

**SECOND AMENDED AGREEMENT BETWEEN THE CITY OF SUNNYVALE
AND THE MID-PENINSULA HOUSING COALITION REGARDING THE
ACQUISITION AND DEVELOPMENT OF A SINGLE ROOM OCCUPANCY
PROJECT AT 174 CARROLL STREET IN THE CITY OF SUNNYVALE**

Whereas, this document supersedes and replaces the Agreement between the City of Sunnyvale and the Mid-Peninsula Housing Coalition Regarding the Acquisition of public property and development of a single room occupancy project at 174 Carroll Street and First Amended Agreement between the Mid-Peninsula Housing Coalition (MPHC) (hereinafter "Developer"), and the City of Sunnyvale ("City"), dated December 8, 1992; and

Whereas, by motion dated October 29, 1991, the Sunnyvale City Council selected Mid-Peninsula Housing Coalition, a nonprofit corporation, to develop a Single Room Occupancy (SRO) housing project, subject to certain conditions; and

Whereas, pursuant to the aforementioned selection, Developer entered into a purchase agreement to purchase .815 acres of undeveloped property from City, commonly referred to as 174 Carroll Street, Sunnyvale, California for \$925,000; and

Whereas, upon close of escrow, Developer purchased the Property for \$925,000, issuing a Letter of Credit for \$92,500 and a Promissory Note in the amount of \$832,500; and

Whereas, upon close of escrow, the City will cash the Letter of Credit in the amount of \$92,500; and

Whereas, the City Council of Sunnyvale, on May 15, 1993 approved a request by Developer to reduce the purchase price by \$45,550 to \$879,450, to offset unexpected offsite storm drain costs, and approved a request for an additional \$327,250 in loan funds from the City's 1993 HOME fund allocation, making a total of \$964,750 in loan funds available for the SRO project; and

Whereas, pursuant to the original purchase agreement, the City was obligated to pay the costs for environmental assessment and remediation, which costs to be used to offset the purchase price, and these costs came to a total of \$13,966, the purchase price was revised by the amount of storm drain improvements and environmental assessment and remediation costs to a new purchase price of \$865,484; and

Whereas, the Property is located within an area designated under the City's general plan for high density residential use, and the City desires to increase the number of affordable housing units located within the City of Sunnyvale for low and very low income residents; and

Whereas, the City Council of the City of Sunnyvale approved Developer's application for a Special Development Permit (SDP Number 7530) for construction of a 121 unit SRO building on the Property; and

Whereas, Developer has agreed that no less than 40 percent of the SRO units will be provided at affordable rental rates to very low income persons for the life of the project, as determined in accordance with established guidelines; and

Whereas, the City and Developer recognize that the feasibility and affordability of such a project are dependent on the type and amount of financing available and the competition for the limited number and amount of available funding sources; and

Whereas, Developer has received a State Rental Housing Construction Program (RHCP) loan, a SAMCO loan, a Santa Clara County HOME loan, a County HOME loan, a Red Cross predevelopment loan, a Union Bank construction loan and a low income housing tax credit allocation to finance the project;

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. Developer Commitment

Developer shall develop a SRO housing project on the Property, based upon its development proposal dated July 15, 1991, on file with the City, and in accordance with the terms and conditions of SDP 7530.

2. Loan Amount.

The City agrees to loan Developer the amount of Nine Hundred Sixty Four Thousand Seven Hundred Fifty Dollars and Zero Cents (\$964,750.00) structured as follows: Upon the closing of the Union Bank/ RHCP construction loan, City shall deposit \$572,976 into the construction loan escrow established by Developer for this purpose. City agrees to release the balance of the available loan funds, up to a total of \$391,774, as reimbursement for hard and soft development costs, upon presentation of periodic construction cost draw requests..

3. Payment.

The loan shall be paid as follows:

(a) \$750,000 of the loan amount shall be a non-recourse, non-amortizing loan, with principal and accrued simple interest deferred for thirty (30) years from the date of the Promissory Note, with no prepayment penalty. Interest shall accrue at the rate of three percent (3.0%) per annum, but shall not be compounded.

