



Council Meeting: April 8, 2008

SUBJECT: Approve an Exclusive Negotiating Rights Agreement (ENRA) between the City and Mid-Peninsula Housing Coalition as the Developer of an Affordable Senior Housing Project at 660 S. Fair Oaks Ave.

REPORT IN BRIEF

On February 12, 2008, Council selected Mid-Peninsula Housing Coalition, as developer of the site at 660 S. Fair Oaks Avenue (County Clinic Site). An Exclusive Negotiating Rights Agreement (ENRA) between the developer and the City has been prepared. Staff recommends that Council approve the ENRA on behalf of the City.

BACKGROUND

On February 12, 2008 (**RTC-08-040**) Council selected Mid-Peninsula Housing Coalition (MPHC) as the future developer of a ground leased site at 660 S. Fair Oaks Avenue (County Clinic Site). The Council also authorized the City Manager to prepare a Memorandum of Understanding (MOU) for City Council approval for development of an affordable senior housing project at the County Clinic site at 660 S. Fair Oaks Ave. This report provides the MOU for Council consideration. As the future lessee, the City offered to provide an assignment of a ground lease to a developer who will build the maximum number of housing units for very low income seniors and in addition will provide at least 215 parking spaces for the Clinic. The City intends to assume the costs of a ground lease for the development which will include the cost to construct a garage to serve the clinic.

Staff found that MPHC, with a proposal of at least 120 rental units affordable to very low income seniors was the strongest proposal for the following combined reasons:

- 1) Successful experience in developing, maintaining and managing affordable senior housing projects;
- 2) Proven track record in working successfully with public agencies in the timely development of sizable affordable housing projects;
- 3) Unique opportunity to create a larger project because of ownership by MPHC of the adjacent 662 Garland Avenue property; and

- 4) Evidence of substantial financing for the project that will provide greater certainty and timeliness in obtaining full project financing and will allow MPHC to offer a large number of units to very low income seniors; and

EXISTING POLICY

The Consolidated Plan places a priority on maintaining and increasing the inventory of affordable rental housing for families. The City's Housing and Community Revitalization Sub-Element contains two goals related to affordable housing in the community:

Goal E: Maintain and increase housing units affordable to households of all income levels and ages.

Goal F: Improve Housing conditions for people with special needs.
Assist new housing development and housing support services for the elderly.

The Community Development Strategy goal of Housing Affordability:
To actively promote the provision and protection of housing this is affordable to households of low and middle income.

DISCUSSION

The City and Mid-Peninsula Housing Coalition have negotiated the terms of the ENRA (Attachment A). This document describes the relationship of the parties and the goals of the housing project. Both parties agree to negotiate a Disposition and Development Agreement (DDA) related to the proposed affordable senior housing project, should the City be successful in its discussions with the County to obtain a ground lease at the County clinic site at 660 S. Fair Oaks Avenue. The DDA would then be submitted to the City Council for its consideration. The ENRA describes the financial and pre-development obligations of both parties prior to entering into a more detailed DDA. The initial term of the agreement is for 240 days and may be terminated by either party. The City Manager will have the authority to extend the agreement for up to 180 days upon the mutual agreement of both parties. Although MPHC will have the exclusive right to negotiate with the City during the ENRA period, the City is not obligated to enter into a DDA.

The ENRA does not require the City to assist with pre-development costs for the housing project. MPHC will be responsible for costs related to design plans, studies, and surveys for on-site and off-site improvements. Additional incurred costs will include City-approved expenses for preliminary design of the parking garage, subject to reimbursement through the DDA. MPHC will also provide additional studies or reports of up to \$50,000 that may be exclusively requested by the City.

During the ENRA period and before execution of the DDA, MPHIC will be required to demonstrate the financial feasibility of the project for construction and operations. They must also submit evidence of construction and permanent financing for the project.

FISCAL IMPACT

Authorization of the ENRA would have no fiscal impact to the General fund. Any future costs related to the ground lease or parking garage construction would be funded by the Housing Mitigation Sub-Fund which was created to support the provision of affordable housing within the City.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, in the Council Chambers lobby, in the Office of the City Clerk, at the Library, Senior Center, Community Center and Department of Public Safety; posting the agenda and report on the City's Web site; and making the report available at the Library and the Office of the City Clerk.

