

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: February 16, 2010

Re: Consider SunCal's Requests to: (1) Approve an Addendum to the Exclusive Negotiation Agreement between SunCal and Alameda Requesting Modification to Certain Terms Including Extending the Term of the Agreement to July 20, 2012; and (2) Retract the Notice of Default Sent by Alameda Regarding SunCal's Performance under the ENA

BACKGROUND

On July 18, 2007, the Alameda Reuse and Redevelopment Authority (ARRA), Community Improvement Commission (CIC), and City of Alameda (together "Alameda") approved an Exclusive Negotiation Agreement (ENA) with SCC Alameda Point LLC (SunCal), for redevelopment of Alameda Point, approximately 918 acres of the former Naval Air Station Alameda (NAS Alameda). 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. This decision represented a change from the commitment SunCal made to Alameda to entitle a Measure A-compliant project in their response to Alameda's Request for Qualifications (RFQ) for a Master Developer for Alameda Point dated December 4, 2006, which served as the basis for SunCal's selection as Master Developer.

ENA Extensions

SunCal requested, and Alameda agreed, to amend the ENA by postponing 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. The First Amendment to the ENA was executed in March 2008.

CC/ARRA/CIC
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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 and to (2) create a process that allowed SunCal to pursue a ballot initiative for a non-Measure A-compliant land use entitlement at Alameda Point. This ballot initiative was to occur at an election to be held in early November 2009. The transfer of ownership interest was required to incorporate D.E. Shaw, an investment firm located in New York, as an investment partner into a joint venture with SunCal. A joint venture with D.E. Shaw was requested by SunCal in order to facilitate the continued funding of the ENA entitlement process for Alameda Point. Since October 2008, numerous SunCal development projects have experienced financial difficulties, such as the Oak Knoll Naval Hospital redevelopment in Oakland, the Marblehead Coastal project in San Clemente, and a 55,000-acre project on the west side of Albuquerque, New Mexico. Many of these projects have since entered bankruptcy or become the subject of foreclosure proceedings.

With regard to the ballot initiative process, the amendment provided that in if the initiative failed at the 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 a project consistent with the City Charter (Measure A compliant) that could be processed within the overall timeframe 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, 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 inconsistent 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 required, as a mandatory milestone, that Alameda and SunCal jointly develop a project pro forma 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 pro forma mandatory milestone was deemed waived by Alameda under the terms of the ENA.

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

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details of which were not negotiated with Alameda. The Specific Plan contained specific development standards, procedures, and processes that differed from standard processes prescribed by the Alameda Municipal Code (AMC); the DA also included fee waivers inconsistent with the AMC and financial provisions that were not negotiated with nor agreed to in principle by Alameda. Signatures were collected by SunCal through early June, but not submitted to Alameda until September 23, 2009, later than originally anticipated by the process contemplated in the Second Amendment to the ENA. As a result, the Initiative did not qualify in time for a November 2009 special election. Rather, on November 3, 2009, the Initiative was determined to have qualified for the ballot, and the City Council set the election for February 2, 2010.

Given the deadline outlined in the ENA for an OEA submittal, SunCal submitted an OEA on January 14, 2010. The OEA submitted by SunCal consists of substantially the same plan and processes contained in the Initiative. On January 21, 2010, SunCal initiated a request by letter to the Interim City Manager that Alameda approve an ENA Addendum that (i) extends the term of the ENA and the mandatory milestones for the Disposition and Development Agreement (DDA) and Navy Term Sheet by two years; and (ii) requests agreement by the City not to disapprove of the OEA on the basis that the development contemplated in the OEA is inconsistent with the City Charter and the AMC. This request was presented to Alameda at a closed session meeting on January 26, 2010 with an executed, unilateral ENA Addendum (Exhibit 1). The governing boards of Alameda directed the Interim City Manager/Interim Executive Director to schedule consideration of the request for an ENA Addendum at a subsequent public meeting. Consideration of this request is the first action before Alameda this evening. The ENA Addendum has not been negotiated between SunCal and Alameda, as no preliminary drafts of this document were exchanged. Rather, it has been presented by SunCal in executed and final form for Alameda to consider. Accordingly, it is not a confidential document under the ENA.

