

RESOLUTION NO. 2018-047

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROHNERT PARK AUTHORIZING AND APPROVING AN AMENDED AND RESTATED ESCROW AND FUNDING AGREEMENT BY AND BETWEEN THE CITY OF ROHNERT PARK AND SOMO VILLAGE LLC

WHEREAS, City, Sonoma Mountain Village LLC and KDRP LLC, previously entered into that certain Development Agreement, dated as of September 14, 2010 and recorded on October 1, 2010 as Instrument Number 2010084467 in the Official Records of Sonoma County, as amended by that certain First Amendment to Development Agreement, recorded on June 28, 2012 as Instrument Number 2012061268 in the Official Records of Sonoma County and by that Second Amendment to Development Agreement recorded on December 11, 2012 as Instrument Number 2012126932, in the Official Records of Sonoma County and subject to those certain letter agreements dated June 6, 2016 and December 29, 2016 (collectively, the “**Development Agreement**”) regarding development of the Sonoma Mountain Village Planned Development (“SOMOPD”);

WHEREAS, Sonoma Mountain Village LLC and KDRP LLC owned the Property as tenants in common upon entering the Development Agreement. On July 21, 2016, Sonoma Mountain Village LLC acquired all of KDRP LLC’s rights and assumed all its obligations under the Development Agreement;

WHEREAS, Sonoma Mountain Village, LLC and changed its name to SOMO Village, LLC upon converting from a California limited liability company to a Delaware limited liability company on December 30, 2016;

WHEREAS, the City, SOMO Village LLC and SOMO Village Commercial LLC entered into that certain Partial Assignment and Assumption and Guaranty of Development Agreement and Consent to Transfer of Real Property, whereby, (1) SOMO Village LLC transferred a portion of the Property to SOMO Village Commercial LLC, while retaining all obligations under the Development Agreement, except for those obligations regarding improvements to existing structures on the transferred property; and (2) SOMO Village LLC deposited the sum of \$2.3 million with City to fund its soccer field obligations, with the use of such deposit to be governed by that certain Escrow and Funding Agreement, entered into as April 24, 2017, by and between SOMO Village, LLC and City (the “**Escrow Agreement**”);

WHEREAS, the City and SOMO Village LLC have negotiated a Third Amendment to the Development Agreement that, among other things, sets forth terms regarding the time-frame, funding, and remedies for non-compliance regarding SOMO Village LLC’s design and construction of the all-weather soccer field, including that the City may use the \$2.3 million held pursuant to the terms of the Escrow Agreement may be used by City in the event of a breach of the Third Amendment; and

WHEREAS, the City and SOMO Village LLC now desire to enter into an Amended and

Restated Escrow Agreement in order to consistently implement the provisions of the Third Amendment to the Development Agreement and provide that the City may use the \$2.3 million in funding in the event of a breach.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Rohnert Park as follows:

1. The City Council does hereby authorize and approve the Amended and Restated Escrow and Funding Agreement by and between SOMO Village LLC, a Delaware Limited Liability Company and the City of Rohnert Park, attached as Exhibit A and incorporated herein ("Amended and Restated Escrow Agreement"). The City Manager is hereby authorized and directed to execute the Amended and Restated Escrow Agreement in substantially similar form to that attached hereto, subject to minor modifications by the City Manager or City Attorney.

2. The City Manager is further authorized and directed to take all actions and execute any documents necessary to effectuate the terms and obligations of the Amended and Restated Escrow Agreement for and on behalf of the City of Rohnert Park.

DULY AND REGULARLY ADOPTED this 10th day of April, 2018.

CITY OF ROHNERT PARK


Pam Stafford, Mayor

ATTEST:


Caitlin Saldanha, Deputy City Clerk

Attachment: Exhibit A

AHANOTU: Aye BELFORTE: Aye MACKENZIE: Aye CALLINAN: Aye STAFFORD: Aye
AYES: (5) NOES: (0) ABSENT: (0) ABSTAIN: (0)

AMENDED AND RESTATED ESCROW AND FUNDING AGREEMENT

THIS AMENDED AND RESTATED ESCROW AND FUNDING AGREEMENT ("**Restated Agreement**"), effective as of April 10, 2018 (the "**Effective Date**"), is made by and between SOMO Village, LLC formerly known as Sonoma Mountain Village, LLC, a Delaware limited liability company ("**SOMO**") and the City of Rohnert Park, a municipal corporation (the "**City**"). SOMO and the City may each be referred to as a "**Party**" or collectively as the "**Parties**" in this Agreement.

RECITALS

A. SOMO and the City are parties to that certain Development Agreement dated September 14, 2010, as amended June 4, 2012 and December 4, 2012, and subject to those certain letter agreements dated June 6, 2016 and December 29, 2016 (collectively, the "**Original Development Agreement**"). Capitalized terms used, but not defined, in this Agreement shall have the meaning set forth in the Development Agreement.

