



**DISCUSSION ITEM**

**Agenda Item # 1**

**AGENDA REPORT SUMMARY**

**Meeting Date:** November 02, 2021

**Subject:** Proposed Settlement Agreement Between 40 Main Street Offices, LLC, and the City of Los Altos

**Prepared by:** Arthur Friedman, Partner at Sheppard Mullin

**Approved by:** Gabriel Engeland, City Manager

**Attachment(s):**

1. Proposed Settlement Agreement Between 40 Main Street Offices, LLC, and the City of Los Altos

**Fiscal Impact:**

If approved by the City Council, the proposed settlement agreement will pay 40 Main Street Office, LLC (“Developer”), \$1.2 million to fully and finally resolve all claims related to or arising from the City’s prior denial of Developer’s SB 35 project application and subsequent litigation, including without limitation Developer’s takings claims alleging \$4 million damages, exclusive of potential liability for accrued interest and litigation expenses. These funds will come from the City’s General Fund.

In the event that the Developer applies for a qualifying, four-story discretionary project in lieu of the SB 35 project, and the City approves that project, Developer would qualify for waivers of otherwise applicable City fees to a maximum amount of \$800,000.

**Environmental Review:**

Not applicable.

**Staff Recommendation:**

Staff recommends that the City Council approve the proposed settlement agreement.

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City Manager

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### **Purpose**

The City Council is considering whether to approve a proposed settlement agreement between the City and 40 Main Street Offices, LLC (“Developer”) to resolve all remaining claims of Developer against the City relating to or arising from the City’s previous denial of Developer’s SB 35 permit application to construct a five-story, mixed use project located at 40 Main Street, and to provide incentives to Developer to apply for a four-story discretionary project in lieu of the permitted five-story SB 35 project.

### **Background**

Developer applied for a permit to construct a five-story, mixed use project at 40 Main Street under Senate Bill 35 (“SB 35”), a state law providing for streamlined, ministerial approval of qualifying housing projects. (*See* Gov. Code § 65913.4.) The City denied the permit on grounds that the project did not meet the requirements of SB 35.

In June 2019, Developer filed a petition for a writ of mandate in Santa Clara County Superior Court challenging the City’s denial of the project under state housing laws. In May 2020, the trial court ruled that the City’s denial violated SB 35, the Housing Accountability Act, and the State Density Bonus Law, and it issued a writ of mandate directing the City to issue the requested SB 35 permit. The trial court determined that the City acted in bad faith in denying Developer’s SB 35 application.

In July 2020, the City filed a notice of appeal. Soon thereafter, the trial court ordered the City to post a \$7 million appeal bond under the Housing Accountability Act. In September 2020, rather than post the bond, the City withdrew its appeal and paid Developer claimed damages that had accrued during the pendency of the appeal. At the same time, the City Council rescinded its previous denial of the project and granted the SB 35 permit consistent with the trial court’s writ.

In October 2020, Developer filed a post-judgment motion seeking leave to amend its petition to add new causes of action for unconstitutional taking of private property and wrongful use of administrative proceedings. The new takings claims sought \$4 million in damages arising from the period of delay spanning from the City’s denial of Developer’s application to the City’s filing of its notice of appeal in the writ proceeding (the period of alleged delay damages that fell outside the scope of the statute requiring a bond to support the City’s appeal.) Because final judgment had already been entered, the trial court denied Developer’s motion.

In January 2021, Developer threatened to bring a new lawsuit in federal court to pursue its takings claims, including claims for regulatory taking without just compensation in violation of the Fifth Amendment and denial of due process in violation of the Fourteenth Amendment (“Takings Claims”). Developer and the City thereafter commenced settlement discussions



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designed to avoid litigation if possible, and to encourage Developer to apply for a new, discretionary project limited in height to four stories, in lieu of the authorized SB 35 project.

**Discussion/Analysis**

Under the proposed settlement agreement, the City shall pay Developer \$1.2 million to fully and finally resolve all claims related to or arising from the City’s prior denial of Developer’s SB 35 project application and subsequent litigation, including without limitation Developer’s takings claims alleging \$4 million damages, exclusive of potential liability for accrued interest and litigation expenses.

Additionally, the settlement agreement provides multiple incentives to Developer to apply for a new discretionary project in lieu of the authorized SB 35 project, limited in height to a maximum of four stories. First, the City’s cash payment provides up-front funding required to facilitate Developer’s contemplated four-story discretionary project. Second, in the event that the Developer applies for a qualifying, four-story discretionary project in lieu of the SB 35 project, and the City approves that project, Developer would qualify for waivers of otherwise applicable City fees to a maximum amount of \$800,000. Under the settlement agreement, the City retains its full and complete discretionary authority in considering any new discretionary project application from Developer.

