

RESOLUTION NO. 2015-38

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARINA TO “APPROVE” A CONSTRUCTION LOAN FOR A PRIVATE HOTEL DEVELOPMENT FROM AVANA CAPITAL LLC, AND A U.S. SMALL BUSINESS ADMINISTRATION (SBA) LOAN FROM BAY AREA EMPLOYMENT DEVELOPMENT COMPANY ("CDC"),

WHEREAS, the City Council considered an April 2, 2015 staff report which discusses the financing proposals for Monterey Peninsula Hotels Group, (Harbhajan S. Dadwal and Harwider K. Dadwal) for the construction of a Hotel in University Villages (now known as The Dunes), to include a construction loan from AVANA CAPITAL LLC, an Arizona limited liability company and a U.S. Small Business Administration (SBA) loan from Bay Area Employment Development Company ("CDC"), a Certified Development Company operating with 504 license from the U.S. Small Business Administration, an agency of the United States Government. The promissory note and deed of trust will be in favor of Bay Area Employment Development Company in anticipation that the U.S. Small Business Administration ("SBA") will fund the loan to assist with purchase financing.

WHEREAS, the lenders require the City Council to “approve” the financing, in the form of a construction loan and the SBA loan in accordance with that 2014 Quitclaim Deed from Marina Community Partners LLC to Harbhajan S. Dadwal and Harwider K. Dadwal. If there is such “approval” pursuant to said Quitclaim Deed, a Security Financing Interest takes precedent over the City’s interest. By granting such “approval” the City acknowledges that in the event the repurchase or reverter rights of the City are triggered, said loans are approved so that they fall under the definition of Security Financing Interests and therefore the City takes subject to these liens.

NOW, THEREFORE, BE IT RESOLVED, that the City Council of the City of Marina does hereby:

1. “Approve” a construction loan from AVANA CAPITAL LLC, an Arizona limited liability company and a U.S. Small Business Administration (SBA) loan from Bay Area Employment Development Company ("CDC"), a Certified Development Company operating with 504 license from the U.S. Small Business Administration, an agency of the United States Government for Monterey Peninsula Hotels Group, Harbhajan S. Dadwal and Harwider K. Dadwal for the construction of a Hotel in University Villages. The only effect of the granting of such “approval” is that the City acknowledges that in the event the repurchase or reverter rights of the City are triggered, said loans are approved so that they fall under the definition of “Security Financing Interests” in the Quitclaim Deed and therefore the City takes subject to these liens.

PASSED AND ADOPTED by the City Council of the City of Marina at a regular meeting duly held on the 7th day of September, 2015, by the following vote:

AYES: COUNCIL MEMBERS: Amadeo, Brown, Morton, Delgado

NOES: COUNCIL MEMBERS: O’Connell

ABSENT: COUNCIL MEMBERS: None

ABSTAIN: COUNCIL MEMBERS: None

ATTEST:

Bruce C. Delgado, Mayor

Anita Sharp, Deputy City Clerk

April 2, 2015

Item No. **11c**

To: The Honorable Mayor and City Council

Marina City Council
Meeting of April 7, 2015

From: Rob Wellington, City Attorney

CITY COUNCIL CONSIDER ADOPTING RESOLUTION NO. 2015-, APPROVING OF SUBORDINATION AGREEMENTS AND WAIVER OF INDEMNITY OBLIGATION TO ALLOW A U.S. SMALL BUSINESS ADMINISTRATION LOAN AND A CONSTRUCTION LOAN FOR THE CONSTRUCTION OF A HOTEL ON THE UNIVERSITY VILLAGES (DUNES) SITE BY HOTEL DEVELOPERS MONTEREY PENINSULA HOTEL GROUP (HARBHAJAN S. DADWAL AND HARWIDER K. DADWAL) AND AUTHORIZATION FOR THE CITY MANAGER TO SIGN TWO SUBORDINATION AND ONE WAIVER OF INDEMNITY OBLIGATION AGREEMENTS

REQUEST: It is requested that the City Council:

- (1) Adopt Resolution No. 2015-, The Subordination Agreement (**EXHIBIT "A"**), the Waiver of Indemnity Obligation Agreement (**EXHIBIT "B"**), the Subordination Agreement (**EXHIBIT "C"**), and authorize the City Manager to sign all Agreements.

