

MEMORANDUM OF UNDERSTANDING (Aspen Apartments)

THIS MEMORANDUM OF UNDERSTANDING (“**MOU**”), dated as of _____, 2007, is entered into by and between the Redevelopment Agency of the City of Milpitas, a public body, corporate and politic (“**Agency**”), the City of Milpitas, a municipal corporation (“**City**”) and MIL Aspen Associates, a California limited partnership (“**Developer**”). Agency, City and Developer are hereinafter collectively referred to as the “**Parties**.”

RECITALS

- A. Developer is the owner of or has an option to purchase that certain real property located at 1666 South Main Street in the City of Milpitas and known as Santa Clara County Assessors’ Parcel Number 086-22-023 (the “**Property**”).
- B. The Parties have undertaken discussions relating to the development of Property, and the Parties wish to set forth in this MOU their preliminary points of agreement without intending to be bound thereby.
- C. The Parties intend to negotiate an Owner Participation Agreement (“**OPA**”) which, subject to the approval of the governing board of the Agency (the “**Governing Board**”), would incorporate the terms of this MOU and set forth additional terms and conditions relating to the development and financing of a 101 - unit multi-family affordable housing development on the Property, together with related improvements described herein (all of the foregoing, collectively, the “**Project**”).
- D. The Parties acknowledge that the effectiveness of the OPA will be contingent upon the approval of the OPA and related documents by the Governing Board.

NOW THEREFORE, the Parties hereby agree as follows:

- 1. Purpose of this MOU. This MOU is intended as an expression of preliminary points of agreement among the Parties. The Parties expressly acknowledge and agree that: (i) the terms and conditions set forth in this MOU are subject to the approval of, or modification by, the Governing Board; and (ii) following approval of this MOU by the Governing Board, the Parties intend to negotiate an OPA which will include the terms set forth in this MOU (as such terms may be modified pursuant to the direction of the Governing Board and the agreement of the Parties).
- 2. Preliminary Terms; No Oligation to Proceed. Nothing in this MOU creates a binding obligation, and no binding agreement will exist unless the Parties sign a final and definitive agreement. Each Party expressly acknowledges and agrees that this MOU creates no obligation on the part of any Party to execute an OPA, provide financing for the Project, or to proceed with the development of the

Property. All of the terms set forth in this MOU are preliminary in nature and subject to (i) approval by the Governing Board; and (ii) memorialization in an executed OPA and related documents. The provisions of this Section are hereby incorporated into each and every Section of this MOU as though set forth in their entirety in each such Section.

3. Project. The Project will include the development of a 101- unit multifamily residential project, together with 205 parking spaces of which 185 spaces will be constructed in a subterranean structure, and related improvements including the following: sidewalk frontage and street improvements consistent with the City’s South Main Street Plan Line Study, including the installation of sidewalks, streetlights, trees & planting materials, median islands, irrigation and electrical enhancements, and streetscape furniture installation.

4. Affordability Requirements. The Project will be subject to recorded regulatory restrictions that will require 100 of the residential units to be offered for rent and occupancy by extremely low-, and very low-income households at rents no greater than permitted by TCAC and the applicable provisions of California Community Redevelopment Law (Health and Safety Code Section 33000 et seq.) in accordance with the schedule set forth below for a term of at least fifty-five (55) years.

Number of Units by Unit Size and Targeted Area Median Income (AMI) Levels

	45% AMI	50% AMI	Sub-Total	Manager’s Unit	
2-Bedroom	23	27	50	1	51
3-Bedroom	23	27	50	n/a	50
Total	46	54	100	1	101

5. Agency Loan. The Agency will provide a deferred-payment, low-interest loan to Developer in the maximum amount of Two Million Three Hundred Thousand Dollars (\$2,300,000) (the “**Loan**”) to support development of the affordable rental units. The proceeds of the Loan will be used solely to pay the City’s impact fees assessed for the Project. The City agrees that Developer may defer payment of impact fees for the Project until the later of (i) the date of issuance of a final certificate of occupancy for the Project, or (ii) the closing of the conventional permanent loan for the Project, but in no event later than twenty-four (24) months following issuance of the final certificate of occupancy for the Project, and City further agrees that if all conditions to disbursement of the Loan proceeds are satisfied, but Agency fails to fully fund the Loan, Developer’s obligation to pay impact fees will be reduced by the amount that Agency fails to fund.

