

**Council Meeting: December 16, 2008****SUBJECT: Amendment to Trust Agreement Relating to 2001 Variable Rate Demand Certificates of Participation****REPORT IN BRIEF**

Staff is recommending that Council approve an amendment to Section 4.08 (a) of the Trust Agreement between The Bank of New York Mellon Trust Company, N.A., the Sunnyvale Financing Authority and the City of Sunnyvale relating to the \$18,710,000 (Original Principal Amount) Variable Rate Demand Certificates of Participation issued in 2001 for the Government Center Site Acquisition Project.

**BACKGROUND**

In 2001, Council authorized the issuance of debt to finance the costs of acquiring property located at 505 West Olive Avenue to be used as the site of a new government center. The City issued variable rate demand Certificates of Participation (COPs) in the amount of \$18,710,000 to purchase the property. These COPs are remarketed weekly by the remarketing agent (E.J. De La Rosa & Co.) with interest rates also set weekly dependent upon market conditions. Holders of the COPs have the right to tender their COPs at par at any time on seven days' notice. The COPs have a liquidity provider, Wachovia Bank, to provide a source of funding to COP holders who wish to tender their COPs. Principal of and interest on the COPs are insured by Ambac.

On October 14, 2008 staff requested Council approval to allow the City to purchase its own variable rate demand obligations. The downgrade of some bond insurers and the tightening of the credit markets caused an increase in the interest rates on these and other Municipal Obligations. The interest rate on Sunnyvale's variable rate COPs, for example, is currently 8%. Because the interest rates on these investment instruments are higher than other investment opportunities in today's credit environment, Council approved an amendment to the City's Investment Policy to allow the City to purchase its own obligations as well as State Obligations and California Local Agency Obligations in order to take advantage of higher earning rates while maintaining safety and liquidity of principal.

**DISCUSSION**

In order to purchase our own obligations, the 2001 Trust Agreement must be amended to allow the remarketing agent to sell these obligations to the City. The proposed amendment to the Trust Agreement requires consent of the bond

insurer and the owners of majority in aggregate principal amount of the 2001 Certificates.

The remarketing agent, E.J. De La Rosa & Co., currently owns a majority of the certificates and has consented to the amendment to the Trust Agreement. The bond insurer has also consented to the amendment of the Trust Agreement.

### **FISCAL IMPACT**

Because of current market conditions, interest rates on these investment instruments are currently higher than U.S. Treasuries and other instruments with similar ratings. This amendment will allow staff to take advantage of higher earning rates while maintaining safety and liquidity of principal.

### **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. Adopt a resolution to amend the Trust Agreement relating to the 2001 Variable Rate Demand Certificates of Participation to allow the City to purchase these obligations.
2. Do not adopt a resolution to amend the Trust Agreement.

### **RECOMMENDATION**

Staff recommends Alternative 1, adopt a resolution to amend the Trust Agreement relating to the 2001 Variable Rate Demand Certificates of Participation.

This amendment will allow the City to take advantage of favorable interest rates due to the current credit market environment while ensuring safety of our invested principal.

Reviewed by:

Mary J. Bradley, Director of Finance  
Prepared by: Therese Balbo, Finance Manager

Approved by:

Gary Luebbers  
City Manager

**Attachments**

1. Sunnyvale Financing Authority Resolution Approving, Authorizing and Directing Execution of First Amendment to Trust Agreement Relating to 2001 Certificates of Participation
2. City of Sunnyvale Resolution Approving, Authorizing and Directing Execution of First Amendment to Trust Agreement Relating to 2001 Certificates of Participation
3. First Amendment to Trust Agreement

**SUNNYVALE FINANCING AUTHORITY**

**RESOLUTION NO. \_\_\_\_**

**A RESOLUTION OF THE SUNNYVALE FINANCING AUTHORITY APPROVING A FIRST AMENDMENT TO TRUST AGREEMENT RELATING TO 2001 CERTIFICATES OF PARTICIPATION**

