



STAFF REPORT

Approved and Forwarded to
City Council.


Bryan H. Montgomery, City Manager

Date: January 10, 2016
To: Bryan H. Montgomery, City Manager
From: Dwayne Dalman, Economic Development Manager
Subject: **Resolution authorizing City Manager to execute a Termination Agreement and Deed in Lieu of Foreclosure with Manuel's Five Star Restaurant, Inc. for property located at 3070 Main Street, Oakley, California**

Background and Analysis

3070 Main Street is a two-story commercial building located in downtown Oakley on the corner of Main Street and Vintage Parkway, across from City Hall. The building was constructed in 2013 by the former Oakley Redevelopment Agency, and leased to Manuel's Five Star Restaurant, Inc., who operated the Carpaccio's restaurant.

The restaurant has had periods of profitability, but has also had periods of low sales and declining profitability. In 2015, the City assisted the restaurant owner/operator, Manuel Munoz, by hiring a restaurant consultant to help identify ways to increase efficiency, sales and profitability. Mr. Munoz implemented some of the recommended changes, but continued to experience a decline in sales and profitability. In fall 2016, Mr. Munoz approached the City to discuss the termination of his agreements and a closing date for the restaurant. At the time, Mr. Munoz stated his desire to stay open during the holidays and through February 15th, in order to accommodate numerous events and parties that had already been scheduled.

Termination Agreement

At the time that the restaurant was constructed, numerous agreements were entered into between the City and Mr. Munoz, including Loan Agreements, Promissory Notes and Development and Disposition Agreements. As Mr. Munoz was making mortgage, rather than lease payments, foreclosure would be the typical mechanism to terminate the

agreements. However, Mr. Munoz agreed to a Deed in Lieu of Foreclosure to avoid a drawn out process as well as the effect that a public foreclosure would have on employee retention and the holiday events that were already scheduled.

The Termination Agreement acknowledges that the City and Mr. Munoz (Operator) wish to terminate the duties and obligations set forth in the agreements made between both parties as a result of the building being constructed and occupied by Carpaccio's. The agreement contains the following main provisions:

- Operator forfeits all payments made toward the loan
- Operator will cease operations no later than February 15th, 2017
- Operator will pay the City rent of \$5,000 per month for the months of November, 2016 through February, 2017
- Operator will sign a Deed in Lieu of Foreclosure
- Operator may not sell the business without the written consent of the City
- The City and the Operator release and forgive each other under all obligations set forth in the Promissory Notes, Loan Agreements and Development and Disposition Agreements
- The Operator and the City shall compile and agree upon a list of equipment/fixtures owned by both parties and the Operator shall not remove any items owned by the City

Lease Proposals

In order to retain more control of the property, the City has decided to lease the building to future tenants. As was the case when Republic of Cake was replaced by Mr. Pickles in the downtown, the City has received interest from a number of restaurant operators that desired to be located in the downtown. The lease proposals and the recommended action are outlined in a separate staff report.

Fiscal Impact

The City will receive monthly rent of \$5,000 through February, 2017 per the Termination Agreement. The City will receive future rent from the space when a lease is executed with a new tenant.

Recommendation

Adopt a resolution authorizing the City Manager to execute a Termination Agreement and Deed in Lieu of Foreclosure with Manuel's Five Star Restaurant, Inc.

Attachments

1. Termination Agreement
2. Deed in Lieu of Foreclosure
3. Resolution

TERMINATION AGREEMENT

City of Oakley/Manuel's Five Star Restaurant, Inc.

THIS TERMINATION AGREEMENT is made and entered into this _____ day of _____, 2016 by and between the City of Oakley, a municipal corporation ("CITY"), and Manuel's Five Star Restaurant, Inc. and Manuel Munoz (collectively, "OPERATOR").

