

CITY OF SAND CITY

RESOLUTION SC 20-30, 2020

**RESOLUTION OF THE CITY OF SAND CITY AUTHORIZING THE CITY MANAGER
TO EXECUTE A SECOND AMENDMENT TO AGREEMENT REGARDING
AFFORDABLE HOUSING**

WHEREAS, the affordable housing program at the mixed-use (multi-family and commercial) building commonly referred to as 'The Independent Building' -- located at 600 Ortiz Avenue, Sand City and formerly referred to as 'The Design Center Building' -- is set forth in a prior agreement between the former Sand City Redevelopment Agency and the original property owner, the Design Center, dated June 24, 2005, and in a first amendment to that agreement dated January 2, 2008 (combined "Housing Agreements"); and

WHEREAS, the Housing Agreements currently require that the owners of the Independent Building, Mr. Don Orosco, Ms. Mary K. Orosco, and Mr. Gerard Lyles of Urban Atelier LLC ("Owner") provide ten (10) residential units in the building for occupancy at affordable rents; and

WHEREAS, the Housing Agreements establish specific formulas by which to determine the maximum rent that may be charged for each unit in the program and at what income levels potential occupants are eligible for those units; and

WHEREAS, the affordable housing program has not met the requirements set forth in the Housing Agreements in that Owner has charged occupants different amounts than those required and Owner has rented units in the affordable housing program to occupants who were not in fact eligible for the affordable units; and

WHEREAS, City staff and the City Attorney have met and conferred extensively with the Owners' representative, Richard Utic of Saratoga Capital, to rectify these discrepancies; and

WHEREAS, Saratoga Capital conducted an audit of the affordable program and has notified City/Successor Agency staff that it has repaid any amounts it overcharged any past or present income-eligible occupants; and

WHEREAS, in order to address the additional windfall Owners received as a result of not renting units at the required affordable rates, Owners have agreed to add an additional affordable unit to the affordable housing program for a period of twelve (12) years; and

WHEREAS, the City desires to add flexibility to the affordable housing program in order to avoid immediate evictions when an occupant of an affordable unit starts earning more than the income allowed under the Housing Agreements, and

WHEREAS, Owner has agreed to allow such flexibility by making additional units in the building available under the affordable housing program when an occupant of an affordable unit exceeds income requirements; and


WHEREAS, the City has determined that the proposed action is not a project as defined by the California Environmental Quality Act (CEQA)(CCR, Title 14, Chapter 3 (“CEQA Guidelines), Article 20, Section 15378). In addition, CEQA Guidelines Section 15061 includes the general rule that CEQA applies only to activities that have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. Because the proposed action and this matter have no potential to cause any effect on the environment, or because it falls within a category of activities excluded as projects pursuant to CEQA Guidelines section 15378, this matter is not a project. Because the matter does not cause a direct or any reasonably foreseeable indirect physical change on or in the environment, this matter is not a project.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Sand City that the City Manager is authorized to execute the Second Amendment to Agreement Regarding Affordable housing attached hereto as Attachment A, and .

PASSED AND ADOPTED by the City Council of the City of Sand on this 19th day of May, 2020, by the following vote:


AYES: Council Members Blackwelder, Carbone, Cruz
NOES: None
ABSENT: None
ABSTAIN: Council Members Hawthorne, Sofer

APPROVED:



Mary Ann Carbone, Mayor

ATTEST:



Connie Horca, Acting City Clerk

REQUESTED BY AND WHEN
RECORDED MAIL TO:

City of Sand City
1 Pendergrass Way
Sand City, CA 93955

APN:011-236-026

SPACE ABOVE THIS LINE FOR RECORDER'S USE

***Exempt from fee pursuant to Government Code Section 6103**

SECOND AMENDMENT TO AGREEMENT REGARDING AFFORDABLE HOUSING

This Second Amendment to Agreement Regarding Affordable Housing (**"Second Amendment"**) is made as of the 19th, day of May, 2020 (**"Effective Date"**) in the County of Monterey, State of California by and between the City of Sand City, a municipal corporation (**"City"**), and Urban Atelier LLC, a California limited liability company (**"Owner"**) with reference to the following recitals. Successor Agency and Owner are collectively referred to in this Agreement as **the Parties**.

