

Approved Impartial Summary of Referendum Against Resolution No. 2022-085 Passed by the City Council of the City of Livermore Authorizing Execution of an Amended and Restated Disposition, Development and Loan Agreement (“DDLA”) with Eden Housing, Inc. for Development of the Downtown Multi-Family Housing Site

(Elections Code Section 9238(b)(2)(B)(i))

Introduction. This resolution implements the City Council’s prior legislative acts to approve the development of affordable workforce housing on an approximately 2.0 acre parcel of property owned by the City of Livermore (“City”) in the Downtown Core Area of the Downtown Specific plan (the “Property”).

The Property is listed as a City housing asset in the Long-Range Property Management Plan proposed by the City and approved the State of California on December 28, 2015, for the development of affordable housing.

Background. This resolution approves an amendment to a 2018 contract for the City to sell the Property to Eden Housing, Inc. (“Eden”) for development of the affordable workforce housing component of the Downtown Plan approved by the City Council in January 2018.

On January 29, 2009, a State of California required deed restriction was recorded to require the Property’s use for the development of affordable housing.

On November 27, 2017, the City Council received the Final Report for the Downtown Public Engagement Program that was the culmination of the Downtown Steering Committee’s Public Engagement Plan. The City Council accepted the report and directed the downtown redevelopment of the City’s properties provide 130 workforce housing units on the Property if the City’s property on the east side of Livermore Avenue was selected for the development of hotel.

On January 29, 2018, the City Council approved a Downtown Plan that selected the east side of Livermore Avenue for the hotel and placed the affordable workforce housing component on the Property. The affordable workforce housing component planned for 130 affordable workforce housing units to be located on the Property.

In May of 2018, the City issued a request for qualifications to identify a qualified developer for the 130-unit workforce housing component of the approved Downtown Plan for the Property.

On November 27, 2018, the City and Eden entered into a Disposition, Development and Loan Agreement (“Original DDLA”) with respect to the Property to enable the future development of a 130-unit affordable workforce housing project (the “Project”).

On May 25, 2021, the City approved land use entitlements for the Project, including Downtown Design Review 20-019 and Vesting Tentative Parcel Map 11186 – Subdivision 21-003, subject to conditions of approval (the “Approvals”).

On May 26, 2021, the City and Eden entered into a First Amendment to the Original DDLA to define the development and financial obligations for the proposed Veterans Park, allow for reimbursement by City to Eden for certain emergency vehicle access road improvements adjacent to the Project, and to update the entitlement, financing, and development timeline in the Schedule of Performance in the Original DDLA.

On June 24, 2021, a Petition for Writ of Mandate was filed in Alameda County Superior Court by Save Livermore Downtown against the City and Eden, challenging the Approvals and the City's compliance with the California Environmental Quality Act. On February 14, 2022, the Superior Court entered judgment denying the Petition for Writ of Mandate. On April 13, 2022, Save Livermore Downtown appealed the judgment to the California Court of Appeal, and the appeal is still pending (the "Litigation").

On May 24, 2022, the City Council adopted Resolution No. 2022-085 (the "Resolution"), authorizing the City's execution of an Amended and Restated DDLA with Eden for development of the Project to further amend the previously amended Original DDLA. The Resolution states that "the City and Eden desire to enter into an Amended and Restated DDLA and make several modifications and additions that will facilitate the development process, enumerate specific financial contributions and agreements that would be under the authority of the City Manager to execute, and modify the Schedule of Performance to extend the time period for Eden to complete development of the project in light of the pending Litigation."

The purpose of the Amended and Restated DDLA is to amend the DDLA and update its terms and conditions for Eden to prepare or cause to be prepared all required documents necessary to receive development approvals for the Project, to obtain title to the Property, and to develop the Project. The Amended and Restated DDLA also amends the DDLA and updates its terms and conditions for the City to sell the Property to Eden for the purpose of developing, building, and operating the Project and contribute certain funds for the acquisition and predevelopment of the Property.

Financial Provisions. The Amended and Restated DDLA acknowledges that pursuant to the original DDLA, the City previously provided a predevelopment loan of five-hundred thousand dollars (\$500,000) to Eden for predevelopment costs for the Project, including architecture and design costs, legal and specialty consultant fees, site feasibility analysis, title review, due diligence, and preconstruction costs (the "Predevelopment Loan"). Eden is responsible for payment of the principal of, and interest on, the Predevelopment Loan.

