



**Agency Meeting: November 18, 2008**

**SUBJECT: First Amendment to Amended and Restated Disposition and Development and Owner Participation Agreement for Town Center Property (Modifications to Minimum Project TIF Date, Residential Ownership Requirements, Retail Leasing Milestones)**

**Information Only Report On Compliance with Underground Parking Requirement and Block 6 Fifth Level Parking**

**REPORT IN BRIEF**

Downtown Sunnyvale Mixed Use LLC, a joint venture of RREEF and Sand Hill Property Company (Developer) is requesting a First Amendment to the Amended and Restated Disposition and Development and Owner Participation Agreement ("ARDDOPA"). The Council approved the ARDDOPA on February 6, 2007 with a modification on April 10, 2007 (to provide for environmental allocation and cost cap provisions based on the results of environmental testing).

The Developer is requesting three amendments to the ARDDOPA. First, the Developer is requesting a small reduction in the number of residential units required to be completed as part of the definition of the "Minimum Project TIF Date" from 200 units to 198 units.

Second, the Developer is requesting to modify the provision of the ARDDOPA that currently requires that all residential condo units be for-sale units only. Based on recent changes in the economy and for-sale housing market, the Developer is requesting a modification that will allow for the sale of a majority of the residential units to be phased in over a five year period, based on sound residential marketing practices.

Third, the Developer is requesting a modification of ARDDOPA Milestone 4 requiring the completion of 150,000 square feet of retail shell space and delivery to retail tenants on March 30, 2009. The Developer has met or exceeded all ARDDOPA milestones to date. The Developer has recently informed the Agency that the unprecedented economic situation over the last few months, and the anticipated economic situation in early 2009, has impacted the retail leasing market significantly. The Developer informed the Agency that despite best efforts at getting retail tenants to commit to retail

leases for spring and fall 2009, retailers are declining to commit to expansion and new leases until the economic situation stabilizes. Accordingly, the Developer is requesting a modification of Milestone 4 to require the completion of the Minimum Project retail shell space as currently scheduled on March 30, 2009 (with the exception of the building skin which will be constructed with the retail tenant improvements) and the delivery of 110,000 square feet of retail space to tenants on or before December 31, 2009 and delivery of an additional 40,000 square feet of retail space on or before March 31, 2010.

The Agency and Developer have negotiated to develop acceptable language for these proposed amendments. Staff recommends approval of the Resolution authorizing the First Amendment to the Amended and Restated Disposition and Development and Owner Participation Agreement with Downtown Sunnyvale Mixed Use LLC (RREEF and Sand Hill Property Company) to 1) modify the definition of the "Minimum Project TIF Date" to require 198 residential units instead of 200; 2) allow up to 148 rental units for a maximum of five years subject to specified conditions to insure conversion to ownership housing; and 3) Amend Milestone 4 to Milestone 4(a) completion of retail shell space (except for building skin and storefront framing) for Minimum Project by March 30, 2009, 4(b)(1) commencement of delivery of 110,000 square feet of retail shell space to retail tenants by December 31, 2009, and 4(b)(2) delivery of an additional 40,000 square feet of retail shell space by March 31, 2010.

The final item is for information only and pertains to the overall underground parking requirement for the project and Block 6 parking specifically. The ARDDOPA requires "approximately 1112 spaces which will be underground..." Due to soil contamination issues in Block 6, the Developer was not able to fully excavate the site in that area although there is significant underground parking. There is a ramp leading to the underground parking and standard practice is to count only the spaces that are below grade, 50%, toward the underground parking requirement. With this calculation, the number of underground spaces is 1,101. This is 99% of the "approximately 1112 spaces" required and is brought to the Council for information only on compliance with the ARDDOPA underground parking requirement. Although underground parking was deleted on Block 6, on September 22, 2008, the Sunnyvale Planning Commission approved a modification to the Block 6 parking structure to permit an additional level (fifth level) of above ground parking, if required after the Town Center opens. The proposed new level includes approximately 250 additional spaces.

## **BACKGROUND**

On February 6, 2007, the City Council approved the ARDDOPA with Downtown Sunnyvale Mixed Use LLC, a joint venture of RREEF and Sand Hill Property Company (Developer) (RDA 07-001). The ARDDOPA is the legal agreement

between the Redevelopment Agency and Downtown Sunnyvale Mixed Use LLC which provides for the redevelopment of Block 18 of the Downtown Specific Plan. It provides the mechanism for property transfers between the Agency and the developer, for construction by the developer of specified public and private improvements which constitute the project, and for certain payments to the developer to support the construction of the public improvements.

On April 10, 2007 the Agency approved the first modification to the ARDDOPA allowing for environmental cost sharing provisions to be incorporated into the ARDDOPA based on the environmental test results (RDA 07-004).

The ARDDOPA provides for the amendment or modification of the agreement by a written instrument signed by the Agency and Developer.

On November 7, 2008, the Agency Executive Director received a formal request from the Developer for amendments to the ARDDOPA, based on Agency-Developer discussions and negotiations taking place in September and October, 2008 (Attachment A). Preliminary negotiations were held, as required by law, in confidential closed session.

## **EXISTING POLICY**

### **Implementation Plan, Sunnyvale Central Core Redevelopment Project:**

**Goal 1** Meet the Agency's Existing Financial and Administrative Obligations.

Objective 1.5 Continue to invest in downtown and encourage and nurture private investment in commercial developments.

**Goal 2** Establish the downtown as the cultural, retail, financial and entertainment center of the community, complemented by employment, housing and transit opportunities.

Objective 2.1 Establish a 24-hour downtown with Class A office buildings around a vibrant retail district with easy parking and public transportation and easy access from a variety of housing types.

Objective 2.2 Continue public/private partnerships in the development of office, retail, housing, hotel and open space facilities.

Objective 2.3 Create a unique shopping, dining, entertainment experience in Downtown, combining new restaurants with small

shops, major retail stores and theatre with easy, available parking and strong pedestrian connections to other parts of the Downtown.

**Goal 3** Implement Specific Actions such as the Provisions of Public Improvements in an attractive and cohesive physical form, which clearly identifies Sunnyvale's downtown.

Objective 3.2 Complete priority streetscape projects to facilitate an attractive pedestrian environment and to promote development on adjacent parcels.

**Goal 4** Development and implementation of an overall parking strategy that meets the needs of retail, office, housing and visitor demand.

Objective 4.1 Implement overall parking strategy that optimizes parking use based on office, retail, and entertainment peaks.

Objective 4.2 Replace existing public parking as required.

