

MEMORANDUM OF UNDERSTANDING (230 NORTH MAIN STREET)

THIS MEMORANDUM OF UNDERSTANDING (the "MOU") is entered into by and between the Redevelopment Agency of the City of Milpitas, a public body, corporate and politic (hereinafter "Agency"), and USA Properties Fund, Inc., a California corporation (hereinafter "USA") (collectively the "Parties").

RECITALS

WHEREAS, Apton Properties, L.L.C., a California limited liability company ("Apton") is the property owner of that certain real property located at 230 North Main Street, Milpitas, as more particularly described in the legal description set forth in Exhibit A attached herein and incorporated herein by this reference (the "Property").

WHEREAS, Apton intended to develop a housing project on the Property that consists of approximately 93 condominium units (the "Condominium Project").

WHEREAS, Apton has determined that the Condominium Project is not currently economically feasible.

WHEREAS, Apton and the Agency have entered into certain agreements, including, without limitation, a Memorandum of Understanding (the "Existing MOU"), an Owner Participation Agreement (the "OPA"), and a Regulatory Agreement (the "Existing Regulatory Agreement" and collectively with the Existing MOU and the OPA, the "Existing Document"), which Apton Agreements have been recorded against the Property.

WHEREAS, Apton and USA have entered into that certain Purchase and Sale Agreement and Joint Escrow Instructions (the "Purchase Agreement") pursuant to which it is contemplated that USA shall purchase the Property from Apton.

WHEREAS, USA proposes to develop a 93 unit affordable housing development on the Property (the "Project").

WHEREAS, USA has submitted an application to the California Tax Credit Allocation Committee ("CTCAC") for an allocation of Federal Low Income Housing Tax Credits (the "Tax Credits") for the Project.

WHEREAS, this MOU sets forth the Parties' agreement with respect to USA's affordable housing obligations with respect to the Project and certain financial assistance to be provided by the Agency in connection with the development of the Project.

WHEREAS, the Parties intend to enter into an assumption and modification of the OPA, a Regulatory Agreement, and other documents (the "Project Documents") at a later date that will incorporate the terms of this MOU, set forth additional conditions for the development of the Project, and be recorded against the Property.

NOW THEREFORE, in consideration of the foregoing recitals and the mutual covenants and conditions contained herein and other good and valuable consideration the Parties understand and agree as follows:

I. EXISTING AGREEMENTS:

1. Concurrently with the acquisition of the Property by USA, Agency and USA shall enter into an assignment and assumption of the OPA (the "Assignment and Assumption Agreement"). Notwithstanding the foregoing, the Agency and USA may elect to enter into an amended and restated OPA if the Parties reasonable determine that the financing and development of the Project would be better served by the execution of an amended and restated OPA.

2. Concurrently with the acquisition of the Property by USA, except as provided for in the Assignment and Assumption Agreement, the Existing Documents shall be terminated and released from the Property. Except as provided for in the Assignment and Assumption Agreement, USA shall have no liability or obligation under any Existing Document.

II. AGENCY FINANCIAL ASSISTANCE:

1. The Agency agrees to make a residual receipts loan to USA in the amount of \$4,400,000 (the "Agency Loan") to finance, in part, the acquisition and development of the Project. The Agency Loan shall accrue simple interest at 3.5% per annum and shall have a forty (40) year term. The Agency Loan shall be repayable from 50% of Project residual receipts after repayment of any USA developer note and any required investor or management fees. The Agency Loan shall be subordinate to other Project financing, provided such subordination is consistent with the Community Redevelopment Law. The Agency Loan shall be a non-recourse obligation of USA and shall comply with any other standard Tax Credit related structuring requirements.

2. The Agency Loan shall be documented by a Note, Deed of Trust and other agreements as may be reasonably required by the Agency (the "Agency Loan Documents"). The Agency Loan Documents shall be negotiated in good faith by the Agency and USA.