Notice of Default

On February 2, 2010, the Initiative failed at the polls with 85 percent of those participating in the election voting against the Initiative. By letter dated February 4, 2010, Alameda provided SunCal with a Notice of Default under the ENA for failure to achieve a mandatory milestone, the OEA, by the applicable date in the ENA's schedule of performance (Exhibit 2). The OEA submitted by SunCal does not meet the requirements of the ENA because the OEA conflicts with the City Charter. The only way for the OEA to avoid conflicting with the City Charter is for SunCal to either submit a Density Bonus Application for the project in compliance with the City's Density Bonus Ordinance, which SunCal has not done, or to seek an amendment to the City Charter

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through a second ballot initiative. However, the ENA affords SunCal no further opportunities to amend the City Charter.

Consistent with the terms of the ENA, SunCal has 30 days to cure the default. The issuance of a Notice of Default is an administrative action, which implements the terms of the ENA. Pursuant to the ENA, if a SunCal default is not cured, Alameda's governing boards have the discretionary right to terminate the ENA.

On February 7, 2010, SunCal issued a response to Alameda's Notice of Default (Exhibit 3) and requested that Alameda retract the Notice of Default. This is the second request before Alameda this evening.

DISCUSSION

Two independent requests made by SunCal are before Alameda: (1) approve an ENA Addendum, and (2) retract the Notice of Default.

1. Request to Approve an ENA Addendum

The following summarizes the essential terms of SunCal's requested ENA Addendum and provides staff recommendations for these proposed modifications to the ENA.

A. SunCal is requesting a two-year extension of the term of the ENA, as well as the DDA and Navy Term Sheet mandatory milestones, from July 20, 2010 to July 20, 2012.

The ENA was amended in 2008 to allow SunCal a single opportunity to submit and receive approval of a ballot initiative, and, if the initiative failed, an OEA. The initiative and/or OEA were to be processed within the term of the ENA. The ENA intentionally provided SunCal with a limited number of opportunities to pursue entitlements for the project so that if SunCal was unable to achieve the required entitlements and associated mandatory milestones within the specified timeframe, Alameda could pursue other options. Alameda did not want to be committed beyond July 2010 to a master developer that proved to be incapable of entitling the property, postponing indefinitely Alameda's ability to return NAS Alameda to productive use.

Given the decisive defeat of the Initiative at the polls, SunCal's pending default under the ENA, and concerns regarding other SunCal development projects in bankruptcy or subject to foreclosure proceedings, circumstances do not presently exist under which an ENA extension should be granted. Should SunCal cure the default notice within 30 days of the Notice of Default, more than five months remain for SunCal to pursue an

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OEA consistent with the City's Charter, negotiate a DDA, and negotiate a Navy Term Sheet. This is a reasonable timeframe in which to determine the economic feasibility and viability of any proposed development project under negotiation.

B. SunCal is requesting Alameda's agreement not to disapprove of the OEA on the basis that the development contemplated in the OEA is prohibited by the City Charter or the AMC.

The ENA requires that SunCal submit an entitlement application that is complete, in that it includes "all land use entitlements and approvals it will seek from the City." However, the ENA Addendum would require the City to agree not to disapprove the OEA on the basis of its noncompliance with existing land use law, including Measure A. The City cannot process a development application that is inconsistent with the City Charter, nor can the City contract away its discretionary authority to approve or disapprove a development application.

Staff recommendation: Deny the request to accept the terms of SunCal's ENA Addendum, including the request to extend the term of the ENA, given the aforementioned facts.

2. Request to Retract Notice of Default

By letter dated February 4, 2010, Alameda issued a Notice of Default to SunCal under the ENA. There is no discretionary decision involved in the determination of whether SunCal's OEA meets the requirements of the ENA. As provided in the ENA, should a default occur for failure to comply with a mandatory milestone, a Notice of Default is to be sent via certified mail or similar delivery with record of receipt, thus triggering the 30-day period to "cure." The service of the Notice of Default on February 5, 2010 was an administrative function of a City Manager, implementing the terms of the ENA. However, the request by SunCal that the City Council "retract" the Notice of Default would create a waiver of the default and of the 30-day cure period mutually agreed in the ENA. This request requires a discretionary decision before the legislative bodies of Alameda who are party to the ENA. Accordingly, the default—and the impact of waiving it—are discussed below.

Under Section 7.1.6 of the ENA, SunCal has defaulted for failure to achieve a mandatory milestone by the applicable date set forth in the mandatory milestone Schedule of Performance. SunCal failed to meet the ENA's mandatory milestone requiring SunCal to submit, once it opted to do so, an OEA. The following outlines the reasons the OEA does not meet the requirements of the ENA, thus creating the default:

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A. The OEA conflicts with the City Charter.