**Goal 5** Increase housing opportunities.

Objective 5.2 Encourage mixed housing consisting of market rate and affordable housing in appropriate locations on transit corridors in or near the downtown.

**Downtown Specific Plan:**

**Goal B** Establish the Downtown as the cultural, retail, financial and entertainment center of the community, complemented by employment, housing and transit opportunities.

Policy B.3. Improve the Town Center area by reinforcing connections into and through the mall and improve the quality of the tenant mix and the mall's physical environment

**Land Use and Transportation Element:**

*Action Statement C1.2.1* Promote Downtown as a unique place that is interesting and accessible to the whole City and the region.

Policy N1.12 Permit more intense commercial and office development in the downtown, given its central location and accessibility to transit

*Action Statement N1.12.1* Use the Downtown Specific Plan to facilitate the redevelopment of downtown.

**Socio-Economic Element:**

**Goal 5.1C** Endeavor to maintain a balanced economic base that can resist downturns of any one economic sector

Policy 5.1C. Support efforts to establish Sunnyvale's downtown area as a strong commercial center for the City.

**Community Development Strategy Goals:**

**Tax Base:** To retain and attract businesses which will provide a stable tax base to support City services

**Retail**

**Services:** To retain and attract businesses which provide a variety of needed retail services for our residents at locations which are convenient for them.

**DISCUSSION**

The ARDDOPA, which provides the terms of the relationship between the Agency and Developer, can be amended by written agreement of the parties. The Developer is requesting several amendments to the ARDDOPA. The Developer is currently in compliance with all of the ARDDOPA requirements and milestones. However, the ARDDOPA was negotiated prior to actual construction of the Project and the Developer is stating that the availability of information from the on-site construction requires some minor changes to the ARDDOPA. In addition, the recent and ongoing developments in the global and U.S. financial markets over the last several months in 2008 have, according to the Developer, had a significant effect on the retail leasing markets and the Developer is requesting a modification of Milestone 4 in the ARDDOPA to respond to changes beyond its control in the retail leasing market resulting from the current economic situation.

**Change in Residential Units for Minimum Project TIF Date**

The Developer is requesting a reduction in the required number of residential units to be completed as defined in the "Minimum Project TIF Date" from 200 units to 198 units. The Developer requests that the definition of the "Minimum Project TIF Date" (Section 1.01 (tt)) be revised to reduce the required number of residential units from 200 to 198. The Minimum Project TIF Date defines the minimum project that needs to be constructed before the Developer is eligible for payments of tax increment from the increase in the assessed value of the project over the established base. The complete definition is listed as follows:

*"Minimum Project TIF Date" means the date on which last of the following have occurred: (i) the City issuing a certificate of occupancy for the Minimum Public Improvements, (ii) completion of the shell for a minimum of three hundred thousand square feet (300,000) of the retail portion of the Project, as evidenced by final City building permit and inspection, (iii) the City issuing a certificate of occupancy*

*for at least two hundred (200) of the residential units in the residential portions of the Project, (iv) the Redwood Plaza Area (referred to as "Redwood Square" in the City Approvals) and (v) completion of the shell for a minimum of one hundred thirty thousand (130,000) square feet of the office portion of the Project, as evidenced by final City building permit inspection and approval (emphasis added).*

The intent of the Minimum Project TIF Date was to ensure that a substantial amount of the development would be completed prior to starting the annual payments to the Developer. Currently nine retail buildings are under construction totaling 262,208 square feet. Although this is less than the 300,000 square feet required for the minimum TIF project, building permits have been issued on 13,313 square feet of retail space in Buildings G & G1, and permits have been approved and are ready for issuance on another 38,127 square feet of retail space in Building N for a total of 313,648 square feet. Additionally, two office building totaling 279,773 square feet (exceeding the 130,000 required in the minimum TIF project) and three residential buildings containing 198 units total are under construction.

**Retail SF Under Construction and Approved Retail Permits**

Building #	SF.
A	17,059
C	17,088
D	15,702
E	43,425
F	36,691
H	23,650
I	25,551
J	51,040
L	32,002
G & G1	13,313
N	38,127
<b>Total</b>	<b>313,648</b>

**Residential Units Under Construction**

Building #	SF.
A	139,901
B	139,872
<b>Total</b>	<b>279,773</b>

**Office SF Under Construction**

Building #	Units
D	50
E	74
F	74
<b>Total</b>	<b>198</b>

The Developer states that the 200 units was negotiated as the best estimate of what the final design would be for a substantial portion of the residential units, but that upon actual design and construction of the units 198 rather than 200 units was the maximum they could obtain without making undesirable modifications to the residential unit plans. Accordingly, the Developer is requesting that the definition of Minimum Project TIF Date be amended to require 198 residential units instead of 200.

**Phased sale of residential units**

The Developer is requesting an amendment to the ARDDOPA that would allow for the sale of the residential units to be phased in over a five year period.

Out of the 198 for-sale residential units being constructed and mapped for condominiums in the first phase of the development (Buildings D, E, and F) the Developer is requesting a maximum of 148 units to be made available as rental units for a period of up to five years from the date that the first residential unit is made available for sale. Section 3.01(a)(3) of the ARDDOPA provides the description requiring the development of ownership units defined as "for-sale residential units mapped for condominiums".

The Developer states that the request is in response to the current market environment in the mortgage and credit industries that has limited qualified buyers and market interest in condo sales. The Developer states that its analysis shows the projected market has a maximum absorption rate for the sale of residential units at approximately four units per month. That assumption would leave two-thirds of the available units vacant at the end of the first year with only 50 residential units being sold. At that absorption rate, it would take nearly four years to sell out the first phase.

The Developer would initially offer the 50 units in Building D located on Washington Avenue for sale. Eight of the 50 initial for-sale units that were identified in the Developer Agreement recorded with the Housing Division will be sold as Below Market Rate (BMR) ownership units.

As a negotiated trade-off for allowing the use of rental units, the Developer will be required to pay an annual in-lieu fee equivalent to the difference between the market rent and the established BMR rent for 15% of the units designated as rental units. This avoids the possibility of displacing BMR renters when the units are converted for sale. The Developer will designate which units will be rented for the upcoming calendar year starting when the first residential unit is made available for sale. As the designated rental units are made available for sale within the five year period, the Developer will be obligated to comply with the approved Developer Agreement identifying specific units as BMR ownership units. Rental units identified as BMR ownership units after the rental period must be rehabilitated to "as-new" condition, including upgrading and replacement if necessary, prior to occupancy of the new BMR owner. The sales prices are to remain as they were originally established per the City's BMR Program Guideline and as recorded in the Developer Agreement on May 23, 2008.