**Recommendation**

Staff recommends that the City Council approve the proposed settlement agreement.

**SETTLEMENT AGREEMENT**

This Settlement Agreement (“Settlement Agreement”) is entered into as of October 12, 2021 (“Effective Date”), between 40 Main Street Offices, LLC (“Developer”) on the one hand, and the City of Los Altos (“City”), on the other. Developer and City are each individually referred to as a “Party” and are collectively referred to as the “Parties.”

**RECITALS**

Whereas, on or about November 8, 2018, Developer applied to the City for streamlined ministerial approvals pursuant to SB 35 to construct a five-story, mixed-use building with office space on the ground floor and residential units on the floors above at 40 Main Street in downtown Los Altos (the “SB 35 Project”).

Whereas, on or about April 23, 2019, the City denied Developer’s SB 35 Project application.

Whereas, on or about June 12, 2019, Developer filed a petition for writ of mandate in the Santa Clara County Superior Court (“trial court”) to set aside the City’s denial and order the City to approve Developer’s SB 35 Project.

Whereas, in May 2020, the trial court issued a writ of mandate directing the City to set aside its denial and approve Developer’s SB 35 Project.

Whereas, in July 2020, the City filed a notice of appeal of the trial court’s decision. Soon thereafter, the trial court ordered the City to post a \$7 million appeal bond under the Housing Accountability Act.

Whereas, in September 2020, rather than post the bond, the City withdrew its appeal and paid Developer \$490,001.00 in full satisfaction of all delay damages that had accrued during the pendency of the City’s appeal. At the same time, the City rescinded its previous denial and granted the SB 35 Project permit.

Whereas, in October 2020, Developer filed a post-judgment motion seeking leave to amend its petition to add new causes of action for unconstitutional taking of private property and wrongful use of administrative proceedings. Developer’s proposed new claims sought \$4 million in damages arising from the period of delay spanning from the City’s denial of Developer’s SB 35 Project application to the City’s filing of its notice of appeal in the writ proceeding.

Whereas, on December 29, 2020, the trial court denied Developer’s post-judgement motion for leave to amend its petition in the writ proceeding.

Whereas, Developer has threatened to bring a new lawsuit in federal court to pursue claims against the City for regulatory taking without just compensation in violation of the Fifth Amendment and denial of due process in violation of the Fourteenth Amendment for alleged damages arising from the period of delay spanning from the City’s denial of Developer’s SB 35

Project application to the City's filing of its notice of appeal in the writ proceeding ("Takings Claims").

Whereas, the City denies any liability to Developer arising from the Takings Claims.

Whereas, without concession to any claims of fault, responsibility or liabilities to each other, the Parties wish to minimize their respective risks and avoid costly and protracted litigation, while simultaneously incentivizing Developer to construct an alternative, four-story discretionary project at 40 Main Street ("Discretionary Project") instead of the approved SB 35 Project.

**NOW THEREFORE**, in consideration of the mutual promises contained herein, and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

### **AGREEMENT**

1. **City's Payment to Developer.** Within fourteen (14) business days after the effective date of the Settlement Agreement, the City will pay to Developer the sum of one million two hundred thousand dollars (\$1,200,000).
2. **City's Financial Incentive for Discretionary Project.** Developer will have the right to submit applications to the City for a new Discretionary Project in lieu of the approved SB 35 Project. To qualify for the waivers described in this section, the Discretionary Project shall not be subject to ministerial approvals and may be up to a maximum of four stories in height, defined as no greater than forty-six (46) feet in height to the roof deck of the building, inclusive of, without limitation, any and all applicable density bonuses, incentives or waivers, but not including parapets, elevator shafts, mechanical and other related building equipment located on the roof deck. The City will process any applications for the Discretionary Project in accordance with its ordinary planning and development processes, and it will have no obligation to approve the Discretionary Project. The Discretionary Project will be subject to all applicable laws, including without limitation the Planning and Zoning Law, the California Environmental Quality Act (CEQA), and applicable building codes. If the City, in its discretion, approves the Discretionary Project, then it will provide a waiver of otherwise applicable fees and costs for the Discretionary Project up to a maximum amount of eight hundred thousand dollars (\$800,000).
3. **Releases.**
  - a. **Mutual General Release.** Except with respect to the obligations created by or arising from this Settlement Agreement, each of the Parties on behalf of themselves and each of their respective successors, heirs, assigns, councilmembers, partners, officers, officials, directors, shareholders, trustees, beneficiaries, insurers, employees, staff, agents and persons and entities holding beneficial interests, hereby release and forever discharge each other, and each of their respective successors, heirs, assigns, councilmembers, partners, officers, officials, directors, shareholders, trustees, beneficiaries, insurers, employees, staff, agents and persons and entities holding beneficial interests from all claims, demands, causes of action, lawsuits, arbitrations, or other legal or administrative proceedings, damages, costs, expenses, or liabilities, whether known

or unknown, suspected or claimed, existing now or which may exist in the future, relating to or arising from the City's denial of Developer's SB 35 Project and subsequent litigation relating to the City's denial of Developer's SB Project, including, without limitation, the Takings Claims.

