

**AGREEMENT REGARDING DESIGN, CONSTRUCTION, AND INSPECTION OF A
MODIFIED TRAFFIC SIGNAL SYSTEM AT BRIGHTON AVENUE**

This agreement is made this 15th day of May, 2015 (the "Agreement"), in San Francisco, California, between the City and County of San Francisco, a municipal corporation ("City"), by and through its Municipal Transportation Agency ("SFMTA"), and Avalon Ocean Avenue, L.P., a Delaware limited partnership ("Avalon").

RECITALS

A. Avalon is the developer of a residential and commercial development located at 1150 Ocean Avenue in San Francisco known as Avalon Ocean Avenue (the "Property"), more fully depicted in Exhibit A.

B. As a condition of obtaining approval from the Planning Commission to develop the Property, and to improve traffic circulation in the vicinity of the Property for the benefit of Avalon's tenants and the community, Avalon obtained DPW Order No. 179,281 for Street Improvement Permit No. 09IE-0693.

C. Avalon has agreed to be responsible for designing and constructing a modification to the existing traffic signal system at the intersection of Ocean Avenue and Brighton Avenue (the "Modifications") subject to review and approval by SFMTA. Avalon is willing to fund the design of the Modifications, and provide SFMTA with the costs of the inspection and maintenance of the Modifications, as provided for in this Agreement.

D. The parties wish to set out their respective duties and obligations with respect to the Modifications in this Agreement.

AGREEMENT

1. Term. The Agreement shall commence as of January 2, 2012 and terminate upon approval and acceptance by the City's Traffic Engineer of the Modifications of the existing signal system, or as otherwise specified herein.

2. Modifications

2.1. Description of the Modifications. The Modifications consist of the design, construction, inspection and approval of changes to an existing traffic signal system at the intersection of Ocean Avenue and Brighton Avenue in San Francisco. The Modifications will be installed on the north side of the intersection to accommodate the extension of Brighton Avenue onto the Property. The Modifications include the design, construction and inspection of signal improvements and signal equipment, as well as related traffic striping and signage. The Modifications shall become the property of the SFMTA upon completion of construction, and SFMTA shall have full responsibility for any future changes to the traffic control system.

2.2. Costs for Modifications. Avalon agrees to bear all costs related to the Modifications, including but not limited to the costs of design, construction, construction support, review of plans, restriping and signage, as further clarified in this Agreement.

2.2.1. Design and Construction. Avalon agrees to cause the Modifications to be constructed, in accordance with the plans and specifications that have been approved by the SFMTA, and subject to final construction inspection and acceptance by the City.

2.2.2. Construction Support; Striping; Signage. To cover SFMTA's estimated costs for reviewing plans, inspecting the Modifications, programming the signal system, permanently striping

the intersection and fabricating and installing signage, Avalon shall pay the SFMTA the amount of Forty-Two Thousand, Five Hundred Dollars (\$42,500) within 15 days from the execution of this Agreement.

2.2.3. Maintenance and Operation Costs. To cover the Costs of maintenance and electrification of the Modifications for their useful life, Avalon agrees to pay to SFMTA the amount of Twenty-Two Thousand, Five Hundred Dollars (\$22,500) within 10 days after construction is completed, but before the Modifications are finally accepted by the City. Once the Signal System is accepted by the City and all payments required under this Agreement have been made, Avalon shall have no further responsibility or obligation for the Signal System.

2.3. City Responsibilities. SFMTA agrees to perform the following tasks:

2.3.1. Review and approval of the plans and specifications for the Modifications.

2.3.2. Construction inspection during installation of the Modifications.

2.3.3. Accept for operation the Modifications provided that the construction has been completed according to the approved plans and specifications.

2.3.4. The necessary programming for operation of the Signal System, as modified.

2.3.5. Installation of permanent striping at the intersection of Ocean Avenue and Brighton Avenue.

2.3.6. Fabrication and installation of appropriate signage at the intersection.

3. Easement

Avalon agrees to the recordation of a permanent easement for the installation, operation and maintenance of sensors and associated striping by SFMTA on Brighton Street, in the form attached as Exhibit B. The easement is subject to approval by the SFMTA Board of Directors and Board of Supervisors.

