



**DATE:** May 8, 2018

**CATEGORY:** Consent

**DEPT.:** City Attorney and City Manager

**TITLE:** **Authorization to Execute Estoppel Certificates for Ameswell Project**

### **RECOMMENDATION**

Authorize the City Manager to execute estoppel certificates for the Ameswell project as required by the Disposition and Development Agreement and Ground Lease and any necessary amendments to these agreements related to participation rent.

### **BACKGROUND AND ANALYSIS**

In an effort to develop the Moffett Gateway site, now known as Ameswell, the City of Mountain View utilized a request for proposal process to select a developer and ultimately negotiated a Disposition and Development Agreement (“DDA”) and Ground Lease with the selected developer, Broadreach, to construct a 200,000 square foot Class A office building and parking garage on City property and a 255 room hotel on the adjacent parcel the developer is purchasing from CalTrans. The parties executed the two agreements in 2015.

The developer is poised to pull building permits, close on the CalTrans parcel and commence construction of the project. As contemplated in the agreements, Broadreach is in the process of acquiring construction financing for the project.

These agreements require the City of Mountain View, as the landlord, to provide an estoppel certificate (estoppel) to the lender upon request. The estoppel certificate provides the lender written verification by the City of Broadreach’s compliance with the terms of the DDA and Ground Lease. The lender has requested two estoppels, one for the DDA and one for the Ground Lease. In particular, these agreements require the City, as landlord, to certify (1) to the best of the City’s knowledge that the lessee has satisfied and is in compliance with any payments, covenants or conditions the tenant is required to perform; (2) to the best of the City’s knowledge, the lessee is not in default in the payment, performance or observance of any condition or covenant in the agreement; (3) to the best of the City’s knowledge, the landlord has no offsets or

counterclaims against the lessee; (4) the agreements and all amendments are in full force and effect and have not been further amended; and a catchall provision that includes (5) such other matters as the lender may reasonably request. The proposed estoppel for the Ground Lease includes a request that falls into this last category.

In order to secure financing, the lender requires clarification regarding the participation rent provision in the Ground Lease for the office building. The lease requires the lessee, and in the event of a foreclosure, the lender, to pay the City participation rent when 50% or more of the lessee's interest in the Lease or office building is sold, transferred or assigned. The participation rent is two percent of the gross sale proceeds.

The intent of this participation rent provision is to ensure the City of Mountain View participates in any profits gained by the lessee as a result of the lessee's sale, transfer or assignment of its interest in the lease or office building. This provision would also apply to a lender who obtains control of the property through a foreclosure. As drafted, the participation rent requirement would apply even if the lender transferred the property following a foreclosure for an amount less than the amount due on the loan. In other words, it would apply even when the lender does not realize a profit.

The lender has indicated it will not provide construction financing for this project without clarifying language in the estoppel stating the participation rent requirement only applies when the net proceeds of the transfer to a third party exceed the amounts owed to the lender in connection with a loan.

At the time the City Council authorized the City Manager to execute the DDA and Ground Lease for the Ameswell project, the participation rent description did not provide this level of detail. For this reason, the City Manager and City Attorney determined the express authorization of the City Council is appropriate to execute the requested estoppel requested by the lender as provided for in the DDA and Ground Lease. As this issue may arise in the future, staff seeks authorization to amend the Ground Lease to clarify the application of the participation rent provisions.

The requested language is consistent with the intent of the negotiated provision. It is also consistent with the participation rent requirement in the more recently negotiated DDA and Ground Leases for the hotel and office development on Lots 4 and 8 which contain more specific language addressing this scenario.

### **FISCAL IMPACT**

This clarification could have a fiscal impact in the event the lender forecloses on the property and subsequently transfers the property for less than the loan amount.

However, it is difficult to quantify the potential fiscal impact. The clarification is consistent with the intent of the participation rent provision.

**ALTERNATIVES**

Provide other direction to staff.

**PUBLIC NOTICING**

Agenda posting and a copy of the report to Broadreach.

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