

## **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: Debra Kurita  
City Manager/Executive Director

Date: October 7, 2008

Re: Approve a Second Amendment to the Exclusive Negotiation Agreement  
with SCC Alameda Point LLC Modifying Certain Terms Including  
Approving a Transfer of the Ownership Interest in SCC Alameda Point  
LLC to Cal Land Venture, LLC

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### **BACKGROUND**

On July 18, 2007, the Alameda Reuse and Redevelopment Authority (ARRA), Community Improvement Commission (CIC), and City (together "Alameda") approved an Exclusive Negotiation Agreement (ENA) with SCC Alameda Point LLC, which is an entity of SunCal Companies (Developer), for redevelopment of Alameda Point. The ENA was amended in March 2008 to provide more time to complete two mandatory milestones. In June 2008, the Developer requested authorization to secure a financial partner to complete its obligations under the ENA. The addition of a financial partner is considered a transfer under the ENA and requires approval by the ARRA Board, the CIC, and the City Council.

At its August 19, 2008, meeting, Alameda considered the Developer's request to transfer ownership interest in SCC Alameda Point LLC to a new entity. Alameda directed the City Manager/Executive Director to negotiate a second amendment to the ENA to address Alameda's concerns regarding the requested transfer of ownership, including ensuring that the Developer will retain day-to-day management responsibilities for the project, establishing a termination date for the ENA that is not subject to extensions, and adding additional mandatory milestones to reflect the new direction of the project. The Second Amendment to the ENA is attached for Alameda's consideration.

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Honorable Chair and  
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## DISCUSSION

The Developer is proposing to transfer ownership of SCC Alameda Point LLC to a new entity called Cal Land Venture, LLC (Cal Land). Cal Land is a joint venture of D.E. Shaw Real Estate Portfolios 20, LLC (D.E. Shaw) and WM Development Group, LLC, a wholly owned affiliate of SunCal (SunCal). Cal Land will be the sole owner of SCC Alameda Point LLC. The new ownership structure is based on an Amended and Restated Limited Liability Company Agreement (Operating Agreement) between D.E. Shaw and SunCal. The Operating Agreement was provided to Alameda under separate cover and will be discussed in a special closed session on October 7, 2008. SunCal has identified this document as confidential and not a public record. Pursuant to the ENA, the Developer is obligated to bear all costs associated with a dispute that the document is a public record.

Consistent with the executed term sheet, the Operating Agreement provides that SunCal will retain responsibility for day-to-day management of the project. During the term of the ENA, D.E. Shaw is precluded from removing SunCal as the manager except for specific cause, including gross negligence, willful misconduct, or fraud. In addition, there are a number of "Member Issues", referred to in the term sheet as "Major Decisions", contained in the Operating Agreement. If SunCal refuses to implement one or more of these Member Issues, such refusal is also a basis for removal as manager during the ENA term.

The Operating Agreement acknowledges that SunCal has contributed not less than \$1.5 million of equity to the Alameda Point project and other projects in which Cal Land has an interest. The Operating Agreement also states that Cal Land expects to invest \$10 million to meet its obligations under the ENA. However, the Operating Agreement further says that such expectation to invest \$10 million is not a commitment or covenant to make capital contributions to fund the project.

While the Operating Agreement addresses key Alameda concerns, such as retaining SunCal as the day-to-day manager, obligating SunCal to retain an equity stake in the new venture, and providing adequate capital to conduct all of the Developer's obligations under the ENA, D.E. Shaw will have ultimate authority for all decisions on behalf of the new venture. Recognizing that the term sheet, and ultimately the Operating Agreement, would limit the scope of key provisions essential to successfully implementing the obligations pursuant to the ENA, the ARRA/CIC/City Council directed staff on August 19, 2008, to amend the ENA to ensure that the ENA, to which Alameda is a party, has strict performance standards that can be enforced. These performance

Honorable Mayor and  
Members of the City Council

Honorable Chair and  
Members of the Community Improvement Commission

standards include new mandatory milestones, a revised ENA term and expiration date, and shorter cure periods for events of default.

Key provisions of the Second Amendment to the ENA are:

- Alameda's approval of the ownership transfer is conditioned on approval of the Second Amendment.
- The ENA terminates on July 20, 2010. The new termination date reflects SunCal's intent to seek voter approval of its proposed land plan in November 2009. It is anticipated that Development and Disposition Agreement (DDA) negotiations would be completed between November 2009 and July 2010. The July 20, 2010, termination date can be extended only if Alameda has not acted on SunCal's requested land use approvals by that date.
- Several new mandatory milestones have been added to ensure performance under the ENA. New mandatory milestones include: SunCal's decision by April 30, 2009, to pursue placing an initiative on the November 2009 ballot; submittal of an Entitlement Application by June 15, 2009, if SunCal decides not to pursue a ballot initiative, or submittal of an Entitlement Application within 45 days after being notified that the ballot initiative did not qualify for the ballot; a final Navy conveyance term sheet by July 31, 2009; and a fully negotiated DDA by July 20, 2010. The first three mandatory milestones reflect the project's new direction based on SunCal's Development Concept and the need for the proposed residential densities to be approved by a vote of the people. The last two milestones have been converted from non-mandatory milestones to mandatory milestones so that Alameda can ensure timely progress on two key documents, the Navy conveyance term sheet and DDA. Failure to meet any mandatory milestone is a default under the ENA and will result in termination.
- Approval of the DDA and/or Entitlement Application will require compliance with the California Environmental Quality Act (CEQA). To ensure that the required environmental review is completed in a timely fashion to guarantee consideration of any discretionary approvals, the Developer will be required to make an initial deposit to fund the City-sponsored environmental review. Failure to make the required initial, and subsequent, deposits is a default under the ENA and will result in termination.
- The time provided to cure defaults has been shortened from 45 business days to 30 business days, and the cure period for making all required deposits has been

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Honorable Chair and  
Members of the Community Improvement Commission

shortened from 15 business days to ten business days. If the Developer fails to perform (e.g., misses a mandatory milestone or fails to make a cash deposit), it is in Alameda's interest to provide a reasonable amount of time to cure the default and, if the default is not cured, to terminate the ENA.

