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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SANTA MONICA COALITION FOR A LIVABLE CITY, a nonprofit organization, Petitioners and Plaintiffs, v. CITY OF SANTA MONICA; SANTA MONICA CITY COUNCIL; and DOES 1 to 100, inclusive, Respondents/Defendants.	CASE NO. **VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** (Code of Civ. Proc., §§ 526, 526a, 1060, 1085, 1094.5; Gov. Code, § 54220 *et seq*.)
CLARETT WEST DEVELOPMENT LLC, a limited liability corporation; DLJ REAL ESTATE CAPITAL PARTNERS LLC, a limited liability corporation; and ROES 1 through 100, inclusive, Real Parties in Interest.	

COMES NOW Petitioner and Plaintiff, and alleges as follows:

INTRODUCTION

1. Petitioner and Plaintiff Santa Monica Coalition for a Livable City ("SMCLC") brings this lawsuit because Respondents and Defendants City of Santa Monica ("the City") and the Santa Monica City Council ("City Council") (collectively, "Respondents") have refused to follow the mandatory process enacted by the Legislature to govern the disposition of "surplus land" owned by local government entities. The California Surplus Land Act (SLA) has long required cities to offer "surplus land" for purposes of affordable housing, recreation, or open space use, prior to selling or leasing the property on the open market. (See Gov. Code §§ 54220, 54222.) The SLA was recently amended to clarify and reaffirm these requirements in an effort to eliminate creative loopholes that cities had exploited in the past to avoid complying with the process.

2. This case concerns a three-acre site in the center of downtown Santa Monica, acquired by the City between 2007 and 2010. In 2012, the City began seeking proposals from commercial developers to develop the site with a mixed use project that included public parking. In 2015, the City Council approved an exclusive negotiating agreement ("ENA") with Real Parties in Interest Clarett West Development, LLC and DLJ Real Estate Capital Partners, LLC ("Real Parties" or "Developers") to negotiate the terms of a 99-year ground lease of these properties. Real Parties proposed to construct a mixed used project including primarily hotel, office, retail, and parking uses, known as the Plaza at Santa Monica ("Plaza Project")

3. Contrary to the requirements of the Surplus Land Act, Respondents never offered the property to entities interested in the land for affordable housing, park and recreational, or open-space purposes.

4. The Plaza Project has generated controversy and significant public opposition for years. When the original ENA expired in December 2015, Real Parties and Respondents did not engage in the public process of extending the ENA, but instead continued non-binding, informal negotiations out of public view.

5. After many years with no ENA, during which the developer was expressly informed, in writing, that any discussions with the City were non-binding, the City Council changed course –

without complying with the Surplus Land Act. On July 28, 2020, the Council authorized City staff to formally re-start negotiations with Real Parties in Interest, in blatant violation of the Surplus Land Act provisions requiring the City to issue written notice of the land's availability *prior to* "participating in negotiations to dispose of that property with a prospective transferee." (Gov. Code, § 54222.) Further, by failing to comply with the Act's requirements, Respondents have necessarily failed to ensure that if Developers or their successors in interest construct ten or more residential units, fifteen percent of the total units be affordable to low income households for 55 years. (Gov. Code, § 54233.)

6. Petitioner thus brings this action for violations of California's Surplus Land Act, seeking a writ of mandate pursuant to Code of Civil Procedure section 1085, declaratory relief pursuant to Code of Civil Procedure section 1060, and injunctive relief pursuant to Code of Civil Procedure sections 526 and 526a. Particularly, Petitioner seeks a declaration that the City's ongoing negotiations with Real Parties violates the Surplus Land Act, injunctive relief to require Respondents to cease and desist in their efforts to dispose of surplus land in an illegal manner, and a peremptory writ of mandate commanding Respondents to comply fully with the mandatory duties the Act imposes on the City's disposition of surplus land, including but not limited to, the duties expressly set forth in Government Code section 54220, *et seq.*

7. Petitioner also seeks a preliminary injunction and, if necessary, an administrative stay to prevent Respondents and Real Parties from further negotiating the terms of an agreement to dispose of the publicly-owned parcels in question while this litigation is pending.

PARTIES

8. Petitioner and Plaintiff SANTA MONICA COALITION FOR A LIVABLE CITY ("SMCLC") is a California nonprofit corporation. SMCLC is an all-volunteer group of Santa Monica residents concerned about unsustainable commercial development in Santa Monica. SMCLC was formed in 2005, and has worked since then to ensure citizens have a meaningful voice in the review of planning and development in the City, including of the Plaza at Santa Monica Project. Indeed, SMCLC has participated extensively in the City's review of the Plaza Project, including sending the City Council a detailed explanation of the City's duties under the newly-amended Surplus Land Act

and other aspects of the Project's approval. Many of SMCLC's members have sent their own written comments to the City Council and offered oral remarks at City Council meetings.

9. Respondent and Defendant CITY OF SANTA MONICA ("the City") is a charter city and the governmental entity with jurisdiction over the Site of the proposed Plaza Project. The City is responsible, through its various bodies and officials, for complying with the Surplus Land Act, set forth in Government Code section 54220, *et seq.*

10. Respondent and Defendant SANTA MONICA CITY COUNCIL is the legislative body of the City. It has a mandatory duty to comply with the Surplus Land Act, set forth in Government Code section 54220, *et seq.* Pursuant to the City's Municipal Code, the City Council must approve ENAs with developers or "authorize[] a City officer or employee to negotiate a[n] [ENA] on behalf of the City without further Council approval." (City Mun. Code, § 2.24.060, subd. (e).)

11. Respondents and Defendants DOES 1 through 100 are or were the agents, employees, contractors, and/or entities acting under the authority of each other respondent or real party in interest, and each performed acts on which this action is based within the cause and scope of such agency and/or employment. Petitioner does not know the true names and capacities, whether individual, corporate, or otherwise, of Does 1 through 100, inclusive, and therefore sue said respondents and defendants under fictitious names. Petitioner will amend its Petition and Complaint to show their true names and capacities when they have been ascertained.

12. Real Party in Interest CLARETT WEST DEVELOPMENT, LLC ("Clarett") is a Delaware corporation.

13. Real Party in Interest DLJ REAL ESTATE CAPITAL PARTNERS, LLC ("DLJ Partners") is a Delaware corporation.

14. Clarett and DLJ Partners have jointly applied to construct the Plaza Project on the Site and are thus referred to collectively as "Real Parties" or "Developers." On information and belief, Developers have entered into the Exclusive Negotiating Agreement awarded by the Council on July 28, 2020.

15. Real Parties in Interest ROES 1 through 100 are or were the agents, employees, contractors, and/or entities acting under the authority of each other respondent or real party in interest,

and each performed acts on which this action is based within the cause and scope of such agency and/or employment. Petitioner does not know the true names and capacities, whether individual, corporate, or otherwise, of real parties in interest Roes 1 through 100, inclusive, and therefore sues said real parties in interest under fictitious names. Petitioner will amend its Petition and Complaint to show their true names and capacities when they have been ascertained.

JURISDICTION AND VENUE

16. This Court has original jurisdiction over this matter pursuant to article VI, section 10 of the California Constitution, and sections 526, 526a, 1060, 1085 and 1094.5 of the Code of Civil Procedure.

17. Venue in Los Angeles County is proper under Code of Civil Procedure section 394(a) because Respondents/Defendants are government entities and agents of the City of Santa Monica, which is located in Los Angeles County.

THE SURPLUS LAND ACT

18. The Surplus Land Act directs "local agencies" to prioritize the development of low-income housing, parks, and open space when selling or leasing land "surplus land" by first offering the land to various preferred entities before selling or leasing the property on the open market. (See Gov. Code §§ 54220, 54222.)[1]

19. The City is a "local agency" for purposes of the Act because all cities and counties in the State of California constitute "local agencies" for purposes of the Act. (§ 54221, subd. (a).)

20. "Surplus land" refers to property owned by a local agency that is no longer necessary for the agency's use. (See § 54221, subd. (b)(1).)

21. The Act requires that local agencies disposing of surplus land send "a written notice of availability of the property" to a list of preferred entities "prior to disposing of that property or participating in negotiations to dispose of that property with a prospective transferee." (§ 54222.)

22. For surplus land that can be developed for low- and moderate-income housing, the local agency must provide written notices of availability to all local public entities within the

[1] All citations are to the California Government Code unless otherwise indicated.

jurisdiction and to all housing sponsors that have notified the Department of Housing and Community Development of their interest in surplus land. (§ 54222, subd. (b).)

23. Likewise, prior to disposing of surplus land that is available for open-space purposes — meaning land available for "public recreation, enjoyment of scenic beauty, or conservation or use of natural resources" (§ 54221, subd. (d)) — a local agency must notify all of the parks or recreation departments within the city or county where the land is situated. (§ 54222, subd. (b).)

24. Local agencies must also send written notices of availability to school districts (for land suitable for school facilities construction or use by a school district for open-space purposes) and other various public entities (for properties located within an infill opportunity zones or transit village plans). (§ 54222, subds. (c) and (d).)

25. All eligible entities have 60 days to notify the disposing agency of their interest in buying or leasing the land (§ 54222, subd. (e)), at which point the disposing agency and the entity "shall enter into good faith negotiations to determine a mutually satisfactory sales price and terms or lease terms" (§ 54223, subd. (a)).

26. In the event the local agency and the prospective transferee are unable to agree on price and terms for the disposition *or* if no entities respond to the mandatory notices of availability, and the agency disposes of the surplus land to an entity that uses the property for the development of 10 or more residential units, the purchasing entity or its successor-in-interest is required to sell or rent at least 15 percent of the total number of units developed on the land at "affordable" cost to "lower income households as defined in Section 50079.5 of the Health and Safety Code." (§ 54233.) Section 54233 further specifies that "[r]ental units shall remain affordable to, and occupied by, lower income households for a period of at least 55 years for rental housing and 45 years for ownership housing."

27. If multiple entities express interest in the land, the Act requires a local agency to give priority to an entity that agrees to use the surplus land for affordable housing, except in the case of land already being used as a park or for recreational purposes, in which case the Act gives first priority to entities agreeing to maintain the site as a park or for recreational purposes. (§ 54227.)

28. In September 2019, the Legislature enacted Assembly Bill No. 1486 (AB 1486), containing various amendments to the Surplus Land Act. (Stats. 2019, ch. 664 (A.B. 1486), effective

Jan. 1, 2020. In passing AB 1486, the Legislature re-affirmed its concern over the two chief problems the Act was designed to remedy: a pressing shortage of sites available for affordable housing and an identifiable dearth of land available for recreation and open-space purposes. (§ 54220, subds. (a)-(b).) In particular, AB 1486 sought to respond to the loopholes found by local agencies seeking to sidestep the Act's procedures, which thwarted the law's goal of expanding the supply of land available for affordable housing development. (Sen. Com. on Governance and Finance, Analysis of Assem. Bill No. 1486 (2019–2020 Reg. Sess.) as amended May 16, 2019, p. 7 [explaining "reports of some local agencies attempting to avoid the requirements of the Surplus Land Act."].) "[I]n one high-profile case in 2015, the City of Oakland attempted to sell property to a market-rate developer despite interest from affordable housing developers." (*Id*., at p. 7.)

29. AB 1486 only made cosmetic changes to the language requiring cities to make first surplus land available to preferred entities, replacing the mandatory "written offer to sell or lease the property" to preferred entities (Stats. 2008, ch. 532, § 10) with mandatory "written notice of availability of the property" to those same preferred entities (§ 54222).

30. AB 1486 also made the definition of "surplus land" more concrete. Under the prior version, of the Act, "surplus land" referred to land "owned by any local agency, that is determined to be no longer necessary for the agency's use." (See Stats. 2008, ch. 532, § 9.) AB 1486 clarified that "'[a]gency's use' shall not include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development. Property disposed of for the sole purpose of investment or generation of revenue shall not be considered necessary for the agency's use." (See § 54221, subd. (c)(2)(A).)

31. AB 1486 further clarified that *before* a local agency takes "any action" to dispose of publicly-owned land, its governing body must take formal action in a regular public meeting declaring that the land "surplus land," meaning "not necessary" for the agency's use. (§ 54221(b)(1).) The governing body shall declare land as either "surplus land" (i.e., subject to the Act) or "exempt surplus land," and must justify its determination by "written findings." (§ 54221(b)(1).)

32. AB 1486 also introduced stiff penalties for violating the Act's process for disposing of surplus land. Under newly-amended section 54230.5, subdivision (b)(1), local agencies must send the

Department of Housing and Community Development ("HCD") a description of the notices of availability sent and negotiations it conducted with any responding entities *prior to agreeing to the terms for disposition of surplus land*. HCD must review this information and notify the local agency if the proposed disposal will violate the Act. (§ 54230.5, subd. (b)(2)(C).) If a local agency disposes of land after HCD has notified it that doing so violates the Act, newly-amended section 54230.5 imposes a penalty of "30 percent of the final sale price" on a local agency for "a first violation and 50 percent for any subsequent violation." (§ 54230.5, subd. (a)(1).)

33. AB 1486 expressly exempted two categories of surplus land, instead making them subject to the pre-AB 1486 version of the Act. First, newly-added section 54234, subdivision (a)(1) (hereinafter referred to as the "ENA Exemption") limits AB 1486 from applying to land already subject to an ENA:

> If a local agency, as of September 30, 2019, has entered into an exclusive negotiating agreement or legally binding agreement to dispose of property, the provisions of this article as it existed on December 31, 2019, shall apply, without regard to the changes made to this article by the act adding this section, to the disposition of the property to the party that had entered into such agreement or its successors or assigns, provided the disposition is completed not later than December 31, 2022.

34. Second, newly-added section 54234, subdivision (b)(1) (hereinafter "LRPMP Exemption") exempts land designated in a long-range property management plan ("LRPMP") from the new regime. Specifically, it states:

> With respect to land . . . designated in a long-range property management plan pursuant to Section 34191.5 of the Health and Safety Code, either for sale or retained for future development, this article as it existed on December 31, 2019, without regard to the changes made to this article by the act adding this section which take effect on January 1, 2020, shall apply to the disposition of such property if both of the following apply:
>
> (A) An exclusive negotiating agreement or legally binding agreement for disposition is entered into not later than December 31, 2020.
>
> (B) The disposition is completed not later than December 31, 2022.

35. Though the ENA Exemption and the LRPMP Exemption would exempt two categories of land from AB 1486, those "exempted" lands ***remain subject to "this article as it existed on December 31, 2019.***" (§ 54234, subds. (a)(1), (b)(1) [emphasis added].) Neither exemption operates to "authorize or excuse any violation of the provisions of this article as it existed on December 31, 2019,

in the disposition of any property to which such provisions apply pursuant to subdivision (a) or (b)." (§ 54234(c).)

FACTUAL ALLEGATIONS

The Plaza at Santa Monica Project

36. The City is contemplating a 99-year ground lease of publicly-owned property located on Arizona Avenue between Fourth and Fifth Streets in Santa Monica ("Site") to Developers. The latest iteration of Developers' controversial Santa Monica Plaza Project features a luxury hotel, retail shopping, and thousands of square feet of commercial office space. The Plaza Project will either include 48 affordable housing units or Developers will make a $24 million payment to build affordable housing at an *alternative* City-owned site within the immediate area. However, according to City staff, "[c]urrently, there are no development plans for the off-site affordable housing and a specific site for development has yet to be identified." (City Council Staff Report (7/22/20), attached as Exhibit A, at p. 3.)

37. The Site consists of several assembled parcels, some of which are owned by the City and some of which are owned by the City's Successor Agency to the former Redevelopment Agency. (City Letter to Developer (1/27/20), attached as Exhibit B, at p. 1; Exhibit A, at p. 3.) The Successor Agency parcels are subject to a LRPMP approved by the Department of Finance.

38. At no point in the its review of the Project has the City ever initiated — let alone completed — the requisite procedures for disposing of the Site.

The History of Negotiations Between the City and Developers

39. After receiving prior authorization from the Council, the City regularly enters into formal agreements to negotiate with developers on an exclusive basis.

40. An ENA affirms that the City will not negotiate with any other developer for the development of the Site for the duration of the ENA. An ENA also sets out the particular terms under which a developer and the City will work together to hone a particular project. ENAs also establish a schedule of performance for a developer to solicit community input and receive conceptual approval from the City Council. Once these concept plans are approved, ENAs provide a limited period for negotiation, typically six to twelve months (including a base period and extension options) to fully

negotiate a Disposition and Development Agreement (DDA). DDAs contain the details and agreement terms, and must receive City Council approval.

41. In this case, City staff originally sought authorization from City Council to enter into an ENA with Developers in August 2013. The City and Developers did not enter into the ENA until March 2014. (ENA Between Developer and the City (3/19/14), attached as Exhibit C.)

42. The ENA provided for a one-year initial term and a 90-day administrative extension from the City Manager. City Council approval was required for any additional extensions. (Exhibit C, §§ 402, 403.) The ENA provided that, at the end of the allotted time, if Developers had not received City Council's approval to further extend the exclusive negotiating period, the ENA "shall automatically terminate." (Exhibit C, § 500.)

43. In May 2015, having exhausted the one-year initial term and the 90-day extension from the City Manager, City Staff returned to City Council to seek the authorization to extend the exclusive negotiating period by six months, with an additional three-month option. City Council authorized a 6-month extension, with an additional three-month option at the City Manager's discretion. (Modification to ENA (6/23/15), attached as Exhibit D, at p.1.) According to the City, the ENA finally ***"terminated by its own terms on December 19, 2015."*** (City Letter to Developer (1/23/19), attached as Exhibit E, at p. 1; see also Exhibit A, at p. 4 ["The ENA expired by its own terms in 2015."].)[2]

44. On January 23, 2019—more than three years after the contractual period of exclusive negotiation had ended—the City wrote to Developers to "memorializ[e] the understanding" that "***non-binding negotiations*** for disposition of City-owned property . . . may continue ***without any commitment to negotiate*** for any definite period." (Exhibit E, at p. 1 [emphasis added].) The City reiterated its assertion that the ENA had "terminated by its own terms on December 19, 2015," and sought to record its understanding "and material reliance" on the Developers' waiver of any right to claim damages for negotiations occurring "subsequent to the termination of the ENA" (*id.*), meaning

[2] The Modified ENA extended the Original ENA for a period of 6 months, commencing from June 19, 2015. Because the City indicates that the ENA terminated by its own terms on December 19, 2015, it would appear that the City Manager did not authorize an additional three-month extension.

the period between December 2015 and January 2019. Nowhere does the City indicate its intention to continue negotiating with the Developers on an exclusive basis.

45. As the January 23, 2019 letter from the City had requested, Developers signified their agreement with the City's offer to continue ***"non-binding"*** negotiations by remitting a $100,000 deposit to cover the costs the City incurred for the continuing negotiations. (Exhibit E, at p. 2.)

46. On information and belief, on or before March 13, 2019, Developers, City staff, and other City representatives openly discussed whether it was necessary to formally renew the ENA, which had expired more than four years prior. (See Developer Letter to City (12/16/19), attached as Exhibit F, at p. 4.)

47. On information and belief, Developers decided not to pursue a formal ENA to avoid the public scrutiny that would accompany such a public vote of the City Council.

48. Governor Newsom signed AB 1486 into law on October 9, 2019. By the time the Governor signed the bill into law, the window for the City to enter into an ENA for purposes of the ENA Exemption had already lapsed; ***for the ENA Exemption to apply, a local agency must have entered into an ENA "as of September 30, 2019."*** (§ 54234, subd. (a)(1).)

49. On or around December 12, 2019, the City wrote to Developers seeking Developers' take on the impact of AB 1486 before it went into effect on January 1, 2020.

50. Developers responded to the City via letter, sent on or around December 16, 2019. (See Exhibit F.)

51. In Developers' response to the City, they asserted (1) a long-term ground lease is not one of the "dispositions" that triggers the Act; (2) the Site is not "surplus land;" and (3) even if the Site is "surplus land" and the contemplated lease does qualify as a "disposition," one or the other of the exemption provisions applies, meaning the project would be governed by the SLA "as it existed on December 31, 2019" rather than AB 1486.

52. On January 22, 2020, the City sought advice from HCD on whether the AB 1486 amendments applied to the contemplated project, forwarding the Developer's letter for HCD's

reference. (City Letter to HCD (1/22/20), attached as Exhibit G, at p. 1; City Email to HCD (1/23/2020), attached as Exhibit H.)

