

# MILLER BARONDESS, LLP

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July 12, 2010

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*VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED & E-MAIL*

Mayor Beverly Johnson  
Vice Mayor Doug deHaan  
Councilmember Marie Gilmore  
Councilmember Frank Matarrese  
Councilmember Lena Tam  
2263 Santa Clara Avenue  
Alameda, CA 94501

Re: *Extension of Alameda Point Exclusive Negotiation Agreement  
dated July 18, 2007, as amended (the "ENA")*

Dear Mayor, Vice Mayor and Councilmembers:

Our firm represents SCC Alameda Point, LLC ("SCC Alameda"). We understand that the Alameda staff intends to place on the July 20, 2010 agenda of the City, the ARRA and the CIC (collectively, "Alameda") a vote on whether to extend the term of the ENA referenced above. This vote on the ENA is wholly unnecessary. The ENA will be extended by its own terms and by operation of law. Therefore, we request that the vote be removed from the agenda.

Section 2.2 of the ENA provides for an "automatic extension" of the Exclusive Negotiation if certain milestones have been met. In satisfaction of section 2.2 of the ENA, SCC Alameda has (1) provided a project description meeting the requirements of the ENA and (2) has submitted a Modified Optional Entitlement Application that the City has determined to be complete.

Accordingly, two milestones remain outstanding under the ENA, each with a submission date of July 20, 2010. They are, as follows (see Exhibit B-1 to ENA):

9. Finalized Navy Term Sheet
10. DDA as agreed by the Parties or Developer's best and final offer (as described in section 4.2.1.1)

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A DDA comprising the Developer's best and final offer will be submitted this week, thereby satisfying that milestone. That leaves as the only remaining milestone the Term Sheet with the United States Navy. The City of Alameda, at the instigation and behest of Interim City Manager Ann Marie Gallant, has made satisfaction of this final milestone impossible. As such, satisfaction of this milestone has been frustrated and is excused; and consequently a vote on July 20<sup>th</sup> is moot and unnecessary.

Because the City of Alameda has prevented satisfaction of the Navy Term Sheet milestone, it cannot assert that failure as a bar to extension of the ENA. Under governing law, "[h]indrance of the other party's performance operates to excuse that party's nonperformance." *Erich v. Granoff*, 109 Cal. App. 3d 920, 930 (1980). Put another way, "[p]revention of performance by the promisee is equivalent to performance by the promisor." *Unruh v. Smith*, 123 Cal. App. 2d 431, 437 (1954); *Crawford v. Pioneer Box & Lumber Co.*, 105 Cal. App. 760, 769 (1930).

All conditions having been satisfied as a matter of law, no vote is necessary or required to extend the ENA; it has been, and is, extended by operation of law. City officials have admitted on the record and in numerous meetings that the City blocked SCC Alameda from concluding the Term Sheet with the Navy. The reasons given by Ms. Gallant in her July 7, 2010 report for the refusal of City staff to allow negotiations to proceed with the Navy are fabricated.

The bad faith intransigence of Ms. Gallant is obvious: In December 2008, a joint pro forma was submitted by the City to the Navy with respect to a prior but similar version of the project. But in May 2009, in furtherance of her self-serving scheme, Ms. Gallant called a halt to the discussions, and since then has blocked them from going forward. It gets worse from there, as explained below.

In derogation of the ENA, the City has gone to great lengths to prevent SCC Alameda from entering into a Term Sheet with the Navy. As permitted under section 20.1 of the ENA, and after being frustrated by the City in any attempts to meet with the Navy, representatives of SCC Alameda met directly with Navy officials and discussed extending the term of the ENA. In this meeting, SCC Alameda reaffirmed its earlier commitment to the Navy staff that it would pay \$108.5 million for the Alameda Point Property. Based on those discussions, the Navy indicated it would send a letter to the City expressing its support for extending the ENA and for SCC Alameda continuing on as the master developer of Alameda Point.

But before the letter could be sent, the Navy was informed by the City that SCC Alameda was "backing away" from its Purchase Price commitment. In fact, nothing could be further from

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the truth; this statement by the City was, and is, a bald-faced lie. SCC Alameda has not indicated to the City (or the Navy) that its Purchase Price commitment has changed in any way. The City's misrepresentations to the Navy caused the Pentagon to decide not to write a letter to the City supporting extension of the ENA. This misrepresentation was one of a number of instances where Alameda communicated with the Navy without involving or alerting SCC Alameda, a violation of section 20.2 of the ENA.<sup>1</sup>

The ENA will remain in effect by its terms after July 20, 2010. Any determination not to extend the ENA would be an unlawful violation of the rights of SCC Alameda. Our client reserves all of its rights and remedies herein against the City and all responsible parties.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Miller", followed by a long horizontal line extending to the right.

Louis R. Miller

LRM:ab

cc (via Certified mail Return Receipt Requested and e-mail):  
Interim City Manager Ann Marie Gallant  
City Attorney Teresa L. Highsmith

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<sup>1</sup> Alameda also violated section 20.3 by intentionally communicating with the Navy causing prejudice to SCC Alameda's rights.