



City Attorney's Office

AGENDA REPORT

DATE:	May 17, 2022
TO:	Mayor Butt and Members of the City Council
FROM:	Dave Aleshire, Interim City Attorney
Subject:	Point Molate DDA Closing Issues with Winehaven Legacy, LLC.
FINANCIAL IMPACT:	The sale price is \$45M with half going to the City and half to Upstream and Guidiville Rancheria of California (Upstream/Tribe). The timely closing of Disposition and Development Agreement with Winehaven Legacy LLC (" Developer ") will result with City receiving \$22.5M and \$2M+ for reimbursement from Developer of City costs. Additionally, with the payment to Upstream/Tribe, various claims are resolved, and the <i>lis pendens</i> is released. Failure to close will result in sale of development areas to Upstream/Tribe for \$400.
PREVIOUS COUNCIL ACTION:	Various.
STATEMENT OF THE ISSUE:	To summarize status of outstanding items due from Developer under the DDA prior to closing and seek City Council guidance of items with respect to modification and approval to occur post-closing. Critical items are approval of (i) a financial plan; (ii) MSD Capital as Guarantor of obligations; and (iii) an extension to close of 30 days with Upstream/Tribe requesting payment of \$110,000.
RECOMMENDED ACTION:	REVIEW the latest submittals from SunCal and provide direction – City Attorney's Office (Dave Aleshire 510-620-6509).

DISCUSSION:

This staff report provides a brief history of the acquisition of the Point Molate Property, (ii) the lawsuit and settlement with Upstream and Guidiville Tribe pursuant to the Amended Judgment; and (iii) status of closing of the sale to Winehaven Legacy LLC pursuant to the Disposition and Development Agreement.

PROPERTY HISTORY

In 2003, the US Navy transferred that certain real property consisting of 270 acres of upland and 134 acres of tidal and submerged real property ("**Property**") to the City of Richmond ("**City**").

In 2004, the City and Guidiville Rancheria of California and Upstream Point Molate LLC (jointly "**Plaintiffs**") executed that certain Land Disposition Agreement which was subsequently amended ("**LDA**"). In 2012, the Plaintiffs filed a lawsuit in Federal court against the City alleging, among other things, that the City breached that LDA and the covenant of good faith and fairly dealing and for unjust enrichment. In November of 2019, after 7 long years of expensive litigation, the lawsuit was finally amicably resolved by the parties pursuant to that certain "Amended Judgment" issued by the Federal Court ("**Judgment**"). The Judgment was entered by the Court on November 21, 2019 ("**Effective Date**") and is binding on the Property.

Judgment Requirements

The Judgment mandates that 270 acres of upland area, thirty percent (30%) was to be "development areas" and seventy percent (70%) was to be open space. The Judgment also defines four (4) areas within the Property as "**Development Areas**."

The City was provided the opportunity to market the Development Areas with an outside sale date being the earlier of (i) 30 months from the Effective Date; or (ii) 24 months after issuing the last discretionary approval ("**Outside Sale Date**").

If the City successfully sells the Property, "net" revenues from the sale are to split equally between (i) the City, and (ii) the Plaintiffs. "Net" revenues are determined as the gross sales price less all costs incurred by the City with respect to the Sale.

If the City does **not** consummate the sale of the Development Areas by the Outside Sale Date, the Plaintiffs have the option to acquire ("**Option**") all or any portion of the Development Areas ("**Option Property**") from the City for \$100 per Development Area (for a maximum amount of \$400).

If the Option is exercised by the Plaintiffs, the Plaintiffs must thereafter market and sell the Option Property within 5 years. The Plaintiffs or their transferees can pursue alternate development of the Acquired Option Property (or portions thereof) although new approvals would be subject to the City's discretion.

Upon Plaintiffs ultimately selling the Option Property, the Plaintiffs are obligated to transfer 50% of the Net Proceeds to the City.

The Judgment provides for various reporting obligations of the Parties as well as auditing rights with respect to the calculation of the “Net Revenues.”

WINEHAVEN DDA

The principal goal of the Judgment was to induce the sale of the Property, preferably to a capable developer, and use the proceeds to satisfy Upstream/Tribe claims. This occurred on September 30, 2020, when the City executed that certain Disposition and Development Agreement (“**DDA**”) with Winehaven Legacy, LLC (“**Developer**”) for the sale of all the Development Areas for \$45M (“**Sale Price**”).

Concurrently with the DDA, the City and Developer also executed that certain Development Agreement dated October 20, 2020, which was recorded against the Property on October 23, 2020, as Instrument No. 2020-247749 in the Official Records of Contra Costa County. The proposed project anticipates 1,260 new residential units plus a mix of uses in rehabilitated historic buildings and 250,000 square feet of new construction in the Winehaven Historic District.

Pursuant to the Judgment, the Outside Sale Date for closing the sale to Developer is May 21, 2022.