53. HCD responded to the City by email on February 12, 2020. (See HCD Email to City (2/12/20), attached as Exhibit I.) Dismissing Developers' argument that the City was not required to undertake any of the steps required by the Act because the proposed 99-year lease is not a "disposition" subject to the Act, HCD noted that the Act repeatedly uses the term "lease" to refer to a disposition under the Act. (Exhibit I, at pp. 1-2.) HCD also dismissed Developers' argument that the Site is not "surplus land." (Exhibit I, at pp. 1-2.) Further, HCD indicated Developers failed to explain why AB 1486 did not apply to the Site. (Exhibit I, at p. 2.) Specifically, HCD did not agree that "an expired exclusive negotiating agreement" qualified the Site for the ENA Exemption or that the LRPMP Exemption applied when, as is the case here, "some of the parcels are designated in a long-range property management plan and some are not." (Exhibit I, at p. 2.)

54. Based on this feedback, the City Council voted to direct City staff to cease negotiations with Developers on or around February 25, 2020. (Exhibit A, at p. 2.) According to City staff, the Council also directed staff to bring the Project back to the Council for discussion based on any potential HCD clarification. (Exhibit A, at p. 2.)

55. After a private telephone conversation with Developers' representative, HCD reversed course. (HCD Letter to Developer (3/24/20), attached as Exhibit J, at p. 1.) Carefully qualifying that its opinion was "[b]ased on the facts and circumstances provided to HCD," the agency explained that Developers' attorney had represented that on September 30, 2019 (the relevant date in the statute), the City and Developers had a "non-written (i.e., constructive) ENA in place." (Exhibit J, at p. 1.) HCD's letter offered no legal authority to explain how City staff possessed the legal authority to enter into a "non-written" ENA absent City Council approval, nor did it make even a passing attempt to explain why the Legislature's intent to *reduce* behind-the-scenes negotiations by local agencies was best served by turning a blind eye to precisely that kind of behavior.

56. In light of HCD's about-face, City staff sought authority from the Council to resume negotiations with Developers regarding the Project at the City Council's July 28, 2020, meeting. In a July 22, 2020 report issued in advance of that Council meeting, City staff openly and repeatedly

acknowledged that the prior ENA "expired by its own terms in 2015" and there was no then-existing agreement to continue negotiating with Developers on an exclusive basis. (Exhibit A, at pp. 4, 16.)

57. By acknowledging "[t]he original ENA expired several years ago, and the City is not required to continue negotiations with Developer" (Exhibit A, at p. 16), the City has taken the position that the Plaza Project does not qualify for the ENA Exemption to AB 1486.

58. Nevertheless, the July 22, 2020 staff report took the position that the City need not provide written notices of availability prior to re-starting negotiations with Developers, even though the Act requires such written notices sent "*prior* to disposing of that property or *participating in negotiations* to dispose of that property with a prospective transferee." (§ 54222 [emphasis added].) According to the staff report, the City's duty to comply with the Surplus Land Act is only triggered by *discontinuing* negotiations with Developers. (Exhibit A, at pp. 2, 8, 16.)

59. The July 22, 2020 staff report advised that if the Council preferred to resume negotiations with Developers and proceed as planned, it should authorize the City Manager to enter into a new ENA with Developers to establish an updated scope and schedule of performance for developers to "allow the parties to complete negotiating lease terms and other related matters" (Exhibit A, at p. 8)—again without first complying with the requirement to provide written notices of availability *before* "participating in negotiations to dispose of that property with a prospective transferee." (§ 54222.)

60. On June 22, 2020, Petitioner sent to City Council a detailed letter explaining why the Council should not authorize staff to negotiate with Developers until after the City had complied with the Surplus Land Act procedures for disposing of publicly-owned land. Petitioner's Letter made five key points, briefly summarized below.

61. First, Petitioner's Letter explained that the City's proposed disposition of the Site is governed by the Surplus Land Act as amended by AB 1486, because the ENA Exemption in section 54234, subdivision (a)(1) does not apply to the Project.

62. On this point, Petitioner explained in detail why the negotiations between the City and Developers could not give rise to a legally-cognizable ENA. Stated simply, there can be no implied ENA based on the conduct of City staff and Developers because City law requires *City Council*

authorization for City staff to enter into ENAs. (See City Mun. Code, § 2.24.060, subd. (e) [providing that the City Council "shall" award purchases of goods or services of more than $250,000 and "any other purchases and contracts that have not been otherwise authorized under this Chapter, unless the City Council has authorized a City officer or employee to negotiate a contract on behalf of the City without further Council approval."].)

63. However, the City Council never awarded a new ENA to Developers between December 2015, when the initial ENA expired, and September 2019, the relevant cut-off date in the Surplus Land Act. Absent City Council direction, City staff would have lacked authority to enter into such an ENA. California law flatly bars implied agreements under such circumstances. (See *Katsura v. City of San Buenaventura* ("*Katsura*") (2007) 155 Cal.App.4th 104, 110 ["[C]ontracts that disregard applicable code provisions are beyond the power of the city to make."]; *G.L. Mezzetta, Inc. v. City of American Canyon* ("*G.L. Mezzetta*") (2000) 78 Cal.App.4th 1087, 1093–1094 ["the holding in *Katsura* was that *all* implied contracts against public entities are barred because, by definition, they have not formally been approved by the entity"]; *Green Valley Landowners Assn. v. City of Vallejo* ("*Green Valley*") (2015) 241 Cal.App.4th 425, 435.)

64. Furthermore, Petitioner's Letter explained that California law does not recognize agreements between private parties and public entities that do not adhere to appropriate public processes, such as being processed through public channels, publically noticed, or reduced to writing. (See *Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1189.)

65. City contracts must be memorialized in writing and executed by the City Manager. (City Mun. Code, § 2.32.030.)

66. However, there was no written ENA between City and Developers in effect as of September 30, 2019, which is the cut-off date for the ENA Exemption to apply.

67. Nor does the record indicate the City possessed the necessary intent to be bound to an agreement to negotiate exclusively. To the contrary, the City made its intent crystal clear when it memorialized its understanding back in January 2019 that the exclusive period for negotiation had

terminated in 2015 and that negotiations were continuing subject to "an understanding" that they were "non-binding." (Exhibit E, at p. 1.)

68. In other words, both the City and Developers had recognized—months before the Surplus Land Act trigger date in September 2019—that any negotiations were proceeding purely on a non-binding basis, and all parties understood that it was at Developers' own risk to continue negotiations in the absence of a valid ENA. Absent all parties' intent to be bound to a binding agreement to negotiate exclusively, Petitioner's Letter argued, there is no basis to determine an ENA existed between December 2015 and September 2019.

69. The second key point in Petitioner's Letter was that even if AB 1486 does not apply to the Project by virtue of the ENA Exemption, the City must still comply with the pre-AB 1486 version of the Surplus Land Act, which requires "[a]ny local agency disposing of surplus land [to] send, prior to disposing of that property, *a written offer to sell or lease the property*" for affordable housing, park, recreational, or open-space purposes. (Stats. 2008, ch. 532, § 10 [emphasis added].)

70. Third, Petitioner's Letter to City Council explained that, contrary to Developers' position, the LRPMP Exemption does not apply to the Project because some of the parcels constituting the Site are City-owned, and therefore not "designated in a long-range property management plan." (See § 54234, subd. (b)(1).) Petitioner pointed out that applying AB 1486 to the City-owned parcels and applying the pre-existing Surplus Land Act to former RDA parcels would create a logistical headache with no support in the text or legislative history of the bill.

71. Fourth, Petitioner's Letter to City Council refuted Developers' argument that the entire Surplus Land Act was inapplicable on the theory that the Act only governs "dispositions" of property, and "dispositions" means *selling* property, not *leasing* it. Petitioner's Letter quoted the multiple provisions of the Act referring to "leases" to underscore why Developer's argument that the Legislature meant to exclude "leases" was nonsense.

72. Indeed, in its subsequently-published answers to frequently-asked questions, HCD agreed with Petitioner, concluding a "disposition" of surplus land under the Act included leases. **(**Cal. Dept. Housing and Comm. Dev., Assembly Bill (AB) 1486 Questions and Answers (Q&A) (Aug. 10,

2020) < https://www.hcd.ca.gov/community-development/docs/assemblybill_1486_questionsandanswers_20aug10.pdf > [as of Sept. 24, 2020].)

73. Fifth, Petitioner's Letter urged City Council not to fall for Developer's argument that the City could sidestep the Surplus Land Act simply by characterizing the Project as "necessary for the agency's use."

74. On July 8, 2020, Developers responded to Petitioner's Letter to City Council.

75. The backlash to Developers' Letter to City Council was immediate and damning. For example, in a letter to City Council dated July 26, 2020, former City Manager Rick Cole described Developers' assertion that an exclusive negotiating relationship existed as a "fallacious[]", "false", and "fraudulent." (Letter from Rick Cole (7/26/20), attached as Exhibit K, at p. 1.) Mr. Cole revealed that he had notified the Council that it was *Developers* who had decided not to seek further Council approval for an extension of the ENA upon its lapse in December 2015. Mr. Cole reported to City Council that "City staff told me that the decision to not seek an extension of the ENA was out of a desire to avoid the public controversy that might have ensued." (*Id*.) According to Mr. Cole's letter, "it is erroneous to characterize the continuing processing of the developer's proposal as constituting an exclusive negotiating agreement. That is not how I understood it and it is not how I conveyed it to the Council, despite the efforts by the developer's counsel to mischaracterize my actions." (*Id.* at p. 2.)

76. The City staff offered no further public recommendations.

77. During the City Council's meeting on July 28, 2020, the Council voted 6-1 to authorize the interim City Manager to resume negotiations with Developers.

FIRST CAUSE OF ACTION
Violation of California Surplus Land Act
(Code of Civ. Proc., §§ 526, 526a, 1085, 1094.5)

78. Petitioner hereby re-alleges and incorporates by reference herein the allegations in the preceding paragraphs.

79. At all times relevant to this action, Respondents have had clear, mandatory duties and prohibitions imposed by the Surplus Land Act, section 54220 *et seq*. Those mandatory duties include disposing of surplus land in accordance with the Act.

80. On July 28, 2020, the Council authorized the interim City Manager to begin negotiations with Developers regarding the City's disposition of the publicly-owned surplus land.

81. On information and belief, the interim City Manager and Developers have signed or will shortly sign a new ENA governing the proposed Plaza Project based on the authority granted by the Council at the July 28, 2020, meeting.

82. Prior to taking these actions, Respondents failed to comply with their mandatory duties under the Surplus Land Act by, at least, failing to send either a "written notice of availability" or a "written offer to sell or lease the property" to:

a. Any local public entity, as defined in Section 50079 of the Health and Safety Code, within whose jurisdiction the surplus land is located, for the purpose of developing low- and moderate-income housing.

b. Any park or recreation department in the City, any park or recreation department in Los Angeles County, any regional park authority having jurisdiction within the area in which the land is situated, and to the State Resources Agency for open-space purposes.

c. Any school district in the City school district in whose jurisdiction the land is located for school facilities construction or use by a school district for open-space purposes.

83. By failing to comply with the Act, Respondents deprive Petitioner, Petitioner's members, and all residents of the City of Santa Monica of the potential development of surplus land for affordable housing, recreational uses, or other public good on behalf of the City's residents.

84. Respondents have deprived local agencies and stakeholders of the opportunity to negotiate in good faith to purchase or lease the Site for the development of affordable housing, parks, or open space.

85. Petitioner has a direct and beneficial right to Respondents' performance of their respective duties based on Petitioner's interest in maintaining and improving the quality of the urban infrastructure in the City, as well as the interest of Petitioner's members in improving quality of life in their own city.

86. Petitioner has exhausted all other available remedies.

87. Petitioner has no plain, speedy, and adequate remedy at law, in that unless this Court enjoins Respondents, they will dispose of publicly-owned surplus land for commercial development absent the legally-mandated process for providing prior written notice to interested parties. No amount of monetary damages or other legal remedy can adequately compensate Petitioner for the irreparable harm that Petitioner, its members, and the residents of the City of Santa Monica will suffer from the violations of law described herein.

88. The violations of law described herein will cause irreparable harm to Petitioner, its members, and the residents of the City of Santa Monica because City's failure to send the notices of availability or written offers to preferred entities precludes operation of section 54233 of the Act, which would have required City to ensure that 15 percent of the residential units developed at the Plaza Project would be affordable to lower income households.

SECOND CAUSE OF ACTION
DECLARATORY RELIEF
(Code Civ. Proc., § 1060)

89. Petitioner incorporates by reference all the allegations contained in the previous paragraphs as though fully set forth herein.

90. A dispute has arisen between Petitioner and Respondents, in that Petitioner believes and contends, for the reasons set forth in the cause of action above, that Respondents' actions as set forth above were unlawful and invalid. Petitioner is informed and believes, and on that basis contends, that Respondents contend in all respects to the contrary.

91. Specifically, Petitioner contends that Respondents mandatory duty to comply with the Surplus Land Act cannot be overridden by a period of admittedly non-binding negotiations or an expired ENA. Petitioner further contends that Respondents must comply with section 54222 and deliver written offers or notices of availability to the preferred entities listed in the Surplus Land Act before its staff engaged in further negotiations with Developers.

92. Petitioner is informed and believes that in response to Petitioner having identified these issues for Respondents, Respondents have disagreed with Petitioner's contentions, and continue to rely upon the July 22, 2020 report by City staff, which takes the position that the City need not provide written notices of availability prior to re-starting negotiations with Developers.

93. A judicial declaration as to the legality of Respondents' actions, as set forth above, is therefore necessary and appropriate to determine the respective rights and duties of the parties.

PRAYER FOR RELIEF

WHEREFORE, the Petitioners and Plaintiffs pray for judgment as follows:

1. That the Court issue a peremptory writ of mandate, requiring Respondents and Defendants to set aside the authorization to negotiate with Developers about the Plaza Project and commanding Respondents and Defendants to comply fully with the mandatory duties the Surplus Land Act imposes on the City's disposition of surplus land, including without limitation, the duties under section 54222 either before or after it was amended by AB 1486;

2. That this Court enjoin Respondents from taking any action in furtherance of the Plaza Project, including negotiating with Real Parties regarding the Plaza Project; and that this Court enjoin Respondents to rescind, revoke, and invalidate all approvals issued in support of the Project until such time as the approvals comply with the Surplus Land Act;

3. That this Court issue declaratory relief finding Respondents and Defendants are subject to, and must comply with, the Surplus Land Act in all respects;

4. That this Court award Petitioner costs and attorneys' fees pursuant to Code of Civil Procedure section 1021.5 or other applicable law; and

5. That this Court grant Petitioner such other, different, or further relief as the Court may deem just and proper.

DATED: September 25, 2020

Respectfully submitted,

STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
Beverly Grossman Palmer
Julia Michel

By: _____
Beverly Grossman Palmer

Attorneys for Petitioners and Plaintiffs Santa Monica Coalition for a Livable City and Diana Gordon

VERIFICATION

I, Diana Gordon, declare:

I am a Co-Chair of Santa Monica Coalition for a Livable City and Petitioner in this lawsuit in my capacity as a resident of the City of Santa Monica. I am authorized to make this verification for Petitioner Santa Monica Coalition for a Livable City.

I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Injunctive Relief and know the contents thereof. Said contents are known to me to be true except those matters alleged on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25 day of September, 2020 at Santa Monica, California.

Diana Gordon

Diana Gordon, Co-Chair
Santa Monica Coalition for a Livable City

EXHIBIT A

City Council Report

City Council Meeting: July 28, 2020
Agenda Item: 8.B

To: Mayor and City Council

From: Andy Agle, Director, Housing and Economic Development, Economic Development Division

David Martin, Director, Planning and Community Development

Subject: Proposed Development at 1301 4th Street (Plaza at Santa Monica)

Recommended Action

Staff recommends that the City Council:

1) Authorize the City Manager to resume exclusive negotiations with Clarett West Development, LLC and DLJ Real Estate Capital Partners, LLC (collectively, Developer) for the ground leasing of City-owned or master-leased property between 4th and 5th Streets, south of Arizona Avenue (Site); or, in the alternative, direct the City Manager to terminate all negotiations with Developer and list the property as surplus within the meaning of AB 1486 or maintain the property for municipal purposes; and
2) If continuing exclusive negotiations with the Developer are authorized: (a) authorize the City Manager to enter into an amended and restated Exclusive Negotiating Agreement with Developer; and (b) provide updated direction on the scope of the project and prioritization of public objectives associated with the project.

Executive Summary

Since 2013, the City has been negotiating with Clarett West Development, LLC and DLJ Real Estate Capital Partners, LLC (collectively, Developer) to redevelop a roughly 2.57-acre City-owned property bounded by 4th Street, 5th Street, and Arizona Avenue. The project site (Site) comprises nine contiguous parcels, including surface parking and two banks. The currently proposed mixed-use development (Project) consists of construction of up to 11 stories (129 feet in height) that would include up to 240 hotel rooms, no more than 106,800 square feet (SF) of creative workspace, 42,000 SF of ground-floor retail space, and 820 parking spaces within a three-level subterranean garage. The Project also includes nearly an acre of publicly accessible open space, 12,000 SF of cultural amenity space, and 48 on-site affordable apartments that could potentially be provided off-site as explained further in this report.

Following the City's purchase of the Site, a community visioning process, a competitive request-for-proposals process, and Council's authorization of exclusive negotiations, the Developer has worked to create a project that meets the identified public objectives for the Site. In October 2015, Council voted to proceed with the Environmental Impact Report (EIR), study five EIR alternatives, and commence development agreement (DA) negotiations for the Project with modifications and priorities for public objectives. Based on Council direction in 2015: (a) the total floor area of the Project was reduced by 15 percent, the office component was reduced by 100,000 SF, and a portion of the removed office space was replaced with hotel space; and (b) the following public objectives were prioritized for the Project, in rank order: (1) open space, (2) affordable housing, (3) cultural space, (4) parking, and (5) ground rent. Since 2015, staff has been working with the Developer on various aspects of the Project and has achieved significant milestones, including preparation and circulation of a draft EIR in anticipation of future Planning Commission and City Council hearings.

In February 2020, Council directed staff to cease negotiations with Developer based on feedback from the California Department of Housing and Community Development (HCD) that the Site needed to meet the requirements of California's recently expanded Surplus Land Act (AB 1486). Council also directed staff to bring the Project back to Council for discussion based on any potential HCD clarification.

In March 2020, HCD concluded that the Site qualified for an exemption from the expanded Surplus Land Act. Given HCD's determination, staff seeks Council direction in two areas. First, staff seeks direction as to whether to resume negotiations with Developer regarding the Project. If Council directs staff not to resume negotiations, direction should be provided that the Site be listed as surplus property pursuant to the Surplus Lands Act as expanded by AB 1486. Second, if Council directs staff to resume negotiations, staff: (a) recommends that the City Manager be authorized to enter into an amended and restated ENA with Developer; and (b) given the passage of time since

Council last reviewed the Project, as well as the sudden and recent challenges brought about by COVID-19, seeks direction regarding the Project and the prioritization of its public objectives.

Background

Request for Proposal Process

Between 2007 and 2010, the City and its former Redevelopment Agency purchased nine parcels to assemble the Site for redevelopment purposes. The Site consists of 112,000 SF of land located at 1301-1333 4th Street and 1324-1334 5th Street within the Downtown District in the City's Land Use and Circulation Element of its General Plan (LUCE) and within the Bayside Conservation (BC) and Neighborhood Village (NV) zoning districts of the Downtown Community Plan (DCP) area. The DCP also identifies the Site as being within the "Established Large Site Overlay" requiring processing through a DA, consideration for special development standards, and additional analysis in the project's EIR. Further, the DCP sets forth guidelines for preferred on-site community benefits. The Site is currently occupied by bank tenants with leases that expire in 2022 and 2026 and is used for surface public parking. During the winter season, Downtown Santa Monica Inc. (DTSM) uses part of the Site for a public ice-skating rink.

As a result of the dissolution of all redevelopment agencies throughout the state in 2011, and the financing structure of the former Redevelopment Agency's purchase of two of the nine parcels, the City owns seven of the parcels in fee and the Successor Agency, which is the successor legal entity to the former Redevelopment Agency, owns two parcels, which are subject to existing mortgages in effect through 2042. As part of the financing structure, the Successor Agency parcels are master-leased to the City. Consequently, the City has possessory control over all nine parcels but can only redevelop the Site through long-term ground leases as to the City parcels or sub-leases as to the Successor Agency parcels.

