



# CITY COUNCIL STAFF REPORT

DATE: June 17, 2015

CONSENT AGENDA

SUBJECT: APPROVE ACTIONS RELATED TO THE SUBDIVISION IMPROVEMENT AGREEMENT FOR TRACT MAP NO. 31848-1 (AVALON)

FROM: David H. Ready, City Manager

BY: Public Works and Engineering Department

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## SUMMARY

This action will rescind the City Council's approval on February 18, 2015, of an amendment to the Subdivision Improvement Agreement ("SIA") for Tract Map No. 31848-1 (the development identified as "Avalon"), located on the east side of Indian Canyon Drive between the Whitewater River and San Rafael Drive, and approve a new First Amendment to the original SIA.

## RECOMMENDATION:

1. Rescind approval of the First Amendment to a Subdivision Improvement Agreement for Tract Map 31848-1 ("Avalon"), A5393, between LV Palm Springs Village, LLC, and the City of Palm Springs, approved February 18, 2015; and
2. Approve a First Amendment to the Subdivision Improvement Agreement for Tract Map 31848-1 ("Avalon"), A5393, between LV Palm Springs Village, LLC, and the City of Palm Springs; and
3. Authorize the City Manager to execute all necessary documents.

## STAFF ANALYSIS:

LV Palm Springs Village, LLC, (the "Successor Subdivider"), is the successor to SunCal PSV, LLC, a Delaware limited liability company ("SunCal"), the Original Subdivider. SunCal and the City entered into the original SIA dated December 18, 2006, (A5393), and recorded on February 16, 2007, in conjunction with recordation of Tract Map 31848-1 consisting of approximately one-half of the Palm Springs Village project, generally located at the northeast corner of North Indian Canyon Drive and San Rafael Drive. The City has continued to extend the effectiveness of the SIA through a series of resolutions adopted by the City Council, and the current termination date of the Original SIA was May 4, 2015.

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As set forth in the SIA, the Successor Subdivider, is obligated to construct and install certain improvements to accommodate the development of the Tract. The SIA also required the posting of bonds as security for the faithful performance of the work required under the SIA. In accordance with the SIA, SunCal previously completed substantial components of the required work; however, some work was not completed, or some of the work that had been installed has deteriorated or been vandalized, and may otherwise require repair.

The Successor Subdivider was previously in the process of selling its interests in the project to FCA CA, LLC, and had opened escrow to affect the ultimate sale and transfer of the project. Pursuant to the terms of the sale, the FCA CA, LLC, had agreed to assume all of the obligations of LV Palm Springs Village, LLC, under the SIA and to replace the existing security with the replacement bonds. Unfortunately, the sale of the project from the Successor Subdivider to FCA CA, LLC, did not occur.

On May 4, 2015, the Successor Subdivider submitted a letter advising: (1) the purchase and sale of the Property to the Assigned Subdivider will no longer take place, (2) that the SIA Assignment should be disregarded as null and void, *ab initio*, (3) the Original SIA should remain the governing document between the Successor Subdivider and City, and (4) requested an extension of the time period for completion of the "Works of Improvement" set forth in Section 2.1(ii) of the Original SIA to May 4, 2016.

Accordingly, staff has prepared a replacement document to function as the First Amendment to the Original SIA, which maintains the Successor Subdivider as the responsible party to performing the required obligations identified in the Original SIA and incorporates the requirement to annex the development into the City's Community Facilities District (CFD) No. 2005-1 for public safety services.

Staff recommends that the First Amendment to the Original SIA previously approved by the City Council on February 18, 2015, be disregarded as null and void, and that the City Council approve the First Amendment included as **Attachment 2** as its replacement. The First Amendment provides for a time extension to the Original SIA to May 4, 2016, for completion of the "Works of Improvements" set forth in Section 2.1(ii) of the Original SIA.

**ENVIRONMENTAL IMPACT:**

Section 15061 (b)(3) of the California Environmental Quality Act ("CEQA") Guidelines exempts activities that are covered under the general rule that CEQA applies only to projects that have the potential to cause significant effects on the environment. Where it can be seen with certainty that there is no possibility the activity in question may have a significant effect upon the environment, the activity is not subject to CEQA. The requested action requests approval of an amendment to the Subdivision Improvement Agreement for Tract Map No. 31848-1, which itself will not result in any new direct physical impacts to the environment. Therefore, the requested action is considered exempt from CEQA.