- The original ENA had no time limit on Force Majeure for litigation. The Second Amendment stipulates that if, by July 20, 2017, any litigation remains unresolved, the ENA terminates.
- The Second Amendment approves the transfer of the ownership interest in Developer. By signing the Second Amendment, the Developer represents that SunCal will remain responsible for day-to-day management of the project for the term of the ENA. Further, during the ENA term, the new owner can only remove SunCal as manager for specific causes of material default under the Operating Agreement consisting of gross negligence, fraud, willful misconduct, malfeasance and/or criminal acts. If SunCal is removed as manager for reasons other than those listed, it is a default under the ENA; if SunCal is not reinstated, the ENA terminates. If SunCal is terminated for cause, Alameda retains the right to approve the replacement manager in its reasonable discretion. Reasonable discretion includes evaluation of the proposed replacement manager's experience with public-private partnerships, work on large mixed-use or base reuse projects, familiarity with environmental remediation, etc.
- Consent to the ownership transfer for the ENA period, subject to the terms contained in the amended ENA, does not preclude Alameda from imposing other or additional requirements on the Developer as a basis for entering into the DDA.

The Second Amendment to the ENA provides Alameda with the performance standards it needs to ensure timely progress to redevelop Alameda Point. In the event that the new venture cannot perform, the Second Amendment contains more mandatory milestones and shorter time periods to cure defaults so that the ENA can be terminated more quickly as necessary. The amended ENA has an outside termination date. It requires that SunCal be retained as day-to-day manager. If SunCal is terminated as manager without cause, the ENA can be terminated. Alameda retains the right to approve any replacement manager if SunCal is terminated for cause. All of these modifications result in an Agreement that assures Alameda that its core interests are protected as a new venture assumes responsibility for the ENA obligations, including retaining SunCal and its development expertise, and approving a capital partner that is providing funding to carry out the predevelopment activities necessary to entitle a mixed use project at Alameda Point.

Honorable Chair and  
Members of the Alameda Reuse and Redevelopment Authority

October 7, 2008

Page 5 of 5

Honorable Mayor and  
Members of the City Council

Honorable Chair and  
Members of the Community Improvement Commission

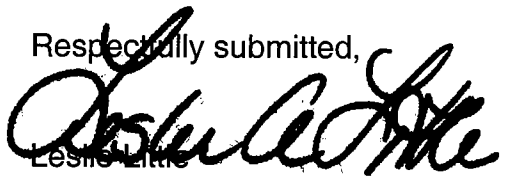
BUDGET CONSIDERATION/FINANCIAL IMPACT


Approving the Second Amendment to the ENA does not modify the financial provisions contained in the ENA regarding reimbursement of staff and ARRA third-party consultant costs. The current budget, which is an exhibit to the ENA, provides for an average of \$39,000 a month in reimbursement for staff costs. Therefore, there is no fiscal impact to the City's General Fund, CIC, or ARRA budgets.

RECOMMENDATION

Approve the Second Amendment to the ENA with SCC Alameda Point LLC modifying certain terms including approving a transfer of the ownership interest in SCC Alameda Point LLC to Cal Land Ventures, LLC.

Respectfully submitted,

  
Leslie Little  
Development Services Director

  
By: Debbie Potter  
Base Reuse and Community Development Manager

Attachment

1. Second Amendment to the ENA

**SECOND AMENDMENT  
TO  
ALAMEDA POINT  
EXCLUSIVE NEGOTIATION AGREEMENT**

THIS SECOND AMENDMENT TO ALAMEDA POINT EXCLUSIVE NEGOTIATION AGREEMENT ("**Second Amendment**") is made as of October \_\_\_\_, 2008 (the "**Effective Date**"), by and between **ALAMEDA REUSE AND REDEVELOPMENT AUTHORITY**, a Joint Powers Authority established by the City of Alameda and the Community Improvement Commission under the California Joint Exercise of Powers Act and a public entity lawfully created and existing under the State of California (the "**ARRA**"), the **COMMUNITY IMPROVEMENT COMMISSION OF THE CITY OF ALAMEDA**, a public body corporate and politic ("**CIC**"), and the **CITY OF ALAMEDA**, a municipal corporation (the "**City**", and together with ARRA and CIC, "**Alameda**") and **SCC Alameda Point LLC, a Delaware limited liability company** ("**Developer**"). Alameda and Developer are individually referred to as a "**Party**" and collectively referred to as the "**Parties**".

**RECITALS**

This Second Amendment is entered upon the basis of the following facts, understandings and intentions of the Parties.

A. The Parties entered into that certain Alameda Point Exclusive Negotiation Agreement, dated as of July 18, 2007 (the "**Original Agreement**") as amended by that certain First Amendment to Alameda Point Exclusive Negotiation Agreement, dated as of March 6, 2008 (the "**First Amendment**"), which shall be amended by this Second Amendment.

B. The Original Agreement, as amended by the First Amendment, and as amended by this Second Amendment, shall hereinafter collectively be referred to as the "**Agreement**".

C. Pursuant to Section 9.2.1 of the Agreement, the qualifications and identity of Developer are of particular concern to Alameda, in view of the importance of the entitlement and development of the Project (as defined in the Agreement) and the Project Site (as defined in the Agreement) to Alameda, and it was because of the qualifications and identity of Developer that Alameda entered into the Agreement with Developer.

D. Pursuant to Section 9.2.2 of the Agreement, Developer has requested the consent of Alameda to Transfer of an Ownership Interest in SCC Alameda Point LLC to a new entity.

E. Alameda's consent to the Transfer is conditioned upon certain modifications to the Agreement and the Parties have agreed to those modifications and to certain additional modifications to the terms and conditions of the 1

Agreement as hereinafter set forth.

## AGREEMENT

NOW, THEREFORE, in consideration of the mutual terms, covenants, conditions and promises set forth herein, the Alameda and Developer agree as follows:

1. Definitions. All capitalized terms used herein shall have the definitions given in the Agreement, unless otherwise expressly stated herein.