B. In April 2017, the Parties entered into that certain Partial Assignment and Assumption and Guaranty of Development Agreement and Consent to Transfer of Real Property (the "**Assignment Agreement**"), which provided, among other things, that SOMO shall deposit the sum of \$2.55 Million Dollars (the "**Deposit Funds**") into an escrow account to be used to fund SOMO's obligations set forth in Section 4.11(B) of the Development Agreement relating to a soccer field.

C. The Parties entered into an Escrow and Funding Agreement dated April 24, 2017 to establish certain terms related to the escrow for and use of the Deposit Funds (the "**Original Agreement**"), which provided, among other things, for the use of \$2.3 million of the Deposit Funds for the improvement of a soccer field and construction of additional improvements to any adjoining fields impacted by the soccer field's relocation to Sunrise Park and/or configuration (the "**Improvements**").

D. Contemporaneous with this Restated Agreement, the Parties are entering into a Third Amendment to Development Agreement (the "**Third Amendment**") and an Improvement Agreement (the "**Improvement Agreement**") to, among other things, document the Parties' previous agreement to move the location of the soccer field and to set forth terms regarding the time-frame, funding and remedies for non-compliance regarding SOMO's design and construction of the soccer field. The Original Development Agreement as amended by the Third Amendment may be referred to as the "**Development Agreement**."

E. The Parties now desire to enter into this Restated Agreement to ensure consistency with the Development Agreement and Improvement Agreement in particular to provide that: (1) no Draw Request (as defined below) may be made until Developer commences construction of the Improvements; (2) acknowledge that the Construction Funds (as defined below) may be increased per the terms of the Development Agreement; and (3) the Construction Funds may be used by City in the event of a breach under the Development Agreement or the Improvement Agreement.

NOW, THEREFORE, the Parties agree as follows:

1. Escrow. SOMO has deposited the Deposit Funds with the City. The City holds the amount of \$2.3 Million Dollars of the Deposit Funds (the “**Original Construction Funds**”) in trust for SOMO for payment of the Improvements in a bank account designated and owned by the City (the “**Account**”). After bids are received for the Improvements, SOMO, in its discretion pursuant to the Development Agreement, may supplement the amount of the Construction Funds to bring the total up to the actual amount of the construction contract for the Improvements. The total amount of the Original Construction Funds, as may be supplemented as provided herein and pursuant to the Development Agreement, shall be referred to as the “**Construction Funds**.” The Account shall be an interest bearing account and SOMO shall be credited with all interest earned on the Construction Funds during the term of this Agreement.

The amount of \$250,000 of the Deposit Funds has been transferred to the City pursuant to, and in satisfaction of, SOMO’s payment obligation under Item No. 3 of that certain Letter Agreement Regarding Development Agreement between City of Rohnert Park, Sonoma Mountain Village LLC and KDRP LLC dated December 29, 2016 (the “**Letter Agreement**”) and is not subject to the terms of this Restated Agreement.

2. Term; Termination. The term of this Agreement shall commence upon the Effective Date and shall terminate upon the earlier of: (a) City’s acceptance of the Improvements pursuant to the Improvement Agreement; or (b) Developer’s breach of the Development Agreement or the Improvement Agreement and release of the Construction Funds to City to complete the Improvements pursuant to Section 5 below. Upon termination of this Agreement pursuant to Section 2(a) above, the City shall promptly, but in no event less than 30 days after written demand by SOMO, return any remaining balance of the Deposit Funds to SOMO without deduction or offset, other than as set forth herein. In the event of a termination under Section 2(b), City shall be entitled to the full amount of the Construction Funds to complete the Improvements.

3. Use of Construction Funds. The Construction Funds shall be used by SOMO to satisfy SOMO’s obligations under Section 4.11(B) of the Development Agreement, as has been amended, for the Improvements. The Construction Funds shall not be used for any other purpose except as set forth herein, including without limitation, to satisfy any other obligation(s) under the Development Agreement, without the Parties’ mutual written consent.

4. Withdrawal of Construction Funds. SOMO may request a withdrawal of the Construction Funds (a “**Draw Request**”) by written notice to Mary Grace Pawson, Director of Development Services for the City, or her successor in this role. No Draw Request may be submitted to City until SOMO has commenced construction, as defined in the Development Agreement, of the Improvements. A Draw Request may be made by email to Ms. Pawson at mpawson@rpcity.org. Each Draw Request shall describe, in reasonable detail, the basis for the request and/ or the portion of the Improvements to be satisfied with the Construction Funds being requested and shall include partial lien releases from contractors, subcontractors and suppliers for the work being funded. If the Draw Request is for reimbursement of funds already spent by SOMO to satisfy the Improvements, the request shall include proof of payment for materials or services. If the Draw Request is for payment of materials or services invoiced but not yet paid, the request shall include a copy of the third party invoice. The City shall distribute the funds requested by a Draw Request within 14 days of receipt, except as set forth in Section 5 below.

5. City's Right to Use Construction Funds. As set forth in the Development Agreement and the Improvement Agreement, City may elect to complete the Improvements with the Construction Funds, which shall be released to City according to the applicable terms of the Development Agreement and/or the Improvement Agreement.