Recitals

- A. The parties have entered into a number of agreements and other security documents relating to a restaurant located at 3070 Main Street, Oakley, California (APN 037-200-006) referred to herein as "the property" or "the restaurant".
- B. The agreements and documents include: a Development and Disposition Agreement dated August 19, 2011; a First Amendment to Development and Disposition Agreement dated March 27, 2012; a Loan Agreement dated August 17, 2011; a Second Loan Agreement dated April 11, 2013; a Promissory Note signed by OPERATOR dated August 17, 2011 for a \$1.2 million loan; a Promissory Note dated April 11, 2013 for a \$160,000.00 loan; a Promissory Note dated May 6, 2013 for a \$600,000.00 loan; a Lease Agreement dated August 9, 2011 and a Leasehold Deed of Trust and Assignment of Rents signed by OPERATOR dated May 6, 2013.
- C. The Loan Agreement and the Promissory Note obligate OPERATOR to repay to CITY the sum of One Million Two Hundred Thousand (\$1,200,000.00), together with interest as specified. The loan was provided so that OPERATOR would have funds to construct the restaurant building on the property. Additional loans of \$160,000.00 and \$600,000.00 were made and secured by a Promissory Note or Notes. The Leasehold Deed of Trust was intended to give CITY a security interest in the restaurant building in the event that OPERATOR defaulted on the Loan Agreements, Lease Agreement, or Promissory Notes.
- D. OPEPERATOR is currently in default for payments under the Promissory Notes and the Lease Agreement in the approximate amount of \$43,088.36. The parties wish to terminate their relationships and duties and obligations to each other as specified herein.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

- 1. OPERATOR will cease doing business and close the restaurant operations on the property not later than February 15, 2017.
- 2. OPERATOR will pay CITY rent of \$5,000.00 per month for the months of November and December of 2016 and January and February of 2017. Such payments shall be due and payable on the first day of each such month. If there is a default or arrearage in any such payment, CITY shall have the right, with five calendar days' advance written notice to correct to OPERATOR, to physically secure and close the building and thus shut down the restaurant business.

3. OPERATOR will sign a Deed in Lieu of Foreclosure, and other reasonable associated documents as determined by CITY, at the time of signing this Termination Agreement. An exemplar of such a Deed in Lieu of Foreclosure document is attached hereto as EXHIBIT "A".
4. OPERATOR hereby forgives and releases to CITY any and all claims it, its owners, officers and agents may have to the restaurant building and/or to the property and to the restaurant business commonly known as "Carpaccio's Ristorante" located at the subject property.
5. CITY hereby forgives and releases OPERATOR, its owners, officers and agents, from any and all obligations under the Promissory Note, the Lease Agreement, and the Development and Disposition Agreements.
6. OPERATOR may not sell the restaurant business without the express written approval of CITY, which may determine whether to approve the proposed new tenant or not at its sole discretion. If such sale is approved by the CITY, the OPERATOR shall inform the new business that a new lease will have to be negotiated with and approved by the CITY, and that there will be no equity interest in the building associated with such transaction.
7. The OPERATOR and CITY shall conduct a walk-through inspection of the property and compile a list of items which are owned by OPERATOR and which are owned by CITY, based on a list of furniture, fixtures and inventory that is created by both parties. In the event there is any dispute as to ownership of any item, the dispute shall be submitted to the City Manager for determination. OPERATOR shall not remove any item which is determined to be owned by the CITY. Any item which OPERATOR does not remove and which has been determined to be owned by it shall be deemed to be abandoned and shall become CITY's property.
8. In consideration of this Agreement and of the forgiveness of various obligations, OPERATOR does hereby, and for its successors and assigns and any personal heirs or assigns, release, acquit and forever discharge the City of Oakley and its component agencies, officers, agents and employees, of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the OPERATOR now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen damage and the consequences thereof resulting from or to result from entering into this Termination Agreement. It is further understood and agreed that all rights under Section 1542 of the Civil Code of California and any similar law or any state or territory of the United States are hereby expressly waived. Said section reads as follows:

"1542. Certain Claims Not Affected by General Release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

The undersigned further declares that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this Release contains the entire agreement between the parties hereto, and that terms of this Release are contractual and not a mere recital.

9. CITY and its component agencies, officers, agents and employees hereby release and forgive performance by OPERATOR and its officers, agents and employees from any and all obligations of each and every of the documents referenced in the Recitals of this Agreement.

10. This Agreement shall be construed and interpreted by use of the laws of the State of California. Proper jurisdiction and venue of any litigation regarding this Agreement shall be in the Contra Costa County Superior Court or the Northern District of the U.S. District Court.
11. OPERATOR has had the opportunity to have this Agreement reviewed by legal counsel of its choosing and to request changes or amendments to its terms and provisions. Therefore, no interpretation shall be given to this Agreement which disfavors the drafter. The undersigned warrant that they have the authority of their principals to execute this Agreement on the behalf of each party.

CITY OF OAKLEY

MANUEL'S FIVE STAR RESTAURANT, INC.

