



City Council Staff Report

DATE: November 20, 2013

CONSENT CALENDAR

SUBJECT: APPROVE AN AMENDMENT TO THE AGREEMENT FOR PLACEMENT OF ARTWORK ON PRIVATE PROPERTY AND GRANT OF EASEMENT FOR 810 NORTH FARRELL DRIVE

FROM: David H. Ready, City Manager

BY: Community and Economic Development

SUMMARY

In 1996 an Agreement for Placement of Artwork on Private Property and Grant of Easement was entered into between the City of Palm Springs and the property owner of 810 North Farrell Drive for placement of public art by artist Michael Watling. This property is currently in escrow and eligible to receive Small Business Administration (SBA) trust deed financing. It has been requested by the SBA lender that an amendment to the Agreement be entered into, specifically agreeing that the U.S. Small Business Administration be completely relieved from any obligation under the Agreement in regards to Public Art at this site.

RECOMMENDATION:

1. Approve an amendment to the Agreement for Placement of Artwork and Grant of Easement Agreement for the public art located at 810 North Farrell Drive.
2. Authorize the City Manager to execute all necessary documents.

STAFF ANALYSIS:

In 1996 an Agreement for Placement of Artwork on Private Property and Grant of Easement was entered into between the City of Palm Springs and the property owner of 810 North Farrell Drive. A 14'x6' copper-clad, steel and brass sculpture by artist Michael Watling was installed at the main entrance to the building.

This property is currently in escrow and eligible to receive Small Business Administration (SBA) trust deed financing in order to assist with job creation, under the 504 program. The Agreement for Placement of Artwork on Private Property and Grant of Easement contains an indemnification clause in paragraph 12 in favor of the City of Palm Springs.

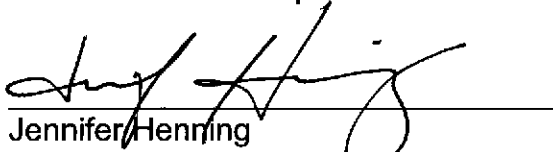
ITEM NO. 2K

Approve an Amendment to the Agreement for Placement of Artwork on Private Property and Grant of Easement for the property at 810 North Farrell Drive

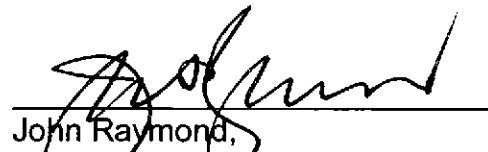
The SBA cannot accept this clause due to the Federal Anti-Deficiency Act and is requesting that an amendment to the Agreement be entered into specifically agreeing that the U.S. Small Business Administration be relieved of the hold harmless and indemnity provisions of the agreement, not be obligated to perform, and be completely relieved from, any obligation under the Agreement in regards to the Public Art located at this site. The SBA is requesting that the City of Palm Springs approve an amendment to the agreement therefore allowing the SBA to proceed with funding this project. This provision would only apply to the SBA and not the borrower of any other party.

FISCAL IMPACT:

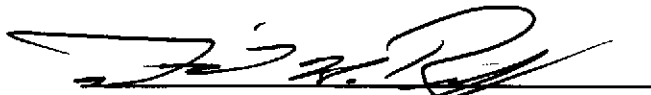
There is no fiscal impact to the Public Arts Fund nor the General Fund.



Jennifer Henring
Public Arts and Special Projects Coordinator



John Raymond,
Director, Community and Economic
Development



David H. Ready, Esq., Ph.D.
City Manager

Attachments:

SBA Request Letter

Proposed Amendment to Agreement for Placement of Artwork on Private Property and Grant of Easement

ORANGE COAST LAW GROUP

November 8, 2013

Mr. John Raymond
Director
Community & Economic Development Department
City of Palm Springs

Via Electronic Mail

RE: Proposed Amendment to Agreement for Placement of Artwork on Private Property and Grant of Easement // 810 North Farrell Drive, Palm Springs, CA 92262

Dear Mr. Raymond:

I represent Pacific West CDC, a Certified Development Corporation working with license from the U.S Small Business Administration (SBA) under the 504 program. This program provides long-term second trust deed financing to deserving small businesses in order to assist with job creation.

