

RESOLUTION NO. 70-22

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RICHMOND,
CALIFORNIA, DECLINING TO WAIVE CERTAIN IMPORTANT FINANCIAL
CONDITIONS PRECEDENT IN THE DISPOSITION AND DEVELOPMENT
AGREEMENT BETWEEN WINEHAVEN LEGACY, LLC AND THE CITY (DDA)**

WHEREAS, the City of Richmond, California (“**City**”) is the fee title owner of 100% of the real property (“**Property**”) described in (i) Exhibit A-1 to that certain Disposition and Development Agreement for Point Molate Mixed-Use Development, by and between the City and Winehaven Legacy LLC, a Delaware limited liability company (“**Winehaven**”), dated as of September 30, 2020 (“**DDA**”), and (ii) Exhibit A to that certain Development Agreement, by and between the City and Winehaven, dated as of October 21, 2020 (“**DA**” and together with the DDA, the “**Development Agreements**”) and the attached Exhibit A; and

WHEREAS, for purposes of this Resolution, defined terms not specifically defined in this Resolution shall have the meaning as defined in the DDA; and

WHEREAS, the Property was formerly within the boundaries of Point Molate Naval Fuel Depot (“**Naval Fuel Depot**”) prior to its closure and was acquired from the United States, subject to the Point Molate Reuse Plan adopted by the City in 1997, during base closure process through 2002; and

WHEREAS the Naval Fuel Depot closed in 1995 and since disposition to the City, the City has been engaged in various processes to determine how to use the land. One project proposed by the Guidiville Band of Pomo Indians and Upstream Point Molate, LLC (jointly “**Upstream/Tribe**”) included a Casino and went through environmental review in 2011 but was turned down by the voters in an advisory measure which caused the Council to decline the project and led to litigation. The lawsuit resulted in a settlement (“**Amended Judgment**”) where the City agreed to consider other developers over a period of four (4) years by the “**City Sales Deadline**”, and if approved, City would sell the Property and split the net proceeds with Upstream/Tribe. If no sale occurred by the City Sales Deadline, Upstream/Tribe has the option to purchase the Property for Four Hundred Dollars (\$400) (“**Option**”) and thereafter would have five (5) years to sell or develop the Property and would share net proceeds with City. The City Sales Deadline is May 21, 2022 and if the sale to Developer is not consummated by May 21, 2022, Upstream/Tribe may exercise the Option anytime thereafter; and

WHEREAS, the Development Agreements provide for the establishment of a Community Facilities District (“**CFD**”), and multiple improvement areas therein, to provide for financing of certain facilities and services described therein, but the DA clearly established that while the City would cooperate with Winehaven in the establishment of one or more CFDs, it stated that the City will not be obligated to pay any cost related to formation or implementation of any Financing Mechanism from its General Fund (at Section 4.2 Assessment Financing); and

WHEREAS, at the public hearing held on March 18, 2022, the City did not approve the Developer’s proposed CFD for a variety of reasons including, but not limited to, the fact that proposed CFD did not satisfy the specific requirement that it was not to have a negative impact on the General Fund (“**Disapproved CFD**”); and

WHEREAS, DDA Section 4.3.2 specifically states that Escrow must close no later than May 21, 2022 (“**Outside Closing Date**”) and also states that the Closing Date is specifically limited by the terms of Amended Judgment and the Option held by Upstream/Tribe; and

WHEREAS, Developer advised the City that Developer would not be obtaining third party financing but rather would be funding the closing obligations directly as its financial investor was MSD Capital (“**Equity Investor**”) which would be contributing funds into the Winehaven as an equity investment; and

WHEREAS, City’s obligation to sell the Property to Winehaven under the DDA is subject to a number of specific conditions precedent set forth in DDA Section 4.6.1, including, among others:

(i) City's approval of the Approved Final Financing Plan for the First Site Improvement Phase (Section 4.6.1.7) revised to omit reference to the Disapproved CFD ("**Revised Financing Plan**");

(ii) City's receipt and approval of the Evidence of Availability of Funds (Section 4.6.1.8) ("**Availability of Funds Letter**") which City requested be executed by the Equity Investor; and

(iii) City's receipt from Developer (Section 4.6.1.12) of either (a) the Guaranty executed by an Approved Guarantor which must be approved by City, OR (b) Initial Project Performance and Payment Security in the form of bonds as approved by City ("**Guarantor/Bonds Security**"); and

WHEREAS, the City's receipt and approval of (i) the Revised Financing Plan, (ii) Availability of Funds Letter, and (iii) the Guarantor/Bonds Security, are all of critical importance to the protection of the City (collectively "**Critical Financial Conditions**"); and

WHEREAS, on May 17, 2022, Developer provided a proposed Availability of Funds Letter (dated May 16, 2022) which was executed only by Winehaven and which was disapproved by the City; and