Measure A limits development in Alameda in two ways: (1) it prohibits multiple dwelling units from being constructed in Alameda; and (2) it restricts the maximum density for residential development within Alameda to one housing unit per 2,000 square foot lot. (as interpreted and implemented by City Council Ordinance No. 2566). The development plan included in SunCal's OEA submittal includes multi-family housing and densities planned at greater than one unit per 2,000 square feet in direct contradiction to the City Charter. The Cover Letter to the SunCal OEA discusses ways in which SunCal might comply with Alameda law, but does not commit to an approach or outline the steps that would be necessary to comply with a particular approach. As a result, SunCal's proposed OEA does not meet the ENA's requirement that the OEA include all necessary approval applications. Alameda cannot anticipate, on behalf of SunCal, the manner in which the OEA should be modified and processed to meet Measure A's requirements.

B. An attempt by SunCal to amend the City Charter would be contrary to the ENA.

The ENA does not permit an OEA that does not comply with the City Charter, or that proposes to undertake an amendment to the City Charter that is not contemplated by the ENA. Under the terms of the ENA, if the Initiative is unsuccessful and SunCal elects to submit an OEA, the OEA must be in compliance with the City Charter.

C. The OEA does not comply with the City's Density Bonus Ordinance.

The OEA states that SunCal may apply the City's Density Bonus Ordinance to the project, but the OEA does not include a Density Bonus Application, as required by the Ordinance. Once again, Alameda cannot process the OEA if it does not include all of the necessary approval applications. Further, even if SunCal were to submit a Density Bonus Application based on their submitted OEA, the project in the proposed OEA would not qualify for a density bonus. The Density Bonus Ordinance requires submittal of a development plan illustrating that the "base" project meets all existing general plan and zoning development standards, which includes compliance with Measure A. The OEA submitted by SunCal does not comply with Measure A, nor is a "base" plan which would comply with Measure A included.

Retracting the Notice of Default would have the effect of waiving the default and the requirement for a cure, as provided in the ENA. SunCal has 30 days to cure its failure to submit an OEA that complies with the requirements of the ENA. This cure period is the City's procedural assurance of that timely performance. Should SunCal fail to cure

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the default, pursuant to the terms of the ENA, the City may elect to terminate the ENA. This is a discretionary decision which is not before the legislative bodies at this time.

Staff recommendation: Deny the request to retract the Notice of Default.

FINANCIAL IMPACT

The proposed requests do not modify the financial provisions contained in the ENA regarding reimbursement of staff and Alameda third-party consultant costs. Therefore, there is no fiscal impact to the City's General Fund, Community Improvement Commission, or Alameda Reuse and Redevelopment Authority budgets.

RECOMMENDATION

- (1) Deny SunCal's request to approve an ENA Addendum requesting modification to certain terms including extending the term of the ENA to July 20, 2012; and
- (2) Deny SunCal's request to retract the Notice of Default sent by Alameda regarding SunCal's performance under the ENA.

Respectfully submitted,



Jennifer Ott
Deputy City Manager

Exhibits:

1. ENA Addendum
2. Notice of Default
3. SunCal request for dismissal of Notice of Default

ENA Addendum

This ENA Addendum (“Addendum”) amends that certain Exclusive Negotiation Agreement for Alameda Point dated as of July 18, 2007 by and among the City of Alameda (“City”), the Alameda Reuse and Redevelopment Authority (“ARRA”), the Community Improvement Commission of the City of Alameda (“CIC”) and SCC Alameda Point LLC (“Developer”), as the same has been amended by the First Amendment to ENA dated as of March 6, 2008 and the Second Amendment to ENA dated as of October 7, 2008 (collectively, the “ENA”). Unless otherwise indicated, initially capitalized terms used in this Addendum have the meanings set forth in the ENA. The undersigned parties agree as follows:

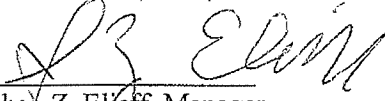
1. Section 2.1 of the ENA and Items A. 9 and 10 of the Schedule of Performance (Exhibit B-1 to the ENA) are amended by replacing the date July 20, 2010 with the date July 20, 2012, thereby extending the Term of the ENA and the Mandatory Milestone submission dates for the Finalized Navy Term Sheet and DDA to July 20, 2012.
2. Exhibit B-2 to the ENA (Non-Mandatory Milestones) is amended by replacing the date July 20, 2010 with the date July 20, 2012 in each of the places it appears and thereby extending the Non-Mandatory Milestone completion dates to July 20, 2012.
3. Developer has submitted an Optional Entitlement Application pursuant to the ENA on January 14, 2010 (the “Entitlement Application”) which includes a request for various entitlement approvals, including, without limitation, amendments to the General Plan and AMC Zoning Code and approval of a Master Plan (or Specific Plan) for development of Alameda Point. Developer shall have the right to supplement, and if necessary, modify the Entitlement Application pursuant to AMC Section 30-17, provided that the development plan described in the modified submittal is substantially consistent with the Master Plan proposed as part of the Entitlement Application. The Entitlement Application as revised by such modification or supplement and as otherwise modified by agreement of the City and Developer is referred to herein as the “Development Submittal”.
4. The City agrees to process and submit for substantive consideration and vote by the Planning Board and the City Council: (a) certification of an EIR for which the “project” (as defined by CEQA) is the project described in the Development Submittal, and (b) the entitlements and approvals requested and/or otherwise required to approve the Development Submittal and permit development of the project.
5. The City agrees that so long as the Development Submittal is consistent with the provisions of AMC Section 30-17 in effect as of the date of this amendment, the City Council shall not disapprove the project described in the Development Submittal on the basis that such development is prohibited by any other provision of the AMC or City Charter.
6. The parties agree that the foregoing is required to allow the Developer the opportunity to apply for the increased residential density necessary to pay the price and meet the terms of payment that the Navy will require to transfer the Project Site to the ARRA and that the ARRA will subsequently require to be paid by the Developer pursuant to the DDA. To further the price and terms discussion with the Navy, notwithstanding any other provision of Section 20 of the ENA to the contrary, Alameda is authorized to communicate directly with the Navy regarding

the Project without the presence of Developer being required, provided that Alameda shall promptly inform Developer of the occurrence and content of all such communications.

Upon execution by Developer and Alameda of this Addendum, the provisions of this Addendum shall constitute a written and binding amendment to the ENA. Except as expressly modified by the terms of this Addendum, the ENA remains unchanged and in full force and effect.

DEVELOPER:

SCC Alameda Point, LLC, a Delaware limited liability company

By: 
Stephan Z. Elheff, Manager

CITY:

City of Alameda, a municipal corporation

By: _____

Approved as to form:

Name: _____

By: _____

Title: _____

Name: _____

Title: _____

ARRA:

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

By: _____

Approved as to form:

Name: _____

By: _____

Title: _____

Name: _____

Title: _____

CIC:

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

By: _____

Approved as to form:

Name: _____

By: _____

Title: _____

Name: _____

Title: _____



February 4, 2010

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

Re: Default Notice under the Exclusive Negotiation Agreement dated July 18, 2007 by and between the Alameda Reuse and Redevelopment Authority ("**ARRA**"), the Community Improvement Commission of the City of Alameda ("**CIC**") and the City of Alameda ("**City**") (collectively, "**Alameda**") and SCC Alameda Point LLC ("**SunCal**"), as amended (the "**ENA**")

Dear Mr. Keliher:

Under Section 7.1.6 of the ENA, Alameda hereby provides notice that SunCal has defaulted under the ENA for failure to achieve a Mandatory Milestone by the applicable date set forth in the Mandatory Milestone Schedule of Performance. SunCal failed to meet the ENA's Mandatory Milestone requiring SunCal to submit, once it has opted to do so, an Optional Entitlement Application.

The ENA governs the negotiations between SunCal and Alameda concerning the Alameda Point project (the "**Project**"). As permitted by the ENA, SunCal elected to pursue a Ballot Initiative for the Project. That Ballot Initiative was placed before the voters of the City on February 2, 2010, and did not pass.

Under the ENA, where SunCal has decided to pursue a Ballot Initiative, SunCal is provided the option to submit an "Optional Entitlement Application." (Section 3.2.5.2) Whether to submit an Optional Entitlement Application is a decision left to SunCal's discretion. The ENA requires that where SunCal *has* elected to submit an Optional Entitlement Application, however, the Optional Entitlement Application is a Mandatory Milestone and must be achieved by January 15, 2010. (Section 3.2.5.2) Failure to comply with a Mandatory Milestone is an Event of Default under the ENA. (Section 7.1.6)