Following community workshops and Council study sessions regarding the vision for development of the Site in 2010 and 2011, in 2012, Council authorized the issuance of a Request for Qualifications (RFQ) and directed staff to issue a Request for Proposals (RFP) to the top three teams identified through the RFQ process. The City issued an RFP to three potential developers on February 1, 2013, and the Developer submitted its proposal on May 1, 2013.

After an extensive review and due diligence effort, including input from independent real-estate-finance consultants, staff issued an information item recommending selection of the Developer on July 10, 2013. The evaluation panel found that the Developer's proposal best addressed the evaluation criteria outlined in the RFP, which identified Council and community priorities for the Site. On December 10, 2013, Council authorized staff to execute an ENA with the Developer. On March 19, 2014, the City and Developer entered into an ENA which provided for a one-year initial term and a 90-day administrative extension. The City and Developer have been engaged in negotiations for the ground leases and the Project since 2014. The ENA expired by its own terms in 2015. Notwithstanding the expiration of the ENA, the Developer and staff continued good-faith negotiations, and the City has not engaged in negotiations with any other party regarding development of the Site.

Prior Planning Commission and City Council Direction

On June 10, 2014, Council gave direction to staff and the Developer to begin the public entitlement process. Following Council's direction, the applicant submitted a DA application for a new mixed-use development consisting of the following program:

Table 1: Original Proposed Project (2013)

Maximum Height	148 feet
Maximum Stories	12 stories
Total SF	420,000 sf
Floor Area Ratio	3.75
Land Uses	
Office	206,800 sf
Residential	48 affordable units
Hotel	195 rooms
Retail	42,200 sf
Cultural	12,000 sf
Public Open Space	51,000 sf
Total parking	1,143 spaces

The Planning Commission held a float-up discussion on the Project on June 3, 2015 and expressed significant concerns regarding the amount of office space proposed in the Project. On October 20, 2015 (Attachment A), Council reviewed information regarding the impacts and trade-offs associated with altering the mix of project uses and evaluated order-of-magnitude impacts to the Project, ground rent, and identified public objectives associated with significant changes in the development program. Council directed that the office component be reduced by 100,000 SF, the envelope of the building be reduced by 63,000 SF, and the remaining 37,000 SF in the building envelope be redirected for another use. Council also directed staff to study the following project alternatives in the EIR:

- The proposed project
- Reduced project
- Six-story project
- Public park
- No project

Council gave further direction to prioritize the following public objectives in order of importance: open space, affordable housing, cultural space, parking, and ground rent. Council also directed staff to proceed with negotiating the Disposition and Development Agreement (DDA) and DA with the Developer.

On July 25, 2017, Council adopted the DCP which includes development standards and regulations that govern the Site. The Site is located within the DCP's Established Large Site Overlay, which allows consideration of height up to 130 feet and FAR of up to 3.5. The Site also has greater open space requirements of 50 percent of the total parcel area, as well as guidelines for preferred on-site community benefits including affordable housing, public open space, and cultural institution. The Site-specific preferred on-site benefits are intended to augment the DCP's community benefit priorities. The community benefit priorities were informed by the DCP's six guiding principles to:

1. Maintain the authentic character of Downtown by requiring new development to contribute high standards of architecture, urban design and landscaping;
2. Create a new model of mobility based on all forms of circulation while prioritizing pedestrians;
3. Promote new housing opportunities by incentivizing housing production for all income levels;
4. Focus investments such as open space to serve residents, visitors and employees;
5. Preserve historic resources; and
6. Maintain Downtown's cultural and economic diversity.

Status of Environmental Analysis

Between 2017 and 2019, the preparation of the EIR (Attachment B) for the Project occurred. The City held a scoping meeting on January 3, 2017 and released a revised Notice of Completion/Availability for the EIR on December 13, 2018, announcing a 60-day comment period that ended on February 13, 2019. Staff is currently in the process of preparing the Final EIR. The EIR analyzed the potential environmental impacts of an approximately 357,000 SF development that includes a mix of open space, retail, restaurant, cultural, workspace, hotel, and bicycle center uses, and options for either on- or off-site affordable housing. In accordance with Council direction, the EIR included analysis of an alternative that would develop a public park on the Site, the CEQA

required “no project” alternative, and five alternative development scenarios (Attachment C).

Prior Project Review and Negotiations on Business Terms

Parallel with the EIR process, staff has been working with the Developer on various aspects of the Project in anticipation of upcoming Planning Commission and Council hearings. Discussions have related to the DDA, DA, ground leases, profit participation, open space programming and management, cultural space programming and management, project design and technical aspects of site planning, and other associated transactional matters.

On February 25, 2020, negotiations were put on hold in response to feedback from HCD that the Site needed to meet the requirements of California's recently expanded Surplus Land Act (AB 1486). The revised law incentivizes the use of public property for affordable housing. In March 2020, after consultation with the Developer’s attorney, HCD concluded that the Site qualified for an exemption because of the City’s on-going negotiations prior to September 30, 2019, the cut-off date set by the amended law.

Discussion

To date, the Developer and staff have negotiated the terms and conditions of a draft DDA in good faith. A DDA is a negotiated contract between a city and a developer that outlines terms of development and conveyance of a city property under a leasehold interest prior to the execution of a ground lease. Given the progress made to date, resuming negotiations would allow staff and the Developer to finalize the draft DDA in anticipation of public hearings. A draft of the DDA is nearly in final form and initial drafts of the DA, ground leases, and participation agreement have been exchanged.

The Developer has also made substantive efforts in developing an Open Space Agreement and Management Plan, which describe future operations, management, governance, and operating budget for the proposed open space. Still outstanding before the Project could come before the Planning Commission for review are the completion of a cultural space programming and management plan, finalization of sustainability details, and resolution of technical aspects of the Project, such as utilities

and mobility. With negotiations substantially advanced, staff believes the Developer is eager to present the EIR, draft DA, and proposed DDA terms to the Planning Commission and City Council.

While the potential applicability of the Surplus Land Act recently stalled negotiations, COVID-19 has also affected market trends and local conditions. The pandemic has also had severe impacts on the City's revenue streams, forcing reduction or elimination of various programs and services that community members value and rely upon. Other external factors include a declared housing crisis in the State of California which has resulted in State and Regional directives regarding housing production. Recognizing the pandemic's effect on Santa Monica, as well as the significant passage of time since the initiation of the Project approximately seven years ago, staff seeks direction regarding resuming negotiations and if desired, modifications to the project scope and public objective priorities.

In light of changed conditions, staff seeks direction as to whether to continue negotiating with the Developer on the Project as proposed, with direction on the prioritization of public objectives and program components. In the alternative, Council could direct staff to continue negotiating with the Developer but on an alternative development proposal, including alternatives outlined in the draft EIR. If Council does not direct staff to continue negotiations with the Developer, Council should direct staff to make the property available: (1) generally pursuant to the requirements of the Surplus Land Act; (2) pursuant to the exclusions within the Surplus Land Act for mixed-income residential or affordable housing development; or (3) for municipal purposes, such as a public park.

Continuing Negotiations to Proceed as Planned

If Council chooses to resume negotiations with Developer and proceed as planned, staff recommends that Council authorize the City Manager to enter into an amended and restated ENA that would establish an updated scope and schedule of performance for the Developer to continue to pursue entitlements and allow the parties to complete negotiating lease terms and other related matters. The amended and restated ENA

would also require that the Developer replenish any depleted good-faith deposits with the City.

If Council chooses to resume negotiations with Developer and proceed as planned, staff would resume work on the Project including review of the project design and technical issues and continued negotiations on the DA in anticipation of hearings by the Planning Commission and City Council. If Council were to certify the EIR and approve the project's entitlements and DA, Council would subsequently consider the terms of a DDA which would specify and govern the City's proprietary interests in the development of the City-owned property. An executed DDA would remain in place through the end of completion of the Project. The DDA structure is proposed to consist of a vertical subdivision of two or more parcels, with a ground lease for each parcel. The DDA and ground leases would control the use of the property and stipulate the business terms and obligations such as the amount of ground rent, term of the lease, permitted uses, assignment, and other project requirements. The DDA would establish conditions precedent to execution of the ground leases such as evidence of financing.

If Council chooses to resume negotiations with Developer and proceed as planned, staff seeks direction on public objectives and project components.

Public Objectives and Project Components

Objectives detailed in the original RFP as well as years of subsequent input from community groups, stakeholders, Planning Commission, and Council have informed the project's prioritization of public benefits. As proposed, the Project intends to satisfy a variety of public objectives, including the following: (a) 121,932 SF of open space, including 41,557 SF of programmed open space on the ground floor and second-floor terrace that would be accessible to the public; (b) 48 affordable residences or payment of $24 million to fund the construction of off-site affordable housing; c) space for a public-serving cultural institution; (d) public parking; and (e) substantial tax revenue to the City.

Furthermore, the DCP established guidelines for preferred community benefits for the Site including affordable housing, public open space, and a cultural institution. The DCP also states that the catalyst development should serve the local community through the provision of new job opportunities, shopping and dining options, and social experiences including ample, programmable, public open space and cultural uses.

Significant time has passed since Council's last direction on the project objectives in 2015. At that time, Council prioritized the objectives in the following order:

1) Public Open Space
2) Affordable Housing
3) Cultural Space
4) Public Parking
5) Ground Rent and Fiscal Impacts

Council's ranking of the objectives has shaped the project negotiations and has been incorporated into the project components. Given the passage of time, economic changes globally and locally, and changes in how people live, work, and recreate, staff seeks direction on the previously envisioned project scope and public objectives.
Of particular note is that the City's finances have changed considerably over the past few years and the City's financial challenges have become especially acute due to COVID-19, resulting in the reduction or elimination of many services and programs. If Council provides direction on modifications to the Project or public objectives, financial implications would have to be analyzed further.

Public Open Space

A top priority of the Site since project inception has been the creation of an exceptionally designed and well-managed programmable gathering space that adds to the community's civic life with multi-faceted cultural and recreational offerings that appeal to a diverse range of users. The open space is anticipated to have a stabilized budget of approximately $2 million per year, with a guaranteed operating budget, contributed by the ground lessees, of $860,000 per year. In addition to funding provided by the ground lessees, revenue to support the open space would come from stall and

kiosk rentals, corporate sponsorships for some activities, naming rights, and private event rentals. Staff has been working with the Developer to complete an Open Space Agreement and Management Plan that would memorialize details related to the operating budget, financial reporting mechanisms, governance structure, operating guidelines to ensure full public access and participation, and how best to integrate the new programming with existing events and programs.

The primary open spaces are proposed to provide spaces for leisure and host daily activities such as lunchtime concerts, mobile kiosks, a free lending library, classes, and events, as well as large-scale gatherings, such as DTSM's annual winter ice-skating rink and seasonal festivals. A non-profit organization would be formed to oversee the public components of the open space including programming.

The Project is proposed to provide approximately 42,000 SF of publicly accessible open space located primarily at the ground floor and the second-floor terrace level, including:

a) Main Plaza area (15,632 SF) at the corner of 4th Street and Arizona, functioning as the primary gathering space, including for the seasonal ice-skating rink and other events and programming opportunities, and an Amphitheater with a dedicated sound system and stage area.
b) Paseo and Pocket Plazas (8,988 SF) to provide a midblock pedestrian connection between 4th and 5th Streets with seating areas that anchor each pocket plaza.
c) Urban Garden (11,648 SF) area on the second-floor terrace level that features a learning garden, as well as an outdoor communal dining space that could support public and private events.
d) Dog Park (3,156 SF) that offers hardscape and softscape.
e) Observation Deck (2,364 SF) that offers panoramic views to the public.

Affordable Housing

The Project is proposed to support the DCP's prioritization of the production of new housing for a diverse range of income levels and encouragement of infill development that efficiently uses Downtown's limited land resources. As reviewed by Council in 2015, the Project includes 48 on-site affordable residences. At the 2015 hearing, Council noted that the affordable housing would be extremely expensive to create, given the high costs associated with the building construction. In response, the Developer offered an alternative to make a payment of $24 million towards the construction of affordable housing at an alternative City-owned site within the immediate area to support the creation of more affordable housing. The payment is comprised of approximately $16.5 million which would be paid in lieu of building the 48 on-site, low-income residences and an additional $7.5 million that would be paid to the City based on the added value to the Project of replacing the affordable housing component with a market-rate retail use. Currently, there are no development plans for the off-site affordable housing and a specific site for development has yet to be identified.

With regard to the provision of affordable housing as a public objective, the Project proposes two options:

- Option 1 – the provision of 48 on-site residences (4 3-bedroom, 8 2-bedroom, 20 1-bedroom, and 16 studios) affordable to very low-income households, occupying approximately 40,300 square feet within the new building; or

- Option 2 – a monetary contribution of $24 million that the City could use for the construction of up to 130 affordable residences within the DCP area.

If Option 2 were pursued, the approximately 40,300 SF previously programmed for affordable housing could be reprogrammed for a spa, fitness facility, or additional retail or restaurant space. The affordable-housing potential of the payment would be maximized by identifying one or more alternative City-owned sites where affordable housing could be created.

Cultural Space

The 2015 proposal incorporated the Zimmer Children's Museum (renamed to Cayton Children Museum) as the cultural tenant. Since then, the museum has relocated to the third floor of Santa Monica Place. While the cultural tenant is still unknown, the Project proposed a 12,000-SF space with 18-foot ceilings and an indoor mezzanine to allow for maximum flexibility for the future operator. The Developer has been seeking suitable partners with regional or national status to activate the space, both during daytime and evening hours and to balance hyperlocal with regional draw. The ultimate tenant of the interior space would provide programming designed to supplement and complement cultural programming of the public spaces as well as the entire Downtown.

To ensure long-term viability for the cultural asset, a management program and funding plan would be memorialized in a Cultural Space Operating and Maintenance Agreement that is being developed. While the Developer has committed to providing a below-market rent for the cultural use throughout the term of the ground lease, the long-term feasibility and costs associated with activating the space is an important consideration, as well as the critical need to integrate the cultural anchor with the public space and its programming schedule. Additionally, non-profits and cultural institutions, especially those that rely on public gatherings, have been severely impacted by the pandemic, making it even more difficult to find suitable, well-financed tenants in the current environment.

Public Parking and Mobility

Based on the Council's prioritization of public objectives, the amount of proposed public parking has been reduced from over 300 public parking spaces to approximately 192 spaces that would be operated by the Developer as part of the City's public parking supply. An additional 513 private or shared spaces would support the project's tenants. Public parking rates would be no higher than the rates charged in other City-owned parking structures and parking uses would be governed by a Parking Garage Operating and Maintenance Agreement.

Reductions in public parking spaces support the mobility goals of Downtown and are a result of several factors which include the elimination of parking requirements in the

DCP, the recent growth of mobility options and enhanced multi-modal access, the desire to reduce vehicular impacts to the Site, the Site's close proximity to a variety of transportation alternatives, and the cost savings related to the reduction of one floor of subterranean parking. Since Council last considered the Project, the DCP was adopted with plans to reduce the amount of parking in the central core Downtown. In addition, parking demand Downtown been steadily declining as a result of light-rail access, shared mobility devices, and transportation network companies.

In addition, the Project proposed to include a Mobility Hub that would connect Downtown's existing public transit options with personalized modes of mobility. The hub would provide 476 bike parking spots for cargo and regular-sized bicycles, multimodal transit, and 1,970 SF of programmable interior space for bike retail and repairs.

Ground Rent and Fiscal Impacts

When Council reviewed the Project in 2015, the Project was proposed to provide ground rent of $1.3 million per year and generate approximately $6 million per year in local taxes. Council's direction to reduce the amount of office space and prioritize the aforementioned public objectives results in the expectation of nothing more than a token ground rent. Conversely, the Council-authorized addition to the hotel space is expected to result in increased tax revenues. Were the Project to move forward as proposed, provisions of the ground lease ensure that the City would share in all potential surplus revenue and profit. Should the Council desire to pursue a significant change in project uses and community benefits, the ground rent would likely be affected. The Developer has indicated that in order to fund the major project objectives, the profitable project components of hotel rooms, office space, and retail and restaurant space are necessary.

Recommended priorities for public objectives

If Council directs staff to continue negotiations with Developer on the Project, and wishes to reconsider the public objectives for the Project, staff recommends ordering the priorities as follows:

1. Main Plaza Open Space, a top community priority since planning for the site was initiated.
2. Affordable Housing, reflecting that redevelopment funds were used to purchase the site and the state's housing mandates. While staff believes that on-site affordable housing is an important value, particularly on a City-owned site, the payment of $24 million would serve many more households and go further in meeting State housing mandates.
3. Ground Rent and Fiscal Impacts to the City, to support the long-term restoration of valued programs and services within Santa Monica.
4. Other Open Spaces, to provide additional amenities for residents and visitors.
5. Cultural Space, to reflect uncertainty regarding an eventual use and that cultural programming (including visual and performing arts) will be integral to the Main Plaza.
6. Public Parking, to reflect reduced parking demand and revised parking policy for Downtown.

Should revised public objectives result in a significant reduction in the total amount of publicly accessible open space on the Site, an amendment to the DCP may be necessary before the Project could be approved.

Continuing Negotiations: Alternatives

If Council chooses to continue negotiations with Developer, Council may also decide to give staff alternative direction regarding the development and ongoing negotiations. For example, Council could direct staff to work with the Developer on an alternative development proposal, including alternatives outlined in the draft EIR. For instance, Alternative 6 of the EIR contemplated mixed-use housing, as follows:

DCP Tier 2-Compliant Alternative (Alternative 6) would involve demolition of the banks and the parking lot and would develop a new 391,820 SF mixed-use building with 330 residential units including 83 affordable residential units, 605 parking spaces, 28,000 SF of public open space, 90,600 SF of retail uses, a 1,700 SF bike center, and 5,700 SF of equipment/service uses. This Alternative includes a greater floor area than the proposed project, is 60 feet in height with a FAR of 3.5 and includes 86 percent residential uses and 14 percent commercial uses.

Discontinuing Negotiations

The original ENA expired several years ago, and the City is not required to continue negotiations with Developer. If Council were to discontinue negotiations with the Developer, then the property would be considered surplus land and be subject to the requirements of the Surplus Land Act (AB 1486). To dispose of the property, the City would have to provide a written notice of availability of the property to specified public agencies and housing sponsors for the purpose of developing low- and moderate-income housing or open space on the property prior to disposing of the property or participating in negotiations to dispose of the property with a prospective transferee. The Developer would not be precluded from submitting a proposal.

The Surplus Land Act includes an exemption for an open, competitive process for either of the following qualifying housing project uses:

i. A housing development, which may have ancillary commercial ground floor uses, that restricts 100 percent of the residences to persons and families of low or moderate income, with at least 75 percent of the residences restricted to lower-income households, with an affordable sales price or an affordable rent, for a minimum of 55 years for rental housing and 45 years for ownership housing.

ii. A mixed-use development (more than one acre in area) that includes not less than 300 housing units, and that restricts at least 25 percent of the residential units to lower-income households with an affordable sales price or an affordable

rent for a minimum of 55 years for rental housing and 45 years for ownership housing.

Were the Council to elect to pursue a housing development at the Site, the requirement for a DA would be replaced with a development review permit, which would streamline the review process. Additionally, if a 100-percent affordable housing development or a housing development compliant with the Housing Accountability Act were pursued, then the project would be reviewed through an Administrative Approval process.

The Council could also elect to maintain the property for municipal purposes, such as creation of a public park, in which case the Surplus Land Act would not apply.

Past Council Actions

Meeting Date	Description
10/20/15 (attachment A)	*Discussion of Concept Plans*

Financial Impacts & Budget Actions

There is no immediate financial impact or budget action necessary as a result of the recommended actions. Staff would return to Council if specific budget actions are required in the future.

