FIFTH AMENDMENT TO MISSION BAY NORTH OWNER PARTICIPATION AGREEMENT

Dated ____________, 2014

by and between

THE SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO

and

FOCIL-MB, LLC, a Delaware limited liability company
FIFTH AMENDMENT TO MISSION BAY NORTH OWNER PARTICIPATION AGREEMENT

This Fifth Amendment to the Mission Bay North Owner Participation Agreement (this “Fifth Amendment”) dated for reference purposes only as of ______________, 2014, is by and between the Successor Agency to the Redevelopment Agency of the City and County of San Francisco, a public body organized and existing under the laws of the State of California (the “Successor Agency”), commonly known as the Office of Community Investment and Infrastructure, and FOCIL-MB, LLC, a Delaware limited liability company (the “Owner”).

RECITALS

This Fifth Amendment is made with reference to the following facts and circumstances:

A. The Redevelopment Agency of the City and County of San Francisco (the "Former Agency") and Catellus Development Corporation, a Delaware corporation ("CDC"), entered into that certain Mission Bay North Owner Participation Agreement dated as of November 16, 1998 (the "Original OPA") and recorded December 3, 1998 as Document No. 98-G477257-00 in the Official Records of San Francisco County (the "Official Records"), which was amended by a First Amendment to Mission Bay North Owner Participation Agreement (the "First OPA Amendment") dated as of February 17, 2004 and recorded March 4, 2004 as Document No. 04-H669956-00 in the Official Records, between Former Agency and Catellus Land and Development Corporation, a Delaware corporation ("CLDC"), successor in all of CDC's rights and obligations under the Original OPA; a Second Amendment to Mission Bay Owner Participation Agreement (the "Second OPA Amendment") dated as of March 16, 2004 and recorded March 30, 2004 as Document No. 04-H687625-00 in the Official Records, between Former Agency and CLDC; a Third Amendment to Mission Bay North Owner
Participation Agreement (the "Third OPA Amendment") dated as of January 18, 2005 and recorded February 16, 2005 as Document No. 2005H905201 in the Official Records, between Former Agency and the Owner, successor in interest to all of CLDC's rights and obligations under the Original OPA, as amended by the First OPA Amendment, Second OPA Amendment, and Third OPA Amendment; and a Fourth Amendment to Mission Bay North Owner Participation Agreement (the "Fourth OPA Amendment") dated as of March 15, 2005 and recorded April 7, 2005 as Document No. 2005H933682 in the Official Records, between Former Agency and Owner. The Original OPA, as amended by the First OPA Amendment, Second OPA Amendment, Third OPA Amendment and Fourth OPA Amendment, shall be referred to in this Fifth Amendment as the "North OPA". The capitalized terms used herein shall have the meaning set forth in the North OPA, unless otherwise specifically provided herein.

B. On February 1, 2012, the Former Agency was dissolved pursuant to the provisions of California State Assembly Bill No. 1X 26 (Chapter 5, Statutes of 2011-12, First Extraordinary Session) ("AB 26"), codified in relevant part in California’s Health and Safety Code Sections 34161 – 34168 and upheld by the California Supreme Court in California Redevelopment Assoc. v. Matosantos, No. S194861 (Dec. 29, 2011). On June 27, 2012, AB 26 was subsequently amended in part by California State Assembly Bill No. 1484 (Chapter 26, Statutes of 2011-12) ("AB 1484") (together, AB 26 and AB 1484 are referred to as the "Redevelopment Dissolution Law").

C. Ordinance 215-12, the San Francisco Board of Supervisors acknowledged the separate legal status of the Successor Agency (also commonly known as the Office of Community Investment and Infrastructure, or "OCII") as the successor agency to the
Redevelopment Agency; created the Successor Agency Commission; and delegated to the Successor Agency Commission, among other powers, the authority to act in place of the Redevelopment Agency to implement, modify, enforce and complete surviving redevelopment projects, including, without limitation, three major integrated, multiphase revitalization projects, which are the Mission Bay North and Mission Bay South Projects, the Hunters Point Shipyard/Candlestick Point Project, and the Transbay Transit Center Project (collectively, the “Major Approved Development Projects”), and which are subject to enforceable obligations requiring the implementation and completion of those projects.