2. Submittals. Alameda acknowledges that Developer satisfied the Mandatory Milestones for submittal of the Development Concept, Infrastructure Plan and draft Business Plan by submission of such Plans on September 19, 2008 and, as of the Effective Date of this Second Amendment, is in compliance with the terms of the Agreement. Developer acknowledges that refinement of such Plans is necessary for submission of the draft Master Plan (as defined below), the final Business Plan, and Project Pro Forma on November 19, 2008.

3. Amended Recital A of the Original Agreement. Recital A of the Original Agreement is hereby deleted in its entirety and replaced with the following:

A. The United States of America, acting by and through the Department of the Navy (“Navy”) is the owner of certain real property located within the City of Alameda, State of California commonly referred to as the former Alameda Naval Air Station, now known as “**Alameda Point**”, which was closed as a military installation and is subject to disposal pursuant to and in accordance with the Defense Base Closure and Realignment Act of 1991, as amended (Pub. Law No. 101-510). The property that is the subject of this Agreement is a portion of Alameda Point, which consists of approximately 960 acres of uplands and approximately 673 acres of submerged lands (collectively, the “**Project Site**”), certain of which lands are subject to public trust restrictions. The Project Site is shown on the “**Map of the Project Site**”, attached hereto as Exhibit A. The Project Site is sometimes referred to as the “**Property**”.

4. Amended Section 1.2. Section 1.2 is hereby deleted in its entirety and replaced with the following:

1.2 Exclusive Negotiations. During the Exclusive Negotiation Period, Alameda covenants and agrees that it shall negotiate exclusively with Developer regarding the Project and the Project Site and shall not solicit, market to, or negotiate with any other person or entity regarding the Project and the Project Site or solicit or entertain bids or proposals to do

so.

5. Amended Section 2. Section 2 is hereby deleted in its entirety and replaced with the following:

Section 2. Term; Extension.

- 2.1** Term. The term of this Agreement (the “**Exclusive Negotiation Period**” or the “**Term**”) shall commence on the Effective Date and, subject to extension pursuant to Sections 2.2 and 5 below, shall terminate on July 20, 2010. Upon such expiration or any termination permitted by this Agreement, neither Party shall have any future right or obligation under this Agreement except with respect to any obligation which expressly survives the termination or expiration of this Agreement.
- 2.2** Extension for Alameda Final Determination. If Alameda can make the following findings (as determined by its Board of Directors, Board of Commissioners and City Council): (i) that Developer has met all of the Mandatory Milestones (as defined in Section 4.2 below), as the same have been extended as provided herein, or except to the extent the Mandatory Milestone for the Project Pro Forma (as defined in Section 3.2.4 below) has been waived by Alameda pursuant to Section 4.2.3 below; (ii) Developer has provided a Project description sufficient to permit the City to review the Project under the California Environmental Quality Act (Public Resources Code §§ 21000-21177) (“**CEQA**”); and (iii) Developer’s completed Entitlement Application (defined in Section 3.2.5.1 below) or Optional Entitlement Application (as defined in Section 3.2.5.2 below, as applicable, has been filed with the City, the Exclusive Negotiation Period shall be extended automatically until Alameda has made its final determination with respect to the approvals requested in the Entitlement Application or the Optional Entitlement Application, as applicable, and, subject to the time limit in Section 5 below, the period for any legal challenge thereto has passed without such challenge, or if such challenge has been made, such challenge has been fully and finally resolved.

6. Amended Section 3.1. The following sentence is hereby inserted at the end of Section 3.1: “Developer and the ARRA acknowledge that the ARRA cannot achieve the Finalized Navy Term Sheet unless Developer agrees to all of its terms.”

7. Amended Section 3.2.1. Section 3.2.1 is hereby amended to clarify that the Development Concept provided by Developer



on September 19, 2008, shall include a draft of the updated Sports Complex Master Plan. Developer shall provide the final updated Sports Complex Master Plan on November 19, 2008.

8. Amended Section 3.2.5. Section 3.2.5 is hereby deleted in its entirety and replaced with the following:

3.2.5 Ballot Initiative; Entitlement Application; Subsequent Approvals. Developer shall elect in writing no later than April 30, 2009 to either submit the Entitlement Application (as defined in Section 3.2.5.1 below), or pursue a ballot initiative for the Project in compliance with 14 Cal. Code Regs. Section 1537(b)(3) (the “**Ballot Initiative**”). If as of April 30, 2009, Developer elects to submit an Entitlement Application, then Developer shall submit the Entitlement Application no later than June 15, 2009. Notwithstanding the foregoing, if Developer elects to pursue a Ballot Initiative but the initiative fails to qualify for the ballot as determined by the City Election Official, then Developer shall submit the Entitlement Application (as defined in Section 3.2.5.1 below) no later than forty-five (45) days from the date of the decision of the City Election Official that the initiative has failed to qualify.

3.2.5.1 Entitlement Application. 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; (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.

3.2.5.2 Optional Entitlement Application. If Developer elects to pursue the Ballot Initiative, then, whether or not the Ballot Initiative passes, Developer shall have the right, but shall not be obligated, to submit an entitlement application as described in Section 3.2.5.1 above, but which shall be referred to herein as the “**Optional Entitlement Application**”. Such application shall not be a Mandatory Milestone unless Developer elects to make such application, and, if the Ballot Initiative shall have passed, shall include only those land use approvals and entitlements that Alameda, in consultation with Developer, determines are necessary to permit development of the Project consistent with the Ballot Initiative. If Developer elects to submit the Optional Entitlement Application, then Developer shall submit the Optional Entitlement Application no later than January 15, 2010. Except as otherwise provided in Sections 2.2 and 5 of this Agreement, the Term of this Agreement shall not be extended for such submission (unless mutually agreed to in writing by the Parties).

3.2.5.3 Subsequent Approvals. 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; subdivision approvals; design review approvals; demolition permits; improvement agreements; infrastructure agreements; grading permits; building permits; site plans; sewer and water connection permits; and other similar requirements.

