CITY OF ALAMEDA

MEMORANDUM

Date: December 17, 2009

To: Mayor Beverly Johnson
And Members of City Council

From: Teresa L. Highsmith
City Attorney

Re: Enforceability of Agreements in Conflict
With the Alameda Point Development Initiative

Questions

At the October 20, 2009, City Council meeting, the City Council requested that the Interim City Manager present an updated Alameda Point Development Initiative Election Report Executive Summary ("Election Reports") describing the Initiative's fiscal, economic development, housing and traffic impacts on the City for the purpose of public education prior to the public vote on the Alameda Point Development Initiative ("Initiative") on February 2, 2010. As part of this updated report, Council also requested a status report on negotiations between the City and SunCal, in order to avoid potential voter confusion on the question whether the impacts identified in the Election Reports can be mitigated through a separate negotiated agreement between the City and SunCal. Council further directed a legal opinion on this matter to be prepared in a non-confidential format. The following questions are addressed here in response to this direction:

1. Can the City and SunCal enter into a legally binding agreement prior to the February 2, 2010 election date, in order to mitigate the fiscal impacts identified by the City in the Alameda Point Development Initiative Election Report Executive Summary?

2. If the Initiative passes, can the Development Agreement in the Initiative be amended and if so, under what process?

3. If the Initiative passes and the City and SunCal enter into subsequent agreements that conflict with the Development Agreement in the Initiative, which agreement would control—the Development Agreement or the subsequent agreement(s)?

Answers

1. No. It is not legally possible for the City and Suncal to enter into a binding and enforceable agreement to mitigate the fiscal impacts identified by the City prior to the February 2, 2010 election date because such an agreement would require compliance with the California Environmental Quality Act (CEQA), and the CEQA analysis of the project will not have been completed prior to the February election date.

2. Assuming the Initiative is adopted by a majority of voters on February 2, 2010, the Development Agreement within the Initiative can be amended only by a subsequent initiative or by an application brought by the developer; however, the developer cannot increase the square footage of the commercial development, increase the number of housing units or eliminate or reduce the developer's obligation to fund the public benefits described in the Initiative.

3. Assuming the Initiative is adopted by a majority of the voters on February 2, 2010, the Development Agreement likely would control in the event of conflicting terms in any other agreement entered into by the City and SunCal subsequent to the election.

Background

As part of the ARRA's 2006 master developer selection process, SunCal was selected by the ARRA on the basis of the qualifications and commitments contained in their statement of qualifications and public presentations. SunCal's submittal included a statement of intent by SunCal to use ARRA's previous planning effort, the Preliminary Development Concept (PDC), which is a Measure A-compliant planning concept, as a framework.

The City of Alameda (including the ARRA and the CIC) entered into an Exclusive Negotiation Agreement ("ENA") with SunCal in July 2007 for the purpose of defining the redevelopment and entitlement of Alameda Point and to provide a framework for the negotiation of a Disposition and Development Agreement ("DDA") for the Alameda Point project. The ENA was amended twice: once to allow SunCal to bring in a financial partner, D.E. Shaw, and later to establish a deadline for SunCal to bring its proposed ballot initiative. SunCal's proposed ballot initiative was intended to amend the City Charter provision known as Measure A for Alameda Point only, thus permitting SunCal to submit a non-Measure A-compliant land use plan as part of its land-entitlement effort.

SunCal held three community workshops and presented to numerous City board and commission meetings between July 2007 and December 2008 as part of its effort to develop a plan for Alameda Point. The workshops included presentations by SunCal's

land use planner and engineers and solicited community input regarding the opportunities and constraints of the site, design principles, and SunCal's proposed alternatives for Alameda Point, including both Measure A and non-Measure A projects. As a requirement of the ENA, this planning effort culminated in the submittal of a Master Plan to the ARRA in December 2008. The Master Plan envisioned a non-Measure A, phased, mixed use project, to include multi-family housing with ground floor retail clustered around a transit hub and a relocated ferry terminal in the Seaplane Lagoon; commercial uses throughout the project, including retail along a main arterial that would serve as the main entrance to the project; lower density townhomes and single-family homes on land farthest from the transit center; and a district that targets the adaptive reuse of existing buildings.