**RESOLVED**, by the Sunnyvale Financing Authority (the "Authority"):

**WHEREAS**, the Authority is a joint exercise of powers agency, duly established and authorized to transact business and exercise powers under and pursuant to the provisions of Section 6500 of the California Government Code (the "Joint Exercise of Powers Law"), including the power to lease real property for public capital improvements; and

**WHEREAS**, the City of Sunnyvale (the "City") determined in 2001 to finance the costs of acquiring property located at 505 West Olive Avenue in the to be used as the site of a new governmental center (the "Project"); and

**WHEREAS**, in order to provide the funds for said purpose, the City agreed to lease to the Authority, and the Authority agreed to lease from the City, the Project; and

**WHEREAS**, the Authority agreed to sublease the Project back to the City pursuant to that certain Lease Agreement, dated as of April 1, 2001, by and between the Authority, as sublessor, and the City, as sublessee (the "Lease" or "Lease Agreement"); and

**WHEREAS**, for such purposes the Authority assigned and transferred to the Trustee certain of its rights under the Lease, and in consideration of such assignment and the execution of a Trust Agreement, dated as of April 1, 2001, among The Bank of New York Mellon Trust Company, N.A., as successor to U.S. Trust Company, N.A. (the "Trustee"), the City and the Authority (the "2001 Trust Agreement"), the Trustee agreed to execute and deliver Variable Rate Demand Certificates of Participation, Series 2001A (Government Center Site Acquisition Project) in the original principal amount of \$18,710,000 (the "2001 Certificates"), \$15,930,000 of which are outstanding as of the date hereof, each evidencing a direct, undivided fractional interest in the Lease Payments to be made by the City under the Lease;

**WHEREAS**, the payment of principal and interest with respect to the 2001 Certificates was insured by Ambac Assurance Corporation, a Wisconsin stock insurance corporation ("Ambac"); and

**WHEREAS**, due to downgrades in the credit ratings of Ambac, the 2001 Certificates have been remarketed at interest rates that are substantially higher than comparable securities with credit enhancement bearing the same credit rating assigned to Ambac at the time the 2001 Certificates were executed and delivered in 2001;

**WHEREAS**, on many occasions in the past several months, E. J. De La Rosa & Co. (the "Remarketing Agent") has been unable to remarket substantial amounts of the 2001 Certificates, and has been forced to hold such Certificates in inventory;

**WHEREAS**, the City has determined that it wishes to purchase 2001 Certificates from the Remarketing Agent to hold for its own account, to avoid paying higher than market rates on its Lease Payments under the Lease, while it structures a refunding or restructuring of the 2001 Certificates; and

**WHEREAS**, Section 4.08 of the Trust Agreement prohibits the Remarketing Agent from remarketing the Certificates to the City or the Authority; and

**WHEREAS**, under Section 9.01 of the 2001 Trust Agreement, the 2001 Trust Agreement may be amended with the consent of Ambac and the Owners of majority in aggregate principal amount of the 2001 Certificates;

**WHEREAS**, the Remarketing Agent is at this time the Owner of greater than a majority in aggregate principal amount of the 2001 Certificates, and has indicated that it will consent to an amendment to the 2001 Trust Agreement which removes the ban on remarketing the 2001 Certificates to the City, and Ambac has also indicated that it will consent to such an amendment; and

**WHEREAS**, under IRS Notice 2008-88, the 2001 Certificates will not be extinguished while held by the City, so long as such ownership by the City of the 2001 Certificates does not extend beyond December 31, 2009; and

**WHEREAS**, the document below specified has been filed with the Authority, and the members of the Authority, with the aid of its staff, have reviewed said documents;

**NOW, THEREFORE**, it is hereby ORDERED and DETERMINED, as follows:

1. The First Amendment to Trust Agreement, dated as of December 1, 2008, among the City, the Trustee and the Authority, and consented to by Ambac and the Remarketing Agent, a copy of which is on file with the Secretary of the Authority, is hereby approved, and the Treasurer is hereby authorized and directed to execute said document, with such changes, insertions and omissions as may be approved by such official, and the Secretary is hereby authorized and directed to attest to such official's signature.