Prepared By: Claudia Kompa, Executive Administrative Assistant

Approved | **Forwarded to Council**

David Martin, Director 7/15/2020

Lane Dilg, Interim City Manager 7/22/2020

Attachments:

A. October 20, 2015 City Council Meeting (Web Link)
B. Draft EIR (Web Link)
C. EIR Project Alternatives
D. 4AZ Proposed Business Terms

E. March 24, 2020 HCD Correspondence
F. SUPPLEMENTAL STAFF REPORT
G. Written Comments
H. 4AZ Summary of Preliminary City Council and RFP Process

EXHIBIT B

City of
Santa Monica®

Office of the City Attorney
1685 Main St., Rm 310
Santa Monica
CA 90401-2200

January 27, 2020

VIA U.S. MAIL AND E-MAIL

Dave Rand
Armbruster Goldsmith & Delvac LLP
12100 Wilshire Boulevard, Suite 1600
Los Angeles, CA 90025
Dave@AGD-LandUse.com

Re: Application of Surplus Lands Act to the Plaza at Santa Monica Project

Dear Mr. Rand:

This letter responds to your correspondence to me, dated December 16, 2019, regarding the applicability of Assembly Bill No. 1486 to a site located at 4th/5th Street and Arizona Avenue in Santa Monica (the "Site") that your clients (collectively, the "Developer") have proposed for development of a project known as "the Plaza" (the "Project"). The Site consists of several assembled parcels, half of which are owned by the City and half of which are owned by the City's Successor Agency to the former Redevelopment Agency. The Successor Agency parcels are subject to a Long-Range Property Management Plan (the "LRPMP") approved by the Department of Finance. The City and Developer had previously entered into an Exclusive Negotiating Agreement ("ENA") with respect to the Site, but that ENA expired by its terms in 2015. Since the expiration of the ENA, the City and Developer have remained in ongoing negotiations regarding a long-term lease of the Site to Developer for development of the Project. Since the expiration of the ENA, the City has not engaged in negotiations with any other party regarding the Site.

As you know, Assembly Bill No. 1486 (AB 1486) (codified as Government Code sections 54220 et seq.) went into effect on January 1, 2020. This bill modifies the existing Surplus Lands Act to impose new restrictions on the "disposition" of "surplus property" owned by local government agencies, including the City. More specifically, as amended by AB 1486, Government Code Section 54222 provides that any local agency disposing of surplus land shall, "prior to disposing of that property or participating in negotiations to dispose of that property with a prospective transferee," send a notice of written availability of the property for various specified uses to various housing sponsors and other local government agencies. As amended by AB 1486, Government Code Section 54230.5(b) imposes an obligation on the local agency, prior to agreeing to terms for disposition of surplus land, to provide the Department of Housing and Community Development ("HCD") with a specified description of the process followed to dispose of the land, and imposes an obligation on HCD to review the description and submit findings to the local agency if HCD

determines that the proposed disposal violates state law. As added by AB 1486, Government Code Section 54230.5(a) imposes a penalty of "30 percent of the final sale price" on a local agency "that disposes of land in violation of this article after receiving a notification from [HCD] pursuant to subdivision (b) that the local agency is in violation of this article," and provides for a third-party cause of action to enforce the law.

As added by AB 1486, Government Code section 54234 creates exemptions from AB 1486's modifications of the Surplus Lands Act if: (1) the local agency, as of September 30, 2019, has entered into an exclusive negotiating agreement or legally binding agreement to dispose of property and the disposition is completed not later than December 31, 2022; or (2) for properties designated in a long-range property management plan ("LRPMP") either for sale or retained for future development, the local agency enters into an exclusive negotiating agreement or legally binding agreement for disposition not later than December 31, 2020 and disposition is completed not later than December 31, 2022.

Your December 16, 2019 letter states the Developer's position that AB 1486 does not apply to the City's ongoing negotiations with Developer regarding a long-term lease of the Site to Developer for development of the Project. To summarize, we understand the Developer's position to be that AB 1486 does not apply because: (i) the property that makes up the site is not "surplus land" as defined under the Surplus Lands Act as amended by AB 1486; (ii) a long-term ground lease of the type and duration that has been the subject of negotiation does not qualify as a "disposition" of the property that makes up the Site; and (iii) even if the property that makes up the site is "surplus land" and even if a long-term ground lease of the type and duration that has been the subject of negotiation qualifies as a "disposition" of that property, one or the other of the exemptions referenced above applies to all of the property that makes up the Site.

In light of Developer's position, the absence of any legal authority interpreting or applying AB 1486 (which became effective only as of January 1, 2020), and the potential adverse ramifications to the City were the City to engage in conduct found to violate AB 1486, the City intends to submit a request to HCD pursuant to Government Code 54230.5(b) seeking an expedited determination of whether AB 1486 would apply to a long-term ground lease of the property that makes up the site to Developer for development of the Project, as has been the subject of the ongoing negotiations. In light of Developer's position, the absence of any legal authority interpreting or applying AB 1486, and a desire not to unnecessarily disrupt ongoing negotiations, the City will continue to engage in negotiation with Developer while awaiting an opinion from HCD.

This action should not be taken as the City's agreement with the Developer regarding any of the positions set forth in your December 16, 2019 correspondence. In particular, the City rejects any contention that there is any limitation on the City's ability, should it choose, not to proceed with a disposition of the property that makes up the Site, or to dispose of the property in any manner determined at the discretion of the City Council, subject to applicable laws. Rather, this action reflects the City's good faith effort to support continuing negotiations within the confines of applicable law.

As reiterated on numerous occasions, the City's willingness to continue negotiations at the staff level is contingent upon the City's understanding (as previously stated in the City's January 23, 2019 letter) that non-binding negotiations can proceed and also terminate without Developer's claim to any monetary damages. Furthermore, nothing herein or in any prior correspondence should be interpreted to preclude Developer from seeking to enter into a new ENA by action of City Council, to the extent authorized by law.

In short, the City believes that seeking HCD's position regarding the applicability or non-applicability of AB 1486 will provide much needed clarity and certainty to both the City and Developer.

Sincerely

Susan Y. Cola
Deputy City Attorney

cc: Lane Dilg, City Attorney
George Cardona, Special Counsel/Chief of Staff
Andy Agle, Director, Housing and Economic Development Department

EXHIBIT C

Contract No. 9844 (CCS)

EXCLUSIVE NEGOTIATION AGREEMENT

THIS EXCLUSIVE NEGOTIATION AGREEMENT ("AGREEMENT") is entered into this 19th day of March 2014 by and between the CITY OF SANTA MONICA ("City"), a municipal corporation organized and existing pursuant to the laws of the State of California and the Charter of the City of Santa Monica, and METROPOLITAN PACIFIC CAPITAL, INC., a California corporation, CLARETT WEST DEVELOPMENT, LLC, a Delaware limited liability company, and DLJ REAL ESTATE CAPITAL PARTNERS, LLC, a Delaware limited liability company (each individually and collectively, referenced herein as "Developer") on the terms and provisions set forth below.

RECITALS

A. The City is the owner or master lessee of certain real property (the "Site") located within the City of Santa Monica, California. The Site is comprised of approximately two and a half acres (112,000 square feet) bound by Arizona Avenue on the north, 4th Street on the west, 5th Street on the east, and the property line to the south. Approximately half of the site (1324-1334 5th Street) is owned by the City, and the other half of the site (1301-1333 4th Street) was acquired by the former Redevelopment Agency of the City of Santa Monica ("RDA") and leased to the City as the "Lessee" pursuant to that certain Lease and Vesting Agreement ("City Lease") dated as of October 29, 2010, recorded as Memorandum of Lease and Vesting Agreement by and between the City of Santa Monica and Redevelopment Agency of the City of Santa Monica on November 2, 2010, as Document No. 20101568941. The residual fee interest in 1301-1333 4th Street was transferred to the City in March 2011, subject to all existing encumbrances on title, including the City Lease. Two buildings initially on the Site were listed in the Historic Resources Inventory; one building has been demolished and one building remains on Site. A Site Map is attached hereto and incorporated herein as Exhibit A.

B. In February 2013, the City issued a Request for Proposals ("RFP") with respect to the ground leased development of a mixed use project on the Site consisting of public and programmed open space, public parking, activating ground-floor uses, a mix of upper-floor uses, and associated infrastructure ("Project").

C. In response to the RFP, Developer submitted a proposal on May 1, 2013 entitled "The Plaza at Santa Monica." Developer also submitted responses to follow-up questions regarding the proposal in June and in October. The proposal and responses to follow-up questions are collectively referred to herein as the "Proposal," incorporated by reference, with the most recently submitted information superseding any conflicts with the initial proposal submission.

D. On December 10, 2013, the City Council authorized staff to enter into exclusive negotiations with Developer for the development of the Project and the ground leasing of the portion of the Site not subject to the City Lease, and the sub-ground leasing of the portion of the Site subject to the City Lease, to Developer, subject to the Council's approval of the terms and

conditions of a Disposition and Development Agreement ("DDA") with respect to the ground leasing and sub-ground leasing of the Site and the development of the Project on the Site.

E. The parties acknowledge that AB1X 26 (enacted Stats. 2011, 1st Ex. Sess. 2011-2012) and AB 1484 (2011-2012) (collectively, the "Dissolution Laws") provide certain oversight authority with respect to transfers of former Redevelopment Agency property that occurred after January 1, 2011, including the transfer of the Property to the City in March 2011. Notwithstanding the Dissolution Laws, Developer understands, acknowledges and agrees that nothing in this Agreement shall be deemed as a warranty or representation regarding the transferability of the City's fee and/or leasehold interest in the Site and that Developer's decision to enter into exclusive negotiations with the City, notwithstanding the Dissolution Laws, is undertaken with City's full disclosure of this risk to Developer.

F. City and Developer wish to enter into this Agreement to exclusively negotiate the terms and conditions for development of the Site, subject to all of the terms and conditions of this Agreement.

IT IS HEREBY MUTUALLY AGREED AS FOLLOWS:

I. [§ 100] Purpose of Agreement

The purpose of this Agreement is to provide a period of exclusive negotiations and to set forth the terms and conditions under which the parties shall work together in developing the scope of the Project and any actions required to be taken by Developer or City with respect thereto and to negotiate diligently and in good faith to achieve the Milestones set forth in the Schedule of Performance attached hereto as Exhibit B (the "Schedule of Performance").

II. [§ 200] Elements of Proposal

In making its determination to enter into this Agreement with Developer, the Developer agrees that the City relied upon the project components, programs, and objectives contained within the Proposal (collectively, the "Elements"). The parties acknowledge that the Project will change based on community and City input. The pro forma for the Project as it evolves shall reflect the Developer's commitment to key Elements (as such key Elements may evolve), including but not limited to ground lease and sub-ground lease payments, Project program, design flexibility, design and management team, and sustainability, outlined in the initial Proposal and the supplemental response as submitted in October 2013, both of which are incorporated herein by reference.

The parties agree that this Agreement and the DDA shall be guided by all of the Elements that are approved by the City Council as the Project design specifics are refined. The negotiations shall address, but need not conform to the exact details of the Proposal; it being understood that the ultimate scope of the Project is subject to change in connection with the development of the scope of the Project outlined below in Article III, as approved by the City Council.

III. [§ 300] Development of Scope of Project

[§ 301] Generally

The Developer agrees that Developer's design of the Project shall be consistent with the Elements and the Design Concept Plans (defined below) approved by the City Council following the community process outlined below in Section 302.

[§ 302] Community Input Process

The Developer agrees that community input will play a major role in the design process for the Project. At Developer's sole cost and expense, the Developer agrees to facilitate community input by implementing a community engagement process of no more than twelve (12) months. The main purpose of the community engagement process is to elicit community input and facilitate consensus-building with regard to the design concept and program for the Project. Key Developer principals, as well as key Developer design consultants, will be active in the process, drawing on the resources of the two Developer architectural teams, the Developer landscape architecture team, and the open space management team.

The Developer and its design team shall work with City staff to structure and refine the community process for the Project consistent with the community input section of the Proposal, and, at Developer's sole cost and expense, Developer agrees to facilitate and implement the community process as refined. The Developer agrees that the refined community process shall proceed in accordance with and pursuant to the Schedule of Performance, subject to City cooperation.

It is anticipated that the community input process will culminate in the approval of the Design Concept Plans (defined below) by the City Council. The Design Concept Plans shall include a site plan, elevations and sections of the Project improvements as they are to be developed and constructed on the Site. Through the community input process, the team will establish the proposed scope and physical appearance of the Project to be presented to the City Council for conceptual approval prior to submission of the Project to the entitlement process. If approved for submission, the Project will then proceed through the entitlement approval process, which may involve the Planning Commission, Architectural Review Board, City Council and Coastal Commission.

[§ 303] Initial Business Terms

As the scope of the Project is defined through the community input process, Initial Business Terms (defined below) will be developed for approval by the City Council. The Initial Business Terms shall include preliminary terms and constitute a general framework for good faith negotiations of the terms and conditions of the DDA, which shall be subject to City Council approval. The Initial Business Terms shall be in conformance with the terms and conditions listed in section 404 of this agreement.

IV. [§ 400] Exclusive Good Faith Negotiations

[§ 401] Good Faith Negotiations

The parties agree to negotiate diligently and in good faith the terms and conditions of the DDA and related documents relating to the ground leasing and sub-ground leasing of the Site and the development, use and operation of the Project on the Site. Good faith negotiations shall mean negotiations based upon the City-approved Design Concept Plans and Initial Business Terms, and a scope of work for any required public improvements, consistent with the Project Elements that are approved by the City Council (referenced collectively hereinafter as "Scope"). Without limiting the foregoing, City shall use its good faith reasonable efforts to schedule public hearings before the City Council and City boards and commissions consistent with the time frames set forth in the Schedule of Performance.

[§ 402] Period of Negotiations

Unless earlier terminated in accordance with the provisions of this Agreement, the parties agree to negotiate diligently and in good faith the Project Scope and the Initial Business Terms for 365 days, commencing upon the full execution of this agreement ("Original Term"). The City Council may approve further extension of the Original Term after approval of the Scope.

[§ 403] Extension of Negotiations

Unless earlier terminated in accordance with the provisions of this Agreement, one ninety (90) day extension beyond the Original Term ("Extension Period") is possible with the written agreement of the City Manager, exercised in the City Manager's sole and absolute discretion. The City Council may authorize additional extensions.

[§ 404] DDA Terms and Conditions

The terms and conditions of any DDA entered into with the Developer shall be in conformance with the following components:

A. The Developer and City would enter into (a) a long-term ground lease with a 55 year base term, plus option periods agreed to by the City and Developer, with respect to the portion of the Site not subject to the City lease, and (b) a long-term sub-ground lease with a 55 year base term, plus option periods agreed to by the City and Developer, with respect to the portion of the Site subject to the City Lease (collectively, the "Ground Leases"). The terms of the Ground Leases, rental, sublease and use restrictions, mortgagee protections, default provisions and such other provisions as City and the Developer shall determine may be necessary or appropriate shall be negotiated and incorporated into the Ground Leases. The exact terms and schedule under which the City would ground lease and sub-ground lease the Site to Developer will be negotiated and set forth in the DDA.

B. In addition, the Developer and City shall discuss the concept of a profit sharing payment.

C. The Developer shall design and construct the Project on the Site in accordance with a schedule of performance to be negotiated as part of the DDA, the approved Scope included in the DDA, all approved discretionary entitlements including Architectural Review Board approval, and technical approvals from the City and other agencies (the "Entitlements").

D. The Developer shall submit to the City a good faith performance deposit and a cost recovery deposit pursuant to sections 701 and 702 of this agreement.

E. The DDA shall contain the following provisions, though if Design Concept Plans or Entitlements approved by the City Council modify the Proposal design, the provisions regarding Project design shall be modified accordingly:

1. Total public open space shall meet or exceed the proposed total area of 56,000 square feet;
2. Total cultural space shall meet or exceed the proposed 12,000 square feet;
3. Total public parking spaces shall exceed the minimum threshold of 339;
4. Minimum number of affordable Project units shall be 48;
5. Developer is responsible for the costs of relocating the two banks that are currently on the Site and for acquiring approvals for and covering the costs of demolition of existing structures as necessary;
6. Prevailing wages under state law are required for construction of the Project; and
7. The execution of the Ground Leases shall occur on or before the start of construction and shall be subject to conditions stated in the executed DDA.

[§ 405] Essential Terms Not Agreed Upon

The parties acknowledge that the Proposal and this Agreement do not establish the essential terms of the development of the Project (sometimes referred to herein as the "Transaction") and that although they have set forth below a framework for negotiation of the essential terms of the Transaction, (A) they have not set forth herein nor agreed upon all essential terms of the Transaction, including, for example, price, terms and timing of the Ground Leases; (B) they do not intend the Proposal or this Agreement to be a statement of all of the essential terms of the Transaction; and (C) the essential terms of the Transaction, if agreed to by the parties, shall be set forth, if at all, in the DDA and Ground Leases approved and executed by authorized representatives of each of the parties.

[§ 406] Not a Final Agreement

This Agreement is solely an agreement providing for the exclusive opportunity to negotiate a DDA and Ground Leases; the parties do not intend this Agreement to be, nor shall it be, a purchase agreement, ground lease, license, option or similar contract, nor does this agreement grant any discretionary approvals or entitlements.

V. [§ 500] Termination of Agreement

In addition to other provisions of this Agreement which provide for the termination of this Agreement, this Agreement may be terminated by the City in the event any of the following occurs:

A. If, for any reason, the City Council has not approved Design Concept Plans and Initial Business Terms as outlined in Sections 301-303, above, by January 31, 2015, then the City shall have the right to immediately terminate this Agreement;

B. If, for any reason, by the end of the Original Term (or the Extension Period, if applicable), the Developer has not received City Council approval to further extend the exclusive negotiating period, then this Agreement shall automatically terminate;

C. If the City reasonably determines that Developer has failed to negotiate diligently and in good faith, the City shall first provide written notice to Developer of such default and provide thirty (30) calendar days to cure the default;

D. If Developer fails to prepare and/or submit any plans, drawings or related documents as required by this Agreement by the dates respectively provided in the Schedule of Performance, the City shall first provide written notice to Developer of such default and provide thirty (30) calendar days to cure the default; and

E. If Developer is in default under any other provision of this Agreement, the City shall first provide written notice to Developer of such default and provide thirty (30) calendar days to cure the default.

F. Notwithstanding anything to the contrary contained herein, if a default is of a nature that it cannot be cured within thirty (30) calendar days, Developer shall be deemed to have cured the default provided that Developer commences the cure within such thirty (30)-day period and diligently prosecutes such cure to completion; provided, however, that in no event shall the time period to cure the default be deemed to extend the term of this Agreement, as set forth in sections 402 and 403, herein.

[§ 502] Effect of Termination

In the event this Agreement is terminated as provided in this Section, no party shall have any liability hereunder following such termination. In the event of such termination of this Agreement, unused portions of the Cost Recovery Deposit shall be allocated as provided in Section 702.

VI. [§ 600] Site Access

[§ 601] Developer Access to the Site

Subject to existing lease and license agreements with Bank of America, JP Morgan Chase, and Downtown Santa Monica, Inc., Developer shall have access to the Site pursuant to and in accordance with a License Agreement to be entered into by the City and Developer, substantially in the form attached hereto as Exhibit C ("License Agreement").

[§ 602] Insurance

Prior to any entry upon the Site and throughout the entire term of this Agreement, the Developer shall furnish or cause to be furnished to the City, evidence of the insurance policies required in the License Agreement, and shall maintain, or cause to be maintained, the insurance policies required in the License Agreement.

[§ 603] Indemnification

The Developer hereby indemnifies and agrees to defend and hold the City of Santa Monica and the City and their respective officers, employees, contractors and agents harmless from and against any and all obligations, losses, injuries, damages, claims, liens, demands, liabilities and other costs and expenses, including, without limitation, attorneys' fees and costs (collectively, "Claims"), incurred in connection with or arising out of or resulting from any work or activity of Developer, its employees, agents, contractors, representatives or consultants permitted pursuant to the License Agreement and/or the grant of access to Developer pursuant to the License Agreement, except to the extent any such Claim arises due to the gross negligence or willful misconduct of any indemnified party.

VII. [§ 700] Deposits

[§ 701] Good Faith Deposit

Prior to execution of this Agreement by the City, the Developer shall submit a good faith deposit to the City in the amount of $325,000 in the form of an unconditional, irrevocable letter of credit, cashier's check or certified check, naming the City as Beneficiary or Payee, as applicable, to ensure that Developer will proceed diligently and in good faith to negotiate and perform all of the Developer's obligations under this Agreement. If the good faith deposit is in the form of a letter of credit, the term shall be at least twelve (12) months, and if this Agreement is still in effect, shall be renewed at least thirty (30) days prior to its expiration for a like period or the City may draw on the letter of credit and hold the proceeds as the good faith deposit. If the Developer has negotiated diligently and in good faith, the deposit shall be returned to Developer upon termination of negotiations.