III. AFFORDABLE HOUSING IMPLEMENTATION:

1. USA shall provide one (1) manager unit and ninety-two (92) Affordable Units constructed on the Property, which shall be rented to Low and Very Low Income households as guaranteed by deed restrictions or other enforceable covenants running with the land. Forty Percent (40%) of the Affordable Units will be designated for Very Low-Income households. Sixty Percent (60%) of the Affordable Units will be designated for Low-Income households. The terms "Very Low Income households" and "Low Income households" shall have the same meaning given those terms in the Community Redevelopment Law (Health and Safety Code, section 33000 et seq.) and Health and Safety Code section 50052.5. Nothing herein shall prohibit USA from imposing additional rental restrictions on the Affordable Unit as may be required in connection with any Tax Credits received in connection with the Project.

2. The Agency and USA hereby declare their understanding and intent that the burdens of the covenants set forth herein touch and concern the land in that the Agency's and USA's legal interest in the Property is rendered less valuable thereby. The Agency and USA hereby further declare their understanding and intent that the benefits of such covenants touch and concern the land by enhancing and increasing the enjoyment and use of the Property by persons to whom the Affordable Units will be affordable, the future tenants of each Affordable Units ("Applicant(s)").

3. Upon completion of the Project, the Property shall be subject to the Regulatory Agreement. The Regulatory Agreement shall be recorded against the Property. Following recordation of the Regulatory Agreement as required hereunder, the Agency shall have the right to enforce the Regulatory Agreement and, upon default under any of the terms of the Regulatory Agreement, the Agency may take any one or more of the following steps, in addition to all other remedies provided by the law or in equity:

A. Enforce the obligations under the Regulatory Agreement by mandamus or other suit, action, or proceeding at law or in equity; including injunctive relief, require the Owner, or any successor in interest, to perform its obligations and covenants under this Agreement or under the Regulatory Agreement; or, enjoin any act or thing that may be unlawful or in violation of the provision of this Agreement, the OPA, or the Regulatory Agreement; and

B. Take such other action at law or in equity as may appear necessary or desirable to enforce the obligations under this MOU, the OPA, and the Regulatory Agreement against the Owner; and

4. Rents for Affordable Units shall be determined pursuant to the terms of the Regulatory Agreement. Notwithstanding the foregoing or anything set forth in the Regulatory Agreement, the maximum housing cost of the Affordable Units for each of the income levels set forth herein must comply with the least restrictive of the regulations promulgated by the California Department of Housing and Community Development Sections 6910-6932 in Title 25 of the California Code of Regulations, governing the Agency's set aside housing fund, or with the eligibility requirements established by the USA's Tax Credit related financing.

5. As set forth in the Regulatory Agreement, in the event that the Project is granted a welfare property tax exemption as a result of the Affordable Units (a "Property Tax Exemption"), in addition to any amounts payable to the Agency pursuant to the Agency Loan, USA shall pay annually to the Agency an Affordable Housing Administration Fee equal to twenty percent (20%) of one percent (1%) of the assessed value of the Project as set forth on the County property tax bill on the line entitled "Value and Taxes Subtotal" multiplied by the percentage of units in the Project occupied by tenants whose incomes are eighty percent (80%) or below of the Median Income for the Area and which units allow the Project or applicable portion thereof to qualify for the Property Tax Exemption; provided, the Affordable Housing Administration Fee shall not exceed the amount of any Property Tax Exemption granted for such annual period.

The Affordable Housing Administration Fee shall be payable fifty percent (50%) on September 10 and fifty percent (50%) on March 10 of year beginning from when the first unit is

occupied. If March 10 or September 10 falls on a Saturday, Sunday, or City Holiday then payment shall be due on the City's next business day. A late payment penalty equal to ten percent (10%) of the payment due shall be added to payments received three (3) days or more after the due date as stated herein or when a deficient check has been given for payment. Payment received more than ten (10) days after the due date shall, in addition to the ten percent (10%) penalty, accrue interest at a rate of twelve percent (12%) from the due date through and including the date the payment is received by the Agency

IV. OTHER MATTERS:

1. The Agency agrees and acknowledges that while USA has entered into the Purchase Agreement, USA has not acquired fee title to the Property as of the date hereof. USA's obligations under this MOU shall be conditioned upon USA's acquisition of fee title to the Property.