Here, SunCal has opted to submit an Optional Entitlement Application. SunCal made a submission to the City on January 14, 2010 of two alternative entitlement packages (collectively, the "**Submittal**") The cover letter accompanying the Submittal stated that SunCal "is expressly authorized by the City, the ARRA and the CIC to submit an 'Optional Entitlement Application' to the City for the entitlement of Alameda Point. Developer's Optional Entitlement Application is attached." Cover Letter to Submittal, p.1 Because it opted to submit an Optional Entitlement Application, SunCal was required to achieve the Optional Entitlement Application Mandatory

Office of the City Manager
2263 Santa Clara Avenue, Room 320
Alameda, California 94501-4477

A/73280191.5 510.747.4700 Office • Fax 510.747.4704 • TDD 510.522.7538

CC/ARRA/CIC
Exhibit 2 to
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Milestone by January 15, 2010. SunCal's Submittal does not, however, meet the requirements under the ENA for an Optional Entitlement Application, for the reasons set forth below. Accordingly, SunCal has not met this Mandatory Milestone.

SunCal's failure to meet this Mandatory Milestone has triggered SunCal's default. Under Section 7.1.6 of the ENA, SunCal shall have thirty days within which to cure this default. If SunCal fails to cure, Alameda has the right to terminate the ENA.

A. The Submittal is not an Optional Entitlement Application Because the Submittal Conflicts with the City Charter

Article XXVI of the Alameda Charter (also known as Measure A) limits development in Alameda in two ways. First, no multi-family housing is permitted to be constructed in Alameda. See Alameda City Charter, Article XXVI, §§ 26-1, 26-2. The only exceptions to this prohibition allow rehabilitation or remodeling of existing multi-family dwellings and replacement of specific, identified, Alameda Housing Authority and senior citizens' units. Second, the maximum density for residential development within Alameda is one housing unit per 2,000 square feet of land (a density of approximately 21 units per acre), with the only exceptions being the "replacement units" described above and replacement of existing units that are damaged or destroyed.

The development plan included in SunCal's Submittal includes multiple dwelling units. The Submittal also includes dwelling units at a density of more than one unit per 2,000 square feet or 21 units per acre. Indeed, SunCal's Submittal includes land use areas with densities of greater than 70 units per acre. Development of multi-unit housing, and development at densities exceeding 21 units per acre, is in direct contradiction to the City's Charter. SunCal's cover letter acknowledges this. See Cover Letter to SunCal Submittal, p.4 ("The land use plan described in this Optional Entitlement Application seeks the ability to construct, in some locations within the Alameda Point property, multiple dwelling units at a density of more than one unit per 2,000 square feet of land area.")

SunCal's cover letter to the Submittal indicates two theoretical approaches that SunCal might use to achieve compliance with the Charter. Specifically, SunCal indicated, "[t]his may be achieved either through an amendment to Article XXVI of the City Charter of the City of Alameda or through application of the City's density bonus ordinance." Thus, the cover letter suggests that SunCal will pursue either an amendment to the City's Charter or application of the City's Density Bonus Ordinance. But the Submittal does not do anything more than hypothesize about how SunCal *might* comply with Alameda law in developing the Project. The Submittal does not commit to undertaking one or both of these two approaches for the Project. Nor does it explain how either of these theoretical approaches might be implemented. Section 3.2.5.2 of the ENA requires an Optional Entitlement Application to meet the criteria of an Entitlement Application. Thus, an Optional Entitlement Application "shall include the following: (a) an application for all land use entitlements and approvals it will seek from the City . . ." (Section 3.2.5.1) SunCal's Submittal does not commit to an approach and thus is unable to include all necessary approvals. On its face, the Submittal is not an Optional Entitlement Application within the meaning of the ENA.

B. The Submittal is Not an Optional Entitlement Application Because SunCal Does Not and Cannot Comply with City's Density Bonus Ordinance

1. SunCal's Submittal Contains No Application for a Density Bonus

As provided above, in order for the Submittal to be considered an Optional Entitlement Application it must include “an application for all land use entitlements and approvals it will seek from the City.” To the extent SunCal seeks, as it stated in its cover letter it may, to apply the City’s Density Bonus Ordinance to the Project, SunCal requires specific approvals from the City and it failed to apply for those approvals in the Submittal.

The City’s Density Bonus Ordinance, adopted as City Ordinance No. 3012 on December 2, 2009 (“**Ordinance**”), sets out numerous specific requirements for projects that seek to receive concessions or waivers under the Ordinance. First among these is the requirement that an applicant submit a Density Bonus Application. (Ordinance 30-17.4.a) Not only has SunCal not formally applied for the approvals it would need to utilize the City’s Density Bonus because the Submittal included no Density Bonus Application, SunCal’s Submission does not contain the specific information required in a Density Bonus Application.