ALTERNATIVES

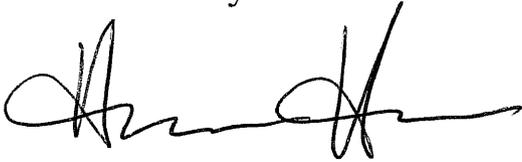
1. Approve an Exclusive Negotiating Rights Agreement for development of an affordable senior housing project at the County Clinic site at 660 S. Fair Oaks Avenue.
2. Modify the Exclusive Negotiating Rights Agreement (Attachment A).
3. Take no action.

RECOMMENDATION

Staff recommends alternative one.

Staff recommends that Council approve the ENRA to allow for the future development of the site to proceed.

Reviewed by:

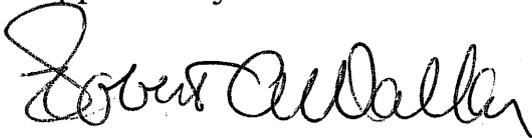


Hanson Hom

Director of Community Development Department

Prepared by: Annabel Yurutucu, Housing Consultant

Approved by:



for Amy Chan

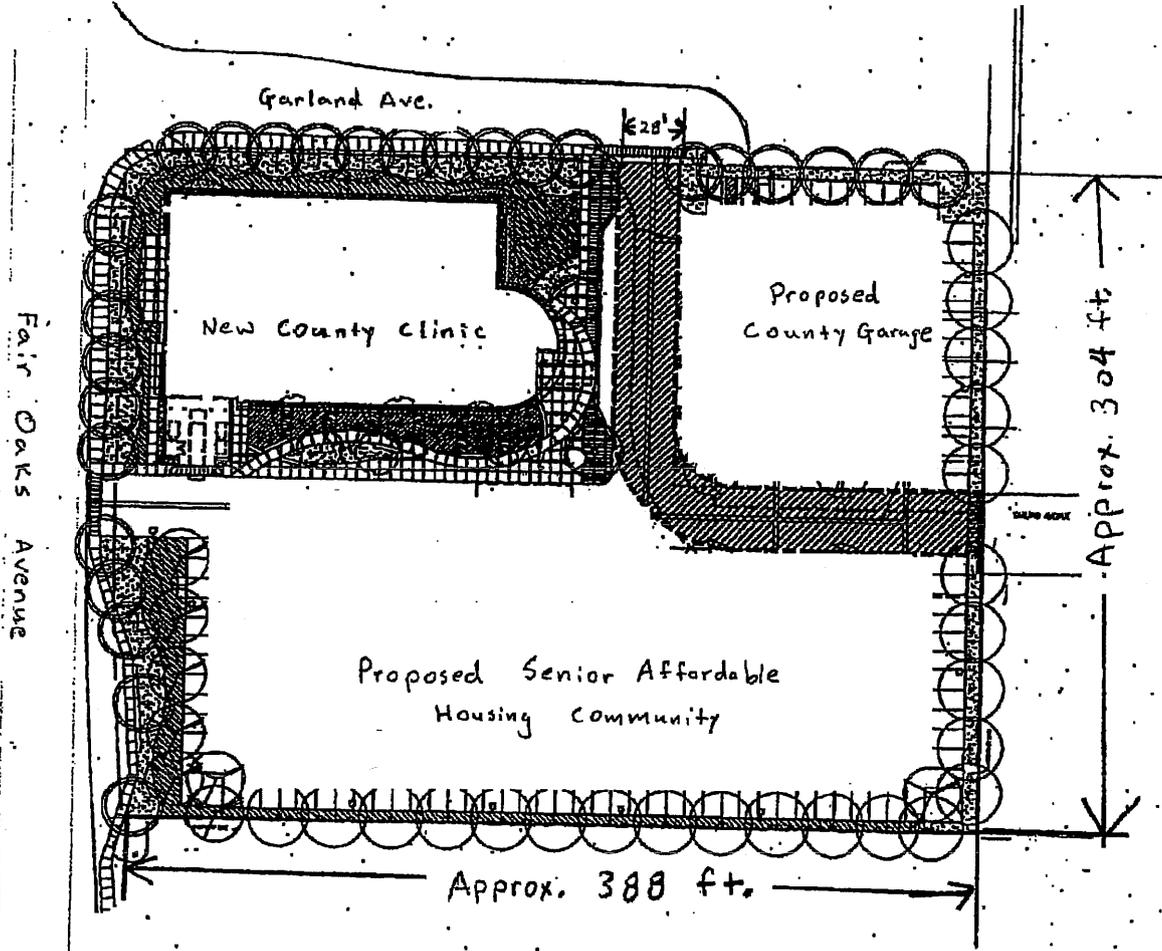
City Manager

Attachments

- A. Fair Oaks/Garland Site Plan
- B. Exclusive Negotiating Rights Agreement by and between Mid-Peninsula Housing Coalition and the City of Sunnyvale

Exhibit A

660 S. Fair Oaks Avenue



EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT

by and between

**MID-PENINSULA HOUSING COALITION,
a California nonprofit public benefit corporation**

and

**CITY OF SUNNYVALE,
a municipal corporation**

THIS EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT (this “**Agreement**”) is entered into effective as of _____, 2008 (“**Effective Date**”) by and between the City of Sunnyvale, a municipal corporation (“**City**”) and Mid-Peninsula Housing Coalition, a California nonprofit public benefit corporation (“**Developer**”). City and Developer are hereinafter collectively referred to as the “**Parties.**”

RECITALS

- A. The County of Santa Clara (“**County**”) is the owner of a 2.76 acre parcel of real property (the “**County Parcel**”) located at 660 South Fair Oaks Avenue in Sunnyvale, California (Assessor’s Parcel No. 211-02-022). The County Property has been used as a health center and a park.
- B. The County is in the process of constructing a 41,000 square foot replacement medical facility and related improvements (“**Medical Clinic**”) on a portion of the County Parcel. The prior health center will be demolished following the completion of the new clinic.
- C. The City and County have commenced discussions regarding the terms of a ground lease whereby a portion of the County Parcel, previously designated for surfacing parking, would be used for the construction and operation of an affordable housing project (the “**Housing Parcel**”), as generally reflected on the preliminary site plan attached hereto as Exhibit A.