(b) The balance of loan amount, up to a total of \$214,750 shall be repaid in annual installments on May 15 of each year, to the extent of Cash Flow for the previous calendar year as defined below. Any outstanding funds shall accrue interest at the rate of three percent (3.0%) simple interest per annum, commencing on June 1, 1994. Any payments made shall be applied first towards accrued interest then towards the outstanding balance. Audited financial statements prepared by an independent auditor for tax credit accounting shall be provided to City on or before May 15 of each year. Any unpaid principal and interest shall be due and payable thirty (30) years from the date of this Note.

(c) For the purposes of this agreement, Cash Flow is determined for each calendar year and is defined as the sum of all cash receipts from the operations of the project including only the following: rents collected, laundry income, late charges, rent subsidy payments and interest earned, less the following items:

- 1.) All operating expenses of the project, including but not limited to advertising, utilities, trash removal, maintenance, repairs, janitorial, insurance/assessments, taxes, salaries, property management fees, accounting, legal fees and expenses associated with providing social services to project tenants.
- 2.) All accounting and legal fees, and partnership management fees of the owner. However the partnership management fee shall not exceed \$25,000 per annum.
- 3.) Payment of any interest and/ or principal loan fees, points or other charges required to be paid on any loan taken out by the owner for use in the development and/ or operations of the project.
- 4.) Any amount set aside by owner for replacement reserves or operating reserves as required by various lenders.

4. Subordination of Note.

City hereby agrees that the Note and Deed of Trust shall be subordinated to the Developer's construction and permanent loans, including RHCP and SAMCO financing, however, the Note may not be subordinated to a position below fourth (fifth or greater), without prior written approval by the City Manager, not to be unreasonably withheld or delayed. Within no more than two (2) weeks following written request, the City agrees to execute whatever documentation the lender requires to evidence this subordination and the City agrees that it will not unreasonably withhold or delay approval of any documents or agreements, the review of which is necessary to effect subordination of the Note and Trust Deed. The City acknowledges that Developer contemplates obtaining financing from one or more of the following: Rental Housing Construction Program, Union Bank, SAMCO, HOME financing from the City and County, the Red Cross and others.

5. Reduction in Purchase Price of Land.

The original purchase price of \$925,000 is hereby reduced by the amount of \$45,550.00 for storm drain costs incurred by the developer, and further reduced by the amount of \$13,966.00 incurred by the developer for environmental testing costs, for a revised purchase price of Eight Hundred Sixty Five Thousand Four Hundred Eighty Four Dollars (\$865,484.00).

6. Repayment of Land Loan--Promissory Note dated December 8, 1992.

Upon closing of the Union Bank/ RHCP construction loans, the promissory note dated December 8, 1992, in the amount of \$832,500 shall be repaid as follows: \$572,976 deposited into escrow from City of Sunnyvale HOME funds shall be paid to the City of Sunnyvale Parking District. \$200,008 from the Santa Clara County HOME funds shall be

paid to the City of Sunnyvale Parking District. The balance, \$59,516, shall be deemed as waived as a result of the reduction of the purchase price by the \$45,550 for storm drain improvements and \$13,966 for environmental assessment and remediation costs. upon completion of the foregoing transactions, the Promissory Note dated December 8, 1992 and the Deed of Trust of even date therewith shall be declared paid in full and canceled.

7. Escrow and Closing Costs

Escrow and closing costs, including the costs of premiums for owner's title insurance policy, shall be paid entirely by Developer, unless otherwise agreed to and documented in writing, signed by the authorized representative of the respective parties, and incorporated in the escrow instructions.

8. Close of Escrow and Extensions

In event that escrow does not close before this date, Developer reserves the right to an automatic 60 day extension.