5.1 Conditions to Disbursement. The Loan will be evidenced by a promissory note executed by Developer (the “**Note**”) and will be secured by a deed of trust executed by Developer as Trustor for the benefit of Agency and

recorded against the Property (the “**Agency Deed of Trust**”). The proceeds of the Loan will be disbursed following satisfaction of all of the following conditions: (i) recordation of the Agency Deed of Trust and an Agency Regulatory Agreement and Declaration of Restrictive Covenants (“**Regulatory Agreement**”) imposing the affordability requirements set forth in Section 4, (ii) the issuance by the City of Milpitas (“**City**”) of a final certificate of occupancy for the Project, (iii) Developer's submittal to Agency, and Agency's approval of a Financing Plan which includes Project development and operating pro formas and which identifies all sources and uses of funds for the construction and permanent financing of the Project; (iv) Developer's delivery to Agency of evidence reasonably satisfactory to Agency that Developer has secured binding commitments, subject only to commercially reasonable conditions, for all financing necessary for the successful completion and operation of the Project; (v) the issuance by an insurer satisfactory to Agency of an A.L.T.A. lender's title policy for the benefit of Agency in the amount of the Loan; (vi) Developer's delivery to the Agency of evidence of property and liability insurance coverage in accordance with the Agency's requirements; and (vii) the closing of Developer's conventional permanent loan for the Project in an amount which, together with all other sources of financing identified in the Financing Plan and for which Developer has received binding commitments, is sufficient to take out Developer's construction loan.

5.2 Loan Terms; Residual Receipts Formula. The Loan will accrue interest at the rate of five percent (5%) compounded annually, commencing upon the date of disbursement. The Loan will be payable in annual installments on a residual receipts basis with fifty percent (50%) of all surplus cash payable to Agency toward principal and accrued interest. The entire outstanding balance of the Loan together with accrued interest will be due and payable on the thirtieth (30th) anniversary of the origination date. Surplus cash will be determined on the basis of financial statements prepared by a certified public accountant in accordance with generally accepted accounting principles.

For the purpose of calculating surplus cash, the following limitations will apply: (i) developer fees and interest on any deferred developer fees will be excluded from expenses, (ii) the maximum annual contribution to Project replacement reserves will be \$400 per unit or such greater amount as may be required by a physical needs assessment prepared by a third-party selected by Agency and prepared at Developer's expense no less frequently than once every five years throughout the term of the Agency Loan, (iii) the maximum annual Project management fee will be an amount to be specified in the OPA and consistent with industry standards for similar residential projects, (iv) the maximum partnership management fee payable to Developer's general partner(s) will be \$15,000 per year, payable only during the first 15 years following issuance of a certificate of occupancy for the Project, (v) the maximum payment to Developer's limited partners as an asset management fee will be \$5,000 per year, increasing at a rate of 3% per year and payable only during the

first 15 years following issuance of a certificate of occupancy for the Project, and (vi) the following shall be excluded from expenses: contributions to Project operating reserves; debt service payments on any loan which is not an Agency-approved senior loan, including without limitation, unsecured loans or loans secured by deeds of trust which are subordinate to the Agency Deed of Trust; depreciation, amortization, depletion or other non-cash expenses; capital expenditures; expenses paid for with disbursements from any reserve account; distributions to partners; any amount paid to Developer, any general partner of Developer, or any entity controlled by the persons or entities in control of Developer or any general partner of Developer (provided however, fees paid to a property management agent, partnership management fees and asset management fees may be paid to affiliates of Developer in accordance with the limitations set forth in this paragraph). Payments to Developer, its partners or affiliates in excess of the limitations set forth in this Section shall not be counted toward operating expenses for the purpose of calculating surplus cash.