- D. To accommodate a housing project at the Housing Parcel, the County would require the construction of a multi-level parking garage (“**Parking Garage**”) on the County Property providing approximately 215 parking spaces for the exclusive use of the Medical Clinic.
- E. In response to an RFP issued by the City, the Developer submitted a proposal for the development of an affordable housing development on the Housing Parcel;
- F. The affordable housing development will consist of the construction of approximately 120 senior rental housing units, all of which will be affordable to either low- or very-low income households, and related improvements (collectively, the “**Project**”).
- G. At its meeting of February 12, 2008, the City’s governing board (“**City Council**”) directed staff to pursue negotiations with Developer regarding the preparation of a memorandum setting forth the terms of the proposed Project.

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

1. Good Faith Efforts to Negotiate. The Parties shall use their best efforts to successfully negotiate a Disposition and Development Agreement (“**DDA**”) and related documents which shall describe the terms and conditions that will govern the transfer of the Housing Parcel to the Developer and the development of the Project. The Parties shall diligently and in good faith pursue

such negotiations. In connection with the negotiations between the Parties, Developer agrees to meet and negotiate with the City and the County in connection with the terms and conditions of a ground lease for the Housing Parcel (“**Ground Lease**”). Developer acknowledges that the City cannot execute a DDA or an assignment of the Ground Lease until such time as the City and County have finalized and approved the Ground Lease or other disposition agreement. In no event shall this Agreement impose any binding obligation on the City to convey the Housing Parcel to Developer, nor does it obligate the City to grant any approvals or authorizations required for the Project. Without limiting the generality of the foregoing, Developer expressly acknowledges that a DDA and other documents resulting from negotiations contemplated hereby shall become effective only if such documents are approved by the City Council following notice and hearing as required by applicable law and compliance with all other requirements of law, including without limitation the California Environmental Quality Act (“**CEQA**”).