9. Compliance with Conditions.

Unless expressly set forth to the contrary in this Agreement, or addenda thereto, Developer shall comply with and satisfy all conditions of approval, if any, which are imposed by the City in conjunction with Special Development Permit No. 7530, and shall comply with all applicable provisions of the Sunnyvale Municipal Code and relevant ordinances and regulations. Nothing in this Agreement may be construed to serve as a waiver by the City of its authority to enforce the conditions, ordinances, and regulations.

10. Construction of Improvements.

Developer hereby agrees to commence construction within ninety (90) days from the effective date of this Second Amended Agreement, unless such time has been extended by mutual, written agreement of the parties, subject to delay as a result of strikes, labor disturbance, or the act of any third party or casualty beyond the reasonable control of Developer. All plans and specifications for the project, and all work related to the construction of improvements, shall be in conformance with the terms and conditions of the Special Development Permit. Failure of the Developer or its assigns or successors to commence and diligently prosecute completion of the construction of improvements shall be deemed a material breach of this Agreement for purposes of Section 15 herein..

11. Certificate of Occupancy

The issuance, by the City, of a Certificate of Occupancy to Developer, shall constitute conclusive proof, upon which third parties may rely, that the construction of improvements conforms to the terms and conditions of the Special Development Permit.

12. Environmental Matters Agreement

Phase I, Phase II Environmental Assessments and subsequent testing results were completed for the subject property and distributed to each party. While each party has reviewed and accepted the conclusions of these studies, the Environmental Matters Agreement dated December 8, 1992 and executed between Mid-Peninsula Housing

Coalition and the City of Sunnyvale, whereby the City indemnified Developer and/ or prospective lenders from any liability arising from the presence of hazardous or toxic materials on the Property as of the date of transfer of title from City to Mid-Peninsula Housing Coalition remains in full force and effect.

13. Assignment.

Developer acknowledges that its right to acquire and develop the property, subject to the terms and provisions of this Agreement, was specifically approved by the Sunnyvale City Council on the basis of the fact that Developer is a non-profit, public benefit corporation with the experience in the development and management of affordable housing projects. Therefore, except as provided in this Agreement, Developer may not assign its rights or obligations pursuant to this Agreement or the Special Development Permit without prior, express, written authorization by the City not to be unreasonably withheld or delayed. Notwithstanding the foregoing, Developer may assign or otherwise transfer or convey, in whole or in part, its interest in the Property and the project contemplated by this Agreement, together with the rights and obligations of Developer under this Agreement, the Special Development Permit and the Note and Trust Deed to a non-profit affiliate or a partnership of which the Developer or a non-profit affiliate is a General Partner. Such assignment, transfer or conveyance may be made without the further approval of City, and upon the effective date of such assignment, transfer or conveyance Developer shall be released of any further obligations under this Agreement, the Special Development Permit and the Note and Trust Deed. Any assignee or successor in interest shall be subject to all of the terms, conditions, covenants and restrictions of this Agreement.

14. Affordability Requirements.

Developer agrees that sixty two (62) units will be designated as HOME units and meet HOME very low income affordability limits for the term of the loan. Developer agrees that not less than forty percent (40%) of the units constructed on the Property as contemplated by this Agreement shall be maintained and offered as affordable units for very low income residents. As used herein, units for very low income residents are those for which the average rent does not exceed 30% of 50% of area median gross income, as currently defined in Section 42 of the Internal Revenue Code of 1986, as amended.

15. Default.

In the event of any default in or breach of this Agreement, or any of its terms or conditions, by either party hereto or any successor to such party, such party or successor shall, upon written notice from the other, proceed immediately to cure or remedy such default or breach within thirty (30) days after receipt of such notice. If such corrective action is not taken or diligently pursued, or the default or breach is not cured or remedied within the time specified herein or as extended by written authorization, the aggrieved party may initiate such proceedings as may be necessary to cure or remedy such default or breach, including, but not limited to, proceedings to compel specific performance by the party in default of its obligations. Alternatively, the parties agree that in the event of default or breach, including, but not limited to failure to secure financing and satisfy the

Note as specified in Section 3 herein, Developer agrees to reconvey full and marketable title to the subject property to City. Any title or escrow costs incurred as a consequence of such reconveyance shall be paid by Developer.