D. As required by AB 26, the Mayor appointed, and the Board of Supervisors confirmed, four members to the Oversight Board of the City and County of San Francisco (“Oversight Board”) (Cal Health and Safety Code Section 34179(a)(10)). The Bay Area Rapid Transit District, the Chancellor of the California Community Colleges, and the County Superintendent of Education, each appointed one of the remaining three members of the Oversight Board.

E. With respect to the Major Approved Development Projects, Ordinance 215-12 granted the Successor Agency Commission authority to approve all contracts and actions related to the assets transferred to or retained by the Successor Agency, including, without limitation, the authority to exercise land use, development and design approval authority for the Major Approved Development Projects. The authority of the Successor Agency Commission, with respect to the Major Approved Development Projects includes the authority to approve amendments to enforceable obligations as allowed under Redevelopment Dissolution Law, subject to any required approval by the Oversight Board, consistent with applicable enforceable obligations.
F. Ordinance 215-12 acknowledged that the Successor Agency has retained enforceable obligations for the development of affordable housing, including Retained Housing Obligations as defined therein, required to fulfill the Major Approved Development Projects.

G. Ordinance 215-12 provides that the Successor Agency Commission shall not modify the Major Approved Development Projects or the Retained Housing Obligations in any manner that would decrease the commitment of property tax revenue for affordable housing or materially change the obligations to provide affordable housing without obtaining the approval of the Board of Supervisors and any required approval of the Oversight Board.

H. Accordingly, the Successor Agency assumed the obligations under the North OPA, which remains in effect. Under the Redevelopment Dissolution Law, a successor agency has the continuing obligation, subject to certain review by an oversight board and the State of California’s Department of Finance (“DOF”), to implement “enforceable obligations” which were in place prior to the suspension of such redevelopment agency’s activities on June 28, 2011, the date that AB 26 was approved. The Redevelopment Dissolution Law defines “enforceable obligations” to include bonds, loans, judgments or settlements, and any “legally binding and enforceable agreement or contract that is not otherwise void as violating the debt limit or public policy” (Cal. Health & Safety Code § 34171(d)(1)(e)), as well as certain other obligations, including but not limited to requirements of state law and agreements made in reliance on pre-existing enforceable obligations. The North OPA meets the definition of “enforceable obligations” under the Redevelopment Dissolution Law.

I. Owner is the current owner of an approximately 41,000 square foot parcel located in the City and County of San Francisco (“City”), State of California, commonly
referred to as Mission Bay Block N4 Parcel 3, as more particularly described on Exhibit A attached hereto ("Block N4P3" or the "Site"). Block N4P3 is the last undeveloped parcel in the Mission Bay North Plan Area ("North Plan Area"). The land use designation for Block N4P3 in the Mission Bay North Redevelopment Plan ("North Plan") is Mission Bay Residential, which allows residential and neighborhood-serving retail as principally permitted uses.

J. Under the North OPA, 20% of the total housing units in Mission Bay North are required to be Affordable Housing Units. These units are developed through a combination of rental and ownership units developed by the Owner and its developer transferees ("Owner Inclusionary Units"), and by OCII-sponsored, nonprofit developers on sites conveyed by the Owner to OCII. At full build out, 593 of the 2,964 total housing units in North Plan Area are required to be Affordable Housing Units. The Owner is required to build 245 of the 593 total Affordable Housing Units. Of the 245 total Affordable Housing Units developed by the Owner, the North OPA requires the Affordable Housing Units to be divided between Owner Very Low Income Units (98 units), Owner Low Income Units (35 units) and Owner Moderate Income Units (112 units).