9. Amended Section 3.2.6. Section 3.2.6 is hereby deleted in its entirety and replaced with the following:

3.2.6 Master Plan. Developer shall submit an initial draft of the Master Plan no later than November 19, 2008, which shall be consistent with the Plans submitted on September 19, 2008 unless otherwise agreed by the Parties. Following the submittal of the draft Master Plan by Developer, the term “Plans” shall include the draft Master Plan, together with any refinements, updates and modifications thereof.

10. New Section 3.2.7. Section 3 of the Agreement is hereby amended to add the following new Section 3.2.7:

3.2.7 Project Master Schedule. Developer shall prepare and maintain a project master

schedule (the “**Project Master Schedule**”) that sets forth, in reasonable detail, the expected tasks necessary to complete all of the Mandatory and Non-Mandatory Milestones, entitlements (whether through an Entitlement Application or Ballot Initiative), and at the Developer’s discretion, subsequent approvals and the anticipated dates that these tasks are expected to be completed. Developer shall submit the initial Project Master Schedule to the ARRA within thirty (30) business days from the Effective Date of the Original Agreement and shall update such schedule and deliver the updated schedule to the ARRA on a quarterly basis thereafter.

11. Amended Section 3.3. Section 3.3 is hereby amended to insert the following sentence immediately after the first sentence: “The term Property Transfer(s) as used herein shall mean conveyance in fee or, with respect to land subject to the public trust, conveyance by long term lease(s) pursuant to State law.”

12. Amended Section 3.4. Section 3.4 is hereby deleted in its entirety and replaced with the following:

3.4 CEQA Documents. The Plans, together with the Entitlement Application submittals or Optional Entitlement Application submittals, as applicable, shall be of sufficient specificity to permit the subsequent preparation of the documents required for environmental review of the Project as required by CEQA (the “**CEQA Documents**”); including an environmental impact report or such other information and reports as may be required to permit Alameda to comply with the requirements of CEQA. Execution of the DDA by the parties thereto and the closing of the Property Transfer(s) under the DDA shall be contingent on compliance with CEQA.

13. Amended Section 3.5.7. Section 3.5.7 is hereby amended to replace “NEPA” with “National Environmental Policy Act (“**NEPA**”)”.

14. Amended Section 3.5.8. Section 3.5.8 is hereby amended to add the following phrase: “or as approved through the Ballot Initiative” immediately after “Entitlement Application filed with Alameda”.

15. Amended Section 3.6.2. Section 3.6.2 is hereby deleted in its entirety and replaced with the following:

3.6.2 Transaction Documents. All applicable terms of the completed Transaction Documents, and provision for completion and incorporation of applicable terms of all Transaction Documents that are to be completed after execution of

the DDA, and if applicable, prior to close of escrow.

3.6.2.1 The Parties acknowledge that their ability to prepare the Transaction Documents is dependent to some extent on reaching agreement with certain third parties, including the California State Lands Commission (with respect to the public trust), and may also be dependent on achieving certain regulatory approvals and satisfying certain other conditions that are outside of their control. If before the execution of the DDA by the parties thereto, any of such third-party agreements, regulatory approvals or other conditions are not finalized, obtained or satisfied, then to the extent practical the Parties shall in good faith negotiate the DDA and characterize such third-party agreements, regulatory approvals or other conditions as conditions precedent to the obligations of the Parties to the close of escrow for conveyance of the Property pursuant to the DDA.

16. Amended 3.6.6. Section 3.6.6 of the Agreement is hereby deleted in its entirety and replaced with the following:

3.6.6 Transfers. Provisions for Transfer (as defined in Section 9.2.4.5 below), which shall include (i) a mechanism for parties contributing debt or equity to the Project to remove SunCal Affiliate (as defined in Section 9.2.2.1 below) or, if applicable, the qualified developer approved by Alameda pursuant to Section 9.2.2.2 below as the replacement manager of Developer (“**Replacement Manager (per ENA)**”) from day-to-day management of the entity that executes the DDA (the “**DDA Development Entity**”) pursuant to the terms of the DDA Development Entity’s operating or partnership agreement, provided that SunCal Affiliate or Replacement Manager (per ENA), as applicable, is concurrently replaced with a substitute developer (“**Replacement Manager (per DDA)**”) controlling day-to-day management that meets the specified criteria as a “qualified developer” provided in the DDA, including the approval of Alameda, which approval will not be unreasonably withheld, conditioned or delayed, and (ii) the right of owners of Ownership Interests (as defined below) in Developer to Transfer, on or after the date on which the DDA is signed, their Ownership Interests in Developer so long as (A) SunCal Affiliate or Replacement Manager (per ENA) or Replacement Manager (per DDA), as applicable, shall continue to manage Developer on a day-to-day basis and (B) Alameda has determined that Developer has the financial ability, including debt and/or equity financing, to carry out its obligations under the DDA, which determination by Alameda shall not be unreasonably withheld, conditioned

or delayed.

17. Amended Section 4.2. Section 4.2 is hereby amended as follows: (a) to delete the first paragraph of Section 4.2 in its entirety; (b) to re-number Sections 4.2.1 and 4.2.2 of the Agreement to Sections 4.2.2 and 4.2.3, respectively; and (c) to insert the following new Section 4.2.1 to the Agreement:

4.2.1 Mandatory Milestones. The mandatory milestones (the “**Mandatory Milestones**”) shall be:

4.2.1.1 the submission of the Project Master Schedule as described in Section 3.2.5.1, above;

4.2.1.2 the submission of the Development Concept as described in Section 3.2.1 above;

4.2.1.3 the submission of the Infrastructure Plan as described in Section 3.2.2 above;

4.2.1.4 the submission of the draft Business Plan as described in Section 3.2.3 above;

4.2.1.5 mutual agreement of the Parties on the Project Pro Forma as described in Section 3.2.4 above;

4.2.1.6 Developer’s election in writing to either submit the Entitlement Application or pursue the Ballot Initiative as described in Section 3.2.5.1 above;

4.2.1.7 if Developer elects to submit the Entitlement Application or, if the Ballot Initiative fails to qualify for the ballot as determined by the City Election Official, then an additional Mandatory Milestone is the submission of the Entitlement Application as described in Section 3.2.5.1 above;

4.2.1.8 the submission of an initial draft of the Master Plan as described in Section 3.2.6 above, together with the final Business Plan as described in Section 3.2.3 above;

4.2.1.9 the submission of the Optional Entitlement Application as described in Section 3.2.5.2 above (if Developer elects to make such submittal);

4.2.1.10 attainment of the Finalized Navy Term Sheet as described in Section 3.1 above;

and

4.2.1.11 mutual agreement of the Parties to the form and substance of the DDA pursuant to Section 3.6 above or if at the time of the Mandatory Milestone for the DDA, mutual agreement has not been achieved, then Developer shall submit its best and final offer of the form of DDA acceptable to Developer.