As you may be aware, the Federal Anti-Deficiency Act prohibits the SBA from funding projects where they could be subject to hold harmless and indemnity provisions should it acquire title on a project where it provided financing. While this a remote risk, it is a risk that SBA Counsel cannot ignore.

Pacific West CDC is working on a project at 810 North Farrell Drive, Palm Springs, California. The preliminary title report revealed an Agreement for Placement of Artwork on Private Property and Grant of Easement that contains an indemnification clause in paragraph 12 in favor of the City of Palm Springs. The SBA cannot accept this clause due to the Anti-Deficiency Act.

Accordingly, in the interest of job creation, we respectfully request that the City of Palm Springs sign the enclosed Amendment. This would resolve our issue and allow SBA to proceed with funding this project.

Should you have any questions, please feel free to contact my office.

Very truly yours,



Jeffrey T. Mulford, Esq.
Attorney for Pacific West CDC

**AMENDMENT TO AGREEMENT FOR PLACEMENT OF
ARTWORK ON PRIVATE PROPERTY AND GRANT OF EASEMENT
810 North Farrell Drive, Palm Springs, CA 92262
APN 507-350-008-4**

This Amendment is made and entered into this November 8, 2013, by and between Nathan Otto and Gina Otto (or an eligible passive concern that they may create to hold title to the property), property owners, hereinafter designated "Owner," and the City of Palm Springs, hereinafter designated "City."

RECITALS

WHEREAS, Owner is or will soon become the owner of real property (the "Property") located in the City of Palm Springs, commonly designated as 810 North Farrell Drive, Palm Springs, CA 92262, APN 507-350-008-4, and more particularly described in Exhibit "A," attached hereto and made a part hereof by such reference; and

WHEREAS, Owner is subject to an Agreement for Placement of Artwork on Private Property and Grant of Easement recorded on December 16, 1996 in the Official Records of Riverside County, California as Instrument #96-473092 (the "Agreement").

WHEREAS, Owner acknowledges that it is subject to all the terms and conditions provided in the Agreement entered into by the previous real property owner and the City.

WHEREAS, Owner desires to obtain financing from Pacific West CDC, a Certified Development Corporation operating with 504 license from the U.S. Small Business Administration ("SBA"), an agency of the United States Government. Owner will execute a promissory note and a deed of trust in favor of Pacific West CDC, which will subsequently be assigned to the U.S. Small Business Administration, in anticipation that the U.S. Small Business Administration will fund the loan to assist with the permanent financing of the commercial real estate.

WHEREAS, it is a condition precedent to obtaining the above referenced financing that the SBA be specifically excluded from and against any and all obligations imposed on the Owner as set forth in the Agreement due to the Federal Anti-Deficiency Act (USC Title 31, Subtitle II, Chapter 13, Subchapter III, Section 1341 ("Act")).

NOW THEREFORE, it is mutually stipulated and agreed as follows:

1. EFFECT OF FEDERAL ANTI-DEFICIENCY ACT: The Agreement is amended to specifically agree that in the event the U.S. Small Business Administration acquire title to the Property in the enforcement of any of its rights pursuant to an agreement between the Owner and SBA, the SBA shall not be obligated to perform, and shall be completely relieved from, any obligation under the Agreement to the extent, and only to the extent, that such performance would constitute a violation of the Act. The U.S. Small Business Administration shall be deemed a third party beneficiary of this Amendment.
2. Notwithstanding paragraph 1 above, all other terms and provisions of the Agreement shall remain in full force and effect.

IN WITNESS THEREOF, the parties hereto have affixed their signatures as of the date first written above.

APPROVED AS TO FORM:

By: _____

APPROVED AS TO CONTENT:

City of Palm Springs

By: _____

Owner: **Nathan Otto and Gina Otto**

By: _____

By: _____

Lender: **Pacific West CDC**

By: _____

NOTE: OWNER(S) SIGNATURE(S) MUST BE NOTARIZED FOR RECORDATION