Perhaps more significantly, the Density Bonus Ordinance requires that an applicant for a Density Bonus must first present a “base” project that complies with existing general plan and zoning requirements. (Ordinance 30-17.4.b.1.) A “base” project would be one that is fully compliant with the City’s Charter and, specifically, with the provisions of Measure A. For example, Alameda’s Preliminary Development Concept (“**PDC**”) provided for the development of 1,735 new units, at densities and dwelling unit types consistent with Measure A. Here, the Submittal does not contain a “base” project development plan, and significantly exceeds the density permitted by Measure A. For example, the PDC project contains a Measure A-compliant “base” of 1,735 units, where the Submittal, at 4,831 units, contains a far greater number of units.

The Submittal also lacks other required features of a Density Bonus Application, including a Project description providing affordable housing unit counts (Ordinance 30-17.4.b.2); a description of what specific concessions or incentives SunCal would request from the City (as described in Ordinance 30-17.10); and justifications for why concessions of increased density to the Project would be necessary to provide for affordable housing cost (Ordinance 30-17.4.b.6). The Master Plan attached as part of the Submittal states only that “When an applicant seeks a density bonus for a housing development within the Plan Area, the City shall provide the applicants with incentives or concessions for the production of housing units and child care facilities as described in Government Code section 65915.” (Submittal Attachment “I”, Alameda Point Master Plan, p.9-15.) This does not meet the requirements of the Density Bonus Ordinance.

The Submittal also failed to include an Affordable Housing Unit Plan, another required element of a Density Bonus Application. (Ordinance 30-17.15.) An Affordable Housing Plan is required to include, for the dwelling units required to be made available at specific levels of affordability (“**Affordable Units**”) specific information about the Affordable Housing Units including unit location, type and size; floor plans; target income levels; phasing plans, marketing plans, and a financial pro forma. *Id.*

Even had SunCal submitted a Density Bonus Application with all required elements, securing bonus units awarded under the Density Bonus Ordinance (“**Density Bonus Units**”) requires the project to adhere to many specific rules, none of which SunCal has demonstrated that it will be able to adhere to. Affordable Units must be constructed concurrently with market-rate units and with comparable infrastructure, construction quality and exterior design, and must be “integrated within the project” (Ordinance 30-17.8.) The statement appearing in the Alameda Point Community Plan attached to the Submittal that “New affordable housing units should be

reasonably dispersed throughout the phases of development . . .” and “Affordable housing should be constructed so that it is coordinated with the overall residential construction program.” (Submittal Attachment “F”, Alameda Point Community Plan, p.15) do not provide any information as to *how* SunCal would comply with this requirement.

In addition, all projects for which Density Bonus Units are granted are required to be the subject of an “Affordable Housing Unit Agreement.” (Ordinance 30-17.16.) Additional conditions are required for the Affordable Housing Unit Agreement where the Affordable Units are for sale (Ordinance 30-17.17), and where the Affordable Units are for rent (Ordinance 30-17.18). The Submittal contains no information as to how SunCal would comply with this requirement, either.

SunCal has failed to show in its Submittal a sufficient application for the approvals that would be required under the Density Bonus Ordinance.

2. Even Were SunCal to Submit a Density Bonus Application Based on the Submittal, the Project in the Submittal Would Not Qualify for a Density Bonus

The City’s Density Bonus Ordinance requires submittal of a development plan illustrating that the “base “ project meets all existing general plan and zoning development standards, which includes compliance with Measure A. See Ordinance 30-17.4.b.1, cited in Section B.1 above. The Project as presented in SunCal’s Submittal does not comply with Measure A. Thus, even if SunCal were to submit a Density Bonus Application based on the Submittal, the Project would not be eligible for a Density Bonus. There are numerous aspects of the Submittal which do not comply with Measure A. For example, the Submittal contemplates very high density development at levels of up to 40, 50 and 70 units per acre. (Submittal, Attachment “O”, Alameda Point Specific Plan, p.7-4) Measure A, however, limits density to approximately 21 units per acre, as described above. The high density units provided for in the Submittal appear to represent a significant portion of the Project. Elsewhere, the Submittal contemplates multi-family housing in all five of its residential land use categories (Preservation Mixed Use, Mixed Use, Residential Medium, Residential Medium High, and Residential High), and multi-family housing appears to represent a significant portion of the Project. (*Id.* at 7-5) Accordingly, without a Measure A-compliant base plan, there can be no Density Bonus.