RECITALS:

- A. On June 24, 2005, the Sand City Redevelopment Agency, a public agency organized and existing pursuant to the Community Redevelopment Law of the State of California (**"Redevelopment Agency"**) and Design Center, LLC, a California Limited Liability Company (**"Design Center"**) entered into an agreement regarding affordable housing, recorded on June 28, 2005 as Document 2005-065075, Monterey County Records (**"Affordable Housing Agreement"**), which provided in part that the Design Center, currently referred to as "the Independent", provide ten (10) residential units in the project for occupancy at affordable rents.
- B. On January 2, 2008, the Design Center and the Redevelopment Agency executed a First Amendment to the Agreement, which *inter alia* designated specific units to be maintained for occupancy at affordable rents ("First Amendment"). The Affordable Housing Agreement and First Amendment are referred to herein as **"Housing Agreements"**.
- C. The Housing Agreements establish formulas by which the Parties are to determine: (1) the maximum rent which may be charged for each unit in the Program (**"Affordable Rent"**); and (2) at what income levels potential occupants are eligible for those units (**"Income Eligibility"** or **"Income Eligible"**) (combined, **"the Affordable Housing Program"**).
- D. On October 30, 2009, Owner took ownership of the Property. In December of 2011, the Successor Agency to the Sand City Redevelopment Agency ("Successor Agency") was

established upon dissolution of the Redevelopment Agency. According to the terms of the Housing Agreements, the requirements to manage the Affordable Housing Program are binding upon the Owner and all covenants established in the Housing Agreements are for the benefit of and run in favor of both the Successor Agency and the City of Sand City (“**City**”).

E. Parties agree that the Affordable Housing Program has not met the goals required by the Housing Agreements in at least two areas: (1) Owner either undercharged or overcharged at different amounts than those set forth in the Housing Agreements as Affordable Rents; and (2) Owner relied on renter information and rented units in the Affordable Housing Program to Occupants that were not Income Eligible under the terms of the Agreements. Parties have met and mutually agreed to update data and the Owner’s site program in order to find an equitable solution for on-going operations.

F. Owner has conducted an audit of the Affordable Housing Program and Parties have reached an agreement that preserves the goals of the Affordable Housing Program. To address any overcharge of rents to individual Occupants, Owner has located and repaid any amount overcharged to past or present income eligible Occupants who either are or have been overcharged since Owner took ownership. To address the additional amounts Owner has received in overcharging for Affordable units, Owner has agreed to include an additional unit in the Affordable Program.

G. The Parties also desire flexibility in the units made available under the Affordable Housing Program in order to allow for a more compassionate solution than automatic eviction when an occupant in an affordable unit in the Program (“**Occupant**”) exceeds Income Eligibility.

AGREEMENT:

NOW THEREFORE, FOR VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Owner agrees to add one additional one-bedroom apartment to the Affordable Housing Program (“**New Unit**”), increasing the number of affordable units available under the Program from ten (10) units to eleven (11). The New Unit, shall be rented to a Moderate Income household, at the affordable rates for Moderate income units set forth in the Housing Agreements for a period of twelve (12) years beginning on the date of this Second Amendment. The New Unit will be made available to a Moderate Income Household within thirty (30) days of the date of this Second Amendment.
2. The Parties agree that if an Occupant’s income exceeds that allowed under the Housing Agreements by an amount not to exceed one-hundred and ten percent (110 %) of Income Eligibility, the Occupant may remain in the unit for a period of up to two (2) years from the date such income increase is determined. Provided, however, that if the Occupant exceeds one-hundred and ten percent (110%) of Income Eligibility during the two-year period, the Occupant will no longer be eligible for the unit. This provision will not change the method by which Income Eligibility is determined upon move-in.
3. The Parties agree that when an Occupant is determined to no longer be Income Eligible because either: (1) the Occupant’s income exceeds one-hundred and ten percent (110%) of the