The Developer has also agreed to conditions on any condo rentals, including limiting rental periods of one year, conversion of 50% of the rental units to ownership no later than 12 months before the expiration of the 5-year rental period and 6 months prior for the remaining 50% of the rental units. The Developer also has agreed to address any complaints from tenants resulting

from the conversion and to offer the for-sale units to current rental tenants at a 5% discount from the current market price.

#### **Modification of Milestone 4 - Retail Shells Completion and Delivery**

On November 7, 2008, the Agency Executive director received a written request from RREEF and Sand Hill Property Company to amend Milestone 4 in the ARDDOPA for completion and delivery of the retail shells. The Milestones were negotiated as part of the ARDDOPA to provide for liquidated damages in the event that certain construction milestones were not met. All ARDDOPA Milestones to date have been completed in advance of the due date. Milestone 1 for commencement of excavation and demolition was due October 15, 2007 and the Developer met it on April 25, 2007. Milestone 2 for substantial completion of excavation and demolition for the Minimum Project was due December 31, 2007 and was met on August 15, 2007. Milestone 3 for topping out of structural systems for building shells for Minimum project due December 31, 2008 was met on October 17, 2008.

The remaining ARDDOPA Milestone related to liquidated damages is Milestone 4 for delivery of shell space to retail tenants for the Minimum Project, due March 30, 2009. As written in the ARDDOPA, Milestone 4 requires both sign-off on the retail shell permits and commencement of delivery of shell space to retail tenants. At the time the ARDDOPA was negotiated in February 2007, there was no hint of the current financial crisis and the Developer states that retail tenants were pushing for immediate occupancy of retail shells. Unfortunately, the current financial crisis and economic downturn appears to have had a serious impact on retail leasing. The Developer states that despite its best efforts, the financial crisis has resulted in a pullback of retailer's plans for immediate expansion in early 2009 and willingness to take delivery and commence tenant improvements in March, 2009. Accordingly, the Developer is requesting that Milestone 4 be divided into Milestone 4(a) and Milestone 4(b)(1) and 4(b)(2). Milestone 4(a) would remain as set in the ARDDOPA for March 30, 2009 and would require the Developer to continue to meet the portion of the Milestone within its control - completion of the retail shells for the Minimum Project except for the building skin and storefront framing. Milestone 4(b)(1) the requirement of commencement of delivery of the retail shell space to tenants, would be extended to December 31, 2009 for 110,000 square feet of retail space and Milestone 4(b)(2) for delivery of an additional 40,000 square feet of retail would be extended to March 31, 2010. Completion of the building skin and storefront framing would be deferred to these later dates.

The Agency has the legal option of enforcing the liquidated damages provision in the ARDDOPA on March 30, 2009. However, the economic losses to the Developer from completing residential units or retail space when there is no

market would significantly exceed the amount of liquidated damages. Moreover, the long-term success of the project is dependent, in part, on a cooperative partnership between the Developer and Agency in responding to unanticipated changes in the national economy that no one anticipated at the time the ARDDOPA was negotiated in early 2007.

The ARDDOPA stipulates milestone dates for delivery of the defined Minimum Project consisting of 150,000 square feet of retail space, 130 residential units, 130,000 square feet of office space, and supporting parking, infrastructure, and public improvements. It does not stipulate milestone dates for delivery of the entire approved project. Under construction currently is a significantly larger project than the Minimum Project. Additionally, the Developer has indicated their desire and commitment to complete the entire project by the end of the calendar year 2010.

#### **Information Only - Underground Parking/Block 6 Parking**

The ARDDOPA requires "approximately 1112 spaces which will be underground..." The Developer originally requested credit for all parking spaces on the ramp leading to the underground parking on Block 6. Standard parking calculation practice, however is to count only the spaces that are below grade, 50%, toward the underground parking requirement. With this calculation, the number of underground spaces is 1,101. This is 99% of the "approximately 1112 spaces" required by the ARDDOPA. Due to soil contamination issues in Block 6, the Developer was not able to fully excavate the site in that area. Although there is significant underground parking, and the 1,101 spaces is in compliance with the "approximately 1112 spaces" required by the ARDDOPA, this final underground parking count is brought to the Council for its information in view of the Council's interest in underground parking. Although the underground parking on Block 6 was deleted, a fifth level of above ground parking was approved by the Planning Commission on September 22, 2008 that added approximately 250 parking spaces.

The developer has stated the reason for the additional parking level is a result of final negotiations with Macy's. During these negotiations it became evident that Macy's wanted the potential for additional parking spaces within proximity of their store. Macy's fundamental concern is that the Downtown Sunnyvale project will be highly successful and parking may not be sufficient for its customers. Macy's and the developer have agreed that the additional level may not be necessary to construct at the time the development is opened but could be necessary at a future date. The additional level will be built only if there is a documented shortage of parking in the development.

## **FISCAL IMPACT**

During the five-year period, the delayed sale of the 148 residential units may negatively impact the assessed valuation. Based on information from the County Assessor, staff estimates the assessed value could be approximately one-third less with a mix of for-sale and rental units than with all for-sale units for the first year. This is because the assessed value of rental units is calculated based on rental income not on the cost of the units. As the rental units are sold, the assessed values will increase to the sale price of each unit. Market conditions will determine how quickly the assessed values will rise. Because the Developer receives the first \$4.5 million in tax increment revenue and 50% after the \$4.5 milestone is reached in accordance with the ARDDOPA, the impact of the reduced assessed valuation is largely borne by the developer until the first \$4.5 million is reached. When the Agency begins to participate in the annual revenue above the \$4.5 million, the fiscal impact to the Agency is estimated to be around \$330,000 total over the five year period based on assessed value projections in the City's adopted budget. Additionally, the City's General Fund Long Term Financial Plan would experience a \$1 million loss in net new sales tax revenue with Milestone 4(b) delivering the retail shell space to tenants one year later.

## **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 Resolution authorizing the First Amendment to the Amended and Restated Disposition and Development and Owner Participation Agreement with Downtown Sunnyvale Mixed Use LLC (RREEF and Sand Hill Property Company) to 1) modify the definition of the "Minimum Project TIF Date" to require 198 residential units instead of 200; 2) allow up to 148 rental units for a maximum of five years subject to specified conditions to insure conversion to ownership housing; and 3) Amend Milestone 4 to Milestone 4(a) completion of retail shell space (except for building skin and storefront framing) for Minimum Project by March 30, 2009, 4(b)(1) commencement of delivery of 110,000 square feet of retail shell space to retail tenants by December 31, 2009, and 4(b)(2) delivery of an additional 40,000 square feet of retail shell space by March 31, 2010.