2. The Agency's obligations under this MOU shall be condition upon the receipt of an award of Tax Credits to USA for the Project.

3. USA may assign its rights and obligations under this MOU, the Agency Loan Documents and the Project Documents to a California limited partnership in which USA, or a wholly owned affiliate thereof, is a general partner.

4. This MOU may be executed in counterparts, all of which together shall constitute a single original agreement, so executed this MOU shall constitute an agreement which shall be binding upon all parties to the MOU, notwithstanding that the signatures of all parties do not appear on the same page.

5. Either Party shall be deemed in default of this MOU when failing to substantially comply with any material term of this MOU. Failure to cure a default within 30 days' written notice provided to the defaulting party by the non-defaulting party shall result in immediate termination of this MOU.

6. If any term or provision of this MOU shall be held invalid or unenforceable, the remainder shall not be affected.

7. No waiver or breach of any covenant or provision shall be deemed a waiver of any other covenant or provision and no waiver shall be valid unless in writing and executed by the waiving party.

8. This MOU may not be amended or altered except by a written instrument executed by Agency and USA.

[EXECUTION PAGE FOLLOWS]

IN WITNESS WHEREOF, Agency has by order of the Agency Board of the Directors caused this Memorandum of Understanding to be subscribed by the Executive Director of the Agency by Resolution No. _____ and attested by the City Clerk thereof, and USA Properties Fund, Inc. has executed the same this _____ day of _____, 2009.

"AGENCY"

Redevelopment Agency of the City of Milpitas

Thomas J. Williams, Executive Director

Attest:

Mary Lavelle, Agency Secretary

Approved to Form:

Michael J. Ogaz, Agency Counsel

USA Properties Fund, Inc.

By: _____
Steven Gall, Senior Vice President

Exhibit "A"

LEGAL DESCRIPTION

Real property in the City of Milpitas, County of Santa Clara, State of California, described as follows:

Parcel One:

Beginning at the point of intersection of the Westerly right-of-way line of the Southern Pacific Railroad Company, with the Easterly line of San Jose-Oakland Road (State Highway), said point of beginning also being the Northernmost corner of that certain tract of land described in the Deed from Standard Oil Company of California, a Delaware corporation, to Erwin A. Luttermoser, dated July 28, 1954, recorded September 7, 1954 in Book 2953, Official Records, page 161, Santa Clara County Records; thence from said point of beginning along the Easterly line of said San Jose-Oakland Road for the following courses and distances: Southwesterly along an arc of a curve to the right, with a radius of 668.25 feet, through a central angle of $7^{\circ} 45' 29''$ for an arc distance of 90.48 feet; thence South $40^{\circ} 12'$ West 27.52 feet and thence Southwesterly along an arc of a curve to the left, with a radius of 477.104 feet, through a central angle of $2^{\circ} 24' 47''$ for an arc distance of 20.09 feet and the true point of beginning of the tract of land to be described, said true point of beginning also being the Westernmost corner of land so described in the Deed to said Luttermoser above referred to; thence from said true point of beginning South $12^{\circ} 00'$ East along a Southwesterly line of land so described in the Deed to said Luttermoser for a distance of 275.72 feet to an angle corner therein in the Northerly line of the Old Oakland Road, as said line was established by Deed from Marion E. Weller, to County of Santa Clara, dated August 31, 1915, recorded November 12, 1915 in Book 434 of Deeds, page 595; thence South $74^{\circ} 15'$ West along the said Northerly line of the Old Oakland Road for a distance of 163.05 feet, more or less, to the point of intersection thereof with the said Easterly line of San Jose-Oakland Road; thence Northeasterly along the said Easterly line of San Jose-Oakland Road, along an arc of a curve to the right, with a radius of 477.104 feet, through a central angle of $40^{\circ} 23' 13''$ for an arc distance of 336.24 feet, more or less, to the true point of beginning.