4. Default; Remedies.

4.1. Default. A default shall occur if either party fails or refuses to perform or observe any material term, covenant or condition contained in this Agreement, and such default continues for a period of 25 days after written notice to cure such default.

3.2 Default of Avalon. On and after any default on the part of Avalon that is not cured within the time period specified in Section 3.1, SFMTA will have the right to terminate this Agreement; provided, however, that before SFMTA shall have the right to terminate this Agreement, SFMTA shall send a second default notice to Avalon informing Avalon that SFMTA intends to terminate this Agreement if the default is not cured within an additional five days. In the event of a default, SFMTA's sole remedies shall be limited to recovery of actual Project Costs incurred, and if construction has commenced, to recovery of the funds necessary to complete construction.

4.2. Default of City. On and after any default on the part of SFMTA with respect to any obligation of SFMTA under Section 2.3 that is not cured within the time period specified in Section 3.1, Avalon's sole remedy is to seek a refund of any and all monies paid to or deposited with SFMTA for such work; provided, however, that before Avalon shall have the right to seek a refund of any and all monies paid to or deposited with SFMTA for such work, Avalon shall send a second default notice to SFMTA informing SFMTA that Avalon intends to terminate this Agreement if the default is not cured within an additional five days. Avalon agrees that it will not be entitled to other damages or any equitable relief for any uncured default on the part of SFMTA.

4.3. Non-Waiver of Rights. The omission by either party at any time to enforce any default or right reserved to it, or to require performance of any of the terms, covenants, or provisions hereof by the other party at the time designated, shall not be a waiver of any such default or right to which the party is entitled, nor shall it in any way affect the right of the party to enforce such provisions thereafter.

5. **Modification of Agreement.** The City and Avalon reserve the right to amend or supplement this Agreement by mutual consent. It is agreed and understood that no alteration or variation to the terms of this Agreement shall be valid unless made in writing and signed by the authorized representatives of the parties, and that separate oral agreements or understandings shall not be binding on any of the parties.

6. **Indemnification.** To the fullest extent permitted by law, and consistent with California Civil Code section 2782, Avalon shall assume the defense of, indemnify and hold harmless the City, Municipal Transportation Agency, its directors, and all of their officers, agents, members, employees, authorized representatives, or any other persons deemed necessary by any of them acting within the scope of the duties entrusted to them, from all claims, suits, damages, actions, losses and liabilities of every kind, nature and description, including but not limited to attorney's fees, directly or indirectly arising out of, connected with or resulting from the performance or nonperformance of the work under this Agreement. The liability of Avalon shall not be limited to the amount of insurance coverages required by Avalon of its contractors. This indemnification shall not be valid in the instance where the loss is caused by the sole negligence or intentional tort of any person indemnified herein.

7. **Notices.** Unless otherwise indicated elsewhere in this Agreement, all written communications sent by the parties may be by U.S. mail, or by facsimile, and shall be addressed as follows:

To SFMTA: Municipal Transportation Agency
1 South Van Ness Avenue, 7th floor
San Francisco, CA 94103-4737
Attn: City Traffic Engineer
Fax: (415) 701-4735

To Avalon: Avalon Ocean Avenue, L.P.
455 Market Street, Suite 1650
San Francisco, CA 94105
Attn: Joe Kirchofer
Fax: (415) 546-4138

With a copy to: Farella Braun + Martel LLP
Russ Building, 17th floor
235 Montgomery St.
San Francisco, CA 94104
Attn: Ilene Dick
Fax: (415) 954-4480

8. **Audit and Inspection of Records.** Each party agrees to maintain and make available to the other party during business hours accurate business records, accurate books and accurate accounting records directly relating to its respective activities and duties under this Agreement, including bids and estimates for construction. Each party will permit the other party to audit, examine and make copies of such books and records, and to audit all invoices, materials, payrolls, records, personnel and other data pertaining to this Agreement to verify or review the quantity, quality, and progress of the work, reimbursable costs, estimates of cost for fixed rates, including those applicable to proposed changes, and for any other reasonable purposes. The parties shall maintain such data and records in an accessible location and condition during the term of this Agreement and for three years thereafter. The State of California or any federal agency having an interest in the subject of this Agreement shall have the same rights conferred upon each party by this Section.