2. Accept Information Only report on underground parking count.
3. Approve Resolution with modifications authorizing the First Amendment to the Amended and Restated Disposition and Development and Owner Participation Agreement with Downtown Sunnyvale Mixed Use LLC (RREEF and Sand Hill Property Company).
4. Do not approve the Resolution authorizing the First Amendment to the Amended and Restated Disposition and Development and Owner Participation Agreement with Downtown Sunnyvale Mixed Use LLC (RREEF and Sand Hill Property Company).

### **RECOMMENDATION**

Staff recommends Alternatives 1 and 2: Approve Resolution authorizing the First Amendment to the Amended and Restated Disposition and Development and Owner Participation Agreement with Downtown Sunnyvale Mixed Use LLC (RREEF and Sand Hill Property Company) to 1) modify the definition of the "Minimum Project TIF Date" to require 198 residential units instead of 200; 2) allow up to 148 rental units for a maximum of five years subject to specified conditions to insure conversion to ownership housing; and 3) Amend Milestone 4 to Milestone 4(a) completion of retail shell space (except for building skin and storefront framing) for Minimum Project by March 30, 2009, 4(b)(1) commencement of delivery of 110,000 square feet of retail shell space to retail tenants by December 31, 2009, and 4(b)(2) delivery of an additional 40,000 square feet of retail shell space by March 31, 2010.

The modification from 200 to 198 residential units completed for the Minimum TIF Project Date reflects the design and construction realities of building primarily more desirable two-bedroom units and does not significantly change the Project.

Staff believes that it is in the best interest of the Project and its merchants to have the residential units fully occupied as soon as possible after completion. By offering 148 of the residential units for rent for no more than 5 years, it is more likely in the current condo housing market that all of the completed residential units will be occupied before the end of the initial 12 months after the Project opens.

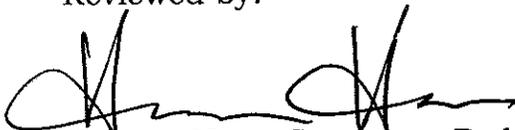
Amending Section 3.01(3) will provide flexibility by allowing for up to 148 rental units for a maximum period of five years. The Developer will be required to make annual in-lieu fee payments pertaining to the rental units that will be calculated at 15% for the remaining rental units each year. The BMR requirement for for-sale units will remain at 12.5% for the entire project. However, the Developer will offer eight BMR units to be sold with the first 50

units which is equivalent to 16% in the first year. This modification to the agreement allows the Developer to respond to a potentially slow for-sale market next year, but will not prohibit the units from being placed on the for-sale market as quickly as the market will bear.

At the conclusion of the five-year period, Developer will have offered every one of the 148 units for sale, including the BMR units per the Downtown Sunnyvale Mixed Use BMR Conditions of Approval as executed on February 6, 2007.

The current financial crisis and its impact on the nation's economy and retail leasing situation could not have been anticipated by the Agency or Developer at the time the ARDDOPA was negotiated in 2006 and 2007. Recent financial news and earnings reports from national retailers confirm that the economic downturn is real and severe and some flexibility is required to continue to make the project successful in view of the changing economic climate. The Developer will continue to meet the portion of Milestone 4 within its logistic and economic control - completion of the Minimum Project retail shell space, except for the building skins and storefront framing, by the original ARDDOPA date of March 30, 2009 as Milestone 4(a). The requirement for delivery of the retail shell space will be amended to Milestone 4(b)(1)- delivery of 110,000 square feet of retail space by December 31, 2009 and Milestone 4(b)(2)- delivery of additional 40,000 square feet of retail space by March 31, 2010. to allow for anticipated economic recovery and stabilization of the retail leasing market. Staff has determined that the Developer has met or exceeded all ARDDOPA Milestones within its control and in fact has accelerated the construction of the Project substantially beyond the Minimum Project required in the ARDDOPA. Staff concludes it is in the best interest of the Agency and the Project to revise Milestone 4 to reflect the current financial and retail leasing crisis that was unpredictable at the time of ARDDOPA negotiation, provides for the continued completion of the Project with a modified timetable, and continues to work with the Developer in meeting Agency goals for the Project consistent with the unfortunate economic issues facing the country and city at this time.

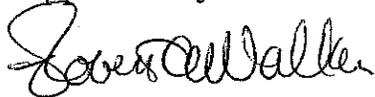
Reviewed by:



Hanson Hom, Secretary, Redevelopment Agency

Prepared by: Brice McQueen, Manager, Redevelopment Agency

Approved by:



for Amy Chan  
Executive Director, Redevelopment Agency

**Attachments**

- A. Letter from Sand Hill Property Company, November 7, 2008
- B. First Amendment to Amended and Restated Disposition and Development and Owner Participation Agreement with Downtown Sunnyvale Mixed Use LLC (RREEF and Sand Hill Property Company)
- C. Resolution authorizing the First Amendment to the Amended and Restated Disposition and Development and Owner Participation Agreement with Downtown Sunnyvale Mixed Use LLC (RREEF and Sand Hill Property Company)

**ATTACHMENT A**

Letter from Sand Hill Property Company dated November 7, 2008

SAND HILL PROPERTY COMPANY

Ms. Amy Chan  
City Manager  
City of Sunnyvale  
456 Olive Avenue  
Sunnyvale, California 94086

November 7, 2008

Dear Ms. Chan,

Downtown Sunnyvale Mixed Use, LLC ("Developer") is pleased to submit this formal request for several amendments to the ARDDOPA dated 7 February 2007 as follows:

1. Reduction from 200 to 198 residential units in the Definition of Minimum Project TIF date Section 1.1(tt)

The parameters determining the "Minimum Project TIF Date" were established in February of 2007, prior to the final approval of the residential building designs. With respect to residences, the number of residential units that need to be completed to meet the minimum as currently defined is 200. After several iterations with inputs from Developer and City Staff, the final plans as approved reflect sound interior space utilization, while maintaining the architectural features consistent with those of a first class mixed-use downtown. The resultant approved plans for buildings D, E, and F, have a total of 198 residential units, comprised mostly of two-bedroom homes, which are more in demand and will result in higher occupancy rates much faster. In order to meet the current minimum of 200 units, we would need to redesign and split several two-bedroom units into one-bedroom units, resulting in an awkward and less than optimal design. The current number of 198 residential units is well above the "Minimum Project" number of 130 units as required by the ARDDOPA. We are therefore requesting a change in the definition of the "Minimum Project TIF Date" from a minimum of 200 to 198 residential units, consistent with the final approved and permitted plans.