The Amended and Restated DDLA also requires the City to make an acquisition loan to Eden for the purchase price of the Property, which shall be seven-million eight-hundred thousand dollars (\$7,800,000) (the "Site Acquisition Loan"). The Site Acquisition Loan shall be evidenced and secured by a Seller Take-Back Note and Seller-Take Back Acquisition Deed of Trust recorded against the Property. Eden shall be responsible for the payment of principal and interest on the Site Acquisition Loan.

In addition, the Amended and Restated DDLA requires the City, at its sole expense, to pay for the costs of improvements to Veterans Park, with Eden managing construction of such improvements. Eden and the City must negotiate a future construction management and reimbursement agreement to coordinate the construction of improvements to Veterans Park,

which shall not exceed five-million five-hundred thousand dollars (\$5,500,000) without additional City Council approval.

Predisposition Requirements. The Amended and Restated DDLA establishes conditions that must be satisfied by Eden in order for Eden to acquire title to the Property. The City may waive satisfaction of the conditions.

The conditions include: (1) Eden providing the City with a preliminary development Pro Forma, setting forth Eden's estimate of sources and uses of funds for development of the Project; (2) Eden obtaining all entitlements necessary for the Project; (3) the City approving Eden's organizational documents; (4) the City providing Eden with written notification that (a) it has completed a federally required environmental review pursuant to the National Environmental Policy Act ("NEPA") and the City's request for release of funds has been approved and the purchase may proceed; or (b) it has determined the purchase is exempt from federal environmental review pursuant to NEPA and a request for release of funds is not required; (5) Eden furnishing to the City the types and amounts of insurance specified in the Amended and Restated DDLA; (6) the parties entering into a temporary parking lease for the Property wherein public parking will be available on the Property until construction of the first phase of the Project commences; and (7) the parties taking the necessary steps to ensure that the City will receive air rights to Parcels 1 and 3 on the Property to ensure that the Project as constructed does not exceed 52 feet above the surface elevation.

Disposition of the Property. The Amended and Restated DDLA requires the City to sell to Eden, and Eden to purchase from the City, the Property provided that the predisposition requirements and additional closing conditions have been satisfied. To accomplish the conveyance of the Property from the City to Eden, the parties must establish an escrow and provide the escrow holder with written instructions consistent with the Amended and Restated DDLA.

The additional closing conditions that must be satisfied prior to conveyance of the Property include (1) completion of the predisposition requirements, (2) Eden depositing all required documents and its share of closing costs, (3) there being no events of default by Eden, (4) Eden's representations and warranties remaining true and correct, (5) the title company being prepared to issue a title policy, and (6) the City having deposited a grant deed and other required documents to the escrow holder.

Upon satisfaction or waiver of all the required predisposition conditions and the deposit of all required documents into escrow, the escrow officer must cause to be recorded with the Official Records of Alameda County the grant deed conveying the Property to Eden as well as other documents required to be recorded under the Amended and Restated DDLA. The Schedule of Performance attached to the Amended and Restated DDLA requires close of escrow on the Property to occur on or before September 30, 2022.

Hazardous Materials. Prior to the close of escrow for the Property, the Amended and Restated DDLA requires the City and Eden to enter into an indemnity and cooperation agreement to apportion costs and any potential liability related to hazardous materials at, on, in, beneath or from the Property from and after the date of the close of escrow. The Amended and Restated DDLA authorizes the City Manager to negotiate and execute the indemnity and

cooperation agreement in an amount not to exceed four-million three-hundred thousand dollars (\$4,300,000), subject to the City Attorney's approval of the agreement as to form. The obligations of the City under the indemnity and cooperation agreement shall not exceed \$4,300,000, without further City Council approval.

Design and Construction. The Amended and Restated DDLA requires that Eden obtain all ministerial permits and approvals necessary to construct the Project within the time specified in the Schedule of Performance attached to the Amended and Restated DDLA. Eden shall be solely responsible for all aspects of Eden's conduct in connection with the Project, including, but not limited to, the quality and suitability of project documents, the supervision of construction work for the Project and the Veterans Park Improvements, and the qualifications, financial condition, and performance of all architects, engineers, contractors, subcontractors, suppliers, consultants, and property managers.