2. This Resolution shall take effect upon its passage and adoption.

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It is hereby certified that the foregoing resolution was duly adopted at a meeting of the Sunnyvale Financing Authority held on the \_\_\_\_ day of \_\_\_\_\_, 2008, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

APPROVED:

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Chairperson

ATTEST:

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Secretary

CITY OF SUNNYVALE

RESOLUTION NO. \_\_\_\_\_

**A RESOLUTION APPROVING, AUTHORIZING AND DIRECTING EXECUTION  
OF FIRST AMENDMENT TO TRUST AGREEMENT RELATING TO 2001  
CERTIFICATES OF PARTICIPATION**

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**RESOLVED**, by the City Council of the City of Sunnyvale (the "City"):

**WHEREAS**, the City determined in 2001 to finance the costs of acquiring property located at 505 West Olive Avenue in the to be used as the site of a new governmental center (the "Project"); and

**WHEREAS**, in order to provide the funds for said purpose, the City agreed to lease to the Sunnyvale Financing Authority (the "Authority"), and the Authority agreed to lease from the City, the Project; and

**WHEREAS**, the Authority agreed to sublease the Project back to the City pursuant to that certain Lease Agreement, dated as of April 1, 2001, by and between the Authority, as sublessor, and the City, as sublessee (the "Lease" or "Lease Agreement"); and

**WHEREAS**, for such purposes the Authority assigned and transferred to the Trustee certain of its rights under the Lease, and in consideration of such assignment and the execution of a Trust Agreement, dated as of April 1, 2001, among The Bank of New York Mellon Trust Company, N.A., as successor to U.S. Trust Company, N.A. (the "Trustee"), the City and the Authority (the "2001 Trust Agreement"), the Trustee agreed to execute and deliver Variable Rate Demand Certificates of Participation, Series 2001A (Government Center Site Acquisition Project) in the original principal amount of \$18,710,000 (the "2001 Certificates"), \$15,930,000 of which are outstanding as of the date hereof, each evidencing a direct, undivided fractional interest in the Lease Payments to be made by the City under the Lease;

**WHEREAS**, the payment of principal and interest with respect to the 2001 Certificates was insured by Ambac Assurance Corporation, a Wisconsin stock insurance corporation ("Ambac"); and

**WHEREAS**, due to downgrades in the credit ratings of Ambac, the 2001 Certificates have been remarketed at interest rates that are substantially higher than comparable securities with credit enhancement bearing the same credit rating assigned to Ambac at the time the 2001 Certificates were executed and delivered in 2001;

**WHEREAS**, on many occasions in the past several months, E. J. De La Rosa & Co. (the "Remarketing Agent") has been unable to remarket substantial amounts of the 2001 Certificates, and has been forced to hold such Certificates in inventory;

**WHEREAS**, the City has determined that it wishes to purchase 2001 Certificates from the Remarketing Agent to hold for its own account, to avoid paying higher than market rates on its Lease Payments under the Lease, while it structures a refunding or restructuring of the 2001 Certificates; and

**WHEREAS**, Section 4.08 of the Trust Agreement prohibits the Remarketing Agent from remarketing the Certificates to the City or the Authority; and

**WHEREAS**, under Section 9.01 of the 2001 Trust Agreement, the 2001 Trust Agreement may be amended with the consent of Ambac and the Owners of majority in aggregate principal amount of the 2001 Certificates;

**WHEREAS**, the Remarketing Agent is at this time the Owner of greater than a majority in aggregate principal amount of the 2001 Certificates, and has indicated that it will consent to an amendment to the 2001 Trust Agreement which removes the ban on remarketing the 2001 Certificates to the City, and Ambac has also indicated that it will consent to such an amendment; and