Excepting therefrom the following described parcel of land as conveyed to the City of Milpitas, a municipal corporation, by instrument recorded May 10, 1972 in Book 9826, page 263 of Official Records:

Beginning at the point of intersection of the Northerly line of a 40 foot county road (Weller Lane) and the Easterly line of the State Highway between San Jose and Oakland, (North Main Street) as described in the Deed from Marion E. Weller to Standard Oil Company, a California corporation, recorded December 23, 1919 in Book 502 of Deeds, page 297, Santa Clara County Records; thence along said Northerly line of Weller Lane North $74^{\circ} 15'$ East 25.93 feet; thence leaving said Northerly line along a tangent curve to the right, whose tangent bears South $74^{\circ} 15'$ West having a radius of 20.00 feet, a central angle of $106^{\circ} 19' 56''$, an arc length of 37.12 feet to a point on the Easterly line of North Main Street; thence along said Easterly line of North Main Street along a curve to the left, whose tangent bears South $0^{\circ} 34' 56''$ West, having a radius of 477.10 feet, a central angle of $3^{\circ} 10' 56''$ an arc length of 26.50 feet to the point of beginning.

Also excepting and reserving to grantor, its successors and/or assigns, as contained in the Deed recorded May 7, 1976 in Book C013, page 56, Official Records, all oil, gas and other hydrocarbons, geothermal resources as defined in Section 6903 of the California Public Resources Code and all other minerals, whether similar to those herein specified or not, within or that may be produced from said real property, provided, however, that all rights and interest in the surface

of said real property are hereby conveyed to grantee, no right or interest of any kind to use the surface, expressed or implied, being excepted or reserved by grantor; and provided that grantor shall not, in exercising such rights, do anything which will damage the surface of said real property or any structures thereon, and shall not conduct any drilling or other operations of any kind in the first five hundred (500) feet below the surface of said property.

An further excepting and reserving to grantor, its successors and/or assigns, as contained in the Deed recorded May 7, 1976 in Book C013, page 56, Official Records, the sole and exclusive right, from time to time, to drill and maintain wells or other works into or through said real property and the adjoining street, roads and highways below a depth of five hundred (500) feet and to produce, of inject, store and remove from and through such wells or works, oil, gas, water and other substances of whatever nature, including the right to perform below said depth any and all operations deemed by grantor necessary or convenient for the exercise of such rights.

Parcel Two:

All that certain parcel of land in the City of Milpitas, County of Santa Clara, State of California, lying within the following described parcel of land and lying Easterly of a line which lies Westerly of, parallel with and 105 feet measured at right angles from the Easterly boundary line of the following described parcel of land:

Beginning at the intersection of the Westerly right-of-way line of the Southern Pacific Railroad between San Jose and Oakland with the Easterly right of way line of the State Highway between San Jose and Oakland, about one-half mile North of Milpitas Railroad Depot; thence along the Easterly right-of-way line of the highway, on a curve to the right, having a radius of 668.25 feet, with a chord of 90.125 feet long bearing South 36° 20' West; thence along the Easterly right-of-way line of highway South 40° 12' West, 27.52 feet; thence along Easterly right-of-way line of highway on a curve to the left, having a radius of 477.104 feet with a chord 348.177 feet long bearing South 18° 48' West, to the intersection of Easterly line of highway right-of-way with Northerly line of a forty foot county road; thence North 74° 15' East 213.95 feet along the Northerly line of said county road; thence South 12° 10' East 146.385 feet along the Easterly line of said county road; thence North 74° 15' East 54 feet to the Westerly right-of-way line of the Southern Pacific Railroad; thence North 12° 00' West 504.74 feet along the Westerly right-of-way of Southern Pacific Railroad to the point of beginning.

APN: 028-24-017 and 028-24-018

ARB: 027-03-026 and 027-03-028