FISCAL IMPACT:

No fiscal impact at this time. Incorporating a requirement to annex the project into CFD No. 2005-1 will provide additional revenue for public safety services.

SUBMITTED:

Prepared by:



Marcus L. Fuller, MPA, P.E., P.L.S.  
Assistant City Manager/City Engineer

Approved by:



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

Attachments:

1. Letter from LV Palm Springs Village, LLC, dated May 4, 2015
2. First Amendment to Original SIA

ATTACHMENT 1

**LV PALM SPRINGS VILLAGE LLC**

c/o Lehman Brothers Holdings Inc.  
3121 Michelson Drive, Suite 200  
Irvine, CA 92612

May 4, 2015

**VIA E-MAIL AND COURIER**

City of Palm Springs  
3200 E. Tahquitz Canyon Way  
Palm Springs, CA 92262  
Attn: Marcus L. Fuller, MPA, PE, PLS  
Assistant City Manager/City Engineer

RE: Palm Springs Village – Subdivision Improvement Agreement

Ladies and Gentlemen:

Reference is made to that certain Subdivision Improvement Agreement dated December 18, 2006 and recorded on February 16, 2007 as Document No. 2007-0113033 in the Official Records of Riverside County, California (the "**Original SIA**"), by and between the City of Palm Springs, California, a municipal corporation ("**City**"), and LV Palm Springs Village LLC, a Delaware limited liability company ("**LV Palm Springs**"), as successor-in-interest to SunCal PSV, LLC, a Delaware limited liability company, relating to the development of the property described by Tract Map No. 31848-1 "Avalon" (the "**Property**"). Capitalized terms used herein and not otherwise defined shall be used herein with the meaning ascribed to such terms in the Original SIA.

Reference is also made to that certain Agreement of Purchase and Sale and Joint Escrow Instructions (Palm Springs Village) dated as of February 4, 2015, by and between LV Palm Springs and FCA CA, LLC, a Delaware limited liability company ("**Buyer**"), as amended by that certain First Amendment to Agreement of Purchase and Sale and Joint Escrow Instructions dated as of February 19, 2015 (as amended, the "**Purchase Agreement**"), with respect to the sale of that Property (the "**Sale**").

As you are aware, in connection with the Sale, LV Palm Springs and Buyer requested that the City enter into that certain First Amendment to and Assignment of Subdivision Improvement Agreement (the "**First Amendment to SIA**"), which First Amendment to SIA would only be effective upon the Close of Escrow (as defined in the First Amendment) of the transaction described in the Purchase Agreement.

As you may also be aware, the Close of Escrow did not occur and the Sale contemplated by the Purchase Agreement will no longer take place. Accordingly, the First Amendment to SIA should be disregarded as null and void, *ab initio*, and the Original SIA should remain the governing document between LV Palm Springs and the City with respect to the matters set forth therein.

May 4, 2015  
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Notwithstanding the termination of the Sale, LV Palm Springs hereby request that the City agree to an extension of the time period for completion of the "Works of Improvements" set forth in Section 2.1(ii) of the Original SIA until May 4, 2016.

If you have any questions, please feel free to contact the Elena Branzburg, Esq. at (213) 683-6129 or [elenabranzburg@gmail.com](mailto:elenabranzburg@gmail.com) or Michael Masterson at (949) 260-4675 or [michael.masterson@lehmanholdings.com](mailto:michael.masterson@lehmanholdings.com).

Sincerely,

**LV PALM SPRINGS VILLAGE LLC,**  
a Delaware limited liability company

By:   
Name: **Anthony Barsanti**  
Title: **Authorized Signatory**

cc: Eric Hoffman  
Michael Masterson  
Robert M. Keane, Jr., Esq.  
Elena Branzburg, Esq.

ATTACHMENT 2

WHEN RECORDED MAIL TO:

City of Palm Springs  
3200 E. Tahquitz Canyon Way  
Palm Springs, CA 92262

Attention: City Clerk

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(Space above this line is for recorder's use)

**FIRST AMENDMENT TO  
SUBDIVISION IMPROVEMENT AGREEMENT**

THIS FIRST AMENDMENT TO SUBDIVISION IMPROVEMENT AGREEMENT ("**First Amendment**") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2015, by and among LV PALM SPRINGS VILLAGE LLC, a Delaware limited liability company ("**Successor Subdivider**"), and the City of Palm Springs, California, a California charter city and municipal corporation ("**City**").