K. As of January 2014 a total of 2,835 units have been constructed in the North Plan Area with 672 units, or 23.7% of the total units, of those units Affordable Housing Units. Of the Affordable Housing Units, 407 are OCII-sponsored units, and 265 were developed by the Owner or its transferee. The Owner has exceeded its obligation to build Owner Very Low and Owner Low Income Units, but is still required to build an additional 80 Owner Moderate Income Units.
L. Pursuant to the North OPA these remaining 80 units must be For-Sale Owner Moderate Income Units targeting moderate-income households earning up to 110% of area median income ("AMI"). Block N4P3, as described in Recital I, is the last remaining developable parcel in the North Plan Area. As a result, it is the location where the Owner is required to construct its remaining Affordable Housing Units. Overall, the Owner is permitted to build up to 129 For-Sale Owner Moderate Income Units on Block N4P3, of which 80 units (or 62% of the total project) are required to be affordable to households at 110% of AMI ("N4P3 Inclusionary Requirement").

M. There will be additional affordable housing constructed in Mission Bay South Redevelopment Project Area ("South Plan Area") under the Mission Bay South Owner Participation Agreement ("South OPA"), with at least 1,108 affordable units required to be built by OCII-sponsored non-profits on land donated by the Owner. However, it is anticipated that all of the new OCII-sponsored affordable units in the South Plan Area will target very low or low income households (maximum of 70% AMI) since currently there are no affordable housing financing tools, such as tax credit or bond financing, available for moderate income development. In addition, the only Owner requirement for inclusionary housing in the South Plan Area is on Block 1 and any affordable units constructed on that site will be affordable to low income households at 60% AMI. Therefore, the only opportunity for additional moderate income housing in Mission Bay is in the North Plan Area.

N. A previous third party developer was unable to finance a project on Block N4P3 with the existing N4P3 Inclusionary Requirement and since the North OPA was adopted in 1998 no other developers that have expressed interest to OCII staff have pursued development of Block N4P3. A study prepared by The Concord Group, a San Francisco-based real estate...
market research firm, in 2013 confirmed that constructing 80 For-Sale Owner Moderate Income Units on Block N4P3 with 49 Market Rate Residential Units is not financially feasible under current or foreseeable market conditions and would require a substantial subsidy.

O. There is a strong need for additional moderate income housing in Mission Bay and San Francisco, and Block N4P3 is the only site in Mission Bay to provide moderate income housing.

P. The Owner has proposed this fifth amendment to the North OPA (“Fifth Amendment”) to allow N4P3 to be developed with 45 For-Rent Owner Moderate Income Units at 120% AMI and 84 For-Rent Market Rate Residential Units (N4P3 Project”). The Owner would also donate the land to a third party developer to help the N4P3 Project achieve financial feasibility. With the change to rental from for-sale, reduction in affordable units, and increase of the AMI levels, the project would be financially feasible without other additional subsidies, other than the land donation and an equity investment comparable to other non-subsidized housing projects.

Q. At full buildout, with the Fifth Amendment, the Owner Moderate Income Unit requirement would be reduced by 35 units and the units would be For-Rent instead of For-Sale. However, the overall total number of Affordable Housing Units constructed by the Owner in Mission Bay North would be 65 Affordable Housing Units more than required under the North OPA. The resulting percentage of Affordable Housing Units to Market Rate Units would be over 24% Affordable Housing Units compared to the required 20% under the North OPA.

R. The Owner and the Successor Agency wish to enter into this Fifth Amendment for the purpose of achieving the further redevelopment within the North Plan Area to further
effectuate the program of development contemplated in the North Plan. The Fifth Amendment fulfills the following objectives:

(i) the development of Block N4P3 will fulfill the objectives of the North Plan, including providing flexibility in the development of the North Plan Area to respond readily and appropriately to market conditions, facilitating the development of additional housing, including affordable housing, strengthening the economic base of the North Plan Area and the community by adding to the diversity of uses within the North Plan Area, and achieving these objectives in the most expeditious manner feasible;

(ii) Block N4P3 is the last remaining undeveloped parcel in the North Plan Area. Its completion will mark an important milestone for Mission Bay by completing all vertical development required under the North OPA;

