



Jennifer McGrath
City Attorney

OFFICE OF
CITY ATTORNEY

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Sarah Sutton, Deputy City Attorney
Mike Vigliotta, Deputy City Attorney

September 16, 2008

Via Electronic Mail Mark@Bixby.org

Mark Bixby
17451 Hillgate Lane
Huntington Beach, CA 92649

Re: Request for Copies of Public Records

Dear Mr. Bixby:

We received your request dated September 7, 2008, requesting a copy of written communications between City and Makallon Atlanta Huntington Beach, LLC regarding the OPA.

Attached to this transmittal are copies of correspondence in response to your request.

Very truly yours,

LEONIE MULVIHILL
Sr. Deputy City Attorney

cc: Jennifer McGrath, City Attorney



CITY OF HUNTINGTON BEACH
CITY ADMINISTRATOR'S OFFICE
2000 Main Street, Huntington Beach, CA 92648

February 22, 2008

Makallon Atlanta Huntington Beach, LLC
Attn: Michael Gagnet, Executive Vice President
4100 MacArthur Boulevard #200
Newport Beach, CA 92660

Dear Mr. Gagnet:

This correspondence confirms Jim Engle's earlier acknowledgement via a return email to you on December 3, 2007, of the City's receipt of the proforma proposed budget for the Senior Center project. Although until plans and specifications are prepared, the proforma budget is preliminary in nature. This letter will confirm that the City approves of the proforma in accordance with Section 305(6)(b) of the Owner and Participation Agreement between Makar, the City, and the Redevelopment Agency dated October 16, 2006 ("OPA").

This letter also serves to inform you that on February 4, 2008, the City Council upheld the Planning Commission's approval of Environmental Impact Report 07-002 and Conditional Use Permit 07-039 for the proposed Senior Center. With this approval, we now anticipate Makar obtaining a building permit for the Senior Center on or before July 1, 2008. To assist you in that process, we recommend the attached timeline with required processing steps (see Attachments I and II) that we believe will enable Makar to meet the requirements of the OPA as they relate to plan submittals and the plan check process that is required to obtain a building permit. On its part, the City will commit to returning comments within two weeks of each of these submittal dates.

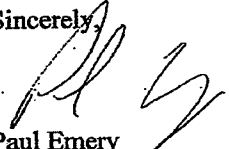
We believe that adherence to this schedule is essential to issuance of building permits by July 1, 2008. As you know, if Makar does not in good faith receive a building permit for the Senior Center by July 1, 2008, Makar will pay the entire Park In Lieu Fee to the City within 30 days.

In order to confirm that the costs and expenses incurred by Makar to date in furtherance of the design, development, installation, and/or construction of the Senior Center are subject to reimbursement pursuant to the OPA, we propose a review of these costs and expenses on a regular basis. To this end, we would like documentation of these costs and expenses provided on a quarterly basis to Terri Elliott, Public Works Principal Civil Engineer, with a copy to Jim Engle, Community Services Director. The first submittal will be from commencement of the project to present and should be received by the City within 30 days from the date of this letter.

Ms. Elliott will contact you within the next week with further instructions regarding the methodology for this auditing process for the design phase.

If you have any questions regarding this matter, please feel free to contact Leonie Mulvihill (714-536-5620) regarding any OPA issues. If you have any questions regarding the preparation of plans and specifications and building permits, please contact Jim Engle (714-536-5495) who will assist you in coordinating with the other development departments.

Sincerely,



Paul Emery
Interim City Administrator

Attachments

c: City Council
Jennifer McGrath
Bob Hall
Terri Elliott
Jim Engle
Scott Hess
Travis Hopkins
Leonie Mulvihill
Stanley Smalewitz
Ethen Thatcher

Senior Center Plan Check Schedule/ Process

Plan Submittal

- 50% 3/17/08
- 70% 4/17/08
- 100% 5/15/08

Plan submittals to include building, plumbing, and mechanical detail
(City staff to provide 2-week turn around time on plan review)

***Grading Permit** (Items below due 3/17/08 in order to receive grading permit by 7/1/08)

- Precise grading plan
- Street improvement plan
- Landscape and Irrigation plan
- Hydrology/Hydraulic analysis
- WQMP

***NOTE: Please see Attachment #2 for listing of Mitigation Measures and Code Requirements associated with Grading Permit issuance**

Design Review Board

- Application and materials submittal 4/28/08
- Meeting date 5/08/08

City Council Approval

- Construction Costs 5/15/08
- LEED Elements 5/15/08
- City Council Meeting 6/16/08

Planning Commission Approvals

- Study Session - Landscape plan/project design 5/13/08
- Planning Commission Action 5/27/08

Grading Permit - Plan Submittals

Plan check prior to issuance of a rough/mass grading permit: (If a rough/mass grading permit is not being pursued, then the following shall be accomplished prior to issuance of a precise grading permit)

MM 4.5-1 - Geotechnical Evaluation – Review and approve grading and building plans for inclusion of soils and geotechnical recommendations.

MM 4.5-2 – Slope compaction / erosion protection – Review and approve grading and building plans for inclusion of soils and geotechnical recommendations.

Plan check prior to issuance of a precise grading permit:

MM 4.7-1 - Water Quality Management Plan (WQMP) – Review and approve WQMP and documentation.

CR 2 – Precise Grading Plan – Review and approve Precise grading plan.