[§ 702] Cost Recovery Deposit

A. Within sixty (60) days following the City's execution of this Agreement, the Developer shall submit a deposit to the City in the amount of $150,000 in the form of a cashier's check or certified check as a deposit toward the reimbursement of City actual and reasonable staff and third party costs ("Cost Recovery Deposit"). The Cost Recovery Deposit will not earn interest and is intended to be used for the reimbursement of City actual and reasonable staff and third party costs. The Cost Recovery Deposit will be expended to cover the City's actual and reasonable staff and third party costs during the term of this Agreement, and the Cost Recovery Deposit will be depleted accordingly. The City reserves the right to increase the amount of the Cost Recovery Deposit for reimbursement of unforeseen City reasonable and actual staff and third party costs associated with the negotiation of the DDA. Unused portions of the Cost Recovery Deposit remaining at the time of the termination of this Agreement, or at the time the DDA is executed, will be disbursed in accordance with subsection C., below. City presently anticipates that such costs would not exceed $150,000.

B. From and after the date of this Agreement, the Cost Recovery Deposit may be used by the City to pay the City's actual and reasonable staff and third party costs incurred in connection with the drafting, negotiation, and execution of the DDA, including all staff costs and third party fees and costs incurred for legal counsel, financial and other consultants, (collectively, the "City Transaction Expenses"). Developer shall upon request be entitled to receive detailed invoices from the City setting forth amounts constituting City Transaction Expenses.

C. In the event that this Agreement terminates or is terminated as provided herein, the Cost Recovery Deposit will become nonrefundable as and to the extent necessary to pay City Transaction Expenses incurred with respect to services performed on behalf of the City through the date of termination, and the City shall return to the Developer any portion of the Cost Recovery Deposit that is not applicable to such City Transaction Expenses.

VIII. [§ 800] Need for DDA

The parties acknowledge and agree that this Agreement states the intention of the parties to negotiate and enter into a DDA. The parties have not reached agreement on such DDA, and do not intend to be bound to any DDA terms until a final written DDA is executed by both parties. With respect to the exclusive negotiations for the DDA, City's acknowledgment of this Agreement is merely an agreement to enter into a period of exclusive negotiations according to the concepts presented herein, reserving final discretion and approval by the City of Santa Monica or any other agencies of the City as to any actions required of them, if any. If the negotiations hereunder culminate in a DDA which involves the lease of property to the Developer, such an agreement becomes effective only after and if the agreement has been considered and approved by the City Council after public hearing.

IX. [§ 900] General Provisions

[§ 901] Developer's Findings, Determinations, Studies, and Reports

From time-to-time, as requested by the City, the Developer agrees to submit to the City reports and analyses, advising the City on all matters related to the Project, including, without limitation, financial feasibility analyses, construction cost estimates, marketing studies and similar due diligence matters. Should negotiations not result in a DDA between the City and Developer, City may use any non-confidential and non-proprietary information provided by the Developer in any way deemed by the City to be of benefit to the Site, subject to applicable laws including but not limited to the Public Records Act.

[§ 902] Full Disclosure

The Developer agrees to make continuing full disclosure to the City of the methods of financing and the financing documents to be used in the Project. The Developer also agrees to make continuing full disclosure to City of its partners, principals, officers, stockholders, and associates and of all other pertinent information concerning the Project, Developer and all other consultants, site developers and other participants. The developer-design team shall remain the same as described in the Proposal submitted by the Developer to the City in May 2013, unless approved by the City Manager, which approval shall not be unreasonably withheld.

[§ 903] Provision of Additional Information and Data

The Developer and the City shall cooperate with each other and provide such additional information and data relating to the Project, the financing or the Developer as either may request.

[§ 904] Real Estate Commissions

The City shall not be liable for any real estate commission or brokerage fees which may arise herefrom. The Developer agrees to indemnify and hold the City harmless from any claim by any broker, agent, or finder retained by the Developer.

[§ 905] No City Liability for Costs

The Developer acknowledges and agrees that the City shall not have any responsibility to pay or reimburse Developer for costs and expenses incurred by the Developer in connection with the RFP, this Agreement or the DDA; design, development or construction of the Project; the compliance by Developer with its obligations under this Agreement or otherwise unless the City expressly assumes any such specific responsibility in the fully executed DDA, but this Section shall not preclude Developer from allocating these costs as Project costs for pro forma purposes.

[§ 906] Remedies

The Developer specifically agrees that it shall have no right to obtain monetary damages, including for reimbursement, lost profit or consequential damages, with respect to this Agreement, the RFP, or the selection process and no right to specifically enforce this Agreement or any provision hereof and expressly waives any right it may have to file a notice of *lis pendens* against the Site, or any part thereof, with the sole exception that, if the City has acted in bad faith in pursuing its obligations under this Agreement, the Developer shall, as its sole and exclusive remedy, be entitled to the return of the Good Faith Deposit and the full amount of the Cost Recovery Deposit.

[§ 907] Interpretation

Wherever required by the context of this Agreement, the singular shall include the plural and the feminine shall include the masculine and vice versa. The words "include", "including" and "included" wherever used in this Agreement shall be construed to be followed by the words: "without limitation".

[§ 908] Notices

All notices or submittals required or permitted hereunder shall be delivered in person, by overnight courier, or by registered or certified mail, postage prepaid, return receipt requested to such party at its address shown below, or to any other place designated in writing by such party.

City: City of Santa Monica
1685 Main Street, Room 212
Santa Monica, CA 90401
Attn: City Manager

Developer: Metropolitan Pacific Capital, Inc.
201 Santa Monica Blvd., Suite 620
Santa Monica, CA 90401
Attn: John Warfel

Clarett West Development
1901 Avenue of the Stars, Suite 1465
Los Angeles, CA 90067
Attn: Frank Stephan

DLJ Real Estate Capital Partners
11150 Santa Monica Blvd., Suite 1020
Los Angeles, CA 90025
Attn: Jay Glaubach

Any such notice or submittal shall be deemed received upon delivery, if delivered personally, one (1) business day after delivery to the courier if delivered by nationally recognized overnight

courier, and three (3) business days after deposit into the United States mail if delivered by registered or certified mail.

[§ 909] Assignments

The Developer shall not assign, sell, convey, hypothecate or otherwise transfer this Agreement or any of the Developer's rights under this Agreement to any person or entity without the expressed written consent of the City, which consent may be withheld in its sole and absolute discretion; provided, however, that each Developer may assign this Agreement without the City's consent or approval to (a) an entity that is controlled by or under common control with such Developer, and (b) an affiliated entity that will develop the Project. Following such assignment, the assignor shall be relieved of all obligations hereunder, provided that the assignee expressly assumes all such obligations.

[§ 910] No Third Party Beneficiaries

Except as otherwise specifically set forth herein, execution of this Agreement is not intended to confer any third party beneficiary rights in or create any liability on the part of any party to any third parties.

[§ 911] Governing Law/Exclusive Venue

The Agreement shall be interpreted in accordance with California law, without giving effect to choice of law provisions. The parties agree that in the event of litigation, exclusive venue shall be in the County of Los Angeles, California, and the parties waive any objection to such forum as inconvenient or inappropriate.

[§ 912] Counterparts

This Agreement may be signed in one or more counterparts, each complete set of which shall constitute an original and all of which together shall constitute one and the same agreement.

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[§ 913] City Acting in Proprietary Capacity

By executing this Agreement, Developer acknowledges, understands and agrees that City, in implementing its duties under this Agreement, is acting solely in its proprietary capacity and nothing herein shall be deemed as a waiver or modification of any local, state or federal regulatory requirements for development of the Site.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date set opposite their signatures.

ATTEST:

SARAH P. GORMAN
City Clerk

APPROVED AS TO FORM:

MARSHA JONES MOUTRIE
City Attorney

CITY OF SANTA MONICA
a municipal corporation

By: _____
ROD GOULD
City Manager

Metropolitan Pacific Capital, Inc.,
a California corporation

By: _____
John Warfel
President

Clarett West Development, LLC,
a Delaware limited liability company

By: _____
Frank Stephan
Senior Managing Director

DLJ Real Estate Capital Partners, LLC,
a Delaware limited liability company

By: _____

Title: _____

[§ 913] City Acting in Proprietary Capacity

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a municipal corporation

By: _____
ROD GOULD
City Manager

_____
SARAH P. GORMAN
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APPROVED AS TO FORM:

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By: _____
Frank Stephan
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City Manager

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City Clerk

APPROVED AS TO FORM:

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By: _____
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President

Clarett West Development, LLC,
a Delaware limited liability company

By: _____
Frank Stephan
Senior Managing Director

DLJ Real Estate Capital Partners, LLC,
a Delaware limited liability company

By: _____

Title: AUTHORIZED SIGNATORY

EXHIBIT A

SITE MAP

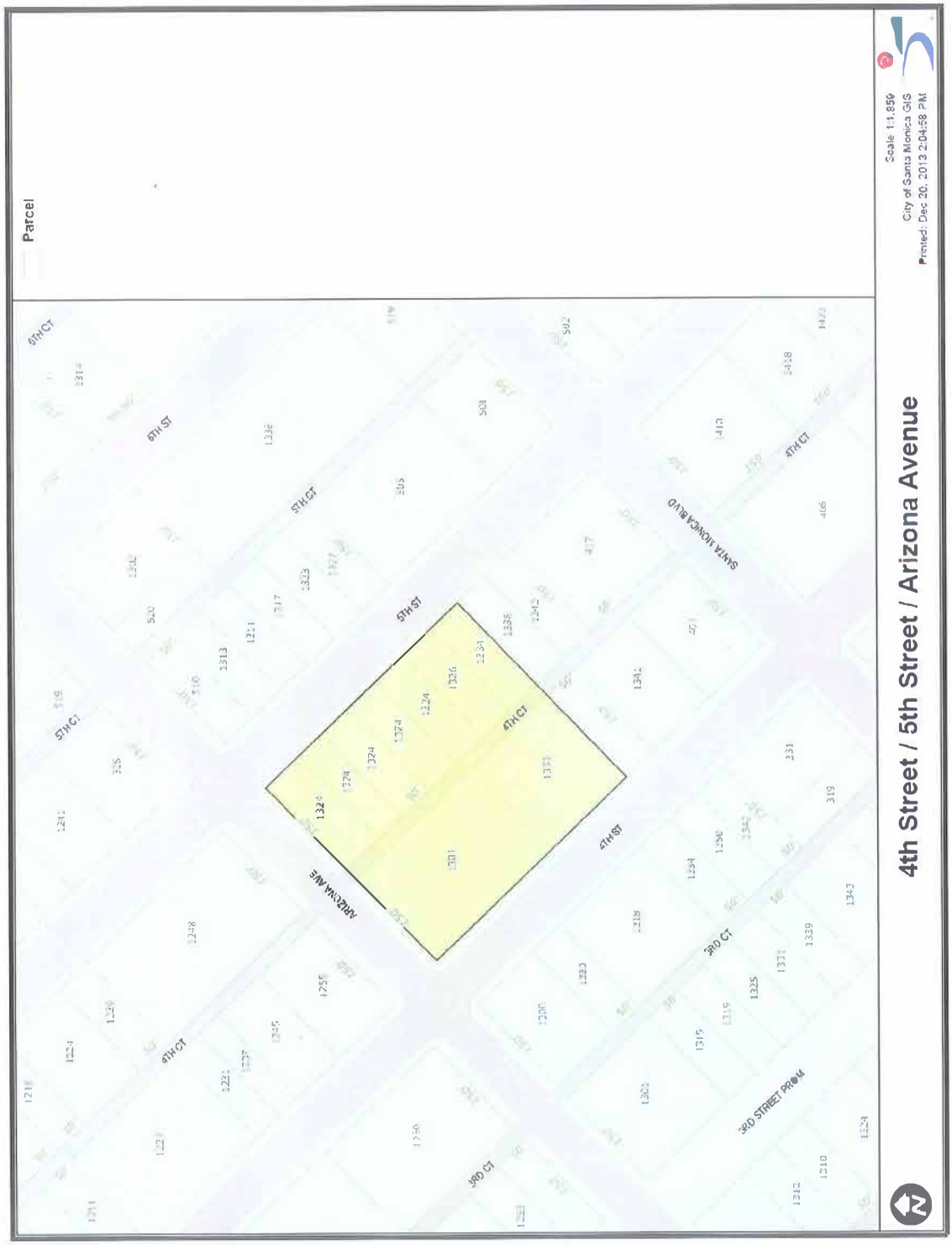

EXHIBIT B

SCHEDULE OF PERFORMANCE

MILESTONES
Phase I – January-May 2014
ENA executed
Developer conducts public workshops and seeks community and City input
Presentation of preliminary designs to Architectural Review Board
Check in with City Council to get direction on Project scope
Phase II – June-December 2014
Developer submits Design Concept Plans and Development Agreement application
Design Concept Plan review and feedback
Visits to appropriate City Boards and Commissions
Formal "float-ups" to Architectural Review Board and Planning Commission
Parties negotiate Initial Business Terms
"Float Up" to City Council and consideration of Design Concept Plans and Initial Business Terms
Extend ENA – 2015
Contingent on Council approval of Design Concept Plans and Initial Business Terms, extend ENA and begin environmental review and negotiation of Development Agreement (DA), Disposition and Development Agreement (DDA), and Ground Leases

Anticipated dates subject to change.

EXHIBIT C

FORM OF LICENSE AGREEMENT

[after this page]

LICENSE AGREEMENT

This LICENSE AGREEMENT ("Agreement") is made as of this ___ day of _____, 2014 (the "Effective Date"), by and between CITY OF SANTA MONICA, a public body corporate and politic, (the "City"), and METROPOLITAN PACIFIC CAPITAL, INC., CLARETT WEST DEVELOPMENT, LLC AND DLJ REAL ESTATE CAPITAL PARTNERS, LLC (each individually and collectively "Licensee").

RECITALS

A. The City is the current owner or master lessee of certain real property located in the City of Santa Monica, Los Angeles County, California, as more particularly shown on the site map attached hereto as Exhibit "A" (the "Property").

B. The Property is the subject of that certain Exclusive Negotiation Agreement by and between the City and Licensee. The purpose of the Exclusive Negotiation Agreement is to provide an exclusive negotiation agreement regarding the Property to set forth the terms and conditions under which City and Licensee ("Developer" therein) shall work together in developing the scope of the Project and any actions required to be taken by Licensee or City with respect thereto and to negotiate diligently and in good faith to prepare a Disposition and Development Agreement to be entered into between the City and Licensee with respect to the Project, subject to all of the terms and conditions of the Exclusive Negotiation Agreement. The term "Project" as used herein shall mean a mixed use project on the Property including residential uses, commercial uses, open space improvements, and associated infrastructure.

C. Subject to the covenants and conditions set forth below, the parties desire to enter into this Agreement to provide Licensee with access to the Property for the purposes and in accordance with the terms and provisions set forth herein.

TERMS

1. Grant of License. The City hereby grants to Licensee and its affiliates and Licensee's consultants ("Consultants") a temporary, nonexclusive license and right of entry to perform the following acts on the Property (1) obtain soil samples and make surveys and tests necessary to determine the suitability of the Property for the development of the Project; (2) conduct reasonable investigations on and beneath the Property to determine the presence of Hazardous Materials; and (3) other studies reasonably approved by City Manager or designee as requested by Licensee to assess the feasibility of the Project (collectively, the "Permitted Purpose"), subject to all licenses, easements, encumbrances and claims of title affecting the Property for the period of time set forth in this Agreement (the "License"). As used herein the phrase "Hazardous Materials" means any substance, whether in the form of a solid, liquid, gas or any other form whatsoever, which by any governmental requirements is defined as "hazardous" or harmful to the environment. Licensee agrees that the Permitted Purpose shall be completed in accordance with any permits and authorization issued by the City or any other governmental entity having jurisdiction over the Property in connection with the Permitted Purpose. Licensee's or its duly authorized employees', agents', consultants', independent contractors' (collectively,

"Licensee's Representatives") use of the Property shall not interfere with the use and enjoyment of the Property by the City or its directors, officers, members, employees, agents and independent contractors (collectively, "City's Representatives"), or anyone claiming under or through them. Licensee shall not permit any other party associated with Licensee, except Licensee's Representatives, to enter onto the Property during the term of this Agreement without the prior written consent of the City Manager or his designee, which may be withheld in his or her sole and absolute discretion. Licensee and Licensee's Representatives shall not perform any work other than the Permitted Purpose upon the Property.

2. Term. This Agreement shall commence upon the date the City executes this Agreement (the "Effective Date") and shall automatically expire upon the earliest to occur of: (i) conveyance of the Ground Leasehold estates in the Property to Licensee; (ii) termination of the Exclusive Negotiation Agreement; or (iii) termination of this Agreement (the "Term").

3. No Possessory Interest. Licensee acknowledges and agrees that City's grant of this License to use the Property creates no possessory interest in the Property and therefore Licensee shall abandon the use of the Property without the necessity of a judicial proceeding by the City no later than the expiration of this Agreement, or, in the event of an earlier termination of this Agreement, Licensee shall abandon the use of the Property immediately upon such earlier termination. Licensee further acknowledges and agrees that any failure to abandon the use of the Property upon expiration or termination of this Agreement shall constitute a trespass. This Agreement is intended to be for a short term duration.

4. Purpose of License. Subject to the provisions of this Agreement, Licensee and Licensee's Representatives may, during the Term, enter onto the Property at reasonable times to perform the Permitted Purpose in a good, substantial and workmanlike manner. Once undertaken, the Permitted Purpose shall be diligently pursued to completion.

5. Permits; Compliance with Laws and Regulations. Any and all work undertaken by Licensee pursuant to this Agreement shall be performed in conformance with all laws, ordinances, codes, and regulations of, or approved by, the applicable federal, state and local governments with respect to Licensee's or Licensee's Representatives use of and activities upon the Property. Licensee, at Licensee's sole cost and expense, shall obtain all required governmental permits and authorizations for Licensee's use of and activities upon the Property pursuant to this Agreement, and Licensee's use of and activities upon the Property shall be in conformance with any such permits and authorizations. City, in its capacity as owner or master lessee of the Property, shall cooperate with Licensee in applying for such permits and authorizations, subject to the approval of City Manager or designee.

6. Reports and Studies. In consideration of the City's granting of this License, Licensee shall promptly provide the City with a copy of all reports and test results arising from this License, without creating any liability for Licensee or the preparer of such reports.

7. Condition of the Property. The Property is licensed to Licensee in an "as is" condition, existing as of the Effective Date of this Agreement. Licensee shall not construct any temporary or permanent improvements or make any material changes to the Property as part of

Licensee's use of the Property without City's prior written consent, which may be withheld in its sole and absolute discretion. Such prohibition on construction of improvements or material changes to the Property shall include but shall not be limited to any signs, paving, construction of fencing, retaining walls, buildings or structures, or the removal of any living trees.

8. Maintenance and Condition of the Property. Licensee shall at all times cause its use of and activities upon the Property to be conducted in a safe, neat and orderly fashion. Licensee shall be responsible for clean-up of the Property from any activities undertaken by Licensee or any Licensee Representative on the Property, including any improvements thereon, in compliance with all zoning, building, safety, health, environmental and other laws, codes, ordinances, regulations, orders, requirements, permits or authorizations of any federal, state or local government applicable to the Permitted Purpose.

9. Restoration of Site. Upon the termination or expiration of this Agreement, and provided that the Property has not been conveyed to Licensee, Licensee shall at its sole cost and expense, cause the Property to be restored from any damage or material change caused by Licensee or any Licensee Representative to substantially the same condition as the Property was in prior to Licensee's entry onto the Property under this Agreement. Licensee shall be responsible for any damage done to the Property by Licensee or Licensee's Representatives. Within forty-eight (48) hours of the termination or expiration of this Agreement, and provided that the Property has not been conveyed to Licensee, Licensee shall at Licensee's sole cost and expense, remove, or cause to be removed, any garbage and debris on the Property caused by Licensee or any Licensee Representative and restore the Property to substantially the same condition as the Property was in prior to Licensee's entry onto the Property under this Agreement caused by activities of Licensee or any Licensee Representative.

10. Liens. Licensee shall not suffer or permit to be enforced against the Property, or any part thereof, any mechanics', materialmen's, contractors' or subcontractors' liens or any claim for damage arising from any work performed by Licensee or Licensee's Representatives or Licensee or Licensee's use of and activities upon the Property pursuant to this Agreement. Subject to any contest undertaken by Licensee in accordance with the requirements of this Paragraph 10 to challenge payment, Licensee shall pay, or cause to be paid, all said liens, claims or demands before any action is brought to enforce the same against the Property. The City reserves the right at any time and from time to time to post and maintain on the Property, or any portion thereof or improvement thereon, such notices of non-responsibility as may be necessary to protect City against any liability for all such liens, claims or demands. In the event Licensee undertakes a contest of any lien, claim or demand to challenge payment, Licensee shall first deliver to the City bonds or other adequate security in form and amount approved in writing by City Manager or designee.