The Amended and Restated DDLA obligates Eden to commence preconstruction activities and the construction of the Project within the times set forth in the Schedule of Performance. Eden shall diligently prosecute to completion the construction of the Project, and shall complete construction of the Project within the time set forth in the Schedule of Performance, subject to Force Majeure requirements set forth in the Amended and Restated DDLA. Moreover, Eden must construct the Project in accordance with approved final construction drawings, and the terms and conditions of all City and other governmental approvals, and in compliance with all applicable laws, ordinances, rules and regulations of federal, state, county or municipal governments or agencies now in force or that may be enacted hereafter and (2) all directions, rules and regulations of any fire marshal, health officer, building inspector, or other officer of every governmental agency having or hereafter acquiring jurisdiction.

The Amended and Restated DDLA also requires Eden to pay and shall cause its contractor and subcontractors to pay prevailing wages in the construction of the Project as those wages are determined pursuant to California Labor Code Section 1720 et seq., and to employ apprentices as required by California Labor Code Sections 1777.5 et seq., and the implementing regulations of the Department of Industrial Relations.

The Amended and Restated DDLA requires Eden to permit the City, upon reasonable prior notice not less than 48 hours, to enter the Property during normal business hours to inspect the construction work to determine that such work is in substantial conformity with the approved final construction drawings or to inspect the Property for compliance with the Amended and Restated DDLA.

Upon recordation of the Final Map and construction finance closing for the first phase of the Project, at the time specified in the Schedule of Performance, Eden must dedicate the Veterans Park Parcel (Parcel 2) back to the City. Parcel 2 shall have air rights over Parcels 1 and 3, as described in the Amended and Restated DDLA, and Parcel 2 shall be dedicated to the City free and clear of any encumbrances created by Eden that have not been authorized by the City.

The Amended and Restated DDLA requires the City to enter into an irrevocable parking

space lease with Eden for 16 reserved parking spaces for Project residents in the L Street Garage, which will be constructed and owned by the City to serve the Project. The spaces will be leased at \$300 per space per year, for an annual cost of \$4,800, for a 55-year term with a 2.5% escalator. The term will commence from lease-up of the first phase of the Project.

Additional Ongoing Obligations. The Amended and Restated DDLA requires Eden to covenant to use the Property for affordable housing for a period not less than 55 years. Eden agrees to maintain the Property in a neat and orderly condition during construction in accordance with industry health and safety standards, and that, once the Project is completed, to maintain the Project as to both external and internal appearance of the buildings, the common areas, and the parking areas. The Amended and Restated DDLA requires Eden to maintain or cause to be maintained the Property in good repair and working order, and in a neat, clean and orderly condition, including the walkways, driveways, parking areas and landscaping, and from time to time to make all necessary and proper repairs, renewals, and replacements.

The Amended and Restated DDLA requires Eden to indemnify, defend, and hold harmless the City and its elected officials, officers, employees, agents, consultants, designated volunteers, and contractors from and against any and all liabilities, losses, costs, expenses (including without limitation attorneys' fees and costs of litigation), claims, demands, actions, suits, causes of action, writs, judicial or administrative proceedings, penalties, deficiencies, fines, orders, judgments and damages which in any manner, directly or indirectly, in whole or in part, are caused by, arise in connection with, result from, relate to, or are alleged to be caused by, arise in connection with, result from, or relate to: (i) approval of the Amended and Restated DDLA and/or the Project; (ii) performance of the Amended and Restated DDLA on the part of Eden or any contractor or subcontractor of Eden; and/or (iii) the development, operation, maintenance or management of the Project,

Default and Remedies. The Amended and Restated DDLA contains provisions governing the parties' remedies for breach of the Amended and Restated DDLA, including events of default by the City and events of default by Eden. If a specified event of default occurs, the non-defaulting party must first notify the defaulting party of the purported breach or failure, giving the defaulting party thirty (30) days from receipt of such notice to cure such breach or failure. If the defaulting party fails to commence the cure during such 30-day period and thereafter to prosecute the cure diligently to completion, the non-defaulting party shall be afforded the right to take any or all of the following remedies: (1) terminating the Amended and Restated DDLA; (2) prosecuting an action for damages; or (3) seeking specific performance or any other remedy available at law or in equity.

The Amended and Restated DDLA provides that following the close of escrow of the Property, (1) if Eden fails to commence the pre-construction activities or construction of the Project by the dates listed in the Schedule of Performance (as such dates may be extended), or (2) if the City does not prevail in the Litigation; then the City may, in addition to other rights granted in the Amended and Restated DDLA, re-enter and take possession of the Property with all improvements thereon, and re-vest in the City the estate previously conveyed to Eden by the City. The City's rights to repossess the Property terminate once Eden closes on construction financing for the first phase of the Project.