CR 3 – Street Improvement Plan – Review and approve Street Improvement plan.

CR 4 – Signing and Striping Plan – Review and approve Signing and Striping plan.

CR 6 – Stopping sight distance analysis.

CR 8 – Hydraulic Water analysis.

CR 9 – Site lighting plan.

CR 10 – Landscape and Irrigation Plan.

CR 13 – Storm Water Pollution Prevention Plan.

Plan check prior to issuance of a grading permit:

MM 4.7-2 – Hydrology and Hydraulic Report and Drainage Plan – Review and approve plan and documentation.

Katten

Katten Muchin Rosenman LLP

1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201
202.625.3500 tel
202.298.7570 fax

WENDY L. FIELDS
202.625.3800 direct
202.298.7570 fax

wendy.fields@kattenlaw.com

May 15, 2008

BY REGULAR AND ELECTRONIC MAIL

Leonie Mulvihill
Senior Deputy City Attorney
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648
LMULVIHILL@SURFCITY-HB.ORG

Re: Owner Participation Agreement dated October 16, 2006

Dear Leonie:

Reference is made to the Owner Participation Agreement ("OPA") entered into among Makallon Atlanta Huntington Beach, LLC ("Makallon"), the Redevelopment Agency of the City of Huntington Beach (the "Agency") and the City of Huntington Beach (the "City"), as approved by the City Council on October 16, 2006. The OPA provides *inter alia* for the development, design and construction of a Senior Center (the "Senior Center") to be constructed on a 5-acre site located in the City, generally southwest of the intersection of Goldenwest Street and Talbert Avenue. The Senior Center is the subject of an Environmental Impact Report No. 07-002 ("EIR"), and Conditional Use Permit No. 07-39 and Findings and Conditions of Approval, approved by the City Council on February 4, 2008.

Reference also is made to Sections 305.3 and 305.8 of the OPA, and to Mitigation Measures 4.3.1(a) and 4.3.1(b) of the Mitigation Monitoring Program included as part of the EIR, copies of which are attached to this letter. Section 305.8 of the OPA in pertinent part provides for Makallon in good faith obtaining a building permit for the Senior Center by July 1, 2008; Section 305.3 of the OPA in pertinent part provides for the letting of the construction contract and the commencement of construction within four (4) months of the February 4, 2008 City Council approval of the EIR. Mitigation Measures 4.3.1(a) and 4.3.(b) are biological resource measures that substantively limit construction activities (including grading activities) to the period September 1 to January 31 in order to avoid impact to the avian nesting season (February 15 to August 31) and the burrowing owl breeding season (February 1 to August 31). Appreciably, while Makallon is submitting its grading permit and has authorized the preparation of its foundation permit, the foregoing Mitigation Measures have been and will continue to delay the ability of Makallon to obtain permits for the

WASHINGTON, DC CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK PALO ALTO WWW.KATTENLAW.COM

LONDON AFFILIATE: KATTEN MUCHIN ROSENMAN CORNISH LLP

A limited liability partnership including professional corporations

Leonie Mulvihill
Senior Deputy City Attorney
May 15, 2008
Page 2

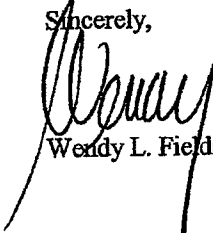
Senior Center prior to September 1, 2008 of this year, and likewise will further delay construction activities. Those delays clearly are force majeure delays under the OPA and, in my opinion, additionally excuse Makallon from performance under the authority of California Civil Code Section 1511.

While it is not the intent of this letter to take a position adverse to the City or the Agency, I do note that the failure of our clients to agree upon the amount of the Park-In-Lieu Fee and its referral to arbitration has had a direct impact on the reasonable ability of Makallon to make a construction commitment to the Senior Center. Under Section 305.6, Makallon is excused from the obligation to construct the Senior Center if the Park-in-Lieu Fee is less than \$19,000,000 and the City has not appropriated shortfall funding. As you are aware, Makallon commissioned an independent appraisal of the parkland and the appraisal attributed an approximate \$17.5 million value for the Park-In-Lieu Fee. Based upon its appraisal, Makallon has had reasonable justification to defer construction commitments pending the completion of arbitration. As you know, arbitration is set to be heard in June. As you also know, it is probable that a final determination will not issue for a number of weeks. As such, while Makallon is not by this letter claiming a relief of its obligations based upon the failure of our clients to agree upon the amount of the Park-In-Lieu Fee, that position hereby is reserved.

Finally, you have advised me that the EIR for the Senior Center is the subject of a CEQA challenge. I am advised by local counsel that, although we have not seen the actual pleadings, by the nature of the action, there is a potential that the EIR will be voided or amended and that the right of the City to construct the Senior Center (or to construct the Senior Center in the designated location) accordingly may be lost. Again, it is not the intent of this letter to take a position adverse to the City or the Agency, but, if the foregoing analysis is substantively accurate and if the pending action is not timely dismissed, then Makallon in the future may, and hereby reserves the right, to make claim for further excused performance by Makallon unless the City in writing assumes the risk of proceeding at the cost and expense of the City under Section 305.8.

As always, I am available to speak with you and talk through the matters raised by this letter.