2. Residential units – change from "For Sale Only" to option for temporary Rental

A first class mixed-use downtown, such as Downtown Sunnyvale, relies on the interdependency of the various elements of the project, i.e. Office, Retail and Residential. Occupancy of the residential units contributes to the success of the retail portions. In today's economic climate, demand for condominiums is very weak and financing for the few home seekers who are in the market to buy is difficult to obtain. In order to facilitate occupancy of the residences, Developer is requesting that it be allowed, subject to the

terms outlined in the Attachment, the option to rent out 148 units as market rate rental units for up to a period of 5 years, starting from the day the first residential unit is made available for sale. Developer will pay an annual in-lieu fee equivalent to the difference between the market rent and the established BMR rent for fifteen percent of the units designated for rent in that upcoming year. As the designated rental units are made available for sale within the 5-year period, Developer will comply with the Developer Agreement identifying specific units as BMR ownership units. Rental units identified as BMR Ownership units shall be rehabilitated to "as-new" condition prior to occupancy by the new BMR owner. In addition, Developer agrees to implement several measures to alleviate potential concerns the City Council may have on this rental option, including addressing complaints by tenants, if any, resulting from the conversion of rental units to ownership units, offering each then-current tenant the opportunity to buy their specific unit at a discount from market pricing prior to offering that unit to the general marketplace, limiting lease terms, and allowing an orderly phase out, the details of which are in the attached proposed amendment.

### 3. Re-definition of Construction Milestone 4 to Milestone 4(a), 4(b)(1), and 4(b)(2)

As currently stated in the ARDDOPA Section 5.02, Milestone 4 is described as "Delivery of shell space to retail tenants for the Minimum Project". This is further elaborated as follows: "Delivery of shell space will be considered completed when the shell permit has been signed off by the City as complete (excluding PG&E) and shell space has been delivered to retail tenants".

The retail leasing market has continued to deteriorate since late 2007, reflecting the turmoil in our nation's financial markets. In fact, as of last month retail sector share value loss has outpaced that of the Dow Jones Industrial Average over the last 12 months (-43.5% to -39.4%, respectively). In Santa Clara County, shopping center vacancy has risen through the first two quarters of 2008, with the expectation that, when released, the third quarter data will show a continuing trend. With respect to our project, while we have a capable retail leasing team in place (comprised of five firms, two specializing in national retail, one specializing in regional/local retail, one specializing in retail tenant construction coordination, and one specializing in the development and implementation of our overall project brand), we have not been able to alter the fact that most retailers have stopped plans for 2009 new store openings. That said, retailers have expressed confidence in a 2010 economic recovery for Sunnyvale and have indicated a willingness to pursue 2010 store openings. For this reason, Developer requests the breakdown of Milestone 4 into three parts, 4(a), 4(b)(1) and 4(b)(2). Milestone 4(a) will be the availability of retail shell space for the Minimum Project for beneficial occupancy and Milestones 4(b)(1) and 4(b)(2) represent the substantial completion of the shell space for retail tenants in two phases: that for the first 110,000 square feet of shell space of new buildings for retail use and that for the Minimum Project.

Developer has proceeded with construction in the spirit of the ARDDOPA and has diligently pursued every Construction Milestone as committed. Milestones 1 and 2 were easily met ahead of time and Milestone 3 was achieved by October 31<sup>st</sup>, fully 2 months

ahead of the December 31, 2008 Milestone 3 Date. Milestone 4(a) as proposed will be achieved by the original Milestone 4 Date of March 30, 2009 with the completion of retail shell space in excess of the Minimum Project requirement. For reasons related to the economic crisis as discussed above, Developer requests that Milestone 4(b) be broken into two phases and amended to Milestone dates of December 31, 2009 and March 31, 2010.

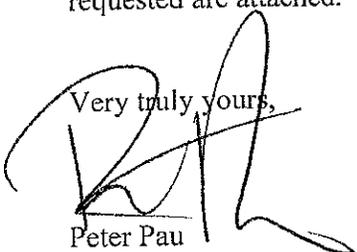
We would also want to take this opportunity to address some speculation surrounding our project, given the economic abyss we are all facing.

First, we have been mostly funding the construction of the project internally. The credit crisis is a significant factor in real estate, and a lot of projects have been curtailed, delayed or shut down due to lack of financing. In our case, while we would like to be able to secure lower cost debt financing at some time, we do not require a construction loan in order to continue. So we are one of the rare large scale projects in the entire county to still be active. The recession is bigger than any of us, and we have to be prudent and will have to continue to adjust our product type and schedule for changing market conditions (for example, this request, and our new request to increase the office footage), but as people can plainly see, construction has not been suspended. Under our current schedule, we expect to start delivering buildings in late 2009 (coinciding with Target's re-opening) and substantially complete the entire project by late 2010. The exceptions may be several pieces that are still in design development, such as residential on Iowa, Building B in Block 1, and the hotel related construction, and those will be scheduled as soon as we finalize the plans and necessary approvals.

Second, RREEF is indeed a wholly owned subsidiary of a bank (Deutsche), which may be a scary notion to some uninformed people. However, the source of funding for this project is from a REIT (RREEF American REIT III). The REIT is an open ended funded that owns 93 investments with a total market value of \$3.8 billion. RREEF is the manager of the fund but not the provider of the capital, nor is Deutsche.

The suggested ARDOPPA language changes reflecting the ARDDOPA amendments requested are attached.

Very truly yours,

  
Peter Pau

Attachment: *Proposed Second Amendments to ARDDOPA*

**ATTACHMENT B**

First Amendment to  
Amended and Restated Disposition, Development  
And Owner Participation Agreement

**FIRST AMENDMENT TO  
AMENDED AND RESTATED DISPOSITION, DEVELOPMENT  
AND OWNER PARTICIPATION AGREEMENT**

THIS FIRST AMENDMENT is dated as of November 18, 2008, and is an amendment to the Amended and Restated Disposition and Development and Owner Participation Agreement (ARDDOPA) dated February 6, 2007, by and between the Sunnyvale Redevelopment Agency (Agency), a public body, corporate and politic, and Downtown Sunnyvale Mixed Use LLC, a Delaware Limited Liability company (Developer).