Income Eligibility; or (2) two (2) years have passed since the determination that the Occupant's income exceeded Income Eligibility (but as set forth in section 2 above the Occupant did not exceed one-hundred and ten percent (110%) of Income Eligibility), then such Occupant may remain in his or her unit and begin to pay market rate rent, and Owner will make the next unit which comes available a replacement Affordable Unit under the Affordable Housing Program as soon as it is available ("**Additional Flexible Unit**"). Owner will ensure that the Additional Flexible Unit is of the same type (e.g., studio/1-Bedroom) as occupied by the Occupant who is no longer Income Eligible, and will rent the Additional Flexible Unit for not more than the maximum rent amount required for such unit type, as set forth in the Housing Agreements. Owner agrees to immediately notify the City when an Additional Flexible Unit is made available under this section. In order to ensure that enough inventory is available to provide affordable housing under the Affordable Housing Program, in the event more than fifty percent (50%) of all units in the Independent Building are sold to a party other than Owner, Parties agree to meet and confer to revise this section in order to return to the fixed set of affordable units required by the Housing Agreements. In the event that less than eleven (11) units are made available in the Affordable Housing Program for a period of two (2) months or longer (or, after twelve (12) years from the date of this Agreement, ten (10) units) Owner agrees to pay to the City, starting on the first day the unit was charged market rent, the difference between the market rent and the Affordable Rent on each of the previously affordable units being offered at market rate rent until such time as eleven (11) units are again available under the Affordable Program at affordable rents.

4. This Second Amendment does not alter the requirement that Owner continue to hold title to the ten (10) units designated as affordable in the First Amendment in a single ownership throughout the term of the Housing Agreements.

5. Owner will provide a report to the City on or before June 1 of every year which sets forth: (a) which specific units are being rented as affordable; (b) the annual income and household size of the Occupants; (c) the rent category of the unit (i.e., low income; moderate etc.) and maximum rent permitted for each unit; (d) the actual rent charged to each unit; (e) which Occupants have exceeded the Income Eligibility by less than 110% and for how long; (f) whether during the preceding year eleven units were not available under the Affordable Housing Program and if so for how long (after twelve years from the date of this Second Amendment this number drops to ten); and (g) the number of units in the Independent building owned by Owner during the preceding year.

6. Miscellaneous.

- (a) Governing Law. This Second Amendment is governed by the laws of the State of California and any questions arising thereof shall be construed or determined in accordance with such laws. Any action to enforce or interpret this Second Amendment shall be brought in the Superior Court of the State of California, County of Monterey, or, in the case of any federal claims, in the United States District Court, Central District of California.
- (b) Attorney's Fees. If either the City or Owner brings an action to enforce the terms and conditions of this Second Amendment or to declare its rights hereunder, the

losing or defaulting party shall pay to the prevailing party its attorney's fees and all of its costs and expenses incurred in connection with the prosecution and defense of such action.

- (c) Mediation. Prior to the commencement and continuation of any civil action or suit (an "Action"), any and all claims, controversies or disputes arising out of or relating to this Second Amendment, or the breach thereof, which remain unresolved after good-faith and direct negotiations between the authorized decision maker(s) of the Parties, an Action shall be submitted to confidential non-binding mediation with written notice in accordance with the rules and procedures for mediation then in effect under the Judicial Arbitration and Mediation Service, Inc. (JAMS). Mediation shall be a condition precedent to commencing and continuing an Action based on this Second Amendment by either Party, insofar as: (i) submitting the matter to a mediation in accordance with this provision shall be required prior to a Party being able to obtain any affirmative relief or remedy in an Action; and (ii) a Party that initiates an Action prior to submitting the matter to a mediation in accordance with this provision, or a Party that fails to participate in a mediation initiated by the other Party in accordance with this provision, waives any right to recover its fees and costs (if a prevailing party in the Action) otherwise provided for in this provision. The mediation condition precedent shall be deemed satisfied: (i) as to a particular Party if that Party attempted to mediate the matter in accordance with this provision but the other Party failed to participate in the attempted mediation; or (ii) as to both Parties if the Parties have failed to conclude the mediation, or otherwise fully resolve the disputed matter(s), within forty-five (45) days from the date of their participation in the first mediation session. Unless otherwise agreed by the Parties, the mediation and/or any Action based on this Second Amendment shall take place in Monterey, California with the intent of the Parties to resolve all disputes in one forum, whether it be a multi-party mediation or arbitration provisions or a two-party arbitration governed by this Second Amendment, with claims and disputes being heard by the same mediator(s) in a single proceeding. Except as is otherwise provided in this provision, the prevailing party in any Action based on this Second Amendment shall be entitled to recover all of its reasonable costs and expenses incurred in connection with the dispute, including, but not limited to, expert fees, consultant fees, mediator's fees, mediation costs and expenses, and attorneys' fees.
- (d) Invalidity. Should any portion of this Second Amendment be declared invalid or unenforceable, then such portion shall be deemed to be severed from this Second Amendment and shall not affect the remainder thereof.
- (e) Successors and Assigns. All provisions of this Second Amendment, including the benefits and the burdens, will run with the land and shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of the Successor Agency, the City and Owner.