11. Indemnification. Licensee shall indemnify, defend and hold harmless the City of Santa Monica (the "City"), members of the City Council, the City's boards and commissions, the City, City Representatives and their officers, agents, contractors, employees and volunteers from and against any and all loss, liabilities, damages, judgments, actions, costs, claims and expenses arising out of or resulting from (i) any acts or omissions, negligence, fault or violation of law or ordinance by Licensee or its officers, representatives, employees, agents, subcontractors, patrons

or invitees, (for this Section only, hereinafter collectively, "Licensee") or any Licensee Representative entering or using the Property with the permission of Licensee; and (ii) from and against any and all loss, liabilities, damages, judgments, actions, costs, claims and expenses arising in connection with Licensee's use of the Property. Notwithstanding the forgoing, Licensee has no obligations to indemnify the City, City Representatives and their officers, agents, contractors, employees and volunteers against the City's and City Representative's gross negligence or willful misconduct. Licensee shall give to the City prompt and timely written notice of any claim made or suit instituted related to the subject matter of this Agreement to its knowledge which may in any way directly or indirectly, contingently or otherwise affect either party. Approval of insurance policies by the City shall in no way affect or change the terms and conditions of the indemnification obligations of Licensee described herein.

12. Waiver Of Subrogation. Licensee hereby waives any and every claim which arises or may arise in its favor and against the City during the term of this Agreement or any extension or renewal hereof for any and all loss or damage to Licensee's property, or property of Licensee's officers, representatives, employees, agents, subcontractors, patrons or invitees covered by valid and collectible property insurance policies to the extent that such loss or damage is covered under such insurance policies. Such waiver shall be in addition to, and not in derogation of, any other waiver or release contained in this Agreement. Licensee also agrees that any insurer providing worker's compensation coverage for Licensee shall agree to waive all rights of subrogation against the City and City Representatives for losses arising from activities and operations of Licensee and the use of the Property pursuant to this Agreement.

13. Liability For Loss, Injury Or Damage. In addition to any other assumption of liability set forth herein, and excluding any loss or damage to the extent resulting from the City's negligence or willful misconduct, Licensee agrees that it assumes the sole risk and responsibility for any damage, destruction or theft of Licensee's equipment, materials or personal property placed on the Property and for any injury to persons which occurs on the Property as a result of the permitted use licensed pursuant to Section 1, above, of this Agreement.

14. Insurance. Prior to commencing work, Licensee shall procure, maintain, and pay for insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work or services hereunder by Licensee, its agents, representatives, employees or subcontractors for the duration of the License Agreement. The insurance requirements are set forth in the Insurance Requirements and Verifications, which is attached as Exhibit "B".

15. Termination. In the event that Licensee or Licensee's Representatives violate any of the terms or conditions set forth in this Agreement, the City Manager or designee, after giving Licensee written notice of such violation and a thirty (30) calendar day period within which to cure the same, shall have the right to immediately terminate this Agreement by providing written notice to Licensee of said termination. No termination or expiration of this Agreement shall relieve Licensee of performing any of its obligations required hereunder which were either required prior to or which survive such termination or expiration.

16. Licensee As Independent Contractor. Licensee is, and at all times during the term of this Agreement shall be deemed to be, an independent contractor. City shall not be liable for any acts or omissions of Licensee, or its officers, representatives, employees, agents, subcontractors, patrons or invitees and nothing herein contained shall be construed as creating the relationship of employee and employer between Licensee and City. Licensee shall be solely responsible for all matters relating to payment of its employees, including payment of Social Security taxes, withholdings and payment of any and all federal, state and local personal income taxes, disability insurance, unemployment, and any other taxes for such employees, including any related assessments or contributions required by law or any other regulations governing such matters.

17. Assignability. This Agreement may not be assigned or transferred without the express written consent of the City Manager (which may be withheld in his or her sole and absolute discretion), whether voluntarily or involuntarily, and Licensee shall not permit the use of the Property, or any part thereof, except in strict compliance with the provisions hereof, and any attempt to do otherwise shall be null and void; provided, however, that Licensee may assign this Agreement without the City's consent or approval to (a) an entity that is controlled by or under common control with such Licensee, and (b) an affiliated entity that will develop the Project. Any approved assignee of this Agreement shall enter into an assignment and assumption agreement in a form reasonably approved by the City Manager. No legal title or leasehold interest in the Property is created or vested on Licensee. Following such assignment, the assignor shall be relieved of all obligations hereunder, provided that the assignee expressly assumes all such obligations.

18. Governing Law. The laws of the State of California shall govern this Agreement.

19. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute one and the same instrument.

20. Attorneys' Fees. If any action, proceeding, or arbitration arising out of or relating to this Agreement is commenced by either party to this Agreement, then the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs and expenses incurred in the action, proceeding or arbitration by the prevailing party.

21. City's Proprietary Capacity. Licensee agrees that City, in making and entering into this Agreement, is acting and shall be deemed to be acting solely in City's proprietary capacity for all purposes and in all respects; and nothing contained in this Agreement shall be deemed directly or indirectly to restrict or impair in any manner or respect whatsoever any of City's governmental powers or rights or the exercise thereof by City, whether with respect to the Property or Licensee's use thereof or otherwise. It is intended that Licensee shall be obligated to fulfill and comply with all such requirements as may be imposed by any governmental City or authority of the City having or exercising jurisdiction over the Property in its governmental capacity.

22. Authority to Sign. Licensee hereby represents that the persons executing this Agreement on behalf of Licensee have full authority to do so and to bind Licensee to perform pursuant to the terms and conditions of this Agreement.

23. Notice. Any notice provided for in this Agreement shall be given by mailing such notice by certified, return receipt mail addressed as follows:

If to Licensee:

Metropolitan Pacific Capital, Inc.
201 Santa Monica Blvd., Suite 620
Santa Monica, CA 90401
Attn: John Warfel

Clarett West Development
1901 Avenue of the Stars, Suite 1465
Los Angeles, CA 90067
Attn: Frank Stephan

DLJ Real Estate Capital Partners
11150 Santa Monica Blvd., Suite 1020
Los Angeles, CA 90025
Attn: Jay Glaubach

If to City:

City of Santa Monica
1685 Main Street, Room 212
Santa Monica, CA 90401
Attn: City Manager

24. Time is of the Essence. Time is of the essence as to every term and condition of this Agreement.

25. Recordation. Neither party shall record this Agreement.

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26. Severability. In the event that any provisions of this Agreement shall be held to be invalid, the same shall not affect in any respect whatsoever the validity of the remainder of the Agreement.

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the Effective Date.

ATTEST:

CITY OF SANTA MONICA
a municipal corporation

By: _____
ROD GOULD
City Manager

_____
SARAH P. GORMAN
City Clerk

APPROVED AS TO FORM:

_____
MARSHA JONES MOUTRIE
City Attorney

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Clarett West Development, LLC,
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By: _____
Frank Stephan
Senior Managing Director

DLJ Real Estate Capital Partners, LLC,
a Delaware limited liability company

By: _____

Title: _____

Exhibit "A"

SITE MAP

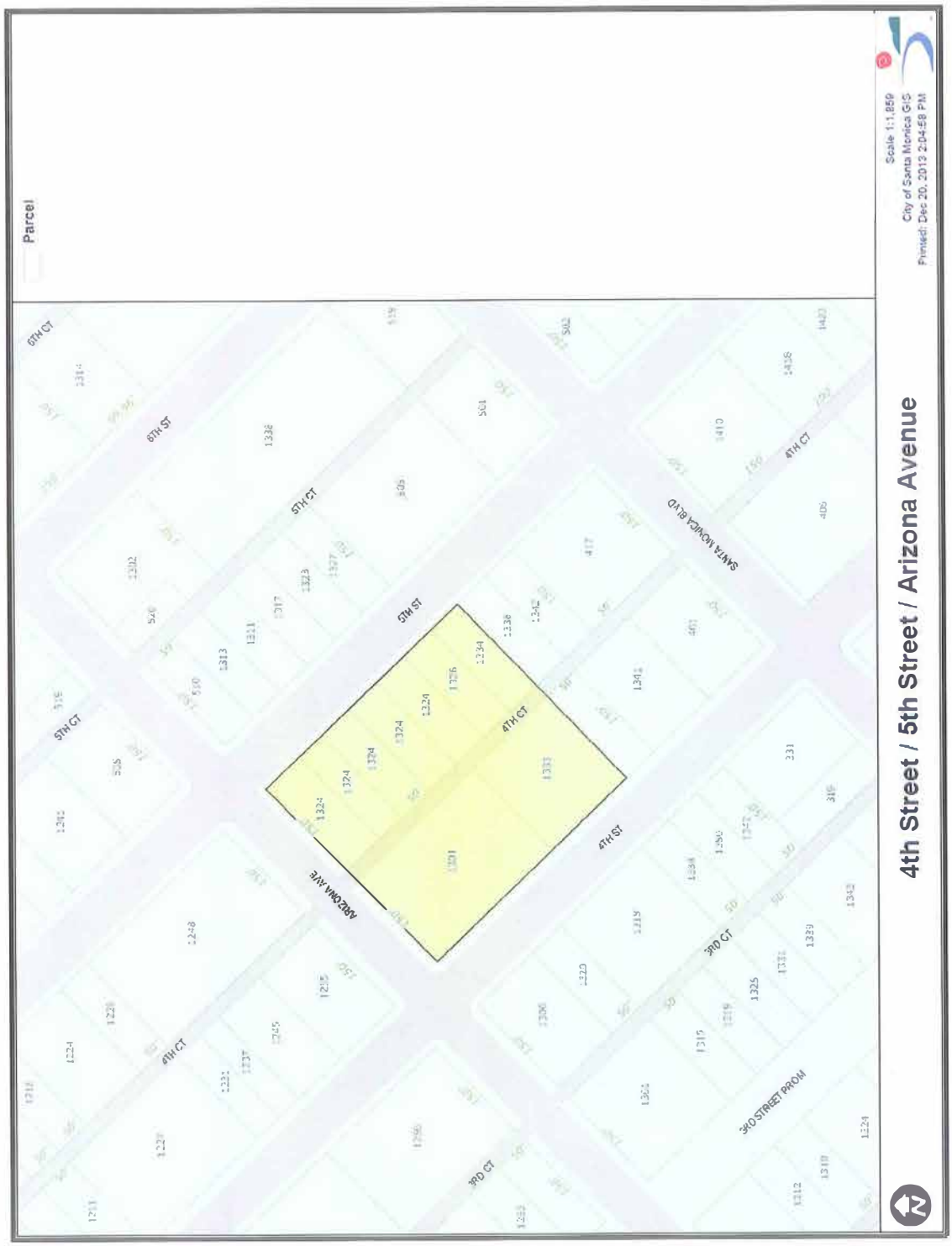


Exhibit B
Insurance Requirements

Licensee and its Consultants shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Licensee and its Consultants and their respective agents, representatives, employees or subcontractors.

Minimum Scope/Limits of Insurance

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office Form CG 00 01 covering GCL on an "occurrence" basis, including products and completed operations, property damage, bodily injury and personal and advertising injury, with limits of no less than $1,000,000 per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

2. **Automobile Liability:** Insurance Services Office Form CA 00 01 covering Code 1 (any auto), or if the Licensee has no owned autos, Code 8 (hired) and Code 9 (non-owned), with limits of no less than $1,000,000 per accident for bodily injury and property damage.

3. **Workers' Compensation:** Workers' Compensation insurance as required by the State of California, with Statutory Limits and Employers' Liability Insurance with limits of no less than $1,000,000 per accident for bodily injury or disease.

4. **Professional Liability:** Insurance appropriate to the Consultant's profession with a limit of no less than $1,000,000 each occurrence/$2,000,000 in the annual aggregate.

5. **Pollution Legal Liability:** Insurance for environmental hazards with limits of no less than $1,000,000 each occurrence/$2,000,000 in the annual aggregate.

If the Licensee maintains higher limits than the minimums shown above, the City of Santa Monica requires and shall be entitled to coverage for the higher limits maintained by the Licensee. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the City of Santa Monica.

Other Insurance Provisions

1. The policies are to contain, or be endorsed to contain, the following provisions:

   a. **Additional Insured Status:** The City of Santa Monica, its officers, officials, employees and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of Licensee including materials, parts or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Licensee's insurance at least as broad as Insurance Services Office Form CG 20 10 11 85. Licensee will also name the City of Santa Monica, its officers, officials, employees and volunteers as an additional insured on the Pollution Legal Liability policy. Should the Licensee use a Subconsultant to provide evidence of Pollution Legal Liability Insurance, the Licensee will require the Subconsultant to name the Licensee and the City of Santa Monica, its officers, officials, employees and volunteers as an additional insured on the Pollution Legal Liability policy.

   b. **Primary Coverage:** For any claims related to this contract, the Licensee's insurance shall be primary as respects the City of Santa Monica, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by the City of Santa Monica, its officers, officials, employees or volunteers shall be in excess of the Licensee's insurance and shall not contribute with it.

   c. **Notice of Cancellation:** Each insurance policy required herein shall state that coverage shall not be cancelled except after notice has been given to the City of Santa Monica.

   d. **Waiver of Subrogation:** Licensee hereby grants to the City of Santa Monica a waiver of any right of subrogation which any insurer of said Licensee may acquire against the City of Santa Monica by virtue of payment of any loss. Licensee agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the City of Santa Monica has received a waiver of subrogation endorsement from the insurer.

      The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the City of Santa Monica for all work performed by the Licensee, its employees, agents and subcontractors.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to and approved by the City of Santa Monica. The City of Santa Monica may require the Licensee to

purchase coverage with a lower deductible or retention or provide satisfactory proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

Acceptability of Insurers

Insurance is to be placed with insurers with a current A.M. Best rating of no less than A:VII, unless otherwise acceptable to the City of Santa Monica.

Claims Made Policies

1. If the Professional Liability or Pollution Legal Liability policy provides "claims made" coverage:

    a. The Retroactive Date must be shown, and must be before the date of this Agreement or the start of work.

    b. The insurance must be maintained and evidence of insurance must be provided for at least 5 years after completion of work.

    c. If the policy is cancelled or not renewed, and not replaced with another "claims made" policy form with a Retroactive Date prior to the effective Agreement date, the Licensee must purchase "extended reporting" coverage for a minimum of 5 years after completion of work.

Verification of Coverage

Licensee shall furnish the City of Santa Monica with original certificates and amendatory endorsements or copies of the applicable policy language providing the insurance coverage required herein. All certificates and endorsements are to be received and approved by the City of Santa Monica before work commences. However, failure to obtain required documents prior to the work beginning shall not waive the Licensee's obligation to provide them. The City of Santa Monica reserves the right to require complete, certified copies of all required insurance policies, including the endorsements required herein, at any time.

Failure to Maintain Insurance Coverage

If Licensee, for any reason, fails to maintain or cause to be maintained insurance coverage which is required pursuant to this Agreement, the same shall be deemed a material breach of contract. The City of Santa Monica, at its sole option, may terminate this Agreement and obtain damages from the Licensee resulting from said breach. Alternatively, the City of Santa Monica may purchase such coverage (but has no special obligation to do so), and without further notice to the Licensee, the City may deduct from sums due to the Licensee any premium costs advanced by the City for such insurance.

Subcontractors

Licensee shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein. All exceptions must be approved in writing by the Risk Manager.

EXHIBIT D

FIRST MODIFICATION TO EXCLUSIVE NEGOTIATION AGREEMENT

This First Modification to Exclusive Negotiation Agreement Number 9844 (CCS) ("First Modification"), entered into as of June 23, 2015, by and between the City of Santa Monica, a municipal corporation ("City"), and METROPOLITAN PACIFIC CAPITAL, INC., a California corporation, CLARETT WEST DEVELOPMENT, LLC, a Delaware limited liability company, and DLJ REAL ESTATE CAPITAL PARTNERS, LLC, a Delaware limited liability company (each individually and collectively, referenced herein as "Developer"), is made with reference to the following:

RECITALS

A. The City is the owner or master lessee of certain real property (the "Site") located within the City of Santa Monica, California. The Site is comprised of approximately two and a half acres (112,000 square feet) bound by Arizona Avenue on the north, 4th Street on the west, 5th Street on the east, and the property line to the south. Approximately half of the site (1324- 1334 5th Street) is owned by the City, and the other half of the site (1301-1333 4th Street) was acquired by the former Redevelopment Agency of the City of Santa Monica ("RDA") and leased to the City as the "Lessee" pursuant to that certain Lease and Vesting Agreement ("City Lease") dated as of October 29, 2010, recorded as Memorandum of Lease and Vesting Agreement by and between the City of Santa Monica and Redevelopment Agency of the City of Santa Monica on November 2, 2010, as Document No. 20101568941. The residual fee interest in 1301-1333 4th Street was transferred to the City in March 2011, subject to all existing encumbrances on title, including the City Lease.

B. In February 2013, the City issued a Request for Proposals ("RFP") with respect to the Ground Leased development of a mixed use project on the Site consisting of public and programmed open space, public parking, activating ground-floor uses, a mix of upper-floor uses, and associated infrastructure ("Project").

C. On December 10, 2013, the City Council authorized staff to enter into exclusive negotiations with Developer for the development of the Project and the sub-ground leasing of the Site, subject to the Council's approval of the terms and conditions of a Disposition and Development Agreement ("DDA") with respect to the sub-ground leasing of the Site and the development of the Project on the Site.

D. On March 19, 2014, the City and Developer entered into Exclusive Negotiation Agreement Number 9844 (CCS) ("the Agreement") for an Original Term of 365 days with one 90 day extension which will expire on June 19, 2015.

E. On May 12, 2015, the City Council authorized an additional extension of the term of the Agreement by an additional six (6) months with an additional three-month option at the City Manager's discretion.

F. The parties seek to extend the term of the Agreement as set forth herein.

TERMS AND CONDITIONS

Now, therefore, the undersigned parties do hereby mutually agree to modify the Agreement as follows:

1. Section [§403] Extension of Negotiations shall be modified to add the following paragraph:

> Commencing from June 19, 2015, the term of this Agreement shall be extended for a period of six (6) calendar months on the same terms and conditions as set forth in the Agreement. Unless terminated earlier in accordance with this agreement, the City Manager may authorize an additional three month extension.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date set opposite their signatures.

ATTEST:

SARAH P. GORMAN
City Clerk

APPROVED AS TO FORM:

MARSHA JONES MOUTRIE
City Attorney

CITY OF SANTA MONICA
a municipal corporation

By: _____
ELAINE M. POLACHEK
Interim City Manager

Metropolitan Pacific Capital, Inc.,
a California corporation

By: _____
JOHN WARFEL
President

Clarett West Development, LLC,
a Delaware limited liability company

By: _____
FRANK STEPHAN
Senior Managing Director

DLJ Real Estate Capital Partners, LLC,
a Delaware limited liability company

By: _____
Title: AUTHORIZE SIGNATORY

EXHIBIT E

City of
Santa Monica®

January 23, 2019

Frank Stephan
Clarett West Development, LLC
1901 Avenue of the Stars, Suite 1465
Los Angeles, CA 90067

Timan Khoubian
DU Real Estate Capital Partners, LLC
1901 Avenue of the Stars, Suite 1465
Los Angeles, CA 90067

Dear Mr. Stephan and Mr. Khoubian:

As you know, the City of Santa Monica ("City") and Clarett West Development, LLC and DU Real Estate Capital Partners, LLC (the "Developer") entered into an Exclusive Negotiating Agreement, dated March 19, 2014 ("ENA"), which terminated by its own terms on December 19, 2015. This letter memorializes the understanding of Developer and the City's Economic Development Division (the "City Team") that non-binding negotiations for disposition of City-owned property, located at 4th Street and Arizona Avenue in the City of Santa Monica (the "Property"), may continue without any commitment to negotiate for any definite period.

In furtherance of this understanding, the City Team will continue to schedule and attend bi-weekly negotiation meetings, and evaluate the Developer's pro forma submittals. The Developer will submit a deposit in the amout of $100,000, a cashier's or certified check made payable to the City of Santa Monica, to cover the City's continued actual and reasonable staff and third party costs of continuing negotiations, reviewing Developer submittals, and drafting transactional documents ("City Transaction Expenses"). The City understands that any funds remaining at the end of these negotiations will be returned to the Developer. Please refer to the attached detailed summary of City Transaction Expenses spent to date.