9. **Agreement Binding on Successors.** This Agreement shall be binding on the heirs, successors and assigns of Avalon.

10. **Assignment.** The services to be performed by the parties are personal in character and neither this Agreement nor any duties or obligations hereunder may be assigned or delegated by either party

unless first approved by written instrument executed and approved as required by applicable City law,, provided however that Avalon may, in its sole discretion and without City's consent, assign this Agreement to any entity acquiring fee title to the Property.

11. Liability. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL CITY BE LIABLE, REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT, FOR ANY SPECIAL OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE SERVICES PERFORMED IN CONNECTION WITH THIS AGREEMENT.

12. Sunshine Ordinance. In accordance with San Francisco Administrative Code §67.24(e), contracts, contractors' bids, responses to solicitations and all other records of communications between City and persons or firms seeking contracts, shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. Information provided which is covered by this paragraph will be made available to the public upon request.

13. Agreement Made in California; Venue. The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.

14. Entire Agreement. This contract sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. This contract may be modified only as provided in Section 4.

15. Compliance with Laws. Target shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and must at all times comply with such local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time.

16. Severability. Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

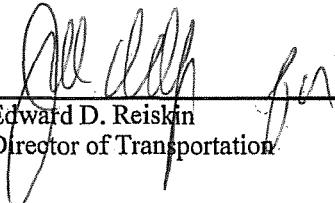
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective officers, duly authorized, on the date written above.

CITY AND COUNTY OF SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY

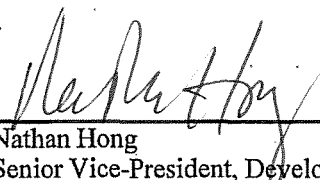
AVALON OCEAN AVENUE, L.P.
a Delaware limited partnership

California Multiple Financing, Inc.,
a Maryland corporation,
its General Partner

By


Edward D. Reiskin
Director of Transportation

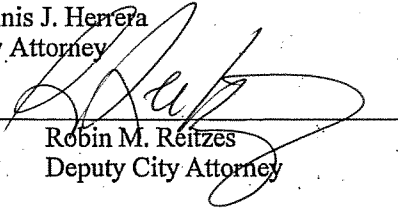
By


Nathan Hong
Senior Vice-President, Development

Approved as to Form:

Dennis J. Herrera
City Attorney

By



Robin M. Reitzes
Deputy City Attorney

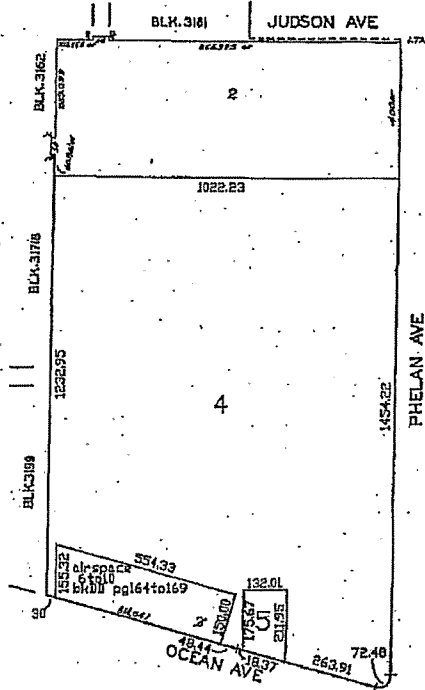
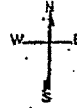
**EXHIBIT A
PROPERTY**

© COPYRIGHT SAN FRANCISCO
CITY & COUNTY ASSESSOR 1946

Lot 1 into lots 4&5 for 2011 roll
lot 3 into lots 6 to 10 for 2012 roll

3180

Revised 2011
Revised 2012



SCALE 200 FT. TO 1 IN.

**EXHIBIT B
FORM OF EASEMENT**

B-1

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5/6/15