1.1 Disposition and Development Agreement. Subject to the approval of a definitive agreement by the City Council, the Parties preliminarily agree that the DDA will include the following items:

1.1.1 Rent; Closing Costs. The Parties shall mutually agree upon the annual rent for the Housing Parcel, allocation of closing costs, and payment of title insurance.

1.1.2 Legal Costs. Each Party shall pay its own legal fees incurred in connection with the negotiation and preparation of the DDA and related documents. The City shall take lead responsibility for the drafting of such documents.

1.1.3 AS-IS Conveyance. The City makes no representations or warranties regarding the physical condition of the Housing Parcel or its suitability for Developer’s use. Developer shall accept the Housing Parcel in its as-is condition.

1.1.4 Project. The preliminary scope for the Project includes approximately 120 residential units, on the Housing Parcel, together with parking and landscaping. The Parties acknowledge that the Project scope is preliminary in nature and subject to modification pending CEQA review and review by the City Planning Department.

1.1.5 Affordability Requirements. The allocation of units between households of low income (no more than 50% of medial income) and very low income (no more than 30% of medial income) shall be subject to the City’s final approval and must satisfy any requirements imposed by the County pursuant to terms of the Ground Lease.

1.1.6 Development Costs. Developer will be responsible for all Project costs, including without limitation all design, development, and construction costs and the cost of all on-site improvements. Developer and City will evaluate all off-site public improvements and on-site environmental remediation, if any, and agree to each Parties’ responsibility for funding and completion. In connection with the foregoing, it is anticipated that Developer will incur expenses related to the design and engineering of the Parking Garage prior to the execution of the DDA. To the extent that the City has approved such expenses, the DDA shall provide for the reimbursement of these expenditures by the City.

1.1.7 Design Review. The DDA will specify the schedule for Developer's submission and City review of design and construction drawings and plans for the Project.

1.1.8 Construction and Permanent Financing. Developer shall be required to demonstrate the financial feasibility of Project construction and operation, and shall be required to provide City with evidence of firm commitments for Project acquisition, construction and permanent financing within the schedule set forth in the DDA. The DDA and related documents will address the terms and conditions for any construction and/or permanent financing that the City may provide for the Project.

2. Developer's Exclusive Right to Negotiate With City. The City agrees that it will not, during the term of this Agreement (the "**Term**") consider or solicit the submission of bids, offers or proposals by any person or entity with respect to the development of the Housing Parcel, and City shall not engage any broker, financial adviser or consultant to initiate or encourage proposals or offers from other parties with respect to the disposition or development of the Housing Parcel.

3. Term. The Term of this Agreement shall commence on the Effective Date, and shall terminate two hundred forty (240) days thereafter, unless extended or earlier terminated as provided herein. The City Manager is authorized to extend the Term by up to an additional one hundred eighty (180) days upon the mutual written agreement(s) of the Parties without further approval of the City Council.

4. Relationship of Parties. The Parties agree that nothing in this Agreement shall be deemed or interpreted to create between them the relationship of lessor and lessee, of buyer and seller, or of partners or joint venturers.

5. Developer's Studies. During the Term, Developer shall use its best efforts to prepare, at Developer's expense, any studies, surveys, plans, specifications and reports ("**Developer's Studies**") Developer deems necessary or desirable to determine the suitability of the Housing Parcel for the Project. Such studies may include, without limitation, title investigation, relocation analyses (if applicable), marketing, feasibility, soils, seismic and environmental studies, financial feasibility analyses and design studies. Without limiting the foregoing, the City may require that the Developer obtain, in connection with the City's negotiation of the Ground Lease or DDA, additional studies or reports reasonably necessary for the assessment of the Housing Parcel or Project; provided, however, Developer shall not be obligated to expend in excess of \$50,000 on studies or reports required exclusively by the City.