5.2.1 Adjustment to Operating Expenses. Notwithstanding anything to the contrary set forth herein, for the purposes of calculating surplus cash, operating expenses shall include: (a) the repayment of operating deficit loans provided by Developer's limited partner(s) provided such loans bear interest at no more than three percent (3%) in excess of the rate of interest most recently announced by Bank of America, NT & SA (or its successor bank) at its San Francisco office as its "prime rate," (hereafter, the "Interest Rate"), and (b) the amount of any tax credit adjustor that is required to be paid from Project cash flow.

6. Development Fees; Processing and Entitlements; Prevailing Wages.

6.1 Development Costs; Design Review. Except as otherwise expressly stated herein, Developer will be responsible for all Project development costs, including without limitation all design, development, demolition and construction costs, the cost of all permits, planning, impact and processing fees, and the cost of all on-site and off-site public improvements required in connection with the Project.

6.2 City Approvals. Developer shall be responsible for obtaining all approvals required by City for the Project in accordance with City's standard application process for discretionary land use entitlements, including payment for all of City's costs of processing such approvals. Nothing set forth herein shall be construed as a grant of any such approvals, or as an obligation on the part of City to grant such approvals.

6.3 Prevailing Wages. Developer shall be required to construct the Project in compliance with all applicable state, local and federal laws, rules and regulations, including without limitation the requirements of California Labor Code 1720 *et seq.* and to indemnify, defend and hold harmless, the Agency, the City, and their respective elected and appointed officials, officers, employees,

consultants, contractors and agents from and against any and all liability, cost, claim or expense arising in connection with the violation thereof. The Parties acknowledge that pursuant to information provided by Developer in Developer's application for state and federal low-income housing tax credits, the Project shall be subject to prevailing wage requirements. The Agency shall have no obligation to increase the amount of the Loan for any reason, including without limitation, any financing shortfall arising for any reason, including without limitation, increase in construction costs or a reduction in the amount of investor equity contributed to the Project as a result of a reduction in tax credits allocated to the Project. Developer shall submit to Agency a plan for monitoring payment of prevailing wages and shall implement such plan at Developer's expense.

7. Agency Option and Right of First Refusal. It shall be a condition precedent to the disbursement of the Agency Loan that Developer shall grant to the Agency and shall obtain the written consent of Developer's general partner(s) and limited partner(s) to: an unsubordinated option (the "**Option**") to buy the Project, the Property and the Project reserves (collectively, the "**Option Property**") and an unsubordinated right of first refusal ("**Refusal Right**") to purchase all right, title and interest Developer has in the Property and the Project pursuant to a written agreement reasonably acceptable to Agency and in accordance with all of the following terms and conditions:

A. Subject to Paragraph G below, the Option shall be exercisable during a twelve (12) month period commencing one year after the expiration of the 15-year tax credit compliance period.

B. The Option price shall be equal to the greater of the following amounts:

(a.) Debt and Taxes. An amount sufficient to (i) pay all debts secured by mortgages or deeds of trust secured by the Option Property, (ii) distribute to the limited partners cash proceeds equal to the taxes projected to be imposed on the limited partners as a result of the sale pursuant to the Option; and (iii) repay to the limited partners the amount of any additional equity contributions and the outstanding balance of any unsecured loans provided by the limited partners to fund Project operating deficits or to cure a default under, or reduce the outstanding principal balance of, conventional permanent loans secured by the Property (together with interest accrued on such sums at the rate specified above in Section 5.2.1); or