By: Bryan H. Montgomery, City Manager

By: Manuel Munoz, President

APPROVED AS TO FORM:

City Attorney

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OAKLEY
AUTHORIZING THE CITY MANAGER TO EXECUTE A TERMINATION
AGREEMENT AND A DEED IN LIEU OF FORECLOSURE WITH MANUEL'S FIVE
STAR RESTAURANT, INC. FOR PROPERTY LOCATED AT 3070 MAIN
STREET, OAKLEY**

BE IT RESOLVED by the City Council of the City of Oakley that the City Manager is hereby authorized and directed to sign on behalf of the City that certain Termination Agreement and Deed in Lieu of Foreclosure between the City and Manuel's Five Star Restaurant, Inc. for property located at 3070 Main Street, Oakley.

The foregoing resolution was introduced at a regular meeting of the Oakley City held on the 10th day of January 2017, by Councilmember _____, who moved its adoption, which motion being duly seconded by Councilmember _____, was upon voice vote carried and the resolution adopted by the following vote:

AYES:

NOES:

ABSTENTION:

ABSENT:

APPROVED:

Sue Higgins, Mayor

ATTEST:

Libby Vreonis, City Clerk

Date

PURSUANT TO GOVERNMENT CODE
§6103 NO FEE IS REQUIRED FOR THE
RECORDATION OF THIS DOCUMENT

WHEN RECORDED MAIL TO:

City Clerk
City Of Oakley
3231 Main Street
Oakley, CA 94561

RECORDING REQUESTED BY:

City Manager
City Of Oakley
3231 Main Street
Oakley, CA 94561

A.P.N. 037-200-010 (formerly a portion of 037-200-006)

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

DEED IN LIEU OF FORECLOSURE

The grantee herein was the foreclosing beneficiary:

The amount of unpaid debt is \$1,894,172.70

The amount paid by the grantee is \$161,318.15

Documentary Transfer Tax is \$ 0

- () computed on full value of property conveyed, or
- () computed on full value less value of liens and encumbrances remaining at time of sale
- () Unincorporated area: (X) City of Oakley

I declare under penalty of perjury that the foregoing declaration is true and correct.

Bryan H. Montgomery
City Manager
City of Oakley, California

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, Manuel's Five Star Restaurant, Inc. hereby GRANTS to the City of Oakley, a municipal corporation, the following described real property situated in the City of Oakley, County of Contra Costa, State of California.

PARCEL ONE: Parcel A, as shown on the Parcel Map of Downtown Plaza, filed August 29, 2012, in Book 207 of Parcel Maps, Page 36, Official Records.

Excepting Therefrom:

All oil, gas, minerals or other hydrocarbon substances in, upon or under said real property, together with surface right of entry thereto, as reserved in the Deed from Diamond Properties, a California corporation, recorded December 18, 1987, Book 14079, Page 786, Official Records.

PARCEL TWO:

A non-exclusive easement for ingress and egress of vehicles and pedestrians, and parking, as an appurtenance to Parcel One above, and any part or portion thereof, to be used by the owners, customers, clients, guests and invitees of Parcel One, subject to the terms and provisions of the Parking Lot and Public Spaces Maintenance Agreements recorded May 31, 2013, in Official Records, as Instrument No. 2013-0193644.

This deed is an absolute conveyance, the grantor having sold the described land to the grantee for a fair and adequate consideration, such consideration being full satisfaction of all obligations secured by Leasehold Deed of Trust and Assignment of Rents executed by Manuel's Five Star Restaurant, Inc., a California corporation, as Trustor, Old Republic Title Company, as Trustee for the City of Oakley, a municipal corporation and its companion entities as beneficiary, dated May 6, 2013 and recorded August 2, 2013 as Instrument No. 2013-0193643-00, Official Records of Contra Costa County, State of California.

Grantor declares that this conveyance is freely and fairly made, and that there are no agreements, oral or written, other than this deed between grantor and grantee with respect to described land.

Manuel's Five Star Restaurant, Inc.

Date: _____

By: _____
Manuel Munoz, President

RESOLUTION NO. _____-10

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OAKLEY
AUTHORIZING THE CITY MANAGER TO EXECUTE A TERMINATION
AGREEMENT AND A DEED IN LIEU OF FORECLOSURE WITH MANUEL'S FIVE
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ATTEST:

Libby Vreonis, City Clerk

Date