18. Amended Section 5. Section 5 of the Agreement is hereby deleted in its entirety and replaced with the following:

Section 5. Litigation Force Majeure. The Exclusive Negotiation Period, and the dates for performance of Mandatory Milestones, shall be extended for the period of any Litigation Force Majeure (as defined below); provided that any extension as a consequence of Litigation Force Majeure shall operate to extend the date for achievement of any Mandatory Milestone only to the extent that the Mandatory Milestone is affected by the event or events constituting the Litigation Force Majeure. Notwithstanding anything to the contrary in the foregoing, in no event shall Litigation Force Majeure pursuant to Section 5.1(b) below extend the Mandatory Milestone for the DDA. Furthermore, notwithstanding anything to the contrary in the foregoing, in no event shall Litigation Force Majeure extend either the Exclusive Negotiation Period or any Mandatory Milestone date beyond July 20, 2017. The Parties may elect to amend this Agreement to reflect extensions pursuant to this Section 5, and such amendments shall reflect which Mandatory Milestones and Transaction Documents (and related Non-Mandatory Milestones) are so affected.

5.1 **“Litigation Force Majeure”** means any action, proceeding, application or request before any court, tribunal, or other judicial, adjudicative or legislative decision-making body, including any administrative appeal, that is brought by a third party and seeks to challenge: (a) the validity of any action taken by Alameda with respect to a Transaction Document(s), including Alameda’s selection of Developer as the developer of the Project Site, the approval by Alameda of any of the proposed Transaction Documents, the performance of any action required or permitted to be performed by Alameda hereunder or under the proposed Transaction Documents, or any findings upon which any of the foregoing are predicated; (b) the Ballot Initiative; or (c) the validity of any other approval that is required for the conveyance, management or redevelopment of the Project Site as contemplated hereby and would prevent the Parties from executing the DDA with conditions, as provided above, or prevent the DDA from

becoming effective, or require a material modification of the DDA, the Plans, the Entitlement Application or the Project.

19. New Section 6.6. Section 6 is hereby amended to add the following new Section 6.6:

6.6 CEQA Funding. No later than April 30, 2009, Developer shall deposit with the City's Planning and Building Department funds in the amount of Two Hundred Fifty Thousand Dollars (\$250,000) (the "**Initial CEQA Deposit**") for the City's use, in accordance with standard procedures, to commence environmental review pursuant to CEQA of the Project (as described in the Master Plan submittal described in Section 3.2.6 above). Developer acknowledges that it may be required to deposit additional funds for such CEQA review. The City shall reimburse to Developer any portion of the Initial CEQA Deposit (or any additional funds deposited by Developer for CEQA review) which is not used for such CEQA review.

20. Amended Section 7.1. Section 7.1 of the Agreement is hereby amended in the following ways: First, Section 7.1.2 is re-titled: "Failure of Developer to Make Required Deposits". Second, Section 7.1.2 is hereby amended to correct the numbering. There are two subsections each numbered 7.1.2.1, the second is hereby corrected to 7.1.2.2. In addition, the timeframes of "fifteen (15) business days" provided in Sections 7.1.2.1 and 7.1.2.2 are hereby deleted and replaced with "ten (10) business days". Lastly, Section 7.1 is hereby amended to add the following new Section 7.1.2.3 to the Agreement:

7.1.2.3 In the event Developer fails to make the Initial CEQA Deposit (or any additional funds deposited by Developer for CEQA review) as required pursuant to Section 6.6 of this Agreement, Alameda shall have the right to give written notice thereof to Developer specifying that the deposit was not made. Following receipt of such notice, Developer shall have ten (10) business days to make the required deposit. If Developer has not then made the required deposit, Alameda shall have the right to terminate this Agreement by written notice to Developer.

21. Amended Section 7.1.3. Section 7.1.3 is hereby amended to delete the timeframe of "forty-five (45) business days" and replace it with "thirty (30) days".

22. Amended Section 7.1.6. Section 7.1.6 is hereby amended to delete the timeframe of "forty-five (45) business days" and replace it with "thirty (30) business days".

23. New Section 9.2.2.1. Section 9.2 is hereby amended to add the following new Sections 9.2.2.1 and 9.2.2.2 to the Agreement:

9.2.2.1 Pursuant 10

to Section 9.2.2 of the Agreement, Developer has requested the consent of Alameda to a Transfer of an Ownership Interest in SCC Alameda Point LLC, which is the entity described in this Agreement as Developer, to a new entity to be owned by WM Development Group LLC (“SunCal Affiliate”), which is an affiliate of the current owner of SCC Alameda Point LLC, and D.E. Shaw Real Estate Portfolios 20, L.L.C. (“DESCO”), which new entity is Cal Land Venture, LLC, a Delaware limited liability company (“Cal Land”). To implement the Transfer, SCC Acquisitions LLC (“SunCal”), the current sole owner of SCC Alameda Point LLC shall assign and transfer its ownership interest in SCC Alameda Point LLC to an affiliate of SunCal, which shall assign and transfer its ownership interest to Cal Land, and in connection therewith, the operating agreement of SCC Alameda Point LLC shall be amended and restated (the “**Operating Agreement**”). Developer further represents to Alameda that it has provided a true and correct and fully executed copy of the Operating Agreement. The Operating Agreement submitted by Developer to Alameda provides that SunCal Affiliate has been appointed as the manager with responsibility for day-to-day management of Developer subject to the terms and conditions of the Operating Agreement. Developer acknowledges that it shall be a default under this Agreement for either Cal Land or Developer to exercise its right to remove SunCal Affiliate as the manager of Developer for reasons other than a material uncured default under the Operating Agreement consisting of gross negligence, fraud, willful misconduct, prohibited transfer, or misappropriation or misapplication of funds, malfeasance and/or criminal acts (collectively, “**Causes for Removal**”).