WHEREAS, on February 6, 2007, the Agency adopted Resolution No. 114-07-RA approving the Amended and Restated Disposition and Development and Owner Participation Agreement the by and between the Agency and Developer, and on April 10, 2007, adopted Resolution No.118-07-RA approving the First Modification to the ARDDOPA; and

WHEREAS, design considerations and on-site construction considerations, and sound interior space utilization and maintenance of approved architectural features result in 198 residential units rather than 200 for the three residential buildings that are part of the Minimum Project TIF Date; and

WHEREAS, the Developer states that unanticipated changes in the housing and credit markets in late 2008 as a result of a downturn in the national economy will make it extremely difficult to market 198 for-sale units at the time of Project opening in 2010, and renting 148 units for a maximum period of 5 years with subsequent conversion to rental housing will provide flexibility in obtaining full occupancy of the residential units which is important to a successful mixed-use project, and Developer will pay in-lieu fees for BMR housing until the units are converted to ownership housing; and

WHEREAS, there have been unanticipated and unprecedented changes in the national economy in fall 2008 that have adversely affected the retail leasing market and the ability of the Developer to obtain retail lease commitments for 2009 but the Developer states that retailers are anticipating an economic recovery in 2010 and the willingness to pursue 2010 store openings;

NOW THEREFORE the Agency and Developer agree that the ARDDOPA shall be amended to read as follows:

**ARTICLE 1.  
DEFINITIONS AND EXHIBITS**

**1.01 Definitions.**

(a) – (ss) [Text unchanged.]

(tt) "Minimum Project TIF Date" means the date on which last of the following have occurred: (i) the City issuing a certificate of occupancy for the Minimum Public Improvements, (ii) completion of the shell for a minimum of three hundred thousand square feet (300,000) of the retail portion of the Project, as evidenced by final City building permit and inspection, (iii) the City issuing a certificate of occupancy for at least ~~two hundred (200)~~ one hundred ninety-eight of the residential units in the residential portions of the Project, (iv) the Redwood Plaza Area (referred to as "Redwood Square" in the City Approvals), and (v) completion of the shell for a

minimum of one hundred thirty thousand (130,000) square feet of the office portion of the Project, as evidenced by final City building permit inspection and approval.

[Remainder of text of Article 1 unchanged.]

ARTICLE 2.  
INITIAL PROPERTY ACTIVITIES.

[Text unchanged]

ARTICLE 3.  
DEVELOPER PREDEVELOPMENT ACTIVITIES

3.01 Description of the Proposed Project.

The Developer desires to undertake the Project consisting of the demolition of the existing improvements on the Private Improvement Parcels and the Public Improvement Parcels (except for the Penney's Structure which will remain) and replacement of those improvements with a new mixed-use development consisting of:

(a) The Private Improvements which include:

(1) – (2) [Text unchanged.]

(3) approximately 292 for-sale residential units mapped for condominiums, of which a maximum of 148 units may be made available as rental units ("Rental Units") for a period of up to 5 years from the date that the first residential unit is made available for sale (the "For-Rent Expiration Date"), where the process of converting the Rental Units back to for-sale units shall begin no later than (i) twelve (12) months prior to the For-Rent Expiration Date for fifty per cent (50%) of the Rental Units and (ii) six (6) months prior to the For-Rent Expiration Date for the remaining Rental Units (collectively, the "For-Sale Conversion"). The commencement of any new leases or rental agreements for any of the Rental Units ("Rental Units' Leases") during the above-stated conversion periods would be prohibited for any of the Rental Units within said conversion periods. The Rental Units' Leases shall be for a specified term, which shall in no event be greater than one (1) year, and shall clearly delineate that no period of holdover by tenants or occupants of the Rental Units shall be permitted; by way of example, a tenancy of two (2) years would require an initial lease with a term of one (1) year followed by a renewal of said lease with a term one (1) additional year. Developer shall agree in good faith (i) to address any complaints from tenants of the Rental Units regarding the For-Sale Conversion and (ii) to offer each applicable for-sale residential unit first to its then-current tenant at a price five per cent (5%) below market price at the time of the For-Sale Conversion of the particular unit. In addition, Developer will pay an annual in-lieu fee equivalent to the difference between market rent and the established BMR rent for fifteen percent (15%) of the units designated for rent in the upcoming year. As designated rental units are made available for sale within the 5-year period, Developer will comply with the Developer Agreement identifying specific units as BMR ownership units. Rental units identified as BMR Ownership Units shall be in "as-new" condition prior to occupancy by the BMR owner.

[Remainder of text of Article 3 unchanged.]

ARTICLE 4.  
PROPERTY TRANSACTIONS

[Text unchanged.]

ARTICLE 5.  
CONSTRUCTION OF IMPROVEMENTS

5.01 [Text unchanged.]

5.02 Completion of the Improvements.

Developer shall proceed diligently to complete the Minimum Project in accordance with the Construction Schedule attached as Exhibit T. In addition, Developer agrees to achieve completion of the following milestones by the date specified.

Milestone	Description	Date	Additional Notes
Milestones 1 – 3 [Text unchanged.]			
Milestone 4	Delivery of shell space to retail tenants for the Minimum Project	March 30, 2009	Delivery of shell space will be considered completed when the shell permit has been signed off by the City as complete (excluding PG&E) and shell space has been delivered to retail tenants.
Milestone 4(a)	<u>Structural completion of shell space for retail tenants for the Minimum Project</u>	<u>March 30, 2009</u>	<u>Substantial completion of retail shell space, except for PG&amp;E permanent electrical service and tenant storefronts, related vertical and horizontal tenant façade improvements and interior tenant improvements</u>
Milestone 4(b)(1)	<u>Delivery of 110,000 square feet of retail shell space to retail tenants</u>	<u>December 31, 2009</u>	<u>Delivery of retail shell space as completed in Milestone 4(a) in condition ready for tenant storefronts, related vertical and horizontal tenant façade improvements and interior tenant improvements</u>
Milestone 4(b)(2)	<u>Delivery of 40,000 square feet of retail shell space to retail tenants, which shall satisfy the retail portion of the Minimum Project</u>	<u>March 31, 2010</u>	<u>Delivery of retail shell space as completed in Milestone 4(a) in condition ready for tenant storefronts, related vertical and horizontal tenant façade improvements and interior tenant improvements</u>

5.03 Liquidated Damages.

If the Project is not completed in accordance with the Construction Schedule attached as Exhibit T, the Agency and City will suffer loss of tax revenue that would be received if the project was timely completed. Because the parties recognize that these damages would be

difficult to calculate and have, therefore, agreed on the following as liquidated damages and not as penalties:

(a) – (c) [Text unchanged]

(d) If the Developer completes Milestone 4 (which is made up of parts 4(a), 4(b)(1), and 4(b)(2)) described in Section 5.02 above by the Milestone 4 Date, there shall not be any liquidated damages. However, if Developer fails to complete any part of Milestone 4 described in Section 5.02 above within sixty (60) days of ~~the~~ that particular part's Milestone 4 Date, Developer shall owe the Agency Eleven Thousand One Hundred Thirty-Three Dollars and Thirty-Four Cents (\$11,133.34) per day from such date until the earlier of one hundred and twenty (120) days from ~~the~~ that particular part's Milestone 4 Date or completion of that particular part of Milestone 4. If any part of Milestone 4 has not been completed within one hundred and twenty (120) days from ~~the~~ that particular part's Milestone 4 Date, the Developer shall pay City Five Thousand Five Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$5,566.67) per day from such date until completion of that particular part of Milestone 4, subject to a maximum amount owed hereunder of Five Million Dollars (\$5,000,000).