Sincerely,



Wendy L. Fields

cc: Michael Gagnet

2. Participant agrees that the final design, plans, and specifications, and furnishings, fixtures and equipment for the Senior Center and any modifications thereto or change orders shall be subject to the complete satisfaction and prior written approval of the City's Community Services Director and the Agency Executive Director or designee.

3. Participant agrees that Participant shall execute the design/build contract for the Senior Center and commence construction (not grading, excavation, demolition, grubbing, or the like) of Senior Center improvements (not utilities, public or private streets, public or private site improvements, landscaping or ancillary structures such as block walls, trash enclosures) permanently fixed to the site (e.g., a foundation or similar) no later than four (4) months following final project plan approval by the City Council for the Senior Center.

4. Participant agrees that Participant shall provide all equipment (including all operations and maintenance manuals), tools, materials, labor, tests, design work, engineering services, and the payment of monies, or any combination thereof, necessary or required to fully and adequately complete the Senior Center unless the City elects otherwise in its sole and absolute discretion. The Site upon which the Senior Center shall be constructed shall be contributed by the City at no cost whatsoever to the Participant.

5. Participant agrees that within one hundred twenty (120) days after final acceptance of the Senior Center by the City as described in Section 612, below, Participant shall submit to City, for the review and written approval or disapproval of the City's Community Services Director the Certified Cost Statement.

6. a. Notwithstanding any provision of this Agreement to the contrary, in no event shall City or Agency have the right to request or demand, and in no event shall Participant have the obligation to implement, a Project Budget or actual Senior Center Costs to exceed a maximum of \$19,000,000 (the "Maximum Senior Center Cost"), provided, however, that if (but only if) the actual Park In-Lieu Fee shall be greater than \$21,850,000 and/or the City or Agency has allocated additional funds to the Senior Center other than the Park In-Lieu Fee, and, no delay in the design, installation, or construction of the Senior Center shall thereby result to the Participant in the exercise of its good faith and reasonable judgment (unless the City and Agency extend the dates herein for design, installation, construction and completion of the Senior Center,) then, upon written instrument approved by the City Council and executed by Participant, which Participant agrees to execute upon its good faith, reasonable determination that there will be no delay in the design, installation or construction of the Senior Center, the City and Agency shall have the right to increase the Maximum Senior Center Cost by any such allocated additional funds of the City or Agency or increased Park In-Lieu Fee greater than \$21,850,000, up to a maximum of 87% of the actual Park In-Lieu Fee. In furtherance of the foregoing, this Agreement shall be interpreted in order to give effect to the Maximum Senior Center Cost hereby created.

b. Participant shall prepare and submit to the City and Agency for written comment and discussion a proforma proposed Project Budget on or before December 1, 2007. City and Agency shall give written comment and/or approve such proforma budget within thirty

(30) days following submission thereof by Participant. shall submit a Project Budget within 90 days of the date of final plan approval of the Senior Center and thereafter may submit from time to time a revised Project Budget, which shall be subject to the review and approval of the City and Agency within thirty (30) days following submission thereof by Participant. City and Agency as used in this subsection shall, at the option of the Agency Executive Director and City Administrator, mean the Agency Board and City Council.

7. Participant agrees that the development of the Senior Center is subject to and conditioned upon approval by a Measure C Vote and project plan approval for the development of the Senior Center.

8. Notwithstanding anything to the contrary contained herein, in the event: (a) a Measure C Vote does not approve development of the Senior Center prior to December 1, 2006, Participant shall be relieved of its obligation to design, develop, install and construct the Senior Center as set forth in this Section and shall instead pay the entire Park In-Lieu Fee to the City in immediately available funds no later than by the recordation of Final Tract Map No. 16338; or (b) the City Council does not authorize project plan approval for the development of the Senior Center by December 1, 2007 (subject to one extension of no more than 4 months provided such extension is in a writing signed by all parties hereto), Participant shall be relieved of its obligation to design, develop, install and construct the Senior Center as set forth in this Section and shall instead pay the entire Park In-Lieu Fee to the City in immediately available funds no later than December 31, 2007 (as may be extended by any such extension); or (c) Participant does not in good faith obtain a building permit for the Senior Center by July 1, 2008, Participant shall be relieved of its obligation to design, develop, install and construct the Senior Center as set forth in this Section and shall instead pay the entire Park In-Lieu Fee to the City in immediately available funds no later than July 31, 2008; or (d) Participant does not in good faith complete construction of the Senior Center and dedicate the Senior Center to the City by July 1, 2009, Participant shall be relieved of its obligation to design, develop, install and construct the Senior Center as set forth in this Section and shall instead pay the entire Park In-Lieu Fee to the City in immediately available funds no later than July 31, 2009. Notwithstanding the foregoing or Section 610.1, if in accordance with the foregoing the Participant shall be released in whole or in part of its obligation to design, develop, install and/or construct the Senior Center and instead shall be obligated to pay the entire Park In Lieu Fee, or if in accordance with Section 610.1 the Participant shall be obligated for the entire Park In Lieu Fee, then and in either such event the Participant shall be entitled to a credit against the Park In Lieu Fee to the extent the Participant shall have expended funds or incurred any expenses in furtherance of the design, development, installation and/or construction of the Senior Center, which funds and expenses shall be substantiated in a Certified Cost Statement and contained in a City and Agency approved proforma or Project Budget. As a condition to Participant being entitled to any credit against the Park In Lieu Fee as provided herein, Participant shall first assign to City all assignable third party work product represented by such credit.