**b. Waiver.** The Parties acknowledge the risk that, subsequent to the execution of the Settlement Agreement, they may discover, incur, or suffer damages based upon claims which arise from facts and claims alleged that were unknown or unanticipated at the time this Settlement Agreement was executed. The Parties acknowledge that they are assuming the risk of such unknown and unanticipated claims and agree that this Settlement Agreement applies to such unknown and unanticipated claims. Therefore, the Parties expressly waive the benefits of California Civil Code § 1542, which provides:

**A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.**

**4. No Commitment as to Future Approvals or CEQA.** Nothing in this Settlement Agreement shall be construed as an approval of the Discretionary Project or as a commitment to grant or issue any future approval for the Discretionary Project. Developer acknowledges and agrees that nothing in this Settlement Agreement limits City's discretion, in any manner, with respect to the Discretionary Project. Developer further acknowledges that the City is the lead agency under CEQA, and that the City retains full discretion and independent judgment under CEQA to determine the appropriate form of environmental review and to make environmental findings for the Discretionary Project.

**5. Incorporation of Recitals.** The Recitals contained in this Settlement Agreement are hereby incorporated into this Settlement Agreement as if fully set forth herein.

**6. Entire Settlement Agreement.** This Settlement Agreement constitutes the full and entire agreement among the Parties and each Party acknowledges that there are no representations, warranties, agreements, arrangements or undertakings, oral or written, between the Parties relating to the subject matter of this Settlement Agreement, which are not fully expressed herein.

**7. No Admission of Liability.** The Parties understand, acknowledge, and agree that this Settlement Agreement represents a settlement of disputed claims and that, by entering into this Settlement Agreement, no Party admits or acknowledges any fault, liability or wrongdoing.

**8. Attorneys' Fees.** The Parties shall each bear their own costs and attorney fees incurred in connection with this Settlement Agreement.

**9. Warranty of Authority.** Each individual signing this Settlement Agreement warrants and represents that he or she has full capacity and authority to execute the Settlement Agreement on whose behalf he or she so signed.

**10. Successors and Assigns.** This Settlement Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective, successors and assigns.

**11. Drafting Acknowledgment.** By executing the Settlement Agreement, the Parties agree that any construction of the intent of the Parties, or language hereof, to be made by a court of law shall be neutral, and that no ambiguity as to any of the terms or provisions of the Agreement shall be construed against any of the Parties hereto.

**12. Comprehension of Terms.** The Parties warrant and represent that they have read this Settlement Agreement in full, have fully understood each and every provision hereof and their significance, are entirely satisfied with the terms of this Settlement Agreement, and agree to be bound by all terms and provisions hereof.

**13. No Other Representations.** No representations, oral or otherwise, express or implied, other than those contained herein, have been made by any of the Parties, or their representatives, and by executing this Settlement Agreement, each of the Parties warrants and represents that the Settlement Agreement is made and entered into without reliance upon any statements or representations of the other Parties, or in reliance upon any statements or representations made by any representatives or affiliates of the Parties, or by any others, whether or not acting for, or on behalf of, any of the Parties.

**14. Governing Law.** The rights and obligations of the Parties hereunder shall be governed by, construed, and enforced in accordance with the laws of the State of California, without regard to conflict of law principles.

**15. Counterparts.** This Settlement Agreement may be executed in one or more counterparts, with the same force and effect as if executed in one complete document.

**16. Email Signature Deemed Original.** This Settlement Agreement may be signed and delivered by electronic mail, and such electronically mailed documents shall be deemed originals and binding upon the signatories upon receipt by the Party to whom the electronic mail is sent.

**17. Severability.** If any provision, paragraph, clause or sentence in this Settlement Agreement 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 Settlement Agreement.

IN WITNESS WHEREOF, this Settlement Agreement has been entered into by and between the Parties as of the Effective Date.

**40 MAIN STREET OFFICES, LLC:**

**CITY OF LOS ALTOS:**



**BY:**  
Gunn Management Group, Inc.,  
Managing Member

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**BY:** Gabriel Engeland  
City Manager  
City of Los Altos

**Approved as to Form:**

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Counsel for City of Los Altos



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Counsel for 40 Main Street, LLC