In early 2009, Suncal prepared a ballot initiative which included a Specific Plan modeled after the Master Plan, an amendment to the City's General Plan, an amendment to the City Charter to exempt Alameda Point from the density restrictions of Measure A, and a Development Agreement which had not been negotiated with or agreed to by the City. The Development Agreement includes terms that limit the property tax burden to two percent (2%) of the assessed value, places a ceiling of $200 million on the Developer's obligation to fund public benefits, and requires that the additional tax revenue that would come in from increased values on the property ("tax increment") would be spent only at Alameda Point. The Initiative also controls the means by which changes can be made to the provisions of the Initiative, including the Development Agreement: it can only be amended by a majority vote of the Alameda electorate, or by a written application made by the Developer, so long as the Developer's funding obligations are not reduced for public benefits and the number of residential units or amount of commercial space are not increased. The Initiative—and in particular, the Development Agreement—was not the product of City staff work, and City Council was not asked to vote on its contents.

In the spring of 2009, SunCal circulated its Initiative petition for signatures and advised the City that it had collected sufficient signatures to submit the Initiative petition for verification and certification. As a result, on April 21, 2009 the City Council directed staff to begin an analysis of the impacts of the proposed Initiative on the City, pursuant to Elections Code 9212, including:

- Fiscal impacts
- Effects on the internal consistency of the City's general and specific plans, including the housing element of the general plan
- Effects on the use of land, availability and location of housing and ability of the City to meet its regional housing needs
- Impacts on funding for all types of infrastructure, including transportation, schools, parks and open space, including analysis of costs of infrastructure maintenance

- Impacts on the community's ability to attract and retain business and employment
- Impacts on agricultural lands, open space, traffic congestion, existing business districts and developed areas designated for revitalization
- And other matters/impacts

The City completed the Alameda Point Development Initiative Election Report Executive Summary, Part I in May 2009. Part II of the Alameda Point Development Initiative Election Report Executive Summary was completed in September 2009, and addresses more particularly the traffic impacts of the Initiative. Both Part I and Part II of the Election Reports are posted on the City's website.

SunCal submitted its petition signatures for verification and certification on September 23, 2009--five days prior to the 180 day deadline set by state law. On October 14, 2009, the City was informed by the County Registrar that the Initiative petition contained a sufficient number of valid signatures to qualify for a special election (e.g., over 15% of registered voters). The City Clerk certified the signatures and the Initiative petition at the November 3, 2009 City Council meeting. As a result of the City Clerk's certification, the City Council was required by state elections law to set an election date for the ballot measure. Given the fact that the Initiative petition had been signed by over 15% of registered voters, the Council was advised by both its City Clerk and its City Attorney that the election should be set for a date between 88 days and 103 days from the November 3, 2009 City Council meeting. In accordance with the City Clerk's list of available dates for special or general elections falling within the 88 to 103 day window, the Initiative was set for the February 2, 2010 special election.[1]

Because the California Environmental Quality Act ("CEQA") provides an exemption for ballot measures that are brought forward by a voter petition and not by the legislative body of a city, environmental review is not required to have been completed prior to the voters' consideration of the Initiative at the February 2, 2010 election. (Under the ENA, environmental review under CEQA has been funded by SunCal and was commenced on October 21, 2009; however, the work will not be completed by the February 2, 2010 election.)

Once the Initiative qualified, City staff began discussions with SunCal, pursuant to the requirements of the ENA, concerning the terms of a DDA.

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[1] It should be noted that had the Developer chosen to submit its already gathered signatures for certification in spring/summer 2009, the Initiative would still have been set for an election between 88 and 103 days from the City Council's action, but that date would have been the general election of November 3, 2009.

