



108-0122022-014

August 23, 2022

Mr. Diego Rico
706 Mission Street Co LLC
7121 Fairway Drive, Suite 410
Palm Beach Gardens, FL 33418

Re: Agreement for Purchase and Sale of Real Estate dated as of July 16, 2013 by and between Successor Agency to the Redevelopment Agency of the City and County of San Francisco, a public body organized and existing under the laws of the State of California (“Successor Agency”), commonly known as the Office of Community Investment and Infrastructure, as transferor, and 706 Mission Street Co LLC, a Delaware limited liability company (“Developer”), as transferee, and The Mexican Museum, a California non-profit corporation (“Mexican Museum”), as a third-party beneficiary (the “Purchase Agreement”)

Mr. Rico:

I am in receipt of your letter dated June 30, 2022 concerning continued delays under the Purchase Agreement, including delays in Developer’s payment of the remaining eighty percent of the Agency Fee (in the amount of \$3,565,102) owed under Section 8.1 of the Purchase Agreement, which was approved by the Successor Agency Commission (Resolution No. 32-2013 (July 16, 2013) and the Oversight Board of the City and County of San Francisco (“Oversight Board”) (Resolution No.8-2013 (July 22, 2013). Capitalized terms used but not defined herein shall have the meaning given in the Purchase Agreement.

As discussed further below, Developer has failed to provide a basis, under Purchase Agreement Section 13.7(a), for claiming excusable delay in paying the Agency Fee due to the COVID-19 Pandemic. Thus, the Successor Agency rejects Developer’s claim of ongoing Force Majeure concerning the Agency Fee payment, and hereby notifies the Developer that failure to pay the Agency Fee in full within five days of this notice shall be considered a default under Purchase Agreement Section 13.1(d). Alternatively, Developer may wish to request an amendment to the Purchase Agreement, to extend the deadline for payment of the Agency Fee. Approval of an amendment is subject to authorization by the Successor Agency Commission and Oversight Board. If Developer wishes to proceed with an amendment, it must notify the Successor Agency within five business days of this notice, and must submit supporting information for such a request, as discussed below, by **September 16, 2022**. Failure to submit such information by such date shall be considered a default under Purchase Agreement Section 13.1(d) and will entitle the Successor Agency to proceed in accordance with its remedies under Section 13.2.

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BACKGROUND

On June 30, 2020, Developer provided notice to Successor Agency and Mexican Museum of the occurrence and continuance of a Force Majeure event under Purchase Agreement Section 13.7(a), based on the City's prohibition of construction activities under Order of Public Health Officer C-19-07b concerning the COVID-19 pandemic (issued March 31, 2020) (the "Force Majeure Notice"). As noted in the Force Majeure Notice, Developer's contractor re-commenced construction activities on May 4, 2020.

On January 5, 2021 (email from H. Gerwertz to M. Farrar), the City provided Developer with a draft Conditional Certification of Completion of Improvements and Restatement of Certain Obligations under Purchase Agreement Section 7.19 ("COC"), indicating the Successor Agency Executive Director's exercise of her discretionary authority under Purchase Agreement Section 13.7(b) "to extend the due date for the second payment of the Agency Fee, for twelve months. Thus, the remaining eighty percent of the Agency Fee, in the amount of \$3,565,102, shall be paid on or before November 25, 2021 (which is the date one year from issuance of the first temporary certificate of occupancy for a residential unit(s) in the Project)." Although Developer never executed the COC, the Successor Agency considers the discretionary extension to be effective.

On November 1, 2021 (email from P. Peltzer to M. Farrar, K. Gonsar, S. Jeffries), Successor Agency staff notified Developer of the upcoming, extended deadline to pay Agency Fees. Successor Agency staff sent similar emails on November 22, 2021 (P. Peltzer to K. Johnston, K. Gonsar, S. Jeffries); December 6, 2021 (P. Peltzer to K. Johnston, K. Gonsar, S. Jeffries); January 26, 2022 (A. Foxworthy to K. Johnston, K. Gonsar, M. Price); February 15, 2022 (A. Foxworthy to K. Johnston, K. Gonsar, M. Price). On December 2, 2021, Successor Agency staff met with Developer representatives (K. Johnston, K. Gonsar, M. Price) to discuss the status of the Agency Fee, at which meeting Developer representatives indicated their intention to request a deferral of the Agency Fee.

On February 11, 2022, Successor Agency received a letter from Developer ("Force Majeure Follow-Up") stating that "[a]lthough the Project has now been completed, the [COVID-19] Pandemic and various governmental orders continue to restrict access to the Project and continue to have adverse impacts on travel and marketing for the Project... ." This letter provides no detail concerning which governmental orders restricted access to the Project as of February 11, 2022, which governmental orders restricted travel to the Project, or how such restrictions cause enforced delays in the payment of the Agency Fee.

Thus, on March 3, 2022 and again on June 16, 2022, the Successor Agency requested that Developer substantiate its claim of enforced delays in making the Agency Fee payment due to the COVID-19 Pandemic.