16. Default of Violation of Affordability Requirements.

In the event that the Developer or its successors in interest shall default in or violate its obligations with respect to Section 14 hereof, then subject to the notice and cure period set forth in Section 15, the City shall have the right, as set forth in the Trust Deed, to re-enter and take possession of the Property and to terminate and revest in the City the Property conveyed by the City to the Developer. It is the intent of this provision, together with other provisions of this Agreement, that in the event of any default, failure, violation, or other action or inaction by the Developer with respect to the requirements specified in Section 14 of this Agreement, and the failure on the part of the Developer to remedy, cease or abrogate such default, failure, violation, or the action or inaction within the time specified in Section 15 above, the City at its option may declare a termination, as set forth in the Trust Deed, in favor of the City, of the title and all the rights and interest in the Property conveyed by the City to the Developer, and that such title and all right and interest of the Developer and any assignees or successors in the site shall revert to the City; provided that the exercise of the preceding remedy by the City shall always be subject to and limited by, and shall not defeat, render invalid, or limit in any way:

- (a) the lien of any deed of trust now or hereafter executed upon the Property; or
- (b) any leasehold interest entered into for adequate consideration for the entire Property or any specific unit thereof; or
- (c) any rights or interest of the holders of such deeds of trust or leaseholds.

17. City's Rights Not Barred by Waiver, Estoppel, or Laches.

City shall have the right, at any time, to initiate such actions or proceedings to effect the purposes of this Agreement, including, but not limited to Sections 14, 15, and 16 above, as against Developer or its assigns or successors in interest. Any delay by the City in initiating such actions or proceedings shall not operate as a waiver, by the City, of such rights, or deprive, limit or restrict the City in any way. It is the intent of this provision that the City shall not be constrained by the doctrines of waiver, estoppel or laches, to exercise such remedy or remedies at a time when feasible to resolve the problems created by any particular default by the Developer or its assigns or successors in interest. No waiver in fact made by the City as to any particular default shall be considered or construed as a waiver of the rights of the City with respect to that default, except to the extent expressly and specifically waived, and shall not operate as a waiver or restriction as to any of the rights of the City to seek any remedies available to it under the law.

18. Rights and Remedies are Cumulative

The rights and remedies of the parties to this Agreement, whether provided by law or by the Agreement, shall be cumulative, and the exercise by either party of any one or more of such remedy shall not preclude the exercise by it or of any other such remedies for

the same default or breach or of any of its remedies for any other default or breach by the other party.

19. Waiver of Defenses as Surety

The Developer, for itself, its successors and assignees, and all other persons who are or may become liable upon or subject to any obligation imposed by this Agreement hereby waives any and all claims or defenses otherwise available on the basis of its being or having become a person in the position of a surety, whereto by agreement or operation of law, including without limitation any and all claims and defenses based upon extension of time, indulgence, or modification of terms of contract.

20. City Officials and Employees Not Personally Liable

No member, official, or employee of the City shall be personally liable to the Developer or any successor in interest in the event of any default or breach by the City of or for any amount which may become due to the Developer under the terms of this Agreement.

21. Covenant Running with the Land

It is intended and agreed, that the agreements and covenants made by the Developer in this Second Amended Agreement shall be incorporated into the Deed of Trust and shall be covenants running with the land, and that they shall be binding upon Developer and their assigns and successors in interest for the benefit and in favor of, and enforceable by, the City and its successors and assigns.

22. Entirety of the Agreement; Modifications Thereof

Except as set forth in the Special Development Permit and the conditions of approval thereof, this Agreement constitutes the entire agreement between the parties with respect to the purchase and development of the Property, and supersedes all other agreements, letters, memoranda of understandings respecting the same, whether written or oral, including the existing purchase agreement which has been executed by the parties. All modifications, amendments or additions to this Agreement shall be in writing and signed by the authorized representative of each of the parties of this Agreement. Any written modification, amendment or addition shall contain language which specifically and expressly references this Agreement and states that it is intended to serve as a modification, amendment or addition to this Agreement.