6. Right of Entry. Developer shall be responsible for obtaining County's advance written permission for access to the Housing Parcel as may be necessary to prepare the Developer's Studies. In connection with entry onto the Housing Parcel, Developer shall and hereby agrees to indemnify, defend (with counsel reasonably approved by County or City, as applicable) and hold harmless the Indemnitees (defined in Section 15) from and against all Claims (defined in Section 15) resulting from or arising in connection with entry upon the Housing Parcel by Developer or Developer's agents, employees, consultants, contractors or subcontractors. County may require Developer to execute a right of entry agreement satisfactory to County prior to entry onto the Housing Parcel.

Developer's inspection, examination, survey and review of the Housing Parcel shall be at Developer's sole expense. Developer shall provide City with copies of all reports and test results within ten (10) days following completion of such reports and testing, whether or not such reports and test results are completed prior to or after the expiration or earlier termination of this Agreement. Developer shall repair, restore and return the Housing Parcel to its condition immediately preceding Developer's entry thereon at Developer's sole expense. Developer shall at all times keep the Housing Parcel free and clear of all liens and encumbrances affecting title. Developer's indemnification obligations, obligations to provide reports and studies, and obligations to discharge liens that attach to the Housing Parcel as set forth in this Section 6 shall survive the expiration or earlier termination of this Agreement.

7. City's Reports and Studies. Within 15 days following the Effective Date, City shall make available to Developer for review or copying at Developer's expense all nonprivileged and nonconfidential studies, surveys, plans, specifications, reports, and other documents with respect to the Housing Parcel that City has in its possession or control.

8. Developer's Pro Formas and Evidence of Financing. During the Term, Developer shall seek financing commitments from prospective lenders or financing partners for the Project. Prior to execution of the DDA contemplated by this Agreement, Developer shall provide City with a pro forma for the Project that confirms the financial feasibility of Developer's proposed redevelopment of the Property. During the period specified in the DDA, Developer shall provide evidence satisfactory to City that Developer has secured binding commitments, subject only to commercially reasonable conditions, for all financing necessary for the successful completion of the Project.

9. Expenses. Except as otherwise expressly provided in this Agreement, all costs and expenses (including, without limitation, staff, consultant and legal fees and expenses) incurred in connection with this Agreement and the activities contemplated hereby shall be paid by the Party incurring such expense.

10. Confidentiality; Dissemination of Information. During the Term, each Party shall obtain the consent of the other Party prior to issuing or permitting any of its officers, employees or agents to issue any press release or other information to the press with respect to this Agreement; provided however, no Party shall be prohibited from supplying any information to its representatives, agents, attorneys, advisors, financing sources and others to the extent necessary to accomplish the activities contemplated hereby so long as such representatives, agents, attorneys, advisors, financing sources and others are made aware of the terms of this Section. Nothing contained in this Agreement shall prevent either Party at any time from furnishing any required information to any governmental entity or authority pursuant to a legal requirement or from complying with its legal or contractual obligations.

11. Execution of Disposition and Development Agreement. If the Parties successfully negotiate a DDA, the City's staff will submit the proposed DDA for review by the City Council. The City shall have no legal obligations to grant any approvals or authorizations in connection with the Project until a final DDA has been approved by the City Council and duly executed on behalf of the City.

12. Termination. This Agreement may be terminated at any time by mutual consent of the Parties. City shall have the right to terminate this Agreement upon its good faith determination that Developer is not proceeding diligently and in good faith to carry out its obligations pursuant to this Agreement. City shall exercise such right by providing at least ten (10) days' advance written notice to Developer which notice shall describe the nature of Developer's default hereunder. Notwithstanding the foregoing, if Developer commences to cure such default within such 10-day period and diligently prosecutes such cure to completion within the earliest feasible time but not later than ninety (90) days following the date of the notice, this Agreement shall remain in effect. Developer shall have the right to terminate this Agreement, effective upon 10 days' written notice to City, if the results of its investigation of the Housing Parcel are unsatisfactory with respect to Developer's desired redevelopment activities or if Developer is unable to obtain other necessary approvals, financing, rights or interests. Neither Party shall have the right to seek an award of damages as a result of the termination of this Agreement pursuant to this Section.