This letter also memorializes the City's understanding, and material reliance thereon, that the Developer will not claim any right to obtain monetary damages, including for reimbursement, lost profit or consequential damages, with respect to any negotiations occurring either prior or subsequent to the termination of the ENA.

The Developer's submittal of the deposit and continuing attendance at the scheduled bi-weekly meetings will signify its agreement with the memorialization expressed in this letter. We look forward to completing the negotiations and finalizing the associated transactional documents.

Sincerely,

Andy Agle
Director of Housing & Economic Development

cc: Jason Harris, Economic Development Manager
Susan Cola, Senior Special Projects Deputy City Attorney

City Transaction Expenses
(2013-2019)

Fiscal Year	Staff Time	Consultant(s)	TOTAL
FY 2013-14	$5,180.40	$608.75	$5,789.15
FY 2014-15	$10,607.09	$24,063.14	$34,670.23
FY 2015-16	$7,518.33	$26,050.63	$33,568.96
FY 2016-17	$2,952.57	$11,978.75	$14,931.32
FY 2017-18	$7,846.36	$23,875.00	$31,721.36
FY 2018-19	$2,081.91	$3,786.25	$5,868.16
TOTAL	$36,186.66	$90,362.52	$126,549.18

Remaining Deposit - $23,450.82

EXHIBIT F

December 16, 2019

VIA U.S. MAIL AND E-MAIL

Ms. Susan Cola
Senior Special Projects Deputy City Attorney
City of Santa Monica Office of the City Attorney
1685 Main Street, Room 310
Santa Monica, CA 90401

Susan.cola@smgov.net

Re: Application of Surplus Lands Act to the Plaza at Santa Monica Project

Dear Ms. Cola:

As you know, this firm is land use counsel to Clarrett West Development, LLC and DLJ Real Estate Capital Partners, LLC (collectively, the "Developer") with respect to the proposed Plaza at Santa Monica project (the "Project") on City-owned property located at 4th/5th Street and Arizona Avenue in the City of Santa Monica (the "Site"). We are in receipt of your December 12, 2019 letter to Frank Stephan, Timan Khoubian, and Keith Elkins (the "Letter") requesting our input as to whether recent amendments to the state Surplus Lands Act ("SLA" or the "Act") adopted pursuant to Assembly Bill No. 1486 ("AB 1486," the final adopted version of which is enclosed as Attachment A), which will become effective on January 1, 2020, are potentially applicable to the Project. We appreciate the opportunity to respond to the Letter and, in particular, to:

- Describe the multiyear course of dealing between the Developer and the City evidencing an ongoing, exclusive negotiating process with respect to the proposed ground lease of the Site to Developer and development of the proposed Project;

- Explain why a ground lease would not qualify as a "disposition" of the Site under AB 1486;

- Analyze why, even if the SLA were deemed to apply to a ground lease, the Site qualifies for two "grandfathering" exceptions included in AB 1486 and therefore at most the existing SLA (prior to the enactment of AB 1486) should apply in this case; and

- Clarify that the Site would not constitute "surplus land" under the existing version of the Surplus Lands Act.

A. The City and Developer Are Exclusively Negotiating the Project

1. The City and Developer have worked together for nearly a decade in furtherance of the proposed Project.

The City has been seeking to develop the Site for nearly a decade, and the Developer and the City have been negotiating the ground lease of the Site and development of the Project for seven years.

The Site was purchased by the City between 2007 and 2010. Following community workshops and study sessions regarding the vision for development of the Site in 2010 and 2011, in 2012 the City Council authorized the issuance of a Request for Qualifications (RFQ) and directed staff to issue a Request for Proposals (RFP) to the top three teams selected through the RFQ. The City issued the RFP to three potential developers on February 1, 2013, and Developer submitted its proposal on May 1, 2013. Following an extensive review and due diligence effort, including input from independent real estate finance consultants, staff issued an information item recommending selection of the Developer on July 10, 2013.

On December 10, 2013, the Council authorized staff to enter into exclusive negotiations with Developer regarding the Project. On March 19, 2014, the City and Developer entered into an Exclusive Negotiation Agreement (the "ENA") which provided for a one-year initial term and a 90 day administrative extension.

During and after the term of the ENA, the Developer and City continued work on the proposed Project. On June 10, 2014, the City Council reviewed and commented on the Developer's design study and analysis of project alternatives. On June 3, 2015, the Planning Commission held a float up meeting and recommended that the City commence the Development Agreement (DA) negotiation process. The City Council then directed staff on October 20, 2015 to proceed with negotiating the DA with Developer.

In addition, the California Environmental Quality Act (CEQA) review process and preparation of the Environmental Impact Report (EIR) for the proposed Project occurred almost entirely *after* the original ENA term. The City held a scoping meeting on January 3, 2017 and released a revised Notice of Completion/Availability for the EIR on December 13, 2018, announcing a 60-day comment period that ended on February 13, 2019. The City is currently in the processing of preparing the Final EIR.

2. Recent events evidence an ongoing, exclusive negotiation of the Project.

In recent years, and even within the past few weeks and months, Developer and City have continued to proceed with work on various aspects of the proposed Project, including multiple

meetings, conference calls, and exchanges of drafts regarding the following documents pertaining specifically to the development of the Project:

- Disposition and Development Agreement (DDA):
  - Developer's team, its real estate counsel, and the City Attorney's office have expended countless hours of negotiation and drafting time to prepare the DDA, which is nearly in final form.
  - Developer and the City exchanged drafts of the DDA as recently as October 25, 2019 and October 30, 2019.

- Development Agreement: Developer has submitted a draft to the City.

- Parking Agreement: Developer has submitted a draft to the City.

- Sustainability Plan: Developer submitted a sustainability plan and received and responded to City comments. A meeting is now scheduled for December 18, 2019 with multiple City departments to discuss and negotiate the sustainability plan for the Project.

- Open Space Agreement and Open Space Management Plans:
  - Developer, its open space management consultants, and City staff from the Housing, Planning, and Cultural Affairs apartments have held regular meetings regarding the Project's open space components.
  - The parties have exchanged numerous drafts describing future operations, management, governance and budget for the proposed open space, including multiple rounds of comments and feedback from City staff.
  - City staff recently indicated that the plans are essentially in final form.

- Participation Agreement: The City provided a draft and Developer is currently preparing comments.

Developer's team has also coordinated and communicated with Planning staff on an ongoing basis to answer questions and provide information to be incorporated in the EIR. The City's ongoing management of the EIR process provides further indication that the City and Developer have worked collaboratively to develop a vision for the Site and proposed Project and that the City is exclusively negotiating with Developer.

The Developer has also had standing meetings every two weeks with Housing and Economic Development Director's office and has made multiple payments to the City, both before and after the term of the ENA, in furtherance of negotiating the ground lease and Project and in

reliance upon the City's assurances that good faith, exclusive negotiations were ongoing, including:

- $325,000 payment invoiced on March 17, 2014.
- $150,000 payment invoiced on May 20, 2014.
- $15,000 payment invoiced on July 9, 2014.
- $112,413.90 payment made on December 2, 2016 (non-refundable EIR administrative fee).
- $315,505 payment made on December 2, 2016 (refundable EIR deposit).
- $85,045 payment made on December 14, 2017 (EIR cost reimbursement).
- $100,000 payment made on March 13, 2019 (replenishment of City administrative expenses)

Prior to the most recent payment in March 2019, the Director of Housing & Economic Development sent a letter to Developer on January 23, 2019 stating that the City would continue to schedule and attend bi-weekly negotiation meetings and evaluate Developer's pro forma submittals in consideration of the $100,000 deposit. Although the January 23 letter states that negotiations are "non-binding"—in other words, that the City and Developer are under no obligation to consummate the ground lease and move forward with the Project—the letter also states that the City "look[s] forward to completing the negotiations and finalizing the associated transactional documents" and strongly suggests that the parties are negotiating with each other exclusively.

Moreover, at one of the biweekly meetings with the Director's office, shortly before the most recent $100,000 payment in March 2019, City staff, including representatives from the City Attorney's office, and Developer's team discussed the ENA. Specifically, the parties discussed the expiration of the original term and whether it was necessary to formally renew the ENA. The City expressed its view that such formal steps were unnecessary, because the parties were negotiating exclusively in good faith, as evidenced by both sides' continued, diligent efforts. Based on the City's assertions, the Developer did not seek to formally renew the ENA, made the $100,000 payment, and the parties continued to negotiate the ground lease and Project.

In short, at every step along the way, the City and Developer have acted as parties engaged in an exclusive negotiating process. Relying in good faith upon the City's assurances that good faith, exclusive negotiations are ongoing, the Developer's team and City staff have devoted thousands of hours—and the Developer has spent millions of dollars—in support of this effort. There is clearly a meeting of the minds with respect to consummating the ground lease and proceeding with the Project, and negotiations are nearly complete. Therefore, despite the formal expiration of the original term of the ENA, it is clear that, for all intents and purposes, the parties are negotiating exclusively.

B. The Ground Lease Is Not a "Disposition" Subject to the Act

The City is not required to undertake *any of* the steps required by the Act, because—even if the amended version of the Surplus Lands Act per AB 1486 applied to the Site and Project—the proposed ground lease of the Site is *not* a disposition that is subject to the Act.

Both the existing and amended versions of the Surplus Lands Act provide that a "local agency *disposing of* surplus land" must take certain actions "prior to *disposing of* that property." *(Emphasis added.)* Government Code Section 54222. Neither the existing nor the amended versions of the Act define the terms "dispose of," "disposing of," or "disposition." However, the legislative history of AB 1486, together with other provisions of the amended Act, indicate that the legislature did not intend for "disposition" to include leases of City-owned property.

1. The legislative history of AB 1486 shows that the legislature considered, but ultimately rejected—in response to local government opposition—a definition of "dispose of" that would have included leases.

Under the initial version of AB 1486, introduced on February 22, 2019 (enclosed as Attachment B), proposed Section 54221 *did* include a definition of "dispose of" that would have covered leases: "(f) "Dispose of" shall mean sell, lease, transfer, or otherwise convey any interest in real property owned by a local agency."

As amended in the State Assembly on March 28, 2019 (enclosed as Attachment C), the revised version of Section 54221 maintained the proposed definition of "dispose of" and added several narrow categories of leases that qualified a potential disposition site as "exempt surplus land," including:

> (E) A lease of land expressly designated for a local agency's future governmental operations that is leased on an interim basis prior to development.
>
> (F) An easement for utility, conservation, or governmental purposes.
>
> (G) A lease of land with an existing structure and lease furthering an express governmental operation of the local agency, including, but not limited to, a concession lease on recreational property.
>
> (H) A financing lease in furtherance of governmental operations, including, but not limited to, a lease and lease-back transaction.
>
> (I) A lease of undeveloped land, provided that construction of any permanent structure is not permitted under the lease.
>
> (J) A short-term lease of one year or less that may be renewed or extended on an annual basis for temporary or seasonal activities.

(K) A lease of more than one year, but less than 10 years, that is not eligible for renewal or extension.

(L) The renewal of an existing lease of one or more years for the same purpose, provided the lease was in effect as of January 1, 2018.

(M) Leases of existing agency-owned facilities for short-term use, such as park facilities, community rooms, and other uses where a facility is being rented on a temporary, short-term basis of days or months.

On April 10, 2019, however, Assembly Local Government Committee staff published its analysis of the March 28 version of the bill for the Local Government Committee of the State Assembly (enclosed as Attachment D), which specifically noted local governments' opposition to the broadened definition of "dispose of" among a list of policy issues for the Committee to consider:

> **Local Agency Leases.** Opposition from local governments argue that the bill redefines and substantially broadens the term "dispose of" to include the sale, ***lease***, transfer, or other conveyance of an interest in real property, which would pose many problems for public agencies. According to these groups, the bill narrowly exempts certain very specific leasing scenarios from the requirements of the bill, but fails to address the global problems associated with making the surplus land requirements applicable to leasing or conveyance of easements of other nonpossessory interests. They write that local governments lease property in a wide array of circumstances in support of their governmental operations and public purposes, not all of which can be predicted or micromanaged in advance as this bill attempts. They ask that the author amend the definition of "disposal" in AB 1486 to apply only to the sale of surplus land. *(Emphasis in original.)*

In order to address this issue, the analysis suggests that the Local Government Committee "may wish to consider" an amendment to "[r]emove new "dispose of" definition added by the bill, and delete corresponding lease exemption language contained in local Surplus Land Act provisions."

The analysis also includes the following among the "Arguments in Opposition" to AB 1486: "Opponents argue that the new definition of "disposal" is problematic for many public agencies that have valid reasons to lease or otherwise protect land they own . . . ."

Following the recommendation in the analysis, the Local Government Committee amended AB 1486 the very next day, on April 11, 2019, to eliminate the definition of "dispose of" and corresponding lease exemptions entirely (see enclosed Attachment E). Through subsequent iterations of the bill, the definition of "dispose of" that included leases was never restored.

Therefore, the timing and sequence of events plainly shows that (1) AB 1486 was originally drafted to cover leases (with some narrow exceptions) as well as sales of City-owned property, (2) local governments specifically objected to the inclusion of leases within the definition of "dispose of", and (3) the Local Government Committee removed the definition of "dispose of" and any corresponding references to "disposition" including leases directly in response to these objections. Accordingly, it is clear from the legislative history of AB 1486 that "disposition" of City-owned property *does not* include leases of City-owned property.

2. Other provisions of AB 1486 reinforce the conclusion drawn from the legislative history that "disposition" does not include leases.

Several other provisions of the final version of AB 1486 are consistent with the conclusion that "disposition" under the Act does not include leases of City-owned property.

For example, amended Government Code Section 54221(f)(1)(B), in the definition of "exempt surplus land," refers to land "*sold* to an owner of contiguous land." In addition, amended Section 54230.5 includes penalties for local agencies that dispose of land in violation of the Act, and specifically reference "a penalty of 30 percent of the final *sale price* of the land *sold* in violation of this article." Finally, new Section 54230.6 also provides that a local agency's failure to comply with the SLA "shall not invalidate the transfer or conveyance of real property to a *purchaser or encumbrancer* for value." *(Emphasis added in all instances.)* All of the sections refer to sales only, and none of them include any corresponding references to leasing, lease value, or lessees. It would be illogical for the Act to cover leases when penalties only apply to the sale of municipal property.

New Government Code Section 65400.1 provides that cities must, in their annual General Plan reports to the state Office of Planning and Research and Department of Housing and Community Development, include a list of sites (1) owned by the city, (2) included in the inventory of land suitable for residential development prepared pursuant to new Section 65583.2, and (3) "sold, leased, or otherwise disposed of in the prior year." This section of AB 1486 does not concern the process and requirements for disposing of individual sites, but rather the legislature's distinct public policies of disclosure and transparency with respect to sites suitable for residential development in an entirely separate title of the Government Code. It is logical that local governments, in the course of objecting to the definition of "dispose of" with respect to the SLA's mechanics for individual sites, would have accepted the obligation to simply disclose their leases as part of a separate inventory to OPR and HCD. This interpretation is supported by the specific comments from local governments in the Committee staff analysis, which criticized the initial draft's attempts to "predict[] or micromanage[] in advance" the "wide array of circumstances" in which local governments lease property in support of their public purposes. Moreover, Section 65400.1 was not even added to AB 1486 until the September 6, 2019 senate amendments to the

bill (enclosed as Attachment F), long after the definition of "dispose of" had been removed and the issue with respect to leases of City-owned property had been resolved.

Especially when read in conjunction with the legislative history, the overall structure of AB 1486 evidences the legislature's intent to exclude leases from the processes required for dispositions of individual City-owned properties. In response to the specific concerns of local governments, the legislature amended the draft bill to remove the proposed expansive definition of "dispose of" and maintain local agencies' flexibility to lease their property without having to take the actions prescribed by the Act. In short, "dispose of" only means sales, not leases.

Therefore, even under AB 1486, the City may validly lease the Site to Developer, as contemplated, without complying with any of the requirements of the Surplus Lands Act.

C. The Site and Project Are Grandfathered Under the Existing SLA

Even if the City disagreed with the logical interpretation, drawn directly from the legislative history and corresponding sections of the bill, that the proposed ground lease of the Site to Developer is not a "disposition" under the amended version of the Act, the Site and Project should be grandfathered under the existing SLA (and not subject to AB 1486) as they qualify for either of two exemptions set forth in AB 1486 under new Government Code Section 54234.

1. The Site has been designated for sale or future development under a long-range property management plan.

The Site qualifies for the exception set forth in Section 54234(b)(1), which provides that land "that has been designated in a long-range property management plan pursuant to Section 34191.5 of the Health and Safety Code, either for sale or retained for future development," shall be subject to the existing SLA rather than the amended SLA if certain conditions are satisfied.

The Site has been designated for sale or future development under the Long-Range Property Management Plan of the Successor Agency to the Redevelopment Agency of the City of Santa Monica (the "LRPMP," enclosed as Attachment G), approved pursuant to Health and Safety Code Section 34191.5 on December 21, 2015 by Resolution No. 33 of the Oversight Board of the Successor Agency (enclosed as Attachment H). Section I.1. of the LRPMP describes the "4th and Arizona" property and subsection B) thereof identifies the purpose for which such property was acquired:

> The 4th and Arizona property was assembled by the former redevelopment *along with two other parcels already owned by the City of Santa Monica* to form a larger development site for mixed use transit oriented development, as contemplated in the City's draft specific plan for the City's downtown area. *(Emphasis added.)*

The Site includes the "two other parcels" referenced in the LRPMP for purposes of forming a larger development site for mixed use transit oriented development. The LRPMP explicitly references the Site as intended for future development. Consistent with Section 54234(b), the entire Site has been designated for future development in the LRPMP, and is therefore eligible for the exception provided the remaining conditions in Section 54234(b) are satisfied.

Because the Site has been designated for future development in the LRPMP, it should be subject to the existing SLA so long as (1) an exclusive negotiating agreement or legally binding agreement for disposition is entered into not later than December 31, 2020 and (2) the disposition is completed not later than December 31, 2022. Given the late stages of the negotiations, these time periods provide ample time for the parties to enter into a new ENA and finalize and execute the DDA and related Project documents.

2. The City and Developer have entered into an exclusive negotiating agreement with respect to the Site.

Alternatively, the Site qualifies for the exception set forth in Section 54234(a)(1), which provides:

> If a local agency, as of September 30, 2019, has entered into an exclusive negotiating agreement or legally binding agreement to dispose of property, the provisions of this article as it existed on December 31, 2019, shall apply, without regard to the changes made to this article by the act adding this section, to the disposition of the property to the party that had entered into such agreement or its successors or assigns, provided the disposition is completed not later than December 31, 2022.

Read literally, Section 54234(a)(1) only requires that the ENA "has" been entered into by that date, not that it remains effective on that date (or, for that matter, as of January 1, 2020). It is inarguable that the City and Developer entered into the ENA by September 30, 2019, and therefore the exception should apply to the Site based upon the plain meaning of the statute. Application of the plain meaning of the statute would be consistent with the public policy behind the exception, which is intended to grandfather sites that local agencies have considered for disposition under the existing version of the Act.

However, even if construed more liberally to require that an exclusive negotiating agreement actually be in effect as of September 30, 2019, the Site should still qualify for the exception because, as discussed above, the parties have continued to negotiate exclusively and in good faith despite the expiration of the original term of the ENA. In particular, Developer relied upon the City's statements in its January 23, 2019 letter and its assurances in subsequent meetings

in making the most recent payment to the City in March 2019. Recent actions taken by the City and Developer and the late stage of the negotiations themselves further support the conclusion that the parties are exclusively negotiating the ground lease of the Site and development of the Project.

Therefore, so long as the actual disposition of the Site is completed by December 31, 2022, the Site should qualify for grandfathering under the existing Act based upon the exception provided for ongoing exclusive negotiations.

Only one of the two exceptions need apply for the Site to be subject to the existing rather than the amended SLA. These grandfathering provisions were intended to protect against exactly this situation, and prevent the eleventh-hour disruption of extended—in this case decade-long—complex negotiations.

D. The Site is <u>Not</u> "Surplus Land" Under the Existing Act

Assuming the existing SLA applies based on one of the exceptions above, then even if the City concluded that the ground lease would be a disposition under the Act, the City <u>still</u> would not be required to take any of the steps prescribed by the Act prior to leasing the Site to Developer, because the Site is <u>not</u> "surplus land" under the existing Act and remains required for the City's use thereunder.