**WHEREAS**, under IRS Notice 2008-88, the 2001 Certificates will not be extinguished while held by the City, so long as such ownership by the City of the 2001 Certificates does not extend beyond December 31, 2009; and

**WHEREAS**, the document below specified has been filed with the City, and the members of the City Council, with the aid of its staff, have reviewed said documents;

**NOW, THEREFORE**, it is hereby **ORDERED** and **DETERMINED**, as follows:

*Section 1.* The First Amendment to Trust Agreement, dated as of December 1, 2008, among the City, the Trustee and the Authority, and consented to by Ambac and the Remarketing Agent, a copy of which is on file with the City Clerk, is hereby approved, and the Mayor, City Manager, and Director of Finance are hereby separately authorized and directed to execute said document, with such changes, insertions and omissions as may be approved by such official, and the City Clerk is hereby authorized and directed to attest to such official's signature.

*Section 2.* The Director of Finance is hereby authorized to purchase the 2001 Certificates held by the Remarketing Agent, at a price equal to the par amount of the 2001 Certificates being purchased, plus accrued interest to the purchase date.

*Section 3.* This Resolution shall take effect upon its passage and adoption.

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I hereby certify that the foregoing resolution was duly adopted at a meeting of the City Council of the City of Sunnyvale duly held on the \_\_\_\_ day of \_\_\_\_\_, 2008, by the following vote:

AYES:

NOES:

ABSENT:

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City Clerk

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**FIRST AMENDMENT TO  
TRUST AGREEMENT**

**Dated as of November 1, 2008**

**by and among**

**THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,  
as Trustee**

**the**

**SUNNYVALE FINANCING AUTHORITY**

**and the**

**CITY OF SUNNYVALE**

**Relating to**

**\$18,710,000 (Original Principal Amount)  
Variable Rate Demand Certificates of Participation, Series 2001A  
(Government Center Site Acquisition Project)**

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## **FIRST AMENDMENT TO TRUST AGREEMENT**

THIS FIRST AMENDMENT TO TRUST AGREEMENT (this "First Amendment"), dated as of November 1, 2008, is by and among THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., a national banking association organized and existing under the laws of the United States of America, successor to U.S. Trust Company, N.A. (the "Trustee"), the SUNNYVALE FINANCING AUTHORITY, a joint exercise of powers agency duly organized and existing under the laws of the State of California (the "Authority"), and the CITY OF SUNNYVALE, a municipal corporation and charter city duly organized and existing under the laws of the State of California (the "City"), which amends that certain Trust Agreement, dated as of April 1, 2001, among the City, the Trustee and the Authority (the "2001 Trust Agreement");

### *WITNESSETH:*

WHEREAS, the City determined in 2001 to finance the costs of acquiring property located at 505 West Olive Avenue in the to be used as the site of a new governmental center (the "Project"); and

WHEREAS, in order to provide the funds for said purpose, the City agreed to lease to the Authority, and the Authority agreed to lease from the City, the Project; and

WHEREAS, the Authority agreed to sublease the Project back to the City pursuant to that certain Lease Agreement, dated as of April 1, 2001, by and between the Authority, as sublessor, and the City, as sublessee (the "Lease" or "Lease Agreement"); and

WHEREAS, for such purposes the Authority assigned and transferred to the Trustee certain of its rights under the Lease, and in consideration of such assignment and the execution of the 2001 Trust Agreement, the Trustee agreed to execute and deliver Variable Rate Demand Certificates of Participation, Series 2001A (Government Center Site Acquisition Project) in the original principal amount of \$18,710,000 (the "2001 Certificates"), \$15,930,000 of which are outstanding as of the date hereof, each evidencing a direct, undivided fractional interest in the Lease Payments to be made by the City under the Lease;

WHEREAS, the payment of principal and interest with respect to the 2001 Certificates was insured by Ambac Assurance Corporation, a Wisconsin stock insurance corporation ("Ambac"); and