Mitigation Monitoring Program

Mitigation Monitoring Program

Mitigation Measure	Implementation Documentation	Monitoring Activity	Timing	Responsible Agency	City of Huntington Approval Signature	Date
<p>Biological Resources:</p> <p>MITV 4.3.1(a) Nesting habitat for protected or sensitive avian species:</p> <p>1) Vegetation removal and construction shall occur between September 1 and January 31 whenever feasible.</p> <p>2) Prior to any construction or vegetation removal between February 15 and August 31, a nesting survey shall be conducted by a qualified biologist of all habitat within 500 feet of the construction area. Surveys shall be conducted no less than 14 days and no more than 30 days prior to commencement of construction activities and surveys will be conducted in accordance with CDE protocol as applicable. If no active nests are identified on or within 500 feet of the construction site, no further mitigation is necessary. This survey can be carried out concurrently with surveys for other species provided it does not conflict with any established survey protocols. A copy of the pre-construction survey shall be submitted to the City of Huntington Began. If an active nest of a sensitive species is identified on-site, the established protocol shall be followed. A 250-foot no-work buffer shall be maintained between the nest and construction activity until CDEG and/or USFWS approves of any other mitigation measures.</p> <p>3) Completion of the nesting cycle shall be determined by a qualified ornithologist or biologist.</p>	<p>Developer shall submit construction schedule (including grading activities) as evidence of construction activity with seeding season. If construction occurs during relevant seeding, developer shall present a survey report, prepared by a consultant approved by the City, to the City prior to issuance of a grading permit. If nests are found, developer shall submit plans identifying nest locations and limits of construction activities.</p>	<p>Review schedule attached survey report and as necessary, review and approve plans indicating construction limits.</p> <p>Perform periodic field checks to ensure compliance.</p>	<p>Plan, design, prior to issuance of a grading permit.</p> <p>During construction.</p>	<p>Planning.</p>		

Mitigation Monitoring Program

Mitigation Measure	Implementation/Documentation	Monitoring/Action	Timing	Planning	Sign-off/Approval	Date
<p>MM4.3-1(g) Burrowing Owl:</p> <p>1) Prior to construction activity, focused pre-construction surveys shall be conducted for burrowing owls where suitable habitats present within the construction areas. Surveys shall be conducted no less than 14 days and no more than 30 days prior to commencement of construction activities and surveys shall be conducted in accordance with the CDPS burrowing owl survey protocol.</p> <p>2) If unoccupied burrows are found during the non-breeding season, the City may collapse the unoccupied burrows, prohibit or obstruct their entrances to prevent owls from entering and nesting in the burrows. This measure would prevent inadvertent impacts during construction activities.</p> <p>3) If no occupied burrows are found in the survey area, a letter report documenting survey methods and findings shall be submitted to the City and CDPS for review and approval and not further mitigation is necessary.</p> <p>4) If occupied burrows are found, impacts on the burrows shall be avoided by providing a buffer of 166 feet during the non-breeding season (September 1 through January 31) or 250 feet during the breeding season (February 1 through August 31). The size of the buffer area may be adjusted if a qualified biologist and CDPS determine it would not be likely to have adverse effects on the owls. No project activity shall commence within the buffer area until a qualified biologist confirms that the burrow is no longer occupied. If the burrow is occupied by a nesting pair, a minimum of 7.5 acres of foraging habitat contiguous to the burrow shall be maintained until the breeding season is over.</p> <p>5) If impacts on occupied burrows are unavoidable, onsite passive relocation techniques approved by CDPS shall be used to encourage owls to move to alternative burrows outside of the impact area. However, no occupied burrows shall be disturbed during the nesting season unless a qualified biologist verifies through non-invasive methods that</p>	<p>Developer shall submit construction schedule (including grading activities) as evidence of construction overlap with breeding season. If construction occurs during relevant breeding-developer shall present a survey report (prepared by a consultant approved by the City) to the City prior to issuance of a grading permit. If nests are found, developer shall submit plans identifying nest locations and limits of construction activities.</p>	<p>Review schedule and field survey report, and as necessary, review and approve plans indicating construction limits.</p> <p>Perform periodic field checks at survey checkpoints.</p>	<p>Plan check prior to issuance of a grading permit.</p>	<p>Planning</p>		