If the Developer owes liquidated damages to the Agency pursuant to subsections (a), (b) or (c) of this Section 5.03, but completes Milestone 4(b)(2) within sixty (60) days of the Milestone 4(b)(2) Date, then any amount owing under subsections (a), (b) or (c) of this Section 5.03 shall be cancelled.

[Remainder of text of Section 5.03 and Article 5 unchanged.]

WHEREFORE, the parties have executed this First Amendment to the Amended and Restated Disposition, Development and Owner Participation Agreement on the date first written above.

ATTEST:

SUNNYVALE REDEVELOPMENT AGENCY,  
a public body, corporate and politic

\_\_\_\_\_  
Agency Secretary

By: \_\_\_\_\_  
Amy Chan, Executive Director

APPROVED AS TO FORM:

\_\_\_\_\_  
Agency Counsel

DOWNTOWN SUNNYVALE MIXED USE, LLC,  
a Delaware Limited Liability Company

By \_\_\_\_\_  
Its Managing Member

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

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

**ATTACHMENT C**

A Resolution of the City of Sunnyvale Redevelopment Agency  
Approving the First Amendment to the Amended and Restated  
Disposition, Development And Owner Participation Agreement  
Between the Sunnyvale Redevelopment Agency and Downtown  
Sunnyvale Mixed Use LLC

**RESOLUTION No. \_\_\_\_-RA**

**A RESOLUTION OF THE CITY OF SUNNYVALE  
REDEVELOPMENT AGENCY APPROVING THE FIRST  
AMENDMENT TO THE AMENDED AND RESTATED  
DISPOSITION, DEVELOPMENT AND OWNER  
PARTICIPATION AGREEMENT BETWEEN THE  
SUNNYVALE REDEVELOPMENT AGENCY AND  
DOWNTOWN SUNNYVALE MIXED USE LLC**

WHEREAS, on February 6, 2007, the Agency adopted Resolution No. 114-07-RA approving the Amended and Restated Disposition and Development and Owner Participation Agreement by and between the Agency and Developer, and on April 10, 2007, adopted Resolution No.118-07-RA approving the First Modification to the ARDDOPA; and

WHEREAS, design considerations and on-site construction considerations, and sound interior space utilization and maintenance of approved architectural features result in 198 residential units rather than 200 for the three residential buildings that are part of the Minimum Project TIF Date; and

WHEREAS, the Developer states that unanticipated changes in the housing and credit markets in late 2008 as a result of a downturn in the national economy will make it extremely difficult to market 198 for-sale units at the time of Project opening in 2010, and renting 148 units for a maximum period of 5 years with subsequent conversion to rental housing will provide flexibility in obtaining full occupancy of the residential units which is important to a successful mixed-use project, and Developer will pay in-lieu fees for BMR housing until the units are converted to ownership housing; and

WHEREAS, there have been unanticipated and unprecedented changes in the national economy in Fall 2008 that have adversely affected the retail leasing market and the ability of the Developer to obtain retail lease commitments for 2009, but the Developer states that retailers are anticipating an economic recovery in 2010 and the willingness to pursue 2010 store openings;

WHEREAS, the First Amendment to the ARDDOPA is fully described in the staff report and attachments prepared for the hearing on this matter, held November 18, 2008, and set forth in the First Amendment to the ARDDOPA, attached to the staff report and a copy of which is incorporated herein by reference as Exhibit A;

NOW THEREFORE BE IT RESOLVED BY THE REDEVELOPMENT AGENCY OF THE CITY OF SUNNYVALE that the First Amendment to the ARDDOPA, as set forth in the staff report and attachment, is hereby adopted, and the Executive Director of the Agency or her/his designee is authorized to execute on behalf of the Agency the First Amendment to ARDDOPA, subject to such minor changes to the First Amendment as the Executive Director and her/his designee and the Agency General Counsel conclude are necessary and/or advisable.

Adopted by the Sunnyvale Redevelopment Agency at a regular meeting held on \_\_\_\_\_, by the following vote:

AYES:  
NOES:  
ABSTAIN:  
ABSENT:

ATTEST:

APPROVED:

\_\_\_\_\_  
Clerk, Redevelopment Agency

(SEAL)

\_\_\_\_\_  
Chair of the Redevelopment Agency  
of the City of Sunnyvale

APPROVED AS TO FORM AND LEGALITY:

By \_\_\_\_\_  
David E. Kahn  
Redevelopment Agency Counsel

**FIRST AMENDMENT TO  
AMENDED AND RESTATED DISPOSITION, DEVELOPMENT  
AND OWNER PARTICIPATION AGREEMENT**

THIS FIRST AMENDMENT is dated as of November 18, 2008, and is an amendment to the Amended and Restated Disposition and Development and Owner Participation Agreement (ARDDOPA) dated February 6, 2007, by and between the Sunnyvale Redevelopment Agency (Agency), a public body, corporate and politic, and Downtown Sunnyvale Mixed Use LLC, a Delaware Limited Liability company (Developer).

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NOW THEREFORE the Agency and Developer agree that the ARDDOPA shall be amended to read as follows:

**ARTICLE 1.  
DEFINITIONS AND EXHIB ITS**

**1.01 Definitions.**

(a) – (ss) [Text unchanged.]

(tt) "Minimum Project TIF Date" means the date on which last of the following have occurred: (i) the City issuing a certificate of occupancy for the Minimum Public Improvements, (ii) completion of the shell for a minimum of three hundred thousand square feet (300,000) of the retail portion of the Project, as evidenced by final City building permit and inspection, (iii) the City issuing a certificate of occupancy for at least ~~two hundred (200)~~ one hundred ninety-eight of the residential units in the residential portions of the Project, (iv) the Redwood Plaza Area (referred to as "Redwood Square" in the City Approvals), and (v) completion of the shell for a

minimum of one hundred thirty thousand (130,000) square feet of the office portion of the Project, as evidenced by final City building permit inspection and approval.