9.2.2.2 If SunCal Affiliate is removed as the manager of Developer during the Term of this Agreement for Causes for Removal, then no later than sixty (60) days after such removal, Cal Land shall provide to Alameda for its approval in its reasonable discretion, a qualified developer to replace SunCal Affiliate as the manager of Developer, together with all documentation required for Alameda’s determination of such developer’s qualifications (collectively, the “**Complete Submittal**”). Alameda shall make its determination as to the approval or disapproval of such replacement manager within thirty (30) days of its receipt of the Complete Submittal. If, notwithstanding the foregoing, Alameda fails to make such determination within such thirty (30) day period, then the remaining Mandatory Milestones shall be extended day-for-day until such determination is made. If Alameda disapproves of the replacement manager, then Cal Land shall have sixty (60) days to propose an alternate manager and submit a new Complete Submittal. If Cal Land shall fail within such time period to



propose an alternate manager or if Alameda shall disapprove, in its reasonable discretion, such alternate manager, then Alameda shall have the right to terminate this Agreement by provision of written notice to Developer. It is reasonable for Alameda to reject an alternative manager on the basis of its qualifications, prior experience, and financial capacity, among other criteria, as such relate to the implementation of the Project. An alternative manager, including key team members, must have qualifications and successful experience working as a master developer on public-private partnerships for large-scale, multi-use urban reuse or redevelopment projects similar to the scope and scale of the Project. For purposes herein, the phrase “public-private partnership” shall not be construed to establish the parties as partners, co-venturers or principal or agent with one another.

9.2.2.3 If SunCal Affiliate is removed as the manager of Developer during the Term of this Agreement for any reason other than Causes for Removal, Alameda shall have the right to provide an Alameda Default Notice pursuant to Section 7.1 above to Developer that such actions constitute a default under this Agreement. Failure to cure such default within thirty (30) days shall constitute a Developer Event of Default pursuant to Section 7.1 above.

9.2.2.4 Alameda hereby consents to the foregoing Transfer of an Ownership Interest for the Term of this Agreement, but such consent shall not be deemed to be a waiver of Alameda’s right to require different or additional criteria regarding Transfer in the CAA and/or the DDA.

24. Amended Section 12.2. Section 12.2 is hereby amended to delete the following parenthetical “(as extended pursuant to Section 2.2 above)” and replace it with “(subject to extension pursuant to Sections 2.2. and 5 above)”.

25. Amended Section 16.1. Section 16.1 is hereby deleted in its entirety and replaced with the following:

16.1 Indemnity. Developer shall defend, hold harmless and indemnify the ARRA, the CIC and the City from and against any and all Claims made by any third party directly or indirectly arising out of Developer’s Response to the RFQ and/or the Developer MOA and/or the Ballot Initiative; provided, however, such obligation shall not apply to any Claim resulting solely from an act or omission of the ARRA, the CIC and/or the City.

26. Amended Section 17. Section 17 is hereby amended to delete the first notice address for Developer in its entirety and

replace it with the following:

SCC Alameda Point LLC  
c/o SunCal Companies  
Bay Area Division  
300 Frank H. Ogawa Plaza, #342  
Oakland, California 94512  
Attention: Pat Keliher, Vice President Operations

Section 17 is hereby further amended to add the following notice address for Developer:

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

27. Amended Section 20. Section 20 is hereby deleted in its entirety and replaced with the following:

Section 20 Governmental Contact.

20.1 Developer Contact. Developer agrees that it will not meet, or engage in negotiations, with any governmental officials or staff (other than Alameda and its staff) whose approval is required to a Transaction Document, concerning the Project or the Project Site without giving the Deputy Executive Director of the ARRA reasonable prior notice and the opportunity to participate with Developer in any such meeting, or negotiations. Notwithstanding anything to the contrary in the foregoing, Developer is authorized to communicate directly with the Navy regarding the Project or the Project Site so long as Developer promptly keeps Alameda informed of all such communications.

20.2 Alameda Contact. ARRA agrees that it will not meet, or engage in negotiations, with any governmental officials or staff whose approval is required to a Transaction Document, concerning the Project or the Project Site without reasonable prior notice to Developer. ARRA shall keep Developer informed of the substance of any such meetings and negotiations and shall permit Developer to participate in the same. Subject to this Section 20.2, Alameda may, in the routine course of governmental affairs, contact (or be contacted by), discuss, or meet with the Navy or any other

governmental entity, and Developer acknowledges that such contact, discussions, meetings, or responses may pertain in whole, or in part, to the Project and/or the Project Site.

20.3 Prejudice Parties Interests. Alameda and Developer agree to refrain from knowingly engaging in contacts or communications with government officials (other than Alameda staff) in a manner reasonably expected to prejudice the interests of the other Party.

28. Amended Exhibit A. Exhibit A to the Agreement is deleted in its entirety and replaced with Exhibit A attached hereto.

29. Amended Exhibit B-1. Exhibit B-1 to the Agreement is deleted in its entirety and replaced with Exhibit B-1 attached hereto.

30. Amended Exhibit B-2. Exhibit B-2 to the Agreement is deleted in its entirety and replaced with Exhibit B-2 attached hereto.

31. Authority. The persons signing below represent that they have the authority to bind their respective party, and that all necessary board of directors', shareholders', partners', redevelopment agency's or other approvals have been obtained.

32. Counterparts. This Second Amendment may be signed by different parties hereto in counterparts with the same effect as if the signatures to each counterpart were upon a single instrument. All counterparts shall be deemed an original of this Second Amendment.

33. Agreement in Full Force and Effect. Except as otherwise expressly modified by the terms of this Second Amendment, the Agreement remains unchanged and in full force and effect.

