before the upcoming July 20, 2010 mandatory milestone date.

Although Alameda has not engaged the Navy in negotiations of a Finalized Navy Term Sheet related to the modified OEA, Alameda staff learned late on June 8<sup>th</sup> that SunCal's senior management team (Robert Hertzberg, Robert Davenport, Frank Faye, Stan Brown and Scott Baugh) would be meeting with Mr. Roger Natsuhara, Principal Deputy Assistant Secretary of the Navy (EI&E) at the Pentagon on June 9<sup>th</sup>. Neither Alameda nor the Navy officers in San Diego managing the Alameda Point conveyance process received any advance notice from SunCal of this meeting, despite repeated requests by both Alameda Staff and the Navy in San Diego that SunCal provide advance notice to both if and when a meeting with senior officers of the Navy in the Pentagon is scheduled, and that Alameda be given an opportunity to participate in the meeting. Further, the ENA (Section 20.1) requires that SunCal not meet or engage in negotiations with the Navy concerning the project or the project site without giving advanced reasonable prior notice to Alameda and giving Alameda the opportunity to

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<sup>1</sup> It has been difficult to corroborate and analyze the detailed assumptions included in the SunCal Project Proforma without an Excel version of the document, which was requested from SunCal some weeks ago, but has yet to be provided.

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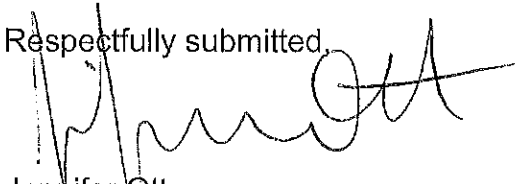
negotiate with SunCal and the Navy in such meeting or negotiations, and further provides that SunCal is authorized to communicate directly with the Navy about the project only so long as SunCal promptly keeps Alameda informed of all such communications. The ENA permits such communications so that SunCal may have informal discussions with the Navy about the project; it was not intended to authorize SunCal to meet and negotiate conveyance terms with the Navy without reasonable notice to Alameda and an opportunity for Alameda to participate in to protect its very substantial interest as the current lessee and future transferee of Alameda Point. SunCal's election to meet with the Navy concerning the project, which meeting likely included discussions and negotiations concerning the terms of conveyance, without providing notice or an opportunity to participate to Alameda, much less keeping Alameda promptly informed of such communications, constitutes a breach of SunCal's obligations under the ENA.

#### FINANCIAL IMPACT

There is no financial impact.

#### RECOMMENDATION

This is for information only.

Respectfully submitted,  
  
Jennifer Ott  
Deputy City Manager

#### Exhibits:

1. Draft Summary of Acquisition Terms and Conditions for the Conveyance of the Former Naval Air Station Alameda
2. April 26, 2010 SunCal Density Bonus Option Project Proforma