Mitigation Monitoring Program

Mitigation Monitoring Program

Mitigation Measure	Implementation Description	Monitoring Activity	Timing	Responsible Parties	Completion Verification Schedule	Date
<p>juvenile from the occupied burrows are foraging independently and are capable of independent survival. Mitigation for foraging habitat for relocated pairs shall follow guidelines provided in the California Burrowing Owl Consortium's April 1998 Burrowing Owl Survey Protocol and Mitigation Guidelines, which ranges from 7.5 to 19.5 acres per pair.</p> <p>MM 4.3-2 (This MM is Measure Biological Resources 4 from the Central Park Master Plan EIR)</p> <p>The City shall mitigate for impacts to raptor foraging habitat through dedication, easement, conservation, and/or enhancing areas of raptor foraging habitat at a rate of 1:1 for acres of impact on raptor foraging habitat to provide suitable habitat values and functions for raptors. Mitigation for impacts on raptor foraging habitat will be accomplished within suitable areas that are City-owned and preferably nearby, such as the areas in association with the Sally Miller Lake Group Facility, Low Intensity Recreation Area, Santa Anita Recreation Area and/or Madlen Area/Urban Forest/Trailhead. Enhancement would include, but not be limited to, the planting of native trees within and adjacent to conserved areas of raptor foraging habitat. Prior to ground disturbance, the City shall identify the particular site or area to be enhanced and shall formulate a plan to accomplish the raptor foraging habitat enhancement activities. This plan shall be reviewed for approval by a qualified biologist.</p>	<p>The City shall determine the location of suitable raptor foraging habitat to be conserved and/or enhanced.</p> <p>The City shall formulate a plan to accomplish the raptor foraging habitat enhancement activities, including the planting of native trees within and adjacent to the dedicated area.</p> <p>Proof of retention of biologist.</p>	<p>Prepare plans including enhancement area and verify retention of a qualified biologist.</p> <p>Review and approval of raptor foraging habitat enhancement plan by qualified biologist.</p> <p>Implementation and completion of enhancement activities.</p>	<p>Plan check prior to issuance of a grading permit.</p>	<p>Planning</p>	<p>Qualified Biologist</p>	<p>_____</p> <p>_____</p> <p>_____</p>



Jennifer McGrath
City Attorney

**OFFICE OF
CITY ATTORNEY**

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VIA U.S. MAIL AND ELECTRONIC MAIL

May 27, 2008

Wendy L. Fields, Esq.
KATTEN MUNCHIN ROSENMAN LLP
1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201

Re: Correspondence dated May 15, 2008

Dear Wendy:

This office is in receipt of your correspondence dated May 15, 2008 regarding the Owner Participation Agreement ("OPA") entered into and among Makallon Atlanta Huntington Beach, LLC ("Makallon"), the Redevelopment Agency of the City of Huntington Beach (the "Agency") and the City of Huntington Beach (the "City"), as approved by the City Council and the Agency on October 16, 2006.

In your correspondence, you claim that mitigation measures 4.3.1(a) and 4.3.1(b) of the Mitigation Monitoring Program included as part of the Senior Center EIR delay the ability of Makallon to obtain permits for the Senior Center prior to September 1, 2008 of this year and also delay construction activities. Your correspondence states that you consider these to be force majeure delays under the OPA that excuse Makallon from performance under the authority of California Code Section 1511.

You further claim that Makallon has reasonable justification to defer construction commitments pending completion of arbitration because Makallon has commissioned an appraisal of the Pacific City property that attributes a \$17,500,000 value for the Park-in-Lieu Fee. Finally, you state that Makallon may further claim excused performance due to the CEQA challenge to the EIR for the Senior Center.

Wendy L. Fields, Esq.
May 27, 2008
Page 2 of 3

The purpose of this letter is to address the items raised in your correspondence and to state unequivocally the Agency and City's position that Makallon has not been excused from the performance mandated by Section 305.8 (c) and (d) of the OPA. As an initial matter, we appreciate that Makallon has acknowledged that Section 305 of the OPA requires that a building permit for the Senior Center be issued on or before July 1, 2008. However, we reject any suggestion that should Makallon fail to obtain a building permit for the Senior Center by July 1, 2008, it will be excused from performance such that Makallon will not have to pay the Park In Lieu Fee by July 31, 2008 as specified in the OPA.

To begin with, it is unclear what, if anything, Makallon has done by way of good faith performance towards the July 1st deadline. In particular, reference is made to the letter dated February 22, 2008 from Interim City Administrator Paul Emery to Michael Gagnet, which outlined the City's concern that Makallon take the appropriate action to perform as required by the OPA. A copy of that letter is attached hereto for your review. At that time, the City provided a detailed schedule of performance to meet the July 1, 2008 deadline listed in OPA Section 305 (8)(c). We understand that nothing was received in response to the City's correspondence. Instead, your correspondence now informs the City that Makallon will not be able to pull the permit due to both the pending litigation on the Senior Center EIR and the mitigation measures included in the EIR for the Senior Center.

We believe that this position ignores the fact the California Environmental Quality Act specifically permits the project to continue notwithstanding the commencement of litigation. *See* Public Resources Code Section 21167.3. As to the effect of the mitigation measures, construction activities are not limited to September 1 to January 31 as you suggest in your correspondence. Rather, prior to any construction activities or vegetation removal between February 15 and August 31, the surveys described in Mitigation Measures 4.3-1(a) and 4.3-1(b) must be undertaken. Although not required to do so under the OPA, the City will assist Makar by arranging to have these surveys completed no less than 14 days and no more than 30 days prior to vegetation removal and commencement of construction activities. In this regard, please advise us as to the appropriate date to have these surveys completed.

Thus, we believe that Makallon's claim that either the pending litigation or the implementation of the EIR mitigation measures is an enforced delay under Section 1004 of the OPA is without merit. Even assuming *arguendo* that there was an enforced delay under Section 1004, prompt notice of the delay as required by Section 1004 was not provided.