WHEREAS, later on May 17, 2022, Developer provided a second proposed Availability of Funds Letter which was executed by the Equity Investor but stated that the commitment of the Equity Investor to contribute the funds into Winehaven was conditioned upon an approved and formed CFD, which later was rejected by City because of the CFD contingency; and

WHEREAS, since late March 2022, the City Attorney and the City's financial consultant Mark Northcross have repeatedly requested that Developer provide the documents needed to satisfy all the Critical Financial Conditions but, except for the disapproved Availability of Funds Letter, has not received any of the information for the Critical Financial Conditions; and

WHEREAS, the Critical Financial Conditions were not satisfied by the Outside Closing Date; and

WHEREAS, on May 9, 2022 the City Attorney sent Developer a letter summarizing remaining issues needed to accomplish closing by Developer's desired date of May 18, 2022, including reimbursement of outstanding fees and costs, and certain other issues, and while several of these issues were addressed, in addition to Critical Financial Conditions, the payment of the outstanding fees and costs were not addressed; and

WHEREAS, the Developer's failure to pay outstanding fees and costs was part of the City's reasons for not approving the CFD on March 18, and since that date the Developer has not addressed the issue of reimbursing legal expenses arising from the indemnity obligation to defend the project, consultant costs on the CFD, or other matters that total \$867,314.58 as of last calculation; and

WHEREAS, the City was led to believe that Winehaven would be making submissions intended to satisfy the foregoing after the posting of the May 17, 2022 agenda but did not do so, and accordingly, staff made no recommendation of resolution, so when the City Council considered these matters on May 17 and the lack of Developer's performance, and the City Council determined by motion approved 4-2-1 (Bates and Butt voting no, Johnson absent), that the conditions were too critical to waive and that a resolution confirming the action should be prepared by the City Attorney for the next meeting (May 24);

WHEREAS, it is recognized that the Outside Closing date for Upstream/Tribe is May 21 and they may exercise their option after that date, and as of the date of agenda posting for the May 24 agenda, i.e., May 19, Developer has made no further submittals; and

WHEREAS, after agenda closing, Winehaven made additional submittals showing their equity partner had significant funding, but not meeting the \$130M requirement and not committing it to the Project, and discussed with escrow a possible \$45M deposit in a separate escrow, but these actions fell short of satisfying the Critical Financial Conditions (no financial plan, no actual deposit or Guarantor).

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF RICHMOND THAT:

Section 1. Recitals. Each of the above recitals is true and correct and made a part hereof, and is a part of the findings hereunder.

Section 2. Failure of City's Conditions Precedent. The Critical Financial Conditions have not been satisfied and the City finds it would be financially irresponsible to waive same and accordingly declines to waive the Critical Financial Conditions. As stated in the recitals and staff reports, the conditions in combination assure that there is security for the performance of obligations on the order of \$130 million just in the first phase, a Guarantor, and funds to proceed. The Developer is continuing to base the whole project on a CDF provided by the City and not willing to consider other financial options not reliant on the City or its General Fund.

Section 3. Other Conditions. In addition to the Critical Financial Conditions, the Developer has not reimbursed expenses as stated herein, and has not performed other requirements of the DDA, as stated in the Staff Report. While these might have been workable in and of themselves, in combination with the Critical Financial Conditions and the failure to pay fees and costs, the City Council cannot waive the conditions nor support closing.

Section 4. Additional Performance. Developer's additional actions since March 17 have not caused the conditions to be satisfied. While Developer has shown MSD Capital has significant funding, they did not permit review of audited financial statements or show \$130M and failed to show it was committed to the Project. They explored setting up a separate escrow for the \$45M deposit, but did not make any deposit. Accordingly, they did not satisfy the Critical Financial Conditions.

Section 5. Notice to Upstream/Tribe. The City Attorney shall transmit this Resolution to Developer and to Upstream/Tribe and proceed with efforts to close at such time as Upstream/Tribe may exercise its option. The City Attorney shall provide a full explanation of the reasons for this action.

Section 6. Upstream/Tribe. As of the time of this Resolution, Upstream/Tribe have now given notice of exercise of this option to purchase.

Section 7. Effective Date. This Resolution shall be effective upon its adoption on May 24, 2022.

I certify that the foregoing resolution was passed and adopted by the City Council of the City of Richmond at a regular meeting thereof held May 24, 2022, by the following vote:

AYES: Councilmembers Jimenez, Johnson III, McLaughlin, Willis, and Vice Mayor Martinez.
NOES: Councilmember Bates and Mayor Butt.
ABSTENTIONS: None.
ABSENT: None.

PAMELA CHRISTIAN
CLERK OF THE CITY OF RICHMOND
(SEAL)

Approved:

THOMAS K. BUTT
Mayor

Approved as to form:

DAVE ALESHIRE
Interim City Attorney

State of California }
County of Contra Costa } : ss.
City of Richmond }

I certify that the foregoing is a true copy of **Resolution No. 70-22**, finally passed and adopted by the City Council of the City of Richmond at a regular meeting held on May 24, 2022.


Pamela Christian, Clerk of the City of Richmond