C. The Submittal is Not an Optional Entitlement Application Because SunCal is Not Seeking to Amend the Charter in Accordance with the ENA

The ENA does not permit an Optional Entitlement Application that does not comply with the City’s Charter. Rather, the ENA provides that if and only if the Ballot Initiative is successful, an Optional Entitlement Application may be submitted containing only the approvals and entitlements necessary to permit development of the Project consistent with the Ballot Initiative. (Section 3.2.5.2) If the Ballot Initiative was not successful, the Optional Entitlement Application was required to be complete and thus in compliance with the City’s Charter. (*Id.*)

This structure is fully consistent with the RFQ process, the initial ENA, and the ENA amendments. As you know, SunCal’s involvement with Alameda Point dates back to its Response to the RFQ for a Master Developer for Alameda Point, dated December 4, 2006 (“**RFQ Response**”). The RFQ Response emphasized the importance of developing a project in accordance with the strict development standards imposed by the citizens of Alameda: “These standards are designed to preserve the history of NAS Alameda and many existing structures, *limit the number of units and the density of development*, provide affordable housing even beyond the statutory redevelopment requirement, and promote mass-transit and transit oriented

development, all while maintaining revenue neutrality for the City.” RFQ Response, p.5 (emphasis added). SunCal’s RFQ Response stated in plain terms that SunCal’s plan would “meet[] all of the policy goals and objectives contained in the PDC and other policy documents” and that SunCal was “fully confident [the] policy goals and objectives contained in the PDC will be successfully met.” RFQ Response, p. 8. In other words, SunCal’s initial commitment to the Project was a commitment to develop in accordance with Measure A.

As negotiations between the City and SunCal progressed, the ENA was amended to allow SunCal an option to submit a development application that was not in accordance with Measure A. Specifically, SunCal was permitted to put a Ballot Initiative before the voters of Alameda. (Section 3.2.5) As it was expected by all that an election would be held in November 2009, the Optional Entitlement Application was anticipated as a safeguard so that should the Ballot Initiative fail, SunCal could then submit a Measure A-compliant plan by January 15, 2010 (Section 3.2.5.2). The election was actually held on February 2, 2010 and the Ballot Initiative, which contained an amendment to the Charter, was rejected by the voters. The January 15, 2010 deadline remained in place, however, and when SunCal elected to submit an Optional Entitlement Application, the ENA required it to be in compliance with the City Charter.

SunCal’s January 14, 2010 Submittal is not in compliance with the City Charter. The Submittal Cover Letter’s listing of the contents of the application includes item P, “Charter Amendment,” which in the “Purpose of Submittal” column cross-references Section 3 of the Cover Letter. This section acknowledges that the Submittal is not in compliance with the City’s Charter, stating that the land use plan “may be achieved either through an amendment to Article XXVI of the City Charter of the City of Alameda or through application of the City’s density bonus ordinance.” Submittal Cover Letter, p.4. Thus, the Submittal is not an Optional Entitlement Application. Again, SunCal has failed to meet the Mandatory Milestone of submitting an Optional Entitlement Application on or before January 15, 2010.

The City wishes to further note that SunCal had one route to submit a non-Measure A-compliant development application, and it has been unsuccessful. It appears SunCal may now be seeking another option: another election. As described above, the Submittal does not include any direct provisions for a Charter amendment; it appears SunCal is contemplating a future Charter amendment, perhaps initiated through a ballot measure to be placed before the voters of Alameda in some future election. (“This may be achieved either through an amendment to Article XXVI of the City Charter of the City of Alameda . . .”). Submittal Cover Letter, p.4 To the extent SunCal seeks yet another election on a non-Measure A compliant project, such further election is simply not permitted under the terms of the ENA.

The City of Alameda has strict development standards pertaining to development density, as evidenced by Article XXVI of the City Charter and as acknowledged by SunCal in its RFQ Response. The ENA was clear in its terms that SunCal had one and only one way in which to present a development plan relying on a Charter amendment, and only one of those was an opportunity to present a plan directly to the voters of Alameda. SunCal has had its chance at the ballot box on February 2, 2010 and was not successful. SunCal may not rely on any future election to extend the ENA, which expires on its terms on July 20, 2010.