The current version of the SLA defines "surplus land" as "land owned by any local agency, that is determined to be no longer necessary for the agency's use . . . ." Government Code Section 54221(b). The current statute does not (1) include any additional specificity regarding the meaning of "agency's use," (2) specify a process for making such a determination, or (3) require that such a determination be made affirmatively or negatively prior to disposing of local agency-owned property. Rather, it simply requires that the City take certain actions prior to disposing of property that it <u>has</u> determined to be "surplus land."

By contrast, the SLA as amended pursuant to AB 1486 adds significant new requirements and procedures to the disposition process. In particular, Government Code Section 54221(b)(1), as amended, requires (a) that the City Council take "formal action in a regular public meeting" declaring that land is surplus and (b) that land be "declared either "surplus land" or "exempt surplus land," as supported by written findings," before the City may take any action to dispose of it. In other words, if AB 1486 applies to City-owned property, unlike under the current law, the City would have to make an express determination that land is or is not surplus property before disposing of it.

Moreover, the amended SLA substantially narrows the definition of "agency's use." New Section 54221(c)(2)(A) provides:

> "Agency's use" shall not include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development. Property disposed of for the sole purpose of investment or generation of revenue shall not be considered necessary for the agency's use.

As noted above, there is no such limitation on disposing of City-owned land for economic development and/or public benefit purposes under the current version of the law.

Therefore, under the current version of the SLA, the Site would not be "surplus land" because the City has not determined that it is no longer necessary for the City's use. In fact, under the current implied meaning of "agency's use," as inferred from the contours of the definition in the amended Act, the Site *is* still necessary for the City's use as: (i) the Project furthers an important economic development objective and will provide extraordinary community benefits to the City, including either a one-time $24 million dollar payment for affordable housing or the construction of 48 deed-restricted affordable housing units, (ii) the City will potentially have a financial participation opportunity in the Project that could generate substantial, ongoing revenue streams for City policy priorities such as the construction of affordable housing, and (iii) the City is retaining its fee interest in the Site. Thus, under the existing SLA, the Site is still required for the City's use and the City *may* dispose of the Site without declaring it surplus or taking any of the steps required by the Act.

E. Upending the Current Negotiations Would Set an Unfortunate Precedent

Upending the long-running negotiations between the City and Developer with respect to the Site and Project would set an unfortunate precedent for future public/private partnerships in the City. It would unnecessarily derail a Project that will bring enormous benefits to the City and the community as a whole—including either a sizable affordable housing subsidy or the actual construction of affordable housing units.

There are several reasons why the City should not have to undertake the onerous steps prescribed by the Surplus Lands Act. First, under the amended Act, the proposed lease of the Site would not constitute a "disposition" triggering the requirements of the Act. Second, even if, contrary to the legislative history and clear statutory language, the lease was a disposition under the Act, the Site is exempt from AB 1486 based upon either of two available exceptions. Finally, under the existing Act, the Site is not "surplus land" and therefore would not be subject to the provisions of the Act at all.

The City faces a clear choice: if it disagrees with *each of* the reasonable interpretations of the SLA set forth in this letter, it would likely have to determine affirmatively that the Site is "surplus land" and take the remaining actions required by the Act before it could consummate the

ground lease. By contrast, if the City agrees with *any of* our analysis, then it need not comply with *any of* the Act's obligations (other than potentially meeting the outside dates for the grandfathering exceptions). Thank you for the opportunity to present this analysis and for your time and consideration of this matter. We look forward to your response. Please do not hesitate to contact us with any questions.

Sincerely,

Dave Rand

cc: Frank Stephan, Clarrett West Development, LLC
Timan Khoubian, DLJ Real Estate Capital Partners, LLC
Keith Elkins, Elkins Kalt Weintraub Reuben Gartside LLP
Lane Dilg, City Attorney
George Cardona, Chief of Staff/Special Projects
Andy Agle, Director, Housing and Economic Development
Jason Harris, Economic Development Manager

Enclosures:
Attachment A - AB 1486 - Chaptered - October 9, 2019
Attachment B - AB 1486 - Introduced - February 22, 2019
Attachment C - AB 1486 - Amended in Assembly - March 28, 2019
Attachment D - AB 1486 - Bill Analysis - Assembly Local Government Committee - April 10, 2019
Attachment E - AB 1486 - Amended in Assembly - April 11, 2019
Attachment F - AB 1486 - Amended in Senate – September 6, 2019
Attachment G - Long-Range Property Management Plan
Attachment H - Oversight Board Resolution No. 33 - December 21, 2015

EXHIBIT G

City of
Santa Monica®

Housing and Economic Development Department
1901 Main Street, Suite C
Santa Monica, CA 90405
310-458-2251

VIA U.S. MAIL AND E-MAIL

January 22, 2020

Zachary Olmstead, Deputy Director
Department of Housing and Community Development, Division of Housing Policy Development
2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
PublicLands@hcd.ca.gov

Re: Application of Surplus Lands Act to the Plaza at Santa Monica Project

Dear Mr. Olmstead:

This letter requests a determination from the Department of Housing and Community Development ("HCD") on whether AB 1486 applies to the City of Santa Monica's contemplated ground lease of certain properties located on Arizona Avenue between Fourth and Fifth Streets in Santa Monica (collectively the "Properties") to a single-purpose development entity formed by Clarett West Development, LLC and DLJ Real Estate Capital partners, LLC (collectively, "the Developer"). The Properties were assembled and are owned by the City of Santa Monica (as to approximately one half of the site) and the Successor Agency to the City's former redevelopment agency (as to the other approximately one half of the site). The Successor Agency properties are listed on a Long-Range Property-Management Plan ("LRPMP") that was approved by the Department of Finance.

The Properties currently exist as surface parking with two commercial banks on short-term leases. The proposed redevelopment project being negotiated for the Properties (the "Project") would include construction of an approximately 17,800 SF ground-level public plaza, a smaller plaza at Fifth Street and Arizona Avenue, two ground-level pocket parks, an approximately 11,000 SF second-level public urban garden, an approximately 12,000 SF cultural space, approximately 42,200 SF of ground-floor retail and restaurant space, approximately 40,000 SF second-floor gym/retail/restaurant space, a 190 to 240-room boutique hotel of approximately 117,000 square feet, approximately 106,800 SF of office space, and below-grade parking.

The City and Developer have been engaged in negotiations for the ground leases and the Project since 2014. The parties entered into an Exclusive Negotiating Agreement in 2014 ("ENA"), a copy of which is attached for your reference), but the ENA expired by its own terms in 2015. Notwithstanding the expiration of the ENA, the parties have continued good-faith negotiations, and the City has not engaged in negotiations with any other party regarding the Properties.

As you know, Assembly Bill No. 1486 (AB 1486) (codified as Government Code sections 54220 et seq.) went into effect on January 1, 2020. This bill modifies the existing Surplus Lands Act to impose new

restrictions on the "disposition" of "surplus property" owned by local government agencies, including the City. More specifically, as amended by AB 1486, Government Code Section 54222 provides that any local agency disposing of surplus land shall, "prior to disposing of that property or participating in negotiations to dispose of that property with a prospective transferee," send a notice of written availability of the property for various specified uses to various housing sponsors and other local government agencies. As amended by AB 1486, Government Code Section 54230.5(b) imposes an obligation on the local agency, prior to agreeing to terms for disposition of surplus land, to provide HCD with a specified description of the process followed to dispose of the land, and imposes an obligation on HCD to review the description and submit findings to the local agency if HCD determines that the proposed disposal violates state law. As added by AB 1486, Government Code Section 54230.5(a) imposes a penalty of "30 percent of the final sale price" on a local agency "that disposes of land in violation of this article after receiving a notification from [HCD] pursuant to subdivision (b) that the local agency is in violation of this article," and provides for a third-party cause of action to enforce the law.

As added by AB 1486, Government Code section 54324 creates exemptions from AB 1486's modifications of the Surplus Lands Act if: (1) the local agency, as of September 30, 2019, has entered into an exclusive negotiating agreement or legally binding agreement to dispose of property and the disposition is completed not later than December 31, 2022; or (2) for properties designated in a LRPMP either for sale or retained for future development, the local agency enters into an exclusive negotiating agreement or legally binding agreement for disposition not later than December 31, 2020 and disposition is completed not later than December 31, 2022.

Given the long history of negotiations between the City and Developer, the Developer's attorney has provided a written analysis, dated December 16, 2019, effectively asserting that AB 1486 is not applicable to the contemplated transaction because: (i) the Properties are not "surplus land" as defined under the Surplus Lands Act as amended by AB 1486; (ii) a long-term ground lease of the type and duration that has been the subject of negotiation does not qualify as a "disposition" of the Properties; and (iii) even if the Properties are "surplus land" and even if a long-term ground lease of the type and duration that has been the subject of negotiation qualifies as a "disposition" of the Properties, one or the other of the exemptions referenced above applies to all of the Properties. Without addressing these arguments in turn, the City believes, in the absence of binding judicial interpretations to the contrary, that the Developer's position merits review and consideration.

In light of Developer's position and the potential adverse ramifications to the City were the City to engage in conduct found to violate AB 1486, the City is simultaneously continuing negotiations with Developer and seeking an expedited determination from HCD on whether AB 1486 applies to the contemplated long-term ground lease of the Properties to Developer for development of the Project. In sum, the City believes that obtaining HCD's position on an expedited basis as to whether AB 1486 applies will provide much needed clarity and certainty to both the City and Developer prior to executing a long-term ground lease for the Properties.

Sincerely,

Andy Agle
Director

EXHIBIT H

From: Susan Cola
To: Jamie Wand
Subject: FW: Application of Surplus Lands Act to the Plaza at Santa Monica Project
Date: Monday, March 2, 2020 4:18:47 PM
Attachments: image002.png
image003.png
image004.png

Susan Y. Cola, Senior Special Projects Deputy City Attorney
City Attorney's Office
1685 Main Street, Room 310
Santa Monica, CA 90401
Tel: (310) 458-8342
Fax: (310) 395-6727
Susan.cola@smgov.net

From: PublicLands@HCD <publiclands@hcd.ca.gov>
Sent: Friday, February 7, 2020 3:02 PM
To: Susan Cola <Susan.Cola@SMGOV.NET>
Cc: Andy Agle <Andy.Agle@SMGOV.NET>; PublicLands@HCD <publiclands@hcd.ca.gov>; Byers, Stephen@HCD <Stephen.Byers@hcd.ca.gov>; Wisotsky, Sasha@HCD <Sasha.Wisotsky@hcd.ca.gov>
Subject: RE: Application of Surplus Lands Act to the Plaza at Santa Monica Project

EXTERNAL

Susan,

Do you/city staff have availability the week of 2/10 for a call with HCD staff/counsel regarding the city's request for a determination on the applicability of AB 1486 to the project in question?

Thank you,

Harrison Anixter
Housing and Community Development Specialist
Housing and Community Development
2020 W. El Camino Avenue, Suite 500 | Sacramento, CA 95833
Phone: 916.263.1781

From: Susan Cola <Susan.Cola@SMGOV.NET>
Sent: Thursday, January 23, 2020 9:20 AM
To: PublicLands@HCD <publiclands@hcd.ca.gov>
Cc: Andy Agle <Andy.Agle@SMGOV.NET>
Subject: Application of Surplus Lands Act to the Plaza at Santa Monica Project

Dear Mr. Olmstead,

This e-mail is being sent at the request of Andy Agle, Director of the City of Santa Monica Housing and Economic Development Department. Attached are: Mr. Agle's request for a determination on the applicability of the recently enacted modification to the Surplus Lands Act (AB 1486) to a specific project and supporting documentation, as further explained in the request.

Susan Y. Cola, Senior Special Projects Deputy City Attorney
City Attorney's Office
1685 Main Street, Room 310
Santa Monica, CA 90401
Tel: (310) 458-8342
Fax: (310) 395-6727
Susan.cola@smgov.net

EXHIBIT I

From: Susan Cola
To: Jamie Wand
Subject: FW: Application of Surplus Lands Act to the Plaza at Santa Monica Project
Date: Monday, March 2, 2020 4:19:43 PM
Attachments: image003.png
image004.png
image005.png
Rand Letter Part 1.pdf

Susan Y. Cola, Senior Special Projects Deputy City Attorney
City Attorney's Office
1685 Main Street, Room 310
Santa Monica, CA 90401
Tel: (310) 458-8342
Fax: (310) 395-6727
Susan.cola@smgov.net

From: PublicLands@HCD <publiclands@hcd.ca.gov>
Sent: Wednesday, February 12, 2020 12:58 PM
To: Susan Cola <Susan.Cola@SMGOV.NET>; Andy Agle <Andy.Agle@SMGOV.NET>
Subject: RE: Application of Surplus Lands Act to the Plaza at Santa Monica Project

EXTERNAL

HCD has reviewed and considered the December 16, 2019 letter from the attorneys for Clarrett West Development, LLC and DLJ Real Estate Capital Partners, LLC (collectively, "Developer"). The letter contains three main arguments which are briefly summarized and responded to below:

1. Developer's First Argument - "The City is not required to undertake any of the steps required by the Act, because—even if the amended version of the Surplus Lands Act per AB 1486 applied to the Site and Project—the proposed ground lease of the Site is not a disposition that is subject to the Act." (pg. 5 (underline and italics omitted).)

    a. HCD's Response – The Surplus Land Act ("SLA") does not specifically define the term "disposition." However, the SLA refers multiple times to a "lease" as a disposition under the Act. (See e.g. Gov't Code § 54223(a) ["After the disposing agency has received a notice of interest from the entity desiring to purchase or lease the land . . . the

disposing agency and the entity shall enter into good faith negotiations to determine a mutually satisfactory sales price and terms or lease terms.] (Emphasis added.); Gov't Code § 54222(e) ["The entity or association desiring to purchase or lease the surplus land . . . shall notify in writing the disposing agency of its interest in purchasing or leasing the land....] (Emphasis added.); Gov't Code § 54227(a) ["In the event that any local agency disposing of surplus land receives a notice of interest to purchase or lease that land from more than one of the entities to which notice of available surplus land was given pursuant to this article...."] (Emphasis added.))

2. Developer's Second Argument – "[T]he Site and Project should be grandfathered under the existing SLA (and not subject to AB 1486) as they qualify for either of two exemptions set forth in AB 1486 under new Government Code Section 54234." (pg. 8.)

   a. HCD's Response – The Developer does not adequately explain how Gov't Code § 54234(a) applies to an expired exclusive negotiating agreement.
   b. HCD's Response – The Developer does not adequately explain how Gov't Code § 54234(b) applies to disposition of property where some of the parcels are designated in a long-range property management plan and some are not.

3. Developer's Third Argument – "[T]he Site is not 'surplus land' under the existing Act and remains required for the City's use thereunder." (pg. 10 (underline and italics omitted.)

   a. HCD's Response – This argument is premised on the applicability of either Gov't Code § 54234(a) or (b). As noted above, the Developer does not adequately explain how either subdivision applies.

Please let me know if you have any questions.

Thank you,

Harrison Anixter
Housing and Community Development Specialist
Housing and Community Development
2020 W. El Camino Avenue, Suite 500 | Sacramento, CA 95833
Phone: 916.263.1781

EXHIBIT J

STATE OF CALIFORNIA - BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY GAVIN NEWSOM, Governor

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

March 24, 2020

Dave Rand, Esq.
Partner
Armbruster Goldsmith & Delvac LLP
12100 Wilshire Boulevard, Suite 1600
Los Angeles, CA 90025

Dear Dave Rand:

RE: Application of Recent Amendments to the Surplus Land Act (Assembly Bill 1486) to the Plaza at Santa Monica Project

Based on the facts and circumstances provided to HCD, it appears that the City of Santa Monica (City) qualifies for the following exemption from Government Code section 54234(a)(1):

"If a local agency, as of September 30, 2019, has entered into an exclusive negotiating agreement or legally binding agreement to dispose of property, the provisions of this article as it existed on December 31, 2019, shall apply, without regard to the changes made to this article by the act adding this section, to the disposition of the property to the party that had entered into such agreement or its successors or assigns, provided the disposition is completed not later than December 31, 2022."

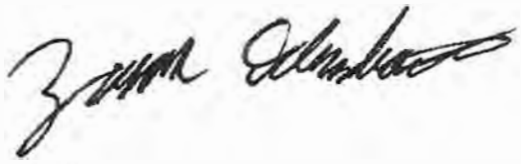
The City of Santa Monica, a "local agency" under the Surplus Land Act ("SLA"), previously entered into a written exclusive negotiating agreement ("Written ENA") with multiple developers regarding land owned by the City. The parties subsequently agreed to an amendment to the Written ENA to briefly extend its term. The Written ENA subsequently expired by its terms. The City and the developers then proceeded for a number of years to continue exclusive negotiations regarding the real property but failed to further amend the Written ENA to memorialize those negotiations. In a telephone conversation with Dave Rand, attorney for the developers, Mr. Rand stated that on September 30, 2019 (the date listed above in the relevant statute) the City and the developers had a non-written (i.e. constructive) ENA in place. Furthermore, Mr. Rand informed HCD that the City, after the expiration of the Written ENA, has not negotiated with any other person or entity regarding the property. Lastly, Mr. Rand advised HCD that the only reason the parties recently stopped negotiations was because of HCD's involvement in providing advice to the City on the SLA issues. These facts, taken together, strongly evidence the fact that the City and the developers had an exclusive negotiating agreement in place as of September 30, 2019.

The SLA does not define "exclusive negotiating agreement" and does not state that it must be in writing. Furthermore, the statute of frauds (which requires that certain contracts be in writing) does not appear to require the type of ENA discussed here to be in writing. The statute of frauds requires that the following real property transactions (neither of which apply here) be in writing: "an agreement to lease real property for a period longer than one year or for the sale of real property or an interest therein." (1 Cal. Real Est. § 1:70 (4th ed.).) The ENA at issue here deals with exclusive negotiations regarding the possible long-term lease of real property but the ENA here does not itself constitute a lease or sale of the property so is not required to be in writing.

The SLA also does not explicitly prohibit an oral or constructive ENA. There also does not appear to be any case law prohibiting such an agreement.

To conclude, the City of Santa Monica qualifies for the exemption found in Government Code section 54234(a)(1).

Sincerely,



Zachary Olmstead
Deputy Director of Housing Policy

EXHIBIT K

July 26, 2020

Santa Monica City Council
City of Santa Monica
1685 Main Street
Santa Monica, California 90401

Re: 7/28/2020 Council meeting Item 1B

Honorable Mayor McKeown and Councilmembers Jara, Davis, Winterer, O'Day, Himmelrich and McCowan:

Having expressed my views directly to the Council last month, I would have nothing further to contribute to your consideration of the proposed 4th and Arizona commercial development -- had not Mr. David Rand, the applicant's attorney, deliberately chosen to publicly refer to that letter in his correspondence to you. I will defer to the City's legal counsel on the validity of his claims regarding an exception to the State Surplus Land Act. However, I cannot let go unanswered Mr. Rand's fraudulent effort to distort my letter and my actions as City Manager to assert the existence of an exclusive negotiating relationship between the City and his client prior to the effective date of the amendments to the Surplus Land Act.

It is false to claim, as the developer's counsel alleges, that "Mr. Cole clearly acknowledges that he was having discussions with the Council advocating against the project." As those Councilmembers who were serving at the time know, as City Manager I consistently acknowledged the Council's public decision to move forward with processing the project at the time of the 2015 Float Up hearing. As City Manager, I continued to keep the Council informed on the status of the proposed project and provided professional feedback as the project itself and circumstances evolved.

Mr. Rand's letter on behalf of the developer then fallaciously expands on the initial false assumption to argue "Mr. Cole would have been (sic) no need to advocate against the project if he and the Council did not believe there were exclusive, Council authorized negotiations then taking place." In fact, I notified the Council that the developer had decided not to seek Council approval for extension of their Exclusive Negotiating Agreement (ENA) upon its lapse. I made clear that with the expiration of the ENA, the City's obligations to the developer had also expired. City staff told me that the decision to not seek an extension of the ENA was out of a desire to avoid the public controversy that might have ensued. So, yes, the City continued to work with the developer to process their proposed development, but with all parties understanding it was at the developer's own risk in the absence of a valid ENA.

At all times I sought to apprise the Council of its options and in accordance with the 2015 Council direction, the City continued to process the project as modified and to discuss potential terms for a Disposition and Development Agreement. But, again, it is erroneous to characterize the continuing processing of the developer's proposal as constituting an exclusive negotiating agreement. That is not how I understood it and it is not how I conveyed it to the Council, despite the efforts by the developer's counsel to mischaracterize my actions.

Respectfully,

Rick Cole