IN WITNESS WHEREOF, the Parties have executed this Second Amendment as of the day and year first above written.

ARRA:


Alameda Reuse and Redevelopment Authority,  
a joint powers authority formed under California law

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Approved as to form:

By:  \_\_\_\_\_

Name: Donna Mooney

Title: Sr. Asst. General Counsel

*[Signatures continue on following page.]*

CIC:

Community Improvement Commission of the City of Alameda,  
a public body, corporate and politic

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Approved as to form:

By: 

Name: Donna Mooney

Title: Sr. Asst. General Counsel

CITY:

City of Alameda,  
a municipal corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Approved as to form:

By: 

Name: Donna Mooney

Title: Sr. Asst. City Attorney

DEVELOPER:

SCC Alameda Point LLC,  
a Delaware limited liability company

By: 

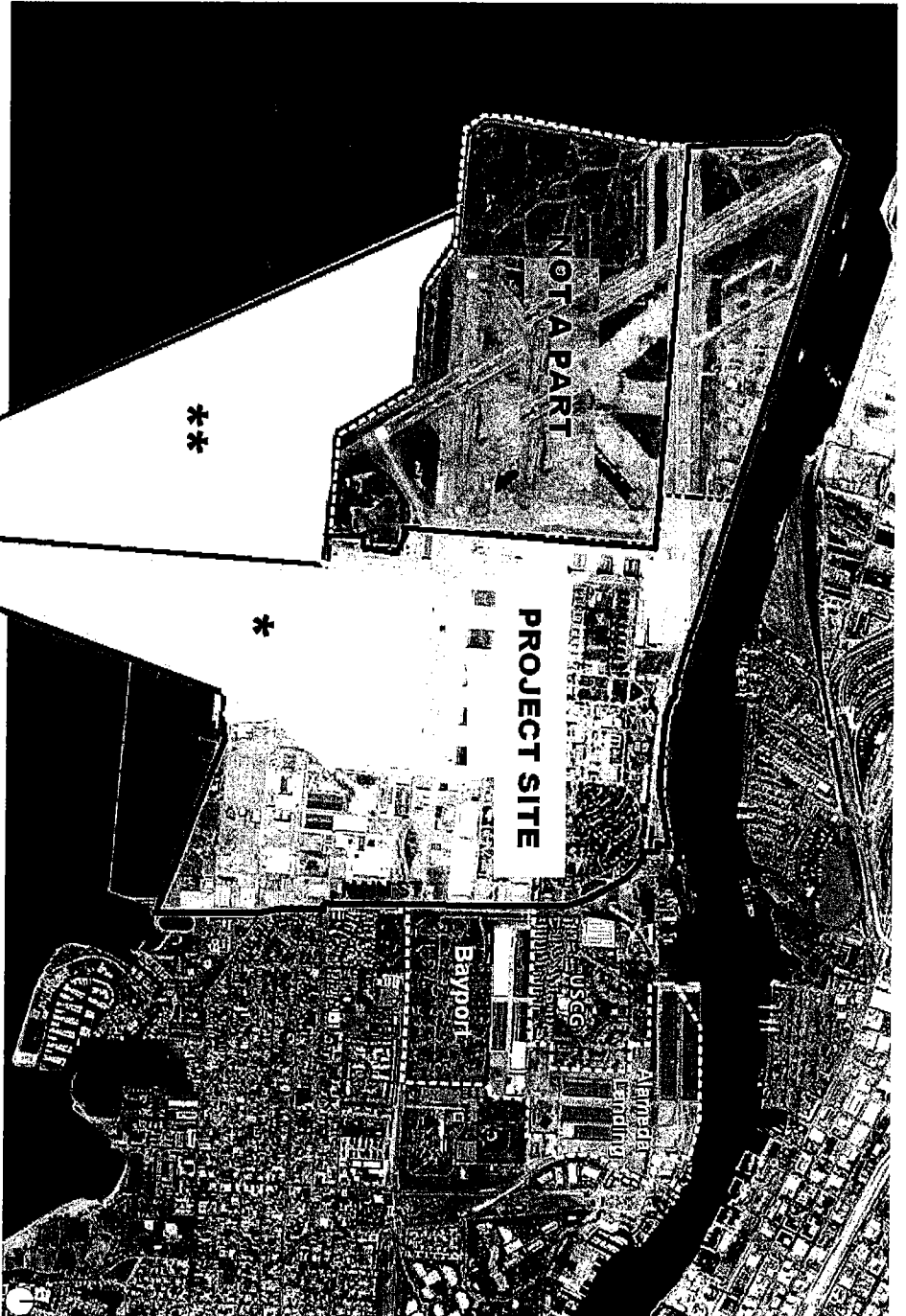
Name: Bruce V. Cook

Title: General Counsel

**Exhibit A**

**Map of the Project Site**

[Attached]



**\*\* Submerged lands to be declared surplus by Navy**

**\* Submerged land**

## **Exhibit B-1**

### **Schedule of Performance (Mandatory Milestones)**

All defined terms not defined herein shall have the respective meanings ascribed to them in the Agreement to which this Exhibit B-1 is attached.

Unless otherwise provided, all Mandatory Milestones are measured from the Effective Date of the Original Agreement (July 18, 2007).