Your letter also incorrectly states that under Section 3056, Makallon is excused from the obligation to construct the Senior Center if the Park-in-Lieu Fee is less than \$19,000,000. Rather, Section 305.6 sets \$19,000,000 as the "Maximum Senior Center Cost," unless the City allocates additional fundraising. As to Makallon's claim it is unable to make a construction commitment to the Senior Center because of the pending arbitration, we believe this claim is belied by the April 30, 2008 appraisal prepared by Integra and submitted by Makallon in the arbitration proceedings, which asserts a value of \$22,071,503 for the Park-in-Lieu Fee. Because Makallon's own appraisal exceeds the cost

Wendy L. Fields, Esq.
May 27, 2008
Page 3 of 3

of the Senior Center, the arbitration does not impact Makallon's ability to make a construction commitment in furtherance of Section 305.8(c) of the OPA.

As stated above, the purpose of this letter is to reject Makallon's sudden claim that it is unable to comply with the terms of the OPA because of the mitigation measures, the pending arbitration, or the litigation on the Senior Center EIR. In light of the tasks to be completed prior to July 1, 2008, we strongly urge your client to contact Interim City Administrator Paul Emery to discuss a schedule of performance.

Very truly yours,



LEONIE MULVIHILL
Sr. Deputy City Attorney

cc: Paul Emery, Interim City Administrator
Jennifer McGrath, City Attorney



CITY OF HUNTINGTON BEACH
CITY ADMINISTRATOR'S OFFICE
2000 Main Street, Huntington Beach, CA 92648

VIA U.S. Certified Mail, Return Receipt Requested

July 1, 2008

Makallon Atlanta Huntington Beach, LLC
Attn: Michael Gagnet, Executive Vice President-Development
4100 MacArthur Blvd., Suite 200
Newport Beach, CA 92660

Re: Owner Participation Agreement, dated October 16, 2006

Dear Mr. Gagnet:

This correspondence is written in regard to the Owner Participation Agreement ("OPA") entered into and among Makallon Atlanta Huntington Beach, LLC ("Makallon"), the Redevelopment Agency of the City of Huntington Beach ("Agency") and the City of Huntington Beach ("City") as approved by the City Council and Agency on October 16, 2006.

Pursuant to the OPA, Makallon was required to use good faith to obtain a building permit for the Senior Center by July 1, 2008. Section 305(8)(c) of the OPA provides that in the event Makallon does not secure a building permit by July 1, 2008, Makallon is relieved of its obligation to design, develop, and construct the Senior Center and shall pay the entire Park-in-Lieu Fee to the City in immediately available funds no later than July 31, 2008.

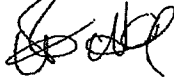
As we have advised Makallon multiple times over the past several months, including correspondence dated February 22 and May 27 of this year, adherence to a submittal and processing schedule was critical to the issuance of building permits by July 1st. Notwithstanding these repeated notices, Makallon has failed to provide plans and specifications sufficient to obtain a building permit for the Senior Center by July 1, 2008. This letter will therefore serve as formal notice that Makallon is no longer obligated to design, develop and construct the Senior Center and is required to pay the entire Park-in-Lieu Fee to the City pursuant to the terms of the OPA.

As you know, Makallon has disputed the amount of the Park-in-Lieu Fee pursuant to Chapter 254 of the City's Zoning and Subdivision Ordinance. An arbitration to resolve the issue of the amount of the Park-in-Lieu Fee was held on June 10, 11 and 12, 2008, and the arbitrators' decision is anticipated to be issued at any time. Therefore, Makallon is hereby directed to pay the amount deemed by the arbitrators' decision to be the

Michael Gagnet, Executive Vice President-Development
July 1, 2008
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Park-in-Lieu Fee within thirty days of issuance of the arbitrators' decision. In the event that Makallon fails to timely provide payment of the Park-in-Lieu fee, please be advised that the City and the Agency intend to pursue any and all legal remedies available.

Very truly yours,



PAUL EMERY
Interim City Administrator *PE*

- c: Jennifer McGrath, City Attorney
Jim Engle, Director of Community Services
Scott Hess, Planning Director
Travis Hopkins, Director of Public Works

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July 17, 2008

BY REGULAR AND ELECTRONIC MAIL

City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

ATTENTION: Paul Emery
Interim City Administrator

Re: Owner Participation Agreement dated October 16, 2006

Dear Mr. Emery:

Reference is made to (i) the Owner Participation Agreement (“OPA” or “Agreement”) entered into among Makallon Atlanta Huntington Beach, LLC (“Makallon”), the Redevelopment Agency of the City of Huntington Beach (the “Agency”) and the City of Huntington Beach (the “City”), approved by the City Council on October 16, 2006, (ii) the provisions of the OPA addressing the Park-in-Lieu Fee and Senior Center design, development and construction, and (iii) your letter dated July 1, 2008 giving to Makallon notice of the obligation to pay the Park-in-Lieu Fee to the City as a consequence of its alleged failure to obtain a building permit for the Senior Center timely in accordance Section 305.8(c) of the OPA.¹ Without waiving any right of our client in the future to claim that it in fact timely submitted and responsibly processed its application for a rough grading permit, we acknowledge that the City did not issue the Senior Center rough grading permit as of July 1, 2008. Notwithstanding, on behalf of our client and for the reasons set forth in this letter, we disagree with your position and dispute your allegation that Makallon failed timely to obtain a building permit for the Senior Center. To the contrary, Makallon’s performance was excused and as of the date hereof continues to be excused, and any demand by the City for the payment of the Park-in-Lieu Fee is unfounded.