Pursuant to the DDA, Developer is required to reimburse the City for all costs which it incurred including, but not limited to, attorney fees, reports, processing fees, etc.as set forth in the DDA (“**Reimbursement Amounts**”). Furthermore, the DDA requires Developer to pay all closing costs for the sale (title, escrow, documentary transfer taxes, etc.).

CFD AND GENERAL FUND IMPACT

The DDA included a tentative financing plan, which included the proposal for a Community Facilities District (CFD) to finance the extensive public facilities and services of police and fire needed for the development. The CFD was intended to prevent the Project from having an impact on the General Fund. Extensive finance projections and studies were prepared. The Developer made changes to try and eliminate financial impact on the General Fund. On March 18, 2022, the City Council concluded the impact could not be eliminated and disapproved the CFD. The Resolution is Attachment A.

STATUS OF DDA CLOSING REQUIREMENTS

On May 9, 2022, Interim City Attorney David Aleshire sent Developer a letter summarizing the pending issues required to be resolved prior to the Closing. See Attachment B. Most items have been resolved but those below remain. This will be updated at the meeting if status changes occur.

	Closing Requirements	Status as of Date of this Report
1.	Parcel map filed	Completed
2.	Transfer of remediation responsibility	Pending, but expected to be completed prior to closing.
3.	<p>“Approved Guarantor” to be reviewed and approved by City.</p> <p>Guaranty provides completion security for the Phase I Master Improvements (rough estimate of \$130M)</p>	<p>Guarantor will be MSD Capital (a private investment firm originally started by Michael Dell of Dell Computer)</p> <p>Requested audited financial statements to determine if qualified. Pending receipt.</p> <p>Financial information will be reviewed by Mark Northcross for City. City acceptance of Approved Guarantor pending.</p>
4.	Conceptual plans for Phase 1	Developer submitted in March. Staff has reviewed and made comments. Plans are not finalized so guaranty will cover future approved plans. City needs to move final approval to be post-closing.
5.	City approval of Master Financing Plan	Developer must resubmit revised Financing Plan to City. City approval pending receipt.
6.	Evidence of availability of funds.	MSD Capital (equity partner) to submit letter to City confirming its commitment to invest equity funds in Winehaven sufficient for Closing. Pending receipt of letter.
7.	Reimbursement obligations (entitlement fund, litigation fund, pre-development fund)	Developer is delinquent with respect to a number of funding requirements. Staff is calculating amounts due which will be paid through escrow at closing. Pending determination of total amounts due.
8.	FF&E for fire station	In process between City and Developer. Pending but expected to be finalized before closing.

EXTENSION REQUESTED FROM PLAINTIFFS

City has requested that Plaintiffs grant an extension of 30 days to the Outside Closing Date.

On May 11, 2022, Plaintiffs stated that they are willing to grant a 30-day extension for a payment of \$110,000. Plaintiffs assert that any extension of the Outside Closing Date would require Court approval as a modification of the Judgment, but the City does not believe that the Court approval is required. Plaintiffs can contractually agree to not exercise the Option under the Judgment. Based on emails, the Plaintiffs agree if the parties agree on an extension, that will probably be a workable solution to accomplish the extension while remaining in compliance with the Judgment.

The City objected to the payment demand as unnecessary and unfair. However, the payment request has been communicated to Developer suggesting that they consider making the payment.

CONSEQUENCES OF ALTERNATIVES:

If the sale to Developer is not consummated, the Property with all current entitlements **will** be sold to Plaintiffs for \$400. Plaintiffs will have the right to sell the Property within 5 years. The City would share in sale proceeds, and Property reverts to the City if not sold by Upstream/Tribe. Since the Property is entitled, its development cannot be prohibited.

- **If Property Sold to Developer per DDA:**
 - City will receive \$22.5M in cash at the closing.
 - Plaintiffs will receive \$22.5M in cash at the closing.
 - At closing, City will also receive approximately \$2M+ in cash for various Developer reimbursement obligations.
 - In adopting Resolution No. 33-22, the City Council has expressed doubts that the Project will be financeable or that General Fund impact will be avoided.
- **If Property NOT Sold to Developer per DDA:**
 - Upstream/Tribe will have option to buy all Development Areas for \$400.
 - Upstream/Tribe will attempt to sell the Development Areas over a period of **5 years** with City receiving fifty percent (50%) of the Net Proceeds at the closing of the sale(s). Upstream/Tribe or transferees can seek alternate development plan.
 - Recovering all reimbursement amounts from Developer may be difficult.

- Developer will likely sue the City for breach of the DDA alleging their failure to close is the result of City's breach.
- Even though Upstream/Tribe would receive the Property, they may sue the City for failing to close the sale to Developer permitting them to receive \$22.5M.

DOCUMENTS ATTACHED:

Attachment A – March 18 Resolution Disapproving CFD

Attachment B – Letter from Dave Aleshire to Developer