13. Effect of Termination. Upon termination as provided herein, or upon the expiration of the Term and any extensions thereof without the Parties having successfully negotiated a DDA, this Agreement shall forthwith be void, and there shall be no further liability or obligation on the part of either of the Parties or their respective officers, employees, agents or other representatives; provided however, the provisions of Section 10 (Confidentiality), Section 15 (Hold Harmless) and Section 19 (No Brokers) and any other provisions that expressly so state, shall survive such termination. Provided further, that upon termination or expiration of this Agreement, Developer shall deliver to City, within 15 days of termination or expiration, all of the Developer's reports and studies not previously provided to City.

14. Notices. Except as otherwise specified in this Agreement, all notices to be sent pursuant to this Agreement shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other parties in accordance with this Section. All such notices shall be sent by:

- (i) personal delivery, in which case notice is effective upon delivery;
- (ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt;
- (iii) nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service; or
- (iv) facsimile transmission, in which case notice shall be deemed delivered upon transmittal, provided that (a) a duplicate copy of the notice is promptly delivered by first-class or certified mail or by overnight delivery, or (b) a transmission report is generated reflecting the accurate transmission thereof. Any notice given by facsimile shall be considered to have been received on the next business day if it is received after 5:00 p.m. recipient's time or on a nonbusiness day.

City: **City of Sunnyvale**
456 West Olive Avenue
Sunnyvale, CA 94088-3707

Attn: Amy Chan

With a copy to:

City of Sunnyvale
456 West Olive Avenue
Sunnyvale, CA 94088-3707
Attn: David Kahn, City Attorney

Developer: Mid-Peninsula Housing Coalition
303 Vintage Park Drive, Suite 250
Foster City, CA 94404
Attn: President

15. Indemnification. Developer hereby covenants, on behalf of itself and its permitted successors and assigns, to indemnify, hold harmless and defend the City, the County, and their respective elected and appointed officials, officers, agents, representatives and employees (all of the foregoing, “**Indemnitees**”) from and against all liability, loss, cost, claim, demand, action, suit, legal or administrative proceeding, penalty, deficiency, fine, damage and expense (including, without limitation, reasonable attorney's fees and costs of litigation) (all of the foregoing, collectively hereinafter “**Claims**”) arising out of or in connection with this Agreement; provided however, Developer shall have no indemnification obligation with respect to the gross negligence or willful misconduct of any Indemnitee. Developer’s indemnification obligations set forth in this Section 15 shall survive the expiration or earlier termination of this Agreement.

16. Severability. If any term or provision of this Agreement or the application thereof shall, to any extent, be held to be invalid or unenforceable, such term or provision shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining terms and provisions of this Agreement or the application of such terms and provisions to circumstances other than those as to which it is held invalid or unenforceable unless an essential purpose of this Agreement would be defeated by loss of the invalid or unenforceable provision.

17. Entire Agreement; Amendments In Writing; Counterparts. This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, oral and written, between the Parties with respect to such subject matter. This Agreement may be amended only by a written instrument executed by the Parties or their successors in interest. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

18. Successors and Assigns; No Third-Party Beneficiaries. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided however, that neither Party shall transfer or assign any of such Party’s rights hereunder by operation of law or otherwise without the prior written consent of the other Party, which may be withheld in such Party’s sole discretion, and any such transfer or assignment without such

consent shall be void. Subject to the immediately preceding sentence, this Agreement is not intended to benefit, and shall not run to the benefit of or be enforceable by, any other person or entity other than the Parties and their permitted successors and assigns.

19. Brokers. Each Party warrants and represents to the other that no brokers have been retained or consulted in connection with this transaction. Each Party agrees to defend, indemnify and hold harmless the other Party from any claims, expenses, costs or liabilities arising in connection with a breach of this warranty and representation. The terms of this Section shall survive the expiration or earlier termination of this Agreement.

20. Captions. The captions of the sections and articles of this Agreement are for convenience only and are not intended to affect the interpretation or construction of the provisions hereof.

21. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

**CITY OF SUNNYVALE,
a municipal corporation**

By: _____

Name: _____

Title: _____

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

**MID-PENINSULA HOUSING COALITION,
a California nonprofit public benefit corporation**

By: _____
Fran Wagstaff, President