WHEREAS, due to downgrades in the credit ratings of Ambac, the 2001 Certificates have been remarketed at interest rates that are substantially higher than comparable securities with credit enhancement bearing the same credit rating assigned to Ambac at the time the 2001 Certificates were executed and delivered in 2001;

WHEREAS, on many occasions in the past several months, E. J. De La Rosa & Co. (the "Remarketing Agent") has been unable to remarket substantial amounts of the 2001 Certificates, and has been forced to hold such Certificates in inventory;

WHEREAS, the City has determined that it wishes to purchase 2001 Certificates from the Remarketing Agent to hold for its own account, to avoid paying higher than market rates on its Lease Payments under the Lease, while it structures a refunding or restructuring of the 2001 Certificates; and

WHEREAS, Section 4.08 of the 2001 Trust Agreement prohibits the Remarketing Agent from remarketing the 2001 Certificates to the City or the Authority; and

WHEREAS, under Section 9.01 of the 2001 Trust Agreement, the 2001 Trust Agreement may be amended with the consent of Ambac and the Owners of majority in aggregate principal amount of the 2001 Certificates;

WHEREAS, the Remarketing Agent is the Owner of \$13,135,000 in aggregate principal amount of the 2001 Certificates at the time of execution of this First Amendment, and has consented to this First Amendment, and Ambac has also consented to this First Amendment; and

WHEREAS, under IRS Notice 2008-88, the 2001 Certificates will not be extinguished while held by the City, so long as such ownership of the 2001 Certificates by the City does not extend beyond December 31, 2009; and

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the parties hereto hereby agree as follows:

Section 1.01. Amendment to 2001 Trust Agreement. The last sentence of Section 4.08(a) of the 2001 Trust Agreement shall be amended in its entirety to read as follows:

"Any sale of Certificates under this subsection (a) shall be made at a price equal to the principal amount of the Certificates sold, plus interest accrued to a mandatory tender date, the Conversion Date, the effective date of the Substitute Liquidity Facility or the Purchase Date, as the case may be, provided that no accrued interest shall be paid if the Conversion Date, a mandatory tender date, the effective date of the Substitute Liquidity Facility or the Purchase Date, as the case may be, falls on an Interest Payment Date or between a Record Date and an Interest Payment Date."

Section 1.02. Governing Law. This First Amendment shall be construed and governed in accordance with the laws of the State of California, without giving effect to principles of conflicts of law of the State of California.

Section 1.03. Binding Effect; Successors. This First Amendment shall be binding upon and inure to the benefit of the parties and their respective successors and assigns. Whenever in this First Amendment either the Authority, the City, Ambac or the Trustee is named or referred

to, such reference shall be deemed to include the successors or assigns thereof, and all the covenants and agreements in this First Amendment contained by or on behalf of the Authority, the City or Ambac, the Trustee shall bind and inure to the benefit of the respective successors and assigns thereof whether so expressed or not.

Section 1.04. Execution in Counterparts. This First Amendment may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same agreement.

IN WITNESS WHEREOF, the parties have executed this First Amendment as of the date and year first above written.

THE BANK OF NEW YORK MELLON  
TRUST COMPANY, N.A.,  
*as Trustee*

By: \_\_\_\_\_  
Authorized Officer

SUNNYVALE FINANCING AUTHORITY

By: \_\_\_\_\_  
Mary J. Bradley,  
Treasurer

[S E A L]

Attest:

\_\_\_\_\_  
Secretary

CITY OF SUNNYVALE

By: \_\_\_\_\_  
City Manager

[S E A L]

Attest:

\_\_\_\_\_  
Deputy City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
\_\_\_\_\_, City Attorney and  
Authority General Counsel

CONSENT TO AMENDMENT

AMBAC ASSURANCE CORPORATION

By: \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

E.J. DE LA ROSA, as Remarketing Agent  
and Owner of \$\_\_\_\_\_ in principal  
amount of 2001 Certificates

By: \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_