(b.) Fair Market Value. (i) The fair market value of the Option Property, appraised as low-income housing to the extent continuation of such use is pursuant to the Regulatory Agreement, or other governmental agency regulatory agreements, with any such appraisal to be made by a licensed appraiser, selected as set forth in (ii) below, who is a Member of the Appraisal Institute ("**MAI**") and who has experience in the geographic area in which the Project is located, as reduced by customary costs of a sale, including customary

sales commissions (anticipated to be approximately six percent (6%); provided, however, that if prior to exercise of the Option the Internal Revenue Service has issued a revenue ruling or provided a private letter ruling to Developer, Agency or City providing that property of the nature and use of the Project may be sold under circumstances similar to those pertaining to the Option at a lesser price, then the Option price shall be such lesser price, but in no event less than the price determined pursuant to paragraph 7.B (a) above.

(ii) The fair market value of the Option Property shall be determined as follows. Developer and Agency shall select a mutually acceptable appraiser who shall determine the fair market value of the Option Property. In the event the parties are unable to agree upon an appraiser, Developer and Agency shall each select an appraiser. If the difference between the two appraisals is less than or equal to ten percent (10%) of the lower of the two appraisals, then fair market value shall be the average of the two appraisals. If the difference between the two appraisals is greater than ten percent (10%) of the lower of the two appraisals, then the two appraisers shall jointly select a third appraiser. The appraisals shall take into account the requirement that the Project remain dedicated for use as affordable housing pursuant to any restrictions under any ground lease, loan agreement or regulatory agreement applicable to the Property, and shall assume that the buyer is required to pay property taxes and is not exempt under California Revenue and Taxation Code Section 214(g). If the third appraisal is less than either of the first two, then fair market value shall be the average of the two lowest appraisals. If the third appraisal is greater than the first two, then fair market value shall be the average of the two highest appraisals. If the third appraisal falls between the previous two appraisals, the fair market value shall be the value established by the third appraisal. Developer and Agency shall each pay the costs of any appraiser they individually select, shall share the cost equally of any appraiser jointly selected, and shall share the cost equally of any third appraiser selected pursuant to this paragraph. Any appraiser selected pursuant to this paragraph shall be an MAI appraiser with at least five years of experience and shall have had substantial experience appraising low-income housing tax credit projects.

C. Refusal Right. Subject to Paragraph G below, Agency shall have a right of first refusal to purchase the Project and the Property for a period of twelve (12) months commencing on the date, which is 12 months after the end of the 15-year low-income housing tax credit compliance period. This right shall be exercisable in accordance with the requirements of Internal Revenue Code Section 42(i)(7)(A) and any successor provision, together with any regulations promulgated pursuant thereto.

D. Purchase Price Under Refusal Right. The purchase price for the Project and the Property pursuant to the Refusal Right shall be equal to the sum of (a) an amount sufficient to pay all debts secured by mortgages or deeds of trust secured by the Project or the Property, (b) an amount sufficient to distribute to the limited partners cash proceeds equal to the taxes projected to be imposed

as a result of the sale pursuant to the Refusal Right, and (c) an amount sufficient to repay to the limited partners the amount of any additional equity contributions and the outstanding balance of any unsecured loans provided by the limited partners to fund Project operating deficits or to cure a default under, or reduce the outstanding principal balance of, conventional permanent loans secured by the Property (together with interest accrued on such sums at the rate specified above in Section 5.2.1). If the Agency desires that existing reserves be transferred to Agency in connection with the transfer of the Project, the purchase price under the Refusal Right shall increase by the fair market value of such reserves as determined by the appraiser(s) who determine the Fair Market Value of the Project. Fair market value shall be calculated considering the nature of the reserves and any existing restrictions on the use or availability of such reserves.

E. Assignment. Agency shall have the right to assign the Option and the Refusal Right to the City, any other governmental entity, or a qualified nonprofit corporation. If the Agency ceases to exist, the City shall automatically succeed to the rights of Agency.