Discussion

1. *Is a Legally Binding Agreement Possible Prior to February 2, 2010*

As stated above, the City and SunCal have been engaged in confidential negotiations regarding the terms of a Disposition and Development Agreement ("DDA"). A DDA is a complex land acquisition document which establishes numerous important terms concerning future development of property controlled by a public agency, including the price the developer will pay for the property, when title to the property or segments of the property will be transferred, the schedule for development of the property, and the obligations for public funding and what funds may be used for property development. Because approval and execution of a DDA commits the public agency to development activities that will affect the physical environment, such action is considered a "project" under the California Environmental Quality Act ("CEQA"), and requires prior completion of environmental review. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128; Cal. Pub. Res. Code §§ 21100, subd. (a) & 21151. If a decision is made by a public agency without compliance with CEQA, a court must enter an order that the decision be voided by the public agency. Cal. Pub. Res. Code § 21168.9. Given the magnitude of the Suncal project, the City has determined that an Environmental Impact Report ("EIR") must be completed, and such work is underway. An EIR for a project of this size typically takes a year to complete because of the time it takes to draft the details of the impacts and to fulfill the legal requirements of holding hearings and responding to public comments. Even if the parties were able to complete negotiation of a DDA, or even a DDA term sheet, prior to February 2, 2010, CEQA analysis will not have been completed by that date. Accordingly, without completion of an EIR it is not possible for the parties to enter into a legally binding agreement to mitigate or otherwise address any of the project impacts the City has identified in the Election Reports prior to the voters taking action on the Initiative on February 2, 2010.

2. *Restrictions on Amending the Development Agreement*

Under California law, a city or county may enter into a development agreement with any property owner for the development of property. Govt. Code § 65865(a). In essence, a development agreement allows for a city or county to freeze the zoning and other land use rules applicable to property, which gives a developer a stable regulatory framework on which to base its budget. It is the policy of this state that the predictability provided by a development agreement encourages private entity participation in long term planning and keeps costs down. A development agreement may also supersede a city's policies, rules, and regulations as the long as the proposed project is consistent with the city's General Plan. A development agreement is a legislative act which case law has held may be approved through the initiative process. *Citizens for Responsible Gov't v. City of Albany* (1997) 56 Cal.App.4th 1199.

The state statutes concerning development agreements allow for "discretionary approvals" after the execution of a development agreement and include a provision for its annual review and termination. Under these provisions, a landowner is "required to demonstrate good faith compliance with the terms of the agreement" at the time of each annual review. Gov't Code § 65865.1. If the local agency finds that the landowner has not complied in good faith with the terms of the agreement, then the local agency may modify or terminate the agreement. *Id.* However, the Development Agreement proposed by SunCal overrides this statutory provision by specifically excluding "any failure by Developer to perform any term or provision of any other Vested Element" from the "material terms" of the Agreement. (DA Section 7.1) And SunCal has broadly defined the term "Vested Element" to include: how and at what intensity the property is used, the maximum density and number of residential units subject to development, the maximum height, bulk and size of the proposed buildings, and any other terms and conditions of development applicable to the property, as set forth in the Applicable Rules[2] and the Development Agreement. Under this broad definition of "Vested Elements," it is unclear what failure of performance, if any, would permit the City to modify or terminate the Agreement. Further, the Development Agreement provides that defaults under any future DDA would not constitute a default under the Development Agreement. (DA Section 2.9.)

Assuming that the City would want to see modifications to the Development Agreement, the ability to amend the Development Agreement is controlled by the terms of the Development Agreement itself. Under the express terms of the Development Agreement, amendments may only be made "in accordance with Section 14 of the Initiative." That Section, in turn, provides that the Initiative may only be amended by the voters at a subsequent election or upon written application to the City Council by Developer or Significant Landowner. (Section 6.1.) A "Developer" is defined as a person with legal or equitable interest in the property; a "Significant Landowner" is defined as a person, other than a governmental entity or agency thereof, who owns, leases or has a right or option to purchase or lease a significant portion of the property. A discussion of whether SunCal qualifies under the terms of the Initiative as a "Developer" is beyond the scope of this opinion; however, no other party presently has such an interest and the ENA, until its expiration or termination, would not permit the City to enter into the Development Agreement with any other party. Given SunCal's efforts and expense in drafting the Development Agreement with developer-favorable provisions and qualifying the Initiative for the February 2, 2010 special election, it should not be assumed that SunCal, or any developer, would voluntarily choose to relinquish its financial and other benefits by submitting an application to the City to modify the Development Agreement.

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[2] "Applicable Rules" include the approved Charter amendment, the General Plan as amended, the Community and the Specific Plans, as adopted, the zoning ordinance, and all other provisions of the Alameda Municipal Code and all other rules, regulations, and policies applicable to the Alameda Point property.