[Remainder of text of Article 1 unchanged.]

ARTICLE 2.  
INITIAL PROPERTY ACTIVITIES.

[Text unchanged]

ARTICLE 3.  
DEVELOPER PREDEVELOPMENT ACTIVITIES

3.01 Description of the Proposed Project.

The Developer desires to undertake the Project consisting of the demolition of the existing improvements on the Private Improvement Parcels and the Public Improvement Parcels (except for the Penney's Structure which will remain) and replacement of those improvements with a new mixed-use development consisting of:

(a) The Private Improvements which include:

(1) – (2) [Text unchanged.]

(3) approximately 292 for-sale residential units mapped for condominiums, of which a maximum of 148 units may be made available as rental units ("Rental Units") for a period of up to 5 years from the date that the first residential unit is made available for sale (the "For-Rent Expiration Date"), where the process of converting the Rental Units back to for-sale units shall begin no later than (i) twelve (12) months prior to the For-Rent Expiration Date for fifty per cent (50%) of the Rental Units and (ii) six (6) months prior to the For-Rent Expiration Date for the remaining Rental Units (collectively, the "For-Sale Conversion"). The commencement of any new leases or rental agreements for any of the Rental Units ("Rental Units' Leases") during the above-stated conversion periods would be prohibited for any of the Rental Units within said conversion periods. The Rental Units' Leases shall be for a specified term, which shall in no event be greater than one (1) year, and shall clearly delineate that no period of holdover by tenants or occupants of the Rental Units shall be permitted; by way of example, a tenancy of two (2) years would require an initial lease with a term of one (1) year followed by a renewal of said lease with a term one (1) additional year. Developer shall agree in good faith (i) to address any complaints from tenants of the Rental Units regarding the For-Sale Conversion and (ii) to offer each applicable for-sale residential unit first to its then-current tenant at a price five per cent (5%) below market price at the time of the For-Sale Conversion of the particular unit. In addition, Developer will pay an annual in-lieu fee equivalent to the difference between market rent and the established BMR rent for fifteen percent (15%) of the units designated for rent in the upcoming year. As designated rental units are made available for sale within the 5-year period, Developer will comply with the Developer Agreement identifying specific units as BMR ownership units. Rental units identified as BMR Ownership Units shall be in "as-new" condition prior to occupancy by the BMR owner.

[Remainder of text of Article 3 unchanged.]

ARTICLE 4.  
PROPERTY TRANSACTIONS

[Text unchanged.]

ARTICLE 5.  
CONSTRUCTION OF IMPROVEMENTS

5.01 [Text unchanged.]

5.02 Completion of the Improvements.

Developer shall proceed diligently to complete the Minimum Project in accordance with the Construction Schedule attached as Exhibit T. In addition, Developer agrees to achieve completion of the following milestones by the date specified.

Milestone	Description	Date	Additional Notes
Milestones 1 – 3 [Text unchanged.]			
Milestone 4	<del>Delivery of shell space to retail tenants for the Minimum Project</del>	<del>March 30, 2009</del>	<del>Delivery of shell space will be considered completed when the shell permit has been signed off by the City as complete (excluding PG&amp;E) and shell space has been delivered to retail tenants.</del>
<u>Milestone 4(a)</u>	<u>Structural completion of shell space for retail tenants for the Minimum Project</u>	<u>March 30, 2009</u>	<u>Substantial completion of retail shell space, except for PG&amp;E permanent electrical service and tenant storefronts, related vertical and horizontal tenant façade improvements and interior tenant improvements</u>
<u>Milestone 4(b)(1)</u>	<u>Delivery of 110,000 square feet of retail shell space to retail tenants</u>	<u>December 31, 2009</u>	<u>Delivery of retail shell space as completed in Milestone 4(a) in condition ready for tenant storefronts, related vertical and horizontal tenant façade improvements and interior tenant improvements</u>
<u>Milestone 4(b)(2)</u>	<u>Delivery of 40,000 square feet of retail shell space to retail tenants, which shall satisfy the retail portion of the Minimum Project</u>	<u>March 31, 2010</u>	<u>Delivery of retail shell space as completed in Milestone 4(a) in condition ready for tenant storefronts, related vertical and horizontal tenant façade improvements and interior tenant improvements</u>

5.03 Liquidated Damages.

If the Project is not completed in accordance with the Construction Schedule attached as Exhibit T, the Agency and City will suffer loss of tax revenue that would be received if the project was timely completed. Because the parties recognize that these damages would be

difficult to calculate and have, therefore, agreed on the following as liquidated damages and not as penalties:

(a) – (c) [Text unchanged]

(d) If the Developer completes Milestone 4 (which is made up of parts 4(a), 4(b)(1), and 4(b)(2)) described in Section 5.02 above by the Milestone 4 Dates, there shall not be any liquidated damages. However, if Developer fails to complete any part of Milestone 4 described in Section 5.02 above within sixty (60) days of ~~the~~ that particular part's Milestone 4 Date, Developer shall owe the Agency Eleven Thousand One Hundred Thirty-Three Dollars and Thirty-Four Cents (\$11,133.34) per day from such date until the earlier of one hundred and twenty (120) days from ~~the~~ that particular part's Milestone 4 Date or completion of that particular part of Milestone 4. If any part of Milestone 4 has not been completed within one hundred and twenty (120) days from ~~the~~ that particular part's Milestone 4 Date, the Developer shall pay City Five Thousand Five Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$5,566.67) per day from such date until completion of that particular part of Milestone 4, subject to a maximum amount owed hereunder of Five Million Dollars (\$5,000,000).

If the Developer owes liquidated damages to the Agency pursuant to subsections (a), (b) or (c) of this Section 5.03, but completes Milestone 4(b)(2) within sixty (60) days of the Milestone 4(b)(2) Date, then any amount owing under subsections (a), (b) or (c) of this Section 5.03 shall be cancelled.

[Remainder of text of Section 5.03 and Article 5 unchanged.]

WHEREFORE, the parties have executed this First Amendment to the Amended and Restated Disposition, Development and Owner Participation Agreement on the date first written above.

ATTEST:

SUNNYVALE REDEVELOPMENT AGENCY,  
a public body, corporate and politic

\_\_\_\_\_  
Agency Secretary

By: \_\_\_\_\_  
Amy Chan, Executive Director

APPROVED AS TO FORM:

\_\_\_\_\_  
Agency Counsel

DOWNTOWN SUNNYVALE MIXED USE, LLC,  
a Delaware Limited Liability Company

By \_\_\_\_\_  
Its Managing Member

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

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