¹ For purposes of this letter, capitalized terms used in this letter without definition have the respective meanings assigned to such terms in the OPA. Additionally, as has been repeatedly stated by the City and relied upon by Makallon, for purposes of Section 305.8 of the OPA and any other pertinent provision(s) of the Agreement, the term ‘building permit’ includes, without limitation, any rough or precise grading permit.

Paul Emery
Interim City Administrator
July 17, 2008
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Park-in Lieu Fee Determination.

As you know, in accordance with Section 254.08(I) of the Huntington Beach Zoning and Subdivision Ordinance, Makallon submitted to arbitration the determination of the appraised valuation of the Park-in-Lieu Fee. The mandated proceedings were held last month, June 11 to June 13, and concluded almost 18 months of the parties' commissioning appraisals and updates in an effort to reach a final determination of the amount of the Park-in-Lieu Fee. I also am advised that the City delayed the release of its appraisal to Makallon after the date the appraisal first was submitted by J.P. Laurain to the City, and that the qualifications of the City appraiser have been a subject of inquiry prior to and during the arbitration proceedings, each of which has delayed the process of making a final determination of the Park-in-Lieu Fee.

Pursuant to the terms of the OPA, Makallon assumed the obligation to design and construct the Senior Center to the extent of its obligation for the Park-in-Lieu Fee. That obligation was undefined as of the execution and delivery of the Agreement in October of 2006 and accordingly was dependent upon the subsequent determination of the Park-in Lieu Fee. The Park-in-Lieu Fee submitted by the parties through their respective appraisals are approximately \$20 million apart, with the City's \$41.4 million fee almost double that of the Makallon \$22.7 million fee. Clearly, until the Park-in-Lieu Fee is determined and the City makes any permitted election under Section 305.6 to establish the Maximum Senior Center Cost, Makallon is without the budgetary guidance prerequisite to the design of the Senior Center and its permitting process. As such, whether based upon the occurrence of a Force Majeure Delay under Section 1004 of the Agreement, a Civil Code Section 1511 excused performance², or common law impossibility of performance, as of July 1, 2008 (and as of this date) and despite the continued good faith efforts of Makallon, the Park-in-Lieu Fee was and remains undetermined, Makallon was and remains unable to design a Senior Center or initiate the building permit process, and its performance was excused, is excused and will continue to be excused until the Park-in-Lieu Fee has been determined and Makallon has a reasonable period of time thereafter to design and construct a Senior Center in accordance with its budgetary requirements and the applicable provisions of the OPA.

In furtherance (and not in limitation) of the foregoing provisions of this letter, as known to the City, the intended Community Facilities District ("CFD") financing of Pacific City has long been an intended source of payment of approximately \$19 million of the required Park-in-Lieu Fee commitment. Since the time that the City and Makallon diverged in their respective determination of the value of the Park-in-Lieu Fee, the City has essentially frozen all processing of the CFD. As such,

² California Civil Code section 1511 excuses any delay in performance of a contract when such performance is prevented or delayed by the act of the owner. See *Semas v. Bergmann*, 178 C.A. 2d 758 (1960) and *Nomellini Construction Co. v. Department of Water Resources*, 19 Cal.App.3d 240, 96 Cal. Rptr. 682 (1971). Civil Code Section 1511 applies equally to contracts between a public entity/government landowner and a contractor. *Peter Kiewit Sons' Co. v. Pasadena City Jr. College District of Los Angeles*, 59 Cal.2d 241, 245 (1963).

Paul Emery
Interim City Administrator
July 17, 2008
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Katten Muchin Rosenman LLP

until the City recommits to the CFD process, Makallon is being denied the underlying benefit of its bargain in entering into the OPA.³

City Estoppel.

There has developed between the parties an established course of dealing respecting the performance of the OPA and parties' obligations thereunder that the City is now attempting to ignore. Section 1100 of the OPA (entitled *Effective Date*) originally provided that the Agreement would terminate unless certain conditions were satisfied as of July 31, 2007. In order to complete final map and related documentary review, the City initiated an extension of the July 31 date to August 31. See the attached February 1, 2008 letter from Paul Emery to Michael Gagnet. Likewise, the language of Section 308.8(b) required the City Council to authorize project plan approval of the Senior Center by December 1, 2007 (with a one-time 4-month extension in writing signed by all parties). No extension ever was requested of or granted by Makallon, and the Environmental Impact Report No. 07-002, and related Conditional Use Permit No. 07-39 and Findings and Conditions of Approval for the Senior Center were not approved by the City Council until February 4, 2008.

Makallon will not be held to a different standard of enforcement or interpretation of the OPA than that applied by the City to itself. As such, and without limitation of the preceding or succeeding sections of this letter, it is Makallon's position that the prior course of dealing between the parties estops the City from asserting or invoking any 'time of the essence' requirement of the Agreement, especially given the record of the facts in the matter and Makallon's continued good faith efforts in support of the Project and the OPA.

Notice and Cure. Assuming *arguendo* that the City has any right or claim based upon any failure by Makallon timely to obtain a building permit for the Senior Center, under Article 900 of the OPA, the City would have no right to demand payment of the Park-in-Lieu Fee without first giving to Makallon notice of default under Section 902 and the benefit of its 90-day cure right under Section 903. Section 901.1 of the OPA defines an Event of Default under the Agreement as a "[f]ailure or delay by a party to perform any term of provision of this Agreement within the time provided herein," If an Event of Default had occurred, then the City would have been obligated to give to Makallon a Default Notice under Section 901 and Makallon's cure rights would have arisen. Barring the giving of the applicable Default Notice and the tolling of the applicable cure period, no rights could have accrued to the City.