3. Conflicting Provisions in Agreements Subsequent to the Initiative Development Agreement

Assuming that the Initiative is approved by a majority of voters on February 2, 2010 and that the City and SunCal eventually conclude negotiations on the terms of a DDA, the City would want to be certain that all of the DDA's negotiated terms will be binding on SunCal. However, there are numerous terms in the Development Agreement which provide that the Development Agreement controls in the event of any conflicting terms of subsequent agreements or regulations.

For example, the Development Agreement states that the Alameda Point project is subject only to the City's land use rules and regulations in effect as of the election date ("Applicable Rules"), any amendments to those rules sought by the Developer and granted by the City ("Vested Elements"), and any government required fees or funding obligations ("Exactions") established in the Development Agreement. (Section 1.2.) Any changes to the Applicable Rules, Vested Elements or Exactions made after the election date are expressly made inapplicable to the project, except as explicitly permitted by the Development Agreement. (Section 1.2.) The Development Agreement permits amendments to the Vested Elements only at the request of the Developer or by the written consent of the Developer (at its sole discretion), so long as they are *consistent* with the Initiative. (Section 6.3.) The Applicable Rules, in turn, may be amended only upon consent of the Developer (at Developer's sole discretion). (Section 2.3.) In the event of a conflict between the Applicable Rules and the Development Agreement, the Development Agreement controls. (Section 2.4.5.)

Future agreements are further restricted by various express provisions within the Development Agreement. For example, Section 2.11.3 of the Development Agreement provides that "[o]nly the specific Exactions listed in Exhibit 3 shall apply to the Alameda Point Project." Moreover, "no change to an Exaction in Exhibit 3 resulting in an increase in dollar amounts charged to the Alameda Point project that is adopted after the Election Date shall apply to the Alameda Point project." (Section 2.11.3(a).) The City is expressly prohibited from imposing conditions requiring "dedications or reservations for, or construction or funding of, public infrastructure or public improvements" on "Subsequent Approvals," which is defined broadly to include, among other things, financing plans, improvement agreements, infrastructure agreements, and *any amendments to the foregoing that are substantially consistent with the Vested Elements.*

While SunCal could agree in a future DDA with the Community Improvement Commission ("CIC") to undertake additional obligations to those set forth in the Development Agreement, it is not clear that such additional obligations would be enforceable in light of a voter-approved Development Agreement. For instance, while the DDA might require SunCal to provide $225 million dollars of public improvements,

the Development Agreement provides that only $200 million in public improvement exactions may be applicable to the project. Since the Development Agreement provisions state the Development Agreement controls in the event of a conflict, there is at least a risk that SunCal or a future developer would challenge the enforceability of such a conflicting DDA provision.

Ultimately, the only way the City could be assured that terms negotiated in the DDA that conflict with the Development Agreement would be binding on SunCal or a future developer is if SunCal were also to amend the Development Agreement to be consistent with the negotiated terms of the DDA. However, as stated above, the Developer—and not the City—controls the ability to amend the Development Agreement. This consistency problem creates the potential for the parties to reach a negotiating impasse, during which time no progress would be made toward development of Alameda Point.

Conclusion

In the Election Reports, the City has identified a number of fiscal, traffic and other land use impacts which would be created by adoption of the Alameda Point Development Initiative. The majority of these impacts can only be mitigated through negotiated agreement of the parties; however:

1) Before the February 2, 2010 election, it will not be possible to enter into any enforceable agreement because no prior environmental review will have been completed;

2) After the election (and assuming voter-approval), SunCal may amend the Development Agreement if it chooses to do so; however, SunCal will control whether and when it would seek such an amendment and it should not be assumed that any developer would voluntarily relinquish fiscal and other benefits gained from a voter-approved Initiative;

3) Inconsistent terms in any other negotiated agreement (such as a Disposition and Development Agreement, or "DDA") may be required to be resolved in favor of the terms in the Development Agreement. Accordingly, although the City and SunCal could negotiate a DDA to mitigate the impacts identified in the Election Reports, SunCal also would have to amend the Development Agreement in order to assure consistency and enforceability of any such negotiated terms.

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cc: Interim City Manager