Upon re-vesting in the City of title to the Property, the City shall, pursuant to its

responsibilities under state law, use its best efforts to resell the Property as soon as possible, in a commercially reasonable manner and consistent with the objectives of such law, to a qualified and responsible party or parties (as reasonably determined by the City) who will assume the obligation of making or completing such improvements as are acceptable to the City in accordance with the uses specified for the Property and in a manner satisfactory to the City. In addition, upon revesting in the City of title to the Property, the Predevelopment Loan and Site Acquisition Loan shall be deemed paid in full and cancelled. If the City's rights to repossess the property are triggered because the City does not prevail in Litigation, the City shall reimburse Eden for actual costs incurred and paid as a result of its ownership of the Property, and not already reimbursed.

The Amended and Restated DDLA contains provisions regarding damages, including an acknowledgment from the City that the exercise of its legislative authority for a land use action, such as but not limited to a General Plan Amendment, Specific Plan Amendment, or zoning action (collectively, a "Land Use Action") that prevents the Project from being developed does not constitute a compensable taking absent extraordinary circumstances. The Amended and Restated DDLA provides examples of extraordinary circumstances that could subject the City to a taking without payment of compensation, including, but not limited to, eliminating all value from the Property, the denial of due process, and reclassifying the Property in a manner to prevent its improvement so that it might be acquired at a lesser price.

The City acknowledges that Eden has expended significant resources to develop the Project that could have been used to develop affordable housing elsewhere and that could be lost, and obtained grant and/or loan funding that would need to be repaid, if the City subsequently exercises its legislative authority for a Land Use Action that prevents the Project from being developed. The City and Eden agree that they would be able to quantify the losses equal to the grant and/or loan funding that would need to be repaid should a Land Use Action by the City prevent the Project from being developed. The City and Eden also agree that quantifying the scope of the economic and noneconomic losses arising from a Land Use Action that prevents the Project from being developed is inherently difficult insofar as the action results in the loss of affordable housing opportunities, negatively impacts Eden's reputation, and cannot adequately capture the soft costs expended on the Project.

The Amended and Restated DDLA states that the City and Eden agree and stipulate that the repayment of Project grant and/or loan funds already expended for the Project that are not available for repayment and the agreed upon sum of two-million three-hundred thousand dollars (\$2,300,000) is a reasonable measure of the damages based upon their experience in the affordable housing industry and given the nature of the losses that may result from a Land Use Action that prevents the Project from being developed.

Thus, the Amended and Restated DDLA states that in the event the City exercises its legislative authority for a Land Use Action that prevents the Project from being developed, then the City shall pay damages to Eden as follows:

- (1) An amount equal to the grant and/or loan funds that were expended by Eden prior to the date of that Land Use Action that is not available for repayment in the event the awarding/loaning agency demands Eden repay the expended funds; and
- (2) The stipulated amount of \$2,300,000 for the losses that cannot be quantified.

General Provisions. The Amended and Restated DDLA also contains general

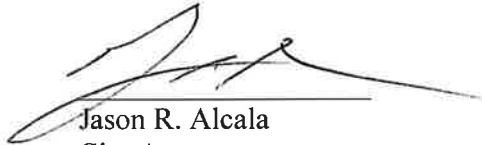
contractual provisions, including notice provisions; non-liability of officials, employees and agents; inspection rights; a severability provision; a Force Majeure provision; and an integration clause. The Amended and Restated DDLA states that its terms shall run with the land, and shall bind all successors in title to the Property until the termination of the Amended and Restated DDLA, except that those provisions that are specified to survive termination of the Amended and Restated DDLA shall run with the land in perpetuity and remain in full force and effect following such termination.

The Amended and Restated DDLA states that it may be amended from time to time as the Parties find is necessary. The City Manager shall have the authority to make minor amendments to effectuate the intent of the Amended and Restated DDLA. The City Manager shall also have the authority to execute the final documents and agreements referenced in the Amended and Restated DDLA and other related documents to implement the intent and terms of the agreement, as well as the specific delegations of authority set forth herein as approved by the Resolution.

The full text of the Resolution that includes the Amended and Restated DDLA as an exhibit can be found in the City's records at this link: <https://livermoreca.gov/2022-085>.

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Approved by the City Attorney for the City of Livermore on June 9, 2009



Jason R. Alcala
City Attorney
City of Livermore