F. Inspection Rights; Rights to Direct Use of Reserves. In connection with the rights afforded to Agency pursuant to this Section, Agency shall have the right to review Developer's financial statements, partnership tax returns, and Developer's partnership agreement and all amendments thereto, including without limitation, any pro formas prepared to project anticipated tax liabilities upon sale of the Project. During the period commencing upon Agency's exercise of the Option or Refusal Right, Agency shall have the right to require Project replacement reserves to be expended for improvements to the Project, as directed by Agency in its reasonable discretion. Developer agrees that it shall take reasonable steps to avoid the accrual of tax obligations on the part of the investor limited partner(s) upon sale of the Project to Agency pursuant to this Section.

G. Prepayment; Termination of Option and Right of First Refusal. Developer shall have the right to prepay the Loan provided that all interest accrued to the date of such prepayment is paid in full. Provided that no Developer default has arisen and remains uncured beyond any applicable cure period under the Regulatory Agreement, the Note, the Agency Deed of Trust, or the OPA (collectively, the "**Agency Documents**"), if Developer pays the entire principal balance of the Loan, together with all accrued interest and all other sums payable to Agency pursuant to the Agency Documents, prior to the date which is 12 months following the end of the 15-year tax credit compliance period, then the Option and Refusal Right shall terminate effective as of the date of such payment. Prepayment of the Loan shall have no effect on the term of the Regulatory Agreement, which shall remain in full force and effect for the entire 55-year term thereof.

8. Relationship of Parties. The Parties agree that nothing in this Agreement is intended to or shall be deemed or interpreted to create among them the relationship of buyer and seller, or of partners or joint venturers.

9. Counterparts. This MOU may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one instrument.

10. Captions. The captions used in this MOU are for convenience only and are not intended to affect the interpretation or construction of the provisions hereof.

IN WITNESS WHEREOF, the Parties have executed this Memorandum of Understanding effective as of the date first written above.

AGENCY

CITY

**REDEVELOPMENT AGENCY OF THE
CITY OF MILPITAS**

**THE CITY OF MILPITAS, a municipal
corporation**

By: _____
Executive Director

By: _____
City Manager

ATTEST:

ATTEST:

By: _____
Agency Secretary

By: _____
City Clerk

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By: _____
Agency Counsel

By: _____
City Attorney

SIGNATURES CONTINUE ON FOLLOWING PAGE

DEVELOPER

MIL Aspen Associates, a California limited partnership

By: Western Community Housing, Inc.,
A _____ corporation

Its: General Partner

By: _____

Its: _____

By: Global Premier Development, Inc.
A _____ corporation

Its: General Partner

By: _____

Its: _____

RESOLUTION NO. ____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILPITAS APPROVING EXECUTION OF A MEMORANDUM OF UNDERSTANDING WITH MIL ASPEN ASSOCIATES REGARDING THE DEVELOPMENT OF PROPERTY LOCATED AT 1666 SOUTH MAIN STREET AND APPROVING DEFERRED PAYMENT OF IMPACT FEES BY DEVELOPER

WHEREAS, the City Council originally approved and adopted the Redevelopment Plan for the Milpitas Redevelopment Project Area No. 1 (“**Project Area**”) by Ordinance No. 192 adopted in 1976 (as subsequently amended, the (“**Redevelopment Plan**”)); and

WHEREAS, the Redevelopment Agency of the City of Milpitas (the “**Agency**”) seeks development of certain real property located at 1666 South Main Street in the City of Milpitas (the “**City**”) and known as Santa Clara Assessor’s Parcel No. 086-22-023 (the “**Property**”) in accordance with the Redevelopment Plan and the Midtown Specific Plan; and

WHEREAS, MIL Aspen Associates, a California limited partnership (“**Developer**”) is the owner of or has an option to purchase the Property and is interested in developing it as a 101-unit multi-family affordable housing development together with related improvements (the “**Project**”); and

WHEREAS, the City, Agency, and Developer have negotiated a Memorandum of Understanding (the “**MOU**”) which sets forth preliminary points of agreement relating to the Project; and