- (f) Entire Agreement. Except as provided herein, all terms and conditions of the Housing Agreements shall remain in full force and effect. Any terms used herein but not separately defined herein shall have the meaning of those terms as defined in the Housing Agreements.
- (g) Indemnification/Hold Harmless. To the fullest extent permitted by law, Owner agrees to indemnify and hold harmless the Successor Agency and/or the City and any and all of their officials, employees, contractors and agents ("**Indemnified Parties**") from and against any and all claims, losses, liabilities, damages, costs and expenses, including legal counsel's fees and costs, caused in whole or in part by the negligent act, error or omission of Owner, its officers, agents, employees or subconsultants in the performance of services under this Agreement. Provided that Owner shall not be obligated under this Agreement to indemnify for claims or actions arising from the negligence of the Successor Agency and/or the City, or from the negligence of any or all of their officials, employees, contractors and agents. With respect to third party claims against the Owner, Owner waives any and all rights to express or implied indemnity against the Indemnified Parties. In the event the Indemnified Parties are made a party to any action, lawsuit, or other adversarial proceeding arising from the performance of the services encompassed by this Agreement, and upon demand by the City and/or the Successor Agency, Owner shall defend the City and/or the Successor Agency with counsel of its choice at Owner's cost or, at City's or Successor Agency's option, shall reimburse the City and/or Successor Agency for its costs of defense, including reasonable attorney's fees and costs incurred in the defense of such matters to the extent the matters arise from, relate to or are caused by Owner's negligent acts, errors or omissions.
- (g) Release of Claims. By executing and implementing this Agreement, the City releases and forever discharges Owner from any claims City may have against Owner arising out of the violations of the prior Housing Agreements as set forth in Recitals E and F of this Agreement.

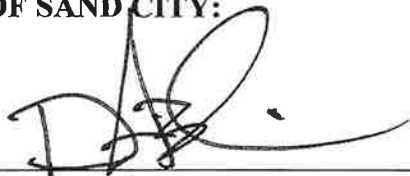
signature pages follow

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date(s) and year set forth below.

CITY OF SAND CITY:

Dated: MAY 21, 2020

By:



Aaron Blair, City Manager

ATTEST:



Connie Horca, Acting City Clerk

OWNER:

Urban Atelier LLC, a California limited liability company

By: The OROSCO FAMILY TRUST dated
June 28, 1977, as amended, Member

Dated: _____

By:

Donald B. Orosco, Co-Trustee

Dated: _____

By:

Mary K. Orosco, Co-Trustee

By: Lyles United, LLC, A Delaware limited liability
company, Member

By:

Gerald V. Lyles, President

Dated: _____

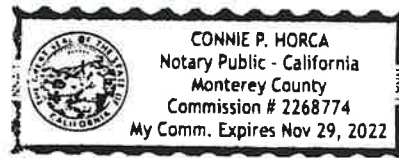
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of Monterey)

On MAY 21, 2020, before me, CONNIE P. HORCA, a Notary Public, personally appeared AARON D. BLAIR, 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 

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

The land referred to is situated in the County of Monterey, City of Sand City, State of California, and is described as follows:

All of Tract No. 1498, Design Center, in the City of Sand City, County of Monterey, State of California, as shown on map filed January 23, 2008 in Volume 24, Page 16, of Maps of Cities and Towns, in the office of the County Recorder of said county,