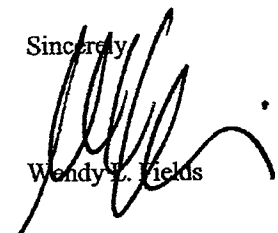
³ For the reasons expressed in this letter, Makallon likewise legally is excused from any other performance obligations under the OPA that reasonably are dependent upon the design, pro forma analysis or CFD funding of the Senior Center.

Paul Emery
Interim City Administrator
July 17, 2008
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Please do not hesitate to contact the undersigned or Michael Gagnet if you have any questions respecting this letter or the subject matter hereof.

Sincerely,



Wendy L. Fields

cc: Michael Gagnet
Leonie Mulvihill, Senior Deputy City Attorney
LMULIHILL@SURFCITY-HB.ORG
Huntington Beach City Council
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VIA ELECTRONIC MAIL TO wendy.fields@kattenlaw.com

July 30, 2008

Wendy L. Fields, Esq.
KATTEN MUNCHIN ROSENMAN LLP
1025 Thomas Jefferson Street, NW
East Lobby, Suite 700
Washington, DC 20007-5201

Re: Pacific City Park-in-Lieu Fee

Dear Wendy:

This letter is written as a follow up our telephone conversation on July 28, 2008 wherein we discussed the possible resolution of the dispute between our clients with regard to the Owner Participation Agreement ("OPA") entered into and among Makallon Atlanta Huntington Beach, LLC ("Makallon"), the Redevelopment Agency of the City of Huntington Beach ("Agency") and the City of Huntington Beach ("City") as approved by the City Council and Agency on October 16, 2006.

In a letter dated July 1, 2008, the City Administrator advised that due to Makallon's failure to secure a building permit for the Senior Center by July 1, 2008, Makallon was required to pay the Park-in-Lieu Fee within 30 days of the arbitrator's decision, or August 23, 2008. In response, and by way of letter dated July 17, 2008, Makallon disputed the City's position and claimed that Makallon is excused from performance under the OPA.

We believe that Makallon's position is without merit, and is no more than an attempt to delay payment of the fees imposed on Makallon pursuant to the entitlements approved by the City in 2004. However, in the spirit of trying to avoid what will surely be contentious litigation, and without waiving any of the claims, rights, and defenses included in the City's correspondence to Makallon dated February 22, 2008, May 27, 2008 and July 1, 2008, this letter is written as a final request for Makallon's commitment and good faith effort towards putting the design and construction of the Senior Center back on schedule before the August 23, 2008 deadline referenced in the City's July 1, 2008 correspondence.

Wendy Fields, Esq.
July 30, 2008
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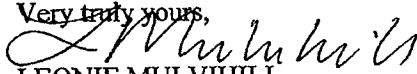
First and foremost, the City hereby demands Makallon's immediate commitment to draft a development schedule and execute an agreement for the construction of the Senior Center by August 23, 2008. Without these two agreements, the terms of the OPA are meaningless and, as a direct result of Makallon's performance to date, puts the City's collection of the 2007 Park-In-Lieu Fee at risk, which is unacceptable. Without this commitment from Makallon, the City has no other reasonable recourse but to pursue all legal remedies available to the City under the terms of the OPA and California law.

Secondarily, we confirm that the arbitrator's award served on July 24, 2008, results in the calculated Park-in-Lieu Fee for the Pacific City project of \$22,071,504.64. For the purposes of settling the current dispute between the parties, and without waiving any claims, rights and defenses set forth in the City's correspondence to you dated February 22, 2008, May 27, 2008 and July 1, 2008, please be further advised that the City has no desire to elect under Section 305.6 of the OPA to increase the maximum Senior Center cost to 87% of the determined Park-in-Lieu Fee. Quite simply, without the benefit of any plans and specifications the City is unable to determine whether or not it is appropriate to increase the "Maximum Senior Center Cost".

Finally, in your email correspondence to me dated July 25, 2008, you indicated that you prefer all scheduling information to be conveyed between Makallon and the City through our offices. As I explained to you during our phone conversation, I believe that it is imperative that City staff communicate with Makallon on the details for the schedule to confirm that the dates and the commitments imposed by the schedule on both Makallon and the City are capable of being satisfied. To this end, I propose that communication between Makallon and City staff copy our offices so that we can agree on a mutually-acceptable schedule in furtherance of the OPA. If you have a more preferable alternative method of completing this discussion, please let us know.

While the schedule is being drafted, our offices can implement the OPA's requirement for a formal agreement between Makallon and the City for the construction of the Senior Center. Again, this needs to be completed prior to August 23, 2008. This date is not arbitrary but is consistent with the City's notice dated July 1, 2008.

Wendy, we recognize this will take a great deal of effort on our part, but it seems that this effort will be well spent if we can implement the terms of the OPA as opposed to proceeding to litigation.

Very truly yours,

LEONIE MULVIHILL
Sr. Deputy City Attorney

cc: Paul Emery, Interim City Administrator
Bob Hall, Deputy City Administrator
Jennifer McGrath, City Attorney
Jim Engle, Director of Community Services
Scott Hess, Director of Planning
Travis Hopkins, Director of Public Works

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