WHEREAS, Developer desires to negotiate an Owner Participation Agreement (“**OPA**”) which, subject to the approval of the governing board of the Agency (the “**Agency Governing Board**”), would incorporate the terms of the MOU and set forth additional terms and conditions relating to the Project; and

WHEREAS, the MOU provides that Developer may defer payment of impact fees for the Project until the later of (i) the date of issuance of a final certificate of occupancy for the Project, or (ii) the closing of the conventional permanent loan for the Project, but in no event later than twenty-four (24) months following issuance of the final certificate of occupancy for the Project.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MILPITAS DOES HEREBY RESOLVE AS FOLLOWS:

Section 1. Finds that the execution of a MOU substantially in the form presented to the Agency Governing Board and on file with the City Clerk will further the implementation of the Redevelopment Plan and is in the best interests of the Agency and the City.

Section 2. Approves the MOU, and authorizes the City Manager to execute the MOU substantially in the form on file with the City Clerk, with such modifications as the City Manager may approve with the advice of the City Attorney.

Section 3. Approves the deferred payment of impact fees as set forth in the MOU provided that (i) the Agency and Developer successfully negotiate an OPA and (ii) the Agency Governing Board approves the OPA.

PASSED AND ADOPTED this _____ day of _____, 2007, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Steven T. Mattas, City Attorney

RESOLUTION NO. ____

A RESOLUTION OF THE REDEVELOPMENT AGENCY OF THE CITY OF MILPITAS APPROVING EXECUTION OF A MEMORANDUM OF UNDERSTANDING WITH MIL ASPEN ASSOCIATES REGARDING THE DEVELOPMENT OF PROPERTY LOCATED AT 1666 SOUTH MAIN STREET

WHEREAS, the City Council originally approved and adopted the Redevelopment Plan for the Milpitas Redevelopment Project Area No. 1 (“**Project Area**”) by Ordinance No. 192 adopted in 1976 (as subsequently amended, the **Redevelopment Plan**”); and

WHEREAS, the Redevelopment Agency of the City of Milpitas (the “**Agency**”) seeks development of certain real property located at 1666 South Main Street in the City of Milpitas (the “**City**”) and known as Santa Clara Assessor’s Parcel No. 086-22-023 (the “**Property**”) in accordance with the Redevelopment Plan and the Midtown Specific Plan; and

WHEREAS, MIL Aspen Associates, a California limited partnership (“**Developer**”) is the owner of or has an option to purchase the Property and is interested in developing it as a 101-unit multi-family affordable housing development together with related improvements (the “**Project**”); and

WHEREAS, the City, Agency, and Developer have negotiated a Memorandum of Understanding (the “**MOU**”) which sets forth preliminary points of agreement relating to the Project; and

WHEREAS, Developer desires to negotiate an Owner Participation Agreement (“**OPA**”) which, subject to the approval of the governing board of the Agency (the “**Agency Governing Board**”), would incorporate the terms of the MOU and set forth additional terms and conditions relating to the Project.

NOW, THEREFORE, THE REDEVELOPMENT AGENCY OF THE CITY OF MILPITAS DOES HEREBY RESOLVE AS FOLLOWS:

Section 1. Finds that the execution of the MOU substantially in the form presented to the Agency Governing Board and on file with the Agency Secretary will further the implementation of the Redevelopment Plan and is in the best interests of the Agency and the City.

Section 2. Approves the MOU, and authorizes the Executive Director of the Agency to execute the MOU substantially in the form on file with the City Clerk, with such modifications as the Executive Director may approve with the advice of the City Attorney.

Section 3. Directs Agency staff to negotiate with Developer and to prepare for Agency review an OPA and related documents consistent with the MOU and this Resolution.

PASSED AND ADOPTED this _____ day of _____, 2007, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, Agency Secretary

Jose S. Esteves, Chair

APPROVED AS TO FORM:

Steven T. Mattas, Agency Counsel