6. Disputes Regarding Draw Requests. In the event the City contests a Draw Request, or any portion thereof, the City shall notify SOMO in writing (a "**Draw Contest Notice**") within 7 days of receipt of the Draw Request. The Draw Contest Notice shall be submitted to Eric Reid, Chief Financial Officer for SOMO, or his successor in this role. A Draw Contest Notice may be made by email to Mr. Reid at eric@somoliving.com. The Draw Contest Notice shall describe, in reasonable detail, the basis for the dispute or contest by the City. If the City's dispute only concerns a portion of the Draw Request, the City shall fund the portion of the Draw Request which it does not dispute within 30 days pursuant to Section 4. The parties shall attempt to resolve the dispute set forth in the Draw Contest Notice pursuant to Section 6.

7. Mediation. With respect to any dispute arising out of or related to this Agreement, including, without limitation, a Draw Contest Notice, the Parties shall first meet and confer and make a good-faith effort to resolve the dispute without resort to mediation. The parties agree to meet informally within 5 business days, or as soon as reasonably practicable, after notice from one party requesting such a meeting. Should the dispute not be resolved by informal discussions, the Parties agree to attempt in good faith to resolve their differences in confidential, non-binding mediation, using a retired judge as a mediator who has at least five (5) years of experience as a mediator and who is mutually agreed upon by the Parties. If the Parties are unable to agree upon a mediator, *Judicial Arbitration and Mediation Services ("JAMS")* will suggest three (3) mediators meeting the above qualifications and each party will strike one. A mediation session shall be scheduled within thirty (30) days, or as soon as reasonably practicable, after the failure of informal discussions to resolve the dispute. Costs of the mediation shall be borne equally by the party requesting mediation. The mediation will be held under the then-applicable rules of JAMS and will be conducted in Sonoma County, California. The Parties will participate in the mediation process in good faith, and will have a representative in attendance throughout the mediation with authority to settle the dispute. The Parties may be represented by counsel at both the informal discussions and the mediation session. Statements made during the mediation process shall be considered to be made in the context of settlement discussions, and shall not be admissible in any subsequent judicial proceeding. If mediation fails to resolve the dispute, the Parties may resort to any form of dispute resolution, including litigation within the California courts.

8. Attorneys' Fees. If either party brings an action or proceeding to enforce, protect or establish any right or remedy arising out of or relating to this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees.

9. Specific Performance. Each party agrees that the other party would be irreparably damaged if any of the provisions of this Agreement are not performed in accordance with their specific terms and that monetary damages would not provide an adequate remedy in such event. Accordingly, it is agreed that, in addition to any other remedy to which a party may be entitled, at law or in equity, such party shall be entitled to injunctive relief to prevent breaches of the provisions of this Agreement and specifically to enforce the terms and provisions hereof.

10. Time. Time is of the essence with respect to this Agreement.
11. Successors. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, subject to the limitation of assignment set forth herein and in the Development Agreement.
12. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.
13. Amendment. This Agreement may only be amended or modified by a written instrument executed by all of the parties hereto.
14. Governing Law. The validity, interpretation and performance of this Agreement shall be controlled by and construed under the laws of the State of California.
15. Entire Agreement. This Agreement, together with the applicable terms of the Development Agreement, constitutes the entire agreement among the parties hereto with respect to the subject matter hereof, and supersedes all prior understandings or agreements. In the event of any conflict between this Agreement and the Development Agreement, the terms of this Agreement shall govern and control.
16. Severability. If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction or otherwise by law rendered invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.
17. No Third Party Beneficiaries. The provisions of this Agreement are not intended to benefit any third parties.
18. Notices. Except as expressly provided herein, all notices shall be in writing, and shall be given in the manner prescribed by Section 10.07 of the Development Agreement. Pursuant to Section 10.07 of the Development Agreement, the address for SOMO is: 1400 Valley House Drive, Rohnert Park, Suite 100, Rohnert Park, CA 94928.
19. Authority. Each individual executing this Agreement on behalf of a corporation or other legal entity represents and warrants that: (a) he or she is duly authorized to execute and deliver this Agreement on behalf of said corporation or other legal entity in accordance with and without violating the provisions of its governing documents, and (b) this Agreement is binding upon and enforceable against said corporation or other legal entity in accordance with its terms. Any entity signing this Agreement on behalf of a corporation or other legal entity hereby represents and warrants in its own capacity that it has full authority to do so on behalf of the corporation or other legal entity.

Exhibit A to Resolution

IN WITNESS WHEREOF, the Parties have entered into this Agreement to be effective as of the Effective Date.

SOMO:

SOMO Village LLC,
a Delaware limited liability company

By: _____

Name: Bradley E. Baker

Title: Manager

By: _____

Name: Lisa B. Coddling

Title: Manager

CITY:

City of Rohnert Park, a municipal corporation

By: _____

City Manager

*Authorized by Resolution 2018-__ adopted by the
Rohnert Park City Council at its meeting of April 10,
2018*

Approved as to Form:

By: _____

City Attorney

Attest:

By: _____

City Clerk