Conclusion

SunCal opted to submit an Optional Entitlement Application, thereby requiring SunCal achieve the Optional Entitlement Application Mandatory Milestone by January 15, 2010. However, SunCal’s Submittal does not fulfill the requirements of an Optional Entitlement Application under

the ENA. The City's Charter and the ENA together require either submission of a non-Measure A compliant plan that has been approved by the City's voters, or submission of a Measure A-compliant Optional Entitlement Application. SunCal has provided neither, thereby defaulting under the ENA for failing to comply with a Mandatory Milestone. If SunCal does not cure this default within thirty days, Alameda will have the right to terminate the ENA.

Sincerely,



Ann Marie Gallant
Interim City Manager

Copies as provided in ENA:

SCC Alameda Point LLC
c/o SunCal Companies
2392 Morse Ave
Irvine, California 92614
Attention: Marc Magstadt

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

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

Courtesy copies:

Alameda City Council
Alameda City Hall
2263 Santa Clara Avenue
Alameda, CA 95401

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

From: Pat Keliher
To: Beverly Johnson
Date: 2/6/2010 10:17 PM
Subject: SunCal Response to City of Alameda's NOD and Press Release

>>> Pat Keliher <pkeliher@suncal.com> 2/6/2010 10:17 PM >>>

Dear Mayor and City Council members,

We were shocked that we received a notice of default on February 4, 2010 for the Optional Entitlement Application (OEA) that we submitted on January 14, 2010 with the full knowledge of the Interim City Manager. The notice is littered with inaccurate and misleading statements. Moreover, the legal argument for determining the default is specious and relies on alleged requirements that simply do not exist in the ENA. For example, there is no requirement in the ENA that SunCal submit a Measure A compliant plan as is alleged in the NOD. In fact, that would be counter to the master plan and business plan accepted by the City, which has been the basis of our negotiations for two years. On numerous occasions, the Interim City Manager maintains that a Measure A compliant plan is not financially feasible. At several of our meetings, she has frequently sought additional residential and commercial densities in excess of the OEA plan, rather than a reduction in density. The Notice of Default alleges obligations that do not exist in the ENA when it states that a density bonus application was a required submittal to meet a Mandatory Milestone, nor is it true when it states the plan submitted in the OEA cannot conform to a density bonus approach, when the City Council can make appropriate findings during the normal entitlement process.

Moreover, we were even more surprised and disturbed to see that these specious legal claims used to determine the non-existent default, were the subject of a City-issued press release. It is simply bad form to deliver this notice of default as a press strategy and we do not understand why the City desires to create public controversy at every step of this process, rather than in working together in a mutually beneficial manner to implement a financial and environmentally viable plan for Alameda Point. While we are preparing a more thorough response to the Notice of Default, we are compelled to respond immediately because of the City's erroneous press release.

Following Tuesday's February 2, 2010 election, SunCal has become acutely aware that the community's desire for a better future for Alameda Point must follow a more traditional development process. We want to respect the community's desire, and will take our lead from the City Council. In accordance with the ENA, we are actively pursuing that vision and are eager to work with the City Council and the community of Alameda in good faith to ensure the future of Alameda Point and the City is secured.

As clearly noted in the OEA submittal, the Plan can be entitled either by City Council decision to place a charter amendment on the ballot or by use of a density bonus. Rather than pre-determine the course the City would choose to take, we assumed that the City would work with us in good faith to craft the plan in a manner that met the City's preferred goals. In the absence of an ulterior motive, the proper way to handle this matter would have been to advise us through the planning department of the City's preferences and to advise us of additional submittals that might be required to conform to the newly adopted density bonus ordinance, if that were the City's preference.

While we remain committed to working with the City Council and the community of Alameda in good faith, the City's actions over the last two days raise questions about whether it shares this commitment. As a result, we must begin to doubt the City's desire to ensure that the vision for Alameda Point is realized in a manner consistent with the City's responsibilities under the ENA, despite the numerous public statements to the contrary.

SunCal has, and is, currently expending significant financial and staff resources on the preparation of an Environmental Impact Report, which was approved by the City Council last October by a unanimous vote. We are continuing to perform under the terms of the ENA.

Unfortunately, the use of City press releases for damaging unsubstantiated claims is becoming a major distraction and obstacle to the success of our mutual Alameda Point effort.

We respectfully request that you withdraw this notice of default and that we work collaboratively on a plan that is best for the City of Alameda.

Sincerely,

Pat Keliher

CC/ARRA/CIC
Exhibit 3 to
Agenda Item #3-A
2-16-10