<b>A.</b>	<b><u>Mandatory Milestone</u></b>	<b><u>Submission Date</u></b>
1.	Master Project Schedule	Thirty (30) business days [submitted];  Updated quarterly thereafter
2.	Development Concept	September 19, 2008 [submitted]
3.	Infrastructure Plan	September 19, 2008 [submitted]
4.	draft Business Plan	September 19, 2008 [submitted]
5.	Master Plan Draft (as described in <u>Section 3.2.6</u> above) and final Business Plan (as described in <u>Section 3.2.3</u> above)	November 19, 2008
6.	Ballot Initiative Determination (Developer's written election to either submit the Entitlement Application or pursue the Ballot Initiative)	April 30, 2009
7.	Entitlement Application	
a.	If Developer elects not to submit a Ballot Initiative, then the Entitlement Application shall be submitted on:	June 15, 2009



- |   |   |
|---|---|
| <p>b. If Developer elects to submit a Ballot Initiative, but the City Election Official determines that the petition has failed to meet requirements to be placed on the ballot, the Entitlement Application shall be submitted on:</p> | <p>The date that is forty-five (45) days following the date of the determination by the City Election Official (as described in <u>Section 3.2.5</u> above)</p> |
| <p>8. Optional Entitlement Application (as described in <u>Section 3.2.5.2</u> above) (if Developer elects to make such submittal):</p>   | <p>January 15, 2010</p>   |
| <p>9. Finalized Navy Term Sheet</p>   | <p>July 31, 2009</p>  |
| <p>10. DDA as agreed by the Parties or Developer's best and final offer (as described in <u>Section 4.2.1.11</u> above)</p>   | <p>July 20, 2010</p>  |
| <p>B. <u>Mandatory Milestone</u></p>  | <p><u>Completion Date</u></p>   |
| <p>1. Project Pro Forma</p>   | <p>November 19, 2008</p>  |

## **Exhibit B-2**

### **Schedule of Performance (Non-Mandatory Milestones)**

All terms not defined herein shall have the respective meanings ascribed to them in the Agreement to which this Exhibit B-2 is attached. Non-Mandatory Milestones described below are good faith estimates by the Parties of the time required to complete the Transaction Documents.

<b><u>Non-Mandatory Milestone</u></b>	<b><u>Completion Date</u></b>
<b>1. EDC MOA Amendment (if applicable)</b>	<b>July 20, 2010</b>
<b>2. NEPA Supplemental Environmental Impact Statement (SEIS)</b>	<b>July 20, 2010</b>
<b>3. Section 106 Memorandum</b>	<b>July 20, 2010</b>
<b>4. USFWS/NMFS Biological Documents</b>	<b>July 20, 2010</b>
<b>5. Early Transfer Documents</b>	<b>July 20, 2010</b>
<b>6. CEQA Documents</b>	<b>July 20, 2010</b>
<b>7. CAA</b>	<b>April 30, 2009</b>
<b>8. DDA</b>	<b>July 20, 2010</b>
<b>9. Development Agreement/Entitlements</b>	<b>July 20, 2010</b>
<b>10. Tidelands Trust Exchange Agreement</b>	<b>July 20, 2010</b>
<b>11. Public Planning Process</b>	<b>November 19, 2008</b>

**DRAFT**  
**MINUTES OF THE REGULAR PLANNING BOARD MEETING**  
**MONDAY, SEPTEMBER 8, 2008**  
**COUNCIL CHAMBERS, CITY HALL**  
**2263 SANTA CLARA AVENUE – 7:00 PM**

**9-B. North Lincoln Strategic Plan.** The Planning Board will be reviewing the August 2008 Public Review Draft of the Gateway District Strategic Plan and making a recommendation to the City Council. The Gateway District Strategic Plan recommends redevelopment and design strategies on the blocks on either side of Park Street between Tilden Avenue and the Park Street Bridge. (DG)

Ian Ross, with City Design Collective, gave an overview of his consulting firm which was responsible for preparing the report. He presented the plan to the Board. He explained that the approach used to create the proposal was based on land use history in Alameda and discussed the purpose of the strategic plan as well as the process used to obtain public input. The plan recommends eliminating single use zoning and creating flexibility to attract new businesses. The proposal does not impact existing parcels but sets guidelines for new projects. Economic recommendations include: creating custom land use options, targeting businesses that complement the plan, and encouraging new residential uses.

In response to a question from the Board, staff reviewed the process for Board comments and discussion, and how the Board's input would be incorporated into the strategic plan.

The public hearing was opened.

Joseph Yon spoke in support of including the Island High site in the Strategic Plan. He would like the Island High site limited to 12 units. He also submitted written comments.

Christopher Buckley submitted written comments. He was pleased with the plan and suggested some small changes detailed in his written comments.

Corinne Lambden spoke on behalf of the Alameda Architectural Preservation Society (AAPS). She expressed concern regarding building height and would like to see it reduced from 100 feet to four stories. She was concerned that a parking structure would not meet demand. She would like the plan to consider hidden historic treasures and did not believe the maps contained in the plan included all historic buildings in Alameda, because the AAPS shows 112 historic buildings in Alameda and the Strategic Plan states there are only 56.

Charles Howell from AAPS would like a comprehensive list of historic buildings. He would prefer multiple small parking structures as opposed to one large structure and he would like a reduction of building height from 100 feet to 40 feet.

Nanette Burdick believed it was a good plan but she did have some concerns regarding building height and would prefer multiple smaller parking structures. She believed redevelopment of the Island High site should be compatible with the neighborhood.

David Kirwin had some of his concerns addressed during Ian's presentation. He did not believe the plan would negatively affect traffic, and should accommodate bicyclists as well as pedestrians.

The public hearing was closed.

A Board discussion ensued regarding the vision and goals for the area. Green elements should be incorporated into the Plan as much as possible. Acknowledgement that this is a waterfront area and incorporation of marine uses should be included. A possible partnership with Oakland concerning residential uses and water access should be explored. The plan should consider noise and traffic with pedestrian uses as well as bicycle parking. A water taxi from Jack London Square to Alameda should be considered and public access to the water is important.

In response to an inquiry from the Board, staff responded that development regulations must be revised prior to approval of the Strategic Plan.

The Board expressed concerns about providing widespread on street parking and agreed with the public input regarding smaller parking structures. Use of the existing city parking garage should be encouraged.

Staff responded that city-wide parking requirements would be presented to the Board at a future date prior to zoning updates.

The Board provided the following direction:

- No drive-through access on Park Street
- Take inventory of and make accommodations for historic structures
- Underground all utilities
- At the intersection of Park and Lincoln pedestrian improvements are needed
- Tilden Street needs attention regarding bicycle paths and pedestrian walkways
- Pedestrian connection to Park Street bridge
- Link the plan to other initiatives, for example the Transportation Element, Parking, and Public Art Commission
- Consider rooftop parking in addition to garages
- Identify parking structures that should be retained

The Board thanked the consultant for a very thorough analysis.