**RECITALS**

A. Successor Subdivider, as successor-in-interest to SunCal PSV, LLC, a Delaware limited liability company ("**SunCal**"), and the City entered into that certain Subdivision Improvement Agreement dated December 18, 2006, and recorded on February 16, 2007, as Document No. 2007-0113033 in the Official Records of Riverside County, California (the "**Original SIA**"), relating to the development of the property described by Tract Map No. 31848-1 approved by the City and filed in 2006, (the "**Property**"). Initially capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Original SIA.

B. The City has continued to extend the effectiveness of the Original SIA through a series of resolutions adopted by the City Council, and the last termination date of the Original SIA was May 4, 2015.

C. As set forth in the Original SIA, Successor Subdivider, (as successor-in-interest to SunCal), as Subdivider, has agreed to construct and install certain improvements to accommodate the development of Tract Map No. 31848-1. Pursuant to Section 4.1(a) of the Original SIA, Subdivider has provided the City with those certain bonds as required pursuant to the terms of the Original SIA, each as security for the Successor Subdivider's faithful performance of the work required under the Original SIA, including without limitation, construction of the Works of Improvement (the "**Required Securities**").

D. In accordance with the Original SIA, Subdivider installed, on the Property and on adjoining property subject to Tentative Tract Map 31848 (the "**Adjoining Property**", and together with the Property, collectively, "**Real Property**"), substantial components of the Works of Improvement that were originally inspected by the City (the "**Installed Improvements**"). Subsequent to installation of the Installed Improvements, work ceased on the Real Property and the Installed Improvements may have, in some cases, deteriorated or been vandalized, and may otherwise require repair.



E. On February 18, 2015, the City Council of the City approved that certain First Amendment to and Assignment and Assumption of Subdivision Improvement Agreement, (the "**SIA Assignment**"), to facilitate a request by the Successor Subdivider to transfer and assign the Original SIA to FCA CA, LLC, a Delaware limited liability company, ("**Assigned Subdivider**"), pursuant to a proposed purchase and sale of the Property which would, among other things, have the Assigned Subdivider assume all of the obligations of the Original SIA, replace the Required Securities with replacement securities, and extended the time period for performance of the Original SIA.

F. The SIA Assignment was effective upon the close of escrow of the purchase of the Property by the Assigned Subdivider; however, by letter dated May 4, 2015, the Successor Subdivider notified City that (1) the purchase and sale of the Property to the Assigned Subdivider will no longer take place, (2) that the SIA Assignment should be disregarded as null and void, *ab initio*, (3) the Original SIA should remain the governing document between the Successor Subdivider and City, and (4) requested an extension of the time period for completion of the "Works of Improvement" set forth in Section 2.1(ii) of the Original SIA to May 4, 2016.

## **AGREEMENT**

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows.

1. Amendment to Original SIA; Extensions of Time Periods for Performance. The Original SIA contains various dates for performance and the obligation for continuous performance by the Subdivider following the commencement of construction of the Works of Improvement (as required by Section 2.4 of the Original SIA) that have not been met and which, due to the passage of time, are not susceptible of cure and that will not be capable of cure until such time as final development plans have been approved for the Property. To address this and to extend the time period for performance of obligations under the SIA, City and Successor Subdivider hereby agree to amend the Original SIA as set forth below.

1.1 Commencement and Completion. The "**Completion Date**" as that term is used in the Original SIA shall hereby be retroactively extended from May 4, 2015, to May 4, 2016.

2. Amendment to Original SIA; Community Facilities District. Section 1.2 of the Original SIA references other obligations as identified in conditions of approval associated with the Tentative Map for Tract Map No. 31848-1, as otherwise identified on Exhibit "B" to the Original SIA. As a condition of the City's approval of this First Amendment to the Original SIA, the Successor Subdivider hereby agrees to incorporate a new condition of approval requiring Successor Subdivider's consent to the legal annexation of the Property into the City's Community Facilities District No. 2005-1 (Public Safety Services) upon request by the City, and accordingly to amend the Original SIA as set forth below.