23. Notices

A written notice or communication pursuant to this Agreement of either party to the other shall be sufficiently given or delivered if it is personally delivered, registered mail, postage prepaid, addressed as follows:

TO CITY: City Manager
City of Sunnyvale
P.O. Box 3707
Sunnyvale, CA 94088-3707

TO DEVELOPER: Mid-Peninsula Housing Coalition
658 Bair Island Road, Suite 300
Redwood City, CA 94063

or addressed in such other way in respect to either party as that party may, from time to time, designate in writing dispatched as provided in this section.

24. Transfer of Deed Shall Not Affect Agreement

None of the provisions of this Agreement are intended to or shall be merged by reason of any deed transferring title to the property from the City to the Developer or any successor in interest, and any such deed shall not be deemed to affect or impair the provisions and covenants of this Agreement.

25. Titles for Reference Only

Any titles of the several parts and sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

26. Attorney's Fees and Costs

In the event that either party to this Agreement initiates legal action to enforce the provisions of this Agreement, the prevailing party shall be entitled to recover from the non prevailing party all reasonable attorney's fees, expenses and costs incurred, whether said matter is resolved by settlement, arbitration or judicial action. Any legal action arising from this Agreement shall be governed by the laws of the State of California.

27. Severability

Should any provision or portion of this Agreement be declared invalid or in conflict with any law of the State of California, the validity of all the remaining provisions and portions thereof shall remain unaffected and in full force and effect.

28. Representation of Authority to Execute

Each person executing this Agreement on behalf of a party represents and warrants that such person is duly and validly authorized to do so on behalf of the entity it purports to so bind, and if such party is a partnership, corporation or trustee, that it has full right and authority to enter into this Agreement and perform all of its obligations as set forth herein.

29. Excess Cash on Dissolution

In addition, developer agrees that upon dissolution of the partnership that owns and is developing is property, and repayment of all obligations including repayment of MPHC capital contributions, any net proceeds available to Mid-Peninsula Housing Coalition through refinancing and not required by the project, and/ or any cash reserves that are released to Mid-Peninsula Housing Coalition and not restricted by other financing

sources shall be made available for further affordable housing investment and development in the City of Sunnyvale.

This Second Amended Agreement shall become effective when executed by the parties below.

DATED: March 17/94

CITY OF SUNNYVALE
A Municipal Corporation

By: Thomas F. Lewcock
Thomas F. Lewcock
City Manager

MID-PENINSULA HOUSING COALITION
A California Non-Profit Public
Benefit Corporation

By: Fran Wagstaff
Fran Wagstaff
Executive Director

Approved as to form:

Jeffrey S. Kane
City Attorney

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State of California
County of San Mateo }

On March 8, 1994 before me, Susan E. Russell, Notary Public
DATE NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared Fran Wagstaff
NAME(S) OF SIGNER(S)

☒ personally known to me - OR - ☐ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.



Susan E. Russell
SIGNATURE OF NOTARY

CAPACITY CLAIMED BY SIGNER

- ☐ INDIVIDUAL(S)
☐ CORPORATE _____
OFFICER(S) _____ TITLE(S) _____
☐ PARTNER(S)
☐ ATTORNEY-IN-FACT
☐ TRUSTEE(S)
☐ SUBSCRIBING WITNESS
☐ GUARDIAN/CONSERVATOR
☒ OTHER: Executive

Director of Mid-
Peninsula Housing Culture

SIGNER IS REPRESENTING:
NAME OF PERSON(S) OR ENTITY(IES)

Mid-Peninsula
Housing
Coalition

ATTENTION NOTARY: Although the information requested below is OPTIONAL, it could prevent fraudulent attachment of this certificate to unauthorized document.

THIS CERTIFICATE
MUST BE ATTACHED
TO THE DOCUMENT
DESCRIBED AT RIGHT:

Title or Type of Document Second Amended Agreement...
Number of Pages 9 Date of Document _____
Signer(s) Other Than Named Above _____