

RESOLUTION NO. 2015-39

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARINA TO APPROVE WAIVER OF INDEMNITY OBLIGATION TO ALLOW A U.S. SMALL BUSINESS ADMINISTRATION 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 AUTHORIZE THE CITY MANAGER TO SIGN AGREEMENT

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 (collectively referred to as "Lenders). 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, SBA requires 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 and therefore requires the City to sign a Waiver of Indemnity Obligation Agreement.

WHEREAS, it is in the public interest to approve financing for the Hotel so that it can be constructed to serve the needs of the community and provide tax revenue to the City of Marina.

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

1. Approve and authorize the City Manager to sign the Waiver of Indemnity Obligation Agreement.

PASSED AND ADOPTED by the City Council of the City of Marina at a special meeting duly held on the 9th day of April, 2015, by the following vote:

AYES: COUNCIL MEMBERS: Brown, Delgado
NOES: COUNCIL MEMBERS: O'Connell
ABSENT: COUNCIL MEMBERS: Amadeo, Morton
ABSTAIN: COUNCIL MEMBERS: None

Bruce C. Delgado, Mayor

ATTEST:

Anita Sharp, Deputy City Clerk

Recording Requested by & When Recorded
Mail to:

Bay Area Employment
Development Company
1801 Oakland Blvd., Suite 100
Walnut Creek, CA 94596

Attn: Servicing

SPACE ABOVE THIS LINE FOR RECORDER'S USE

WAIVER OF INDEMNITY OBLIGATION

This Waiver of Indemnity Obligation is made this _____, 2015 by the CITY OF MARINA, CALIFORNIA, a municipal corporation ("**City**"), in favor of the Bay Area Employment Development Company, a California corporation ("**CDC**"), U.S. Small Business Administration, an agency of the United States Government, hereinafter designated "**SBA**."

RECITALS

WHEREAS, HARBHAJAN S. DADWAL and HARWIDER K. DADWAL ("**Owner**") executed a Quitclaim Deed dated December 26, 2014, and recorded December 26, 2014 as Document number 2014064618 of the Official Records of Monterey County, California (the "**Quitclaim Deed**"). The Quitclaim Deed was recorded as an encumbrance on the title of the real property in the City of Marina, County of Monterey, State of California designated as Assessor's Parcel Number APN: # 031-251-046 and 031-251-047, Marina, CA 93933, and more particularly described in **Exhibit "A"** attached hereto and made a part hereof by such reference (the "**Property**");

WHEREAS, Owner intends to transfer the Assessor's Parcel Number APN: # 031-251-046 to Monterey Peninsula Hotels Group, LP, a California limited partnership and Assessor's Parcel Number APN: # 031-251-047 to Dadwal Management Group, a California corporation. Monterey Peninsula Hotels Group, LP and Dadwal Management Group are hereinafter collectively referred to as the "**Borrower**";

WHEREAS, Borrower desires to obtain financing from CDC, a Certified Development Company operating with 504 license from the SBA. Owner has executed, or intends to execute, a promissory note and a deed of trust in favor of CDC in anticipation that the U.S. Small Business Administration will fund the loan ("**SBA Loan**") to assist with purchase financing.

WHEREAS, it is a condition precedent to obtaining the above referenced financing that CDC and SBA be specifically excluded from and against any and all environmental indemnity obligations imposed on an owner as set forth in the Purchase Agreement and the Quitclaim Deed.

WHEREAS, City acknowledges that it is to City's benefit that CDC and SBA make and fund the SBA Loan to Borrower. This Waiver of Indemnity Obligation is made in consideration of the mutual benefit to City, Owner and Borrower resulting from the SBA Loan and for other valuable consideration, the receipt and sufficiency of

which is acknowledged by City.

NOW THEREFORE, it is agreed by City, on behalf of itself and any and all of its successors and assigns, and as successor to the Redevelopment Agency of the City of Marina, as follows:

1. Waiver of Right to Indemnification by CDC and SBA: To the extent the Quitclaim Deed or any other document recorded against the Property, or otherwise, grants City the right to indemnification by subsequent owners of the Property for the presence of hazardous materials or contamination on the Property, or for any claims resulting from a releases of hazardous materials from, under or on the Property, including, but not limited to, Part A. VII and Part A. IX. G. of the Quitclaim Deed ("City's Indemnification Rights"), City hereby knowingly, willingly and expressly waives all known and unknown rights and releases all claims and causes of action, whether now or hereafter in existence, against SBA and CDC relating to contamination and/or hazardous materials at the property, including the right to indemnification.
2. This Waiver of Indemnity Obligation may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
3. This Waiver of Indemnity Obligation is intended and shall be construed as a covenant running with the Property.
4. This Waiver of Indemnity Obligation shall be binding upon and burden City and its successors and assigns.

IN WITNESS THEREOF, the City hereto has executed this Waiver of Indemnity Obligation as of the date first written above.

**City of Marina, California,
a municipal corporation**

By: _____

Name: _____

Title: _____

ATTEST:

By: _____

Name: _____

Title: City Clerk

ALL SIGNATURES MUST BE NOTARIZED

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

CIVIL CODE § 1189

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
)ss

County of _____)

On _____ before me, _____, Notary Public, personally appeared

Name(s) of Signer(s)

who 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.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

Place Notary Seal Above

EXHIBIT "A"
(Legal Description)

PARCEL I:

Parcel 6 , as said parcel is shown and so designated on the Parcel Map entitled "Phase 1, The Dunes on Monterey Bay", filed for record December 31, 2008, in Volume 22, Parcel Maps, Page 106, Official Records, Monterey County.

Excepting therefrom all mineral rights with right of surface entry in a manner that does not unreasonably interfere with Grantee's development and quiet enjoyment of said land, as reserved in the "Quitclaim Deed for a Portion of the Former Fort Ord, Monterey County, California", recorded March 15, 2004, Instrument No. 2004023330, Official Records, Monterey County.

PARCEL II:

Parcel 7, as said parcel is shown and so designated on the Parcel Map entitled "Phase 1, The Dunes of Monterey Bay", filed for record December 31, 2008, in Volume 22, Parcel Maps, Page 106, Official Records, Monterey County.

Exception therefrom all mineral rights with right of surface entry in a manner that does not unreasonably interfere with Grantee's development and quiet enjoyment of said land, as reserved in the "Quitclaim Deed for a Portion of the Former Fort Ord, Monterey County, California", recorded March 15, 2004, Instrument No. 2004023330, Official Records, Monterey County.

April 2, 2015

Item No. **6a**

To: The Honorable Mayor and City Council
Council

Marina Special City

Meeting of April 9, 2015

From: Rob Wellington, City Attorney

ADOPT A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARINA TO APPROVE A WAIVER OF INDEMNITY OBLIGATION TO ALLOW A U.S. SMALL BUSINESS ADMINISTRATION 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 AUTHORIZE THE CITY MANAGER TO SIGN THE AGREEMENT

REQUEST:

It is requested that the City Council approve the Waiver of Indemnity Obligation Agreement and authorize the City Manager to execute the agreement on behalf of the city subject to final review and approval of the City Attorney.

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.

ANALYSIS:

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 Waiver was not approved at the April 7 City Council Meeting and the Lender's attorney maintains that

the financing cannot go forward without this Waiver. Environmental Waivers are common requirements 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 waiver of 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 the 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 the a Resolution to authorize the City Manager to sign Waiver of Indemnification Obligation Agreement

Respectfully submitted,

//s//_

Rob Wellington
City Attorney