DISCUSSION

Developer's June 30, 2022 letter provides no basis for enforced delay in paying the Agency Fee due to the COVID-19 Pandemic. In sum, the letter alleges that: (1) that local, state and federal governments have imposed and continue to impose quarantine restrictions since March 2020, as well as mandated Project and office closures and travel restrictions; (2) supply chain disruptions and labor shortages inhibited the ability of Developer's general contractor and its subcontractors to complete the Project as originally scheduled, to the point that punch list items remain outstanding on the Project; and (3) several conditions have contributed to achieving less than Developer's

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intended condominium sales to date, including a softening of the robust pre-Pandemic luxury condominium market in San Francisco, decreases in the daily activity and vibrancy of San Francisco's streets, significant increases in drug use on and the presence of the homeless population occupying City streets, particularly in the Project's immediate neighborhood.

As a threshold matter, Purchase Agreement Section 8.1 establishes the following applicable milestones for payment of the Agency Fee: (a) issuance of first building permit or Site Permit for the Project; and (b) issuance of the first temporary certificate of occupancy for residential unit(s) in the Project. There is no dispute as to the first milestone; and by Developer's admission, the second milestone has long since arisen. See Force Majeure Follow-Up ("...the Project is complete").

While the outbreak of the COVID-19 Pandemic caused initial delays in construction of the Project, the Developer's contractor was able to recommence construction activities on May 4, 2020. See Developer's Force Majeure Letter. By November 2020, the City had issued the first temporary certificates of occupancy for residential units within the Project, and at that point, any Pandemic-related delays in achieving this milestone had been resolved. Nevertheless, the Successor Agency Executive Director granted Developer a discretionary extension of twelve months – not a force majeure delay – for payment of the second installment of the Agency Fee. Thus, although the COVID-19 Pandemic may have caused supply chain or labor disruptions affecting the achievement of milestones established in Purchase Agreement Section 8.1 for payment of the Agency Fees, those disruptions have subsided and the affected milestone (first temporary certificates of occupancy) has long since been achieved. Any lingering effects of those delays have been more than adequately addressed by the Executive Director's previously provided 12-month discretionary extension.

Concerning quarantine restrictions, travel and office restrictions, and alleged social conditions in surrounding areas of the City, Developer provides no evidentiary basis for how these conditions, if they exist, have affected Developer's ability to achieve pertinent milestones under the Purchase Agreement. At its core, Developer alleges economic impracticability as the basis for its delay in paying the Agency Fee: Developer has not achieved intended level of sales because the luxury condominium market is not as "robust" as assumed at the execution of the Purchase Agreement, and thus Developer is claiming that it is not obligated to pay the Agency Fee until such time as the market improves.

In effect, the Developer attempts to insert into the Purchase Agreement additional economic milestones for the payment of the Agency Fee. Developer states:

"When the Purchase Agreement was executed almost a decade ago, Developer had expected to have pre-sales of 50 units, representing approximately 34% of the Project, by the time the first temporary certificate of occupancy was issued, with an expected 88 units sold, representing approximately 60% of the Project, within one year thereafter. Achieving these expectations would have provided Developer sales proceeds in excess of \$700 million, sufficient to pay off all Project construction financing with excess cash flow to cover carrying costs and fees, including the Agency Fee."

The Purchase Agreement does not contain sales milestones for payment of the Agency Fee, nor does it contemplate that the Agency Fee would be payable only if sales proceeds reached a certain level to allow prior payoff of construction financing or other Project costs. The only pertinent milestone for payment of the Agency Fee

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is the issuance of first temporary certificate of occupancy for residential units in the Project, which arose in November 2020 despite the COVID-19 Pandemic.

Furthermore, Developer has made other payments related to the Project. Developer states that it has used "net sales proceeds" from the Project to pay down Project financing, pay ad valorem property taxes and pay \$1.5 million in Open Space Fees owed to the City as required under the Purchase Agreement. Developer does not have a contractual right to pay some but not all of the amounts owed under the Purchase Agreement. As such, Developer is hereby notified that it must pay the Agency Fee in full within five days of this letter or be in Default under Purchase Agreement Section 13.1(d).

As Successor Agency staff has previously discussed with Developer representatives, Developer may request an amendment to the Purchase Agreement to extend the date for payment of the Agency Fee, based on the economic conditions of the Project. The Successor Agency Commission and Oversight Board must approve such an amendment. For Successor Agency staff to recommend such an amendment to the Successor Agency Commission and Oversight Board, Developer should provide quantitative information concerning the financial status of the Project and justifying a delay in the payment obligation. Moreover, the Developer should provide information, as required under Redevelopment Dissolution Law, that will assist the Oversight Board in finding that the amendment "would be in the best interests of the taxing entities." Cal. Health & Safety Code § 34181 (e). If Developer wishes to pursue an amendment, Developer must notify the Successor Agency within five business days of this notice, and must submit the required supporting information, **by September 16, 2022**. Failure to submit such information by such date shall be considered a default under Purchase Agreement Section 13.1(d) and will entitle the Successor Agency to proceed in accordance with its remedies under Section 13.2.

Please contact me with any questions on the foregoing.

Best,

DocuSigned by:



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Thor Kaslofsky
Executive Director

Cc: Millennium Partners
MF8 Mission Member, LLC
Kashif Sheikh, Esq., MF8 Mission Member, LLC
Matthew Price, Westbrook Partners (via email)
Kristin Gonsar, Millennium Partners (via email)
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