HISTORY:

In 2014, Monterey Peninsula Hotels Group, (Harbhajan S. Dadwal and Harwider K. Dadwal) (hereafter referred to as the "Hotel Developer") purchased real property (through a Quitclaim Deed) and certain entitlements from the Marina Community Partners in University Villages (now known as The Dunes) to construct a Hotel Development. The City entered into an Operating Covenant and Agreement and Partial Assignment and Assumption Agreement to impose the terms of the prior Development Agreement ("DA") and Disposition and Development Agreement ("DDA") on the Hotel Developer and to defer impact fees as an incentive to Hotel Development under stipulated terms and conditions. Some of these terms were further imposed through the Quitclaim Deed. The Hotel Developer has sought financing for the Hotel Development, in the form of a construction loan from AVANA CAPITAL LLC, an Arizona limited liability company and a U.S. Small Business Administration (SBA) loan. (The Hotel Developer is obtaining the SBA Loan from Bay Area Employment Development Company ("CDC"), a Certified Development Company operating with 504 license from the U.S. Small Business Administration, an agency of the United States Government. The promissory note and deed of trust will be in favor of Bay Area Employment Development Company in anticipation that the U.S. Small Business Administration ("SBA") will fund the loan to assist with purchase financing.) The Construction loan will go in first place and the SBA loan will be in second place, as deeds of trust against the property to secure the loans.

Both lenders have issues with the terms of the Quitclaim Deed which allow the City to repurchase, or have the right of reverter or first refusal with respect to the Property, in the event of default of the DDA. As a condition to financing, the lenders require their interest in the property to be superior to the City's right to repurchase, revert or first refusal. That is, in the event of a default on the loans, the lenders will be entitled to the property as collateral.

ANALYSIS:

The Quitclaim Deed essentially imposes the terms of the DA and DDA, which allows the City the right to repurchase the property, have the right of first refusal on the property or the right of reverter if there is an essential default. It would appear that under the terms of the Quitclaim Deed, these rights would not trump an approved deed of trust to finance the Hotel Development. The lenders are requesting subordination in an abundance of caution. Since this right is already in the Quitclaim Deed, it would not appear that the City is subordinating a significant interest. It is in the City and the public's interest to see financing go into place so that the Hotel Development can move forward and provide a needed service with the accompanying tax revenue to the City. Thus, it is recommended that both Subordination Agreements be authorized for signature by the City Manager.

In the event that the City Council does not choose to execute these Agreements, the lenders will need a Resolution confirming that the financing, both the construction loan and the SBA 504, loan have been approved by the City. As mentioned above, under the Quitclaim Deed, a Security Financing Interest takes precedent over the City's interest. However, the term Security Financing Interests is defined to include any construction or permanent financing that is "approved." The lenders want to insure that in the event the repurchase or reverter rights of the City are triggered, that their loans are approved so that they fall under the definition of Security Financing Interests and therefore the City takes subject to these liens. The attached Resolution accomplishes that result.

The SBA and the Bay Area Employment Development Company, which is acquiring the loan, require a waiver of the City's right to indemnification by subsequent property owners for the presence of hazardous materials and contamination above or under the property. This is a common requirement for lenders. The SBA loan will be in second place so it is unlikely that the SBA will acquire the property due to foreclosure and that this indemnification will ever come into play. But, if they do and the SBA acquires the Hotel Development, there will be some period where the SBA is not in the chain of title for environmental indemnity. The SBA would not retain a property indefinitely and the new owners would be subject to the indemnification requirements. Thus, there is a slight risk, which should be balanced against the public benefit of a Hotel in Marina and the accompanying tax benefits.

CONCLUSION:

It is recommended that the City Council approve and authorize the City Manager to sign the Subordination Agreements and Waiver attached as Exhibits "A," "B" and "C." In the alternative, the City Council could approve the Resolution attached as Exhibit "D." This alternative is not recommended since it is not the desired solution for all of the parties and may substantially delay the Hotel Development.

Because this requires immediate action by the City Council, if there are any questions or a desire to review the documents, please contact us prior to the meeting.

Respectfully submitted,

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Rob Wellington
City Attorney