2.1 Section 1.2(b) is hereby added to the Original SIA to read as follows:

1.2(b) Annexation to Community Facilities District (CFD) No. 2005-1 (Public Safety Services). Successor Subdivider agrees to support annexation of the Property into Community Facilities District (CFD) No. 2005-1 (Public Safety Services). Successor Subdivider further agrees to waive any right of protest or contest such annexation, provided that the amount of any assessment for any single family dwelling unit (or the equivalency

thereof when applied to multiple family, commercial or industrial) shall not exceed \$500 annually per dwelling unit or dwelling unit equivalency unit, subject to an annual consumer price index escalator. Upon request by City, Successor Subdivider shall execute and return all necessary waivers, ballots and other forms required by City to facilitate annexation of the Property into CFD No. 2005-1.

3. Effect of Amendment on Interpretation of SIA.

3.1 Terms; No Other Changes. Unless otherwise expressly indicated herein, all references in Original SIA and in this First Amendment to "this Agreement" or the "SIA" shall mean and refer to the Original SIA as modified by this First Amendment and other than the amendments and changes herein, all provisions of the Original SIA remain unmodified and in full force and effect. In the event of any conflict or inconsistency between the terms of the Original SIA and this First Amendment, the terms of the Original SIA shall control.

4. Miscellaneous Provisions.

4.1 Effectiveness. Notwithstanding anything to the contrary contained in this Assignment, this Assignment shall be null and void, ab initio, if the Close of Escrow for the sale of the Real Property to Assignor pursuant to the terms and conditions of the Transfer Agreement fails to occur on or before the Outside Closing Date (as defined in the Transfer Agreement).

4.2 Entire Agreement. This First Amendment, together with the Original SIA, constitutes the entire agreement between the parties in regards to the subject matter contained herein.

4.3 Recitals. The Recitals above are incorporated herein by reference.

4.4 Governing Law. This First Amendment shall be governed by, interpreted under, and construed and enforceable in accordance with the laws of the State of California.

4.5 Interpretation. All of the parties hereto have been represented by legal counsel of their choice are not relying on any statement of the other party in entering herein. Each party has cooperated and participated in the drafting and the preparation of this First Amendment. Hence, in any construction to be made of this First Amendment, no ambiguity shall be resolved against any party by virtue of that party's participation in the drafting of this First Amendment.

4.6 Severability. If any provision, section, paragraph, clause or sentence in this First Amendment is declared to be illegal, void, invalid, or unenforceable by a court or other authority with jurisdiction thereof, the remaining provisions, paragraphs, clauses, and sentences shall be severable and shall remain in full force and effect. The parties agree that a void or invalid paragraph, clause or provision shall not affect the validity or enforceability of the remaining provisions of this First Amendment.

4.7 Counterparts. This First Amendment may be executed simultaneously in counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.

4.8 Survival. All representations, warranties, covenants and agreements made by the parties hereunder shall be considered to have been relied upon by the parties and shall survive the execution, delivery and performance of this First Amendment and all other documents contemplated herein.

4.9 Successors and Assigns. This First Amendment shall be binding upon and inure to the benefit of the successors, assignees, personal representatives, heirs and legatees of Successor Subdivider and the City and shall be binding upon and inure to the benefit of all successors and assigns to Successor Subdivider's right, title and interest in and to the Property.

4.10 Amendment. Any amendment to this First Amendment shall not be binding unless in writing and executed by Successor Subdivider and the City.

4.11 Additional Documents. Each of the parties shall each execute and deliver to the other parties, upon demand, such further documents, and shall take such further actions as are necessary or desirable to effectuate the intent and purposes of this First Amendment.

4.12 Authority. The persons signing below represent that they have the authority to bind their respective party, and that all necessary board of directors', shareholders', partners', agency's or other approvals have been obtained.

*[Signatures on following pages]*

**IN WITNESS WHEREOF**, City and Successor Subdivider have executed this First Amendment as of the day and year first written above.

**CITY OF PALM SPRINGS**

ATTEST:

By \_\_\_\_\_  
James Thompson, City Clerk

\_\_\_\_\_   
David H. Ready, City Manager

APPROVED AS TO FORM:

\_\_\_\_\_  
Doug Holland, City Attorney

**"SUCCESSOR SUBDIVIDER"**

**LV PALM SPRINGS VILLAGE LLC,**  
a Delaware limited liability company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of [ \_\_\_\_\_ ]  
County of [ \_\_\_\_\_ ]

On \_\_\_\_\_ before me, \_\_\_\_\_ (here insert name and title of officer), personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct

WITNESS my hand and official seal.

Signature \_\_\_\_\_

(Seal)