(iii) The current program requirements for Block N4P3 are infeasible. The Fifth Amendment will allow development of Owner Moderate Income Units on Block N4P3, and accelerate the completion of development under the North Plan, the North OPA and the related enforceable obligations;

(iv) Block N4P3 will include development of 45 For-Rent Owner Moderate Income Units at 120% of Area Median Income, and will make an important contribution to the affordable housing stock in Mission Bay, while providing a diversity of affordable housing for all income levels. With the Fifth Amendment, the percentage of affordable housing units in Mission Bay North will remain substantially above the existing 20% North OPA requirement; and
(v) By allowing a project that is financially feasible, the Fifth Amendment will increase property tax revenue generated from property taxes payable to the taxing entities by ensuring that the parcel is developed quickly to generate additional property taxes.

The parties have entered into this Fifth Amendment to memorialize their understanding and commitments concerning the matters generally described above.

S. This Fifth Amendment is considered a material change in the obligations to provide affordable housing pursuant to Ordinance 215-12 and therefore requires Board of Supervisor approval. However, for the reasons stated above in Recital R, this material change is a benefit to Mission Bay North and the City.

T. Under Redevelopment Dissolution Law, the Oversight Board has the authority to “approve any amendments to [any contracts between the dissolved redevelopment agency and any private parties] if [Oversight Board] finds that amendments . . . would be in the best interests of the taxing entities.” Cal. Health & Safety Code § 34181 (e). For the reasons stated above in Recital R, this Fifth Amendment meets this standard for amendment of an enforceable obligation.

U. The Board of Supervisors, consistent with its authority under Ordinance 215-12 to approve any material change to the obligations to provide affordable housing in Mission Bay North, by Resolution No.__________, has approved the modifications to the development of affordable housing in Mission Bay North.

V. The Oversight Board, consistent with its authority under Redevelopment Dissolution Law to approve amendments to agreements between the dissolved redevelopment
agency and private parties where it finds that amendments or early termination would be in the best interests of the taxing entities, by Resolution No.__________, determined that an amendment to the North OPA that would modify certain requirements with respect to development of housing on Block N4P3 is in the best interests of the taxing entities.

W. Under Redevelopment Dissolution Law, DOF must receive notice and information about all Oversight Board actions, which do not take effect until DOF has either not requested review within five days of the notice or requested review and approved the action within 40 days of its review request. On ______________, 2014, the Successor Agency provided a copy of Oversight Board Resolution No. __________ to DOF, which did not object to the amendment to the North OPA within the statutory time period for its review, or which approved the amendment to the North OPA within the statutory time period of the Successor Agency’s review request.

**AGREEMENT**

Accordingly, for good and valuable consideration, the receipt, amount and sufficiency of which is hereby acknowledged, the Owner and the Successor Agency agree as follows:

1. **Maximum Number of Owner Market Rate Residential and Affordable Units.** Wherever the North OPA (as amended and including without limitation any Attachment thereto) makes reference to the maximum number of Owner Market Rate Residential Units, specifically "2,320," such phrase shall be deemed to be amended to refer to "2,355," and where it makes reference to the maximum number of Owner Affordable Housing Units, specifically "245," such phrase shall be deemed to be amended to refer to "210".
2. **Definition of Moderate Income Households.** Wherever the North OPA (as amended and including without limitation any Attachment thereto) makes reference to “Moderate Income Household”, the following shall be included: “And as to Block N4P3 only, up to one hundred twenty percent (120%) of Area Median Income."

3. **Unit Mix and Affordability Requirements for Owner Affordable Units.** The North OPA, Attachment C (Housing Program), is hereby further amended as follows:

1.39 Section 1.39 is amended to read as follows: "**Owner Moderate Income Units** means an Owner Affordable Housing Unit which is Affordable to household earning up to one hundred percent (110%) of Area Median Income and, as to Block N4P3 only, up to one hundred twenty percent (120%) of Area Median Income."

2.2 Section 2.1(c) is amended to adjust the ratio of Owner Inclusionary Units at each income level. The first sentence in Section 2.1(c) shall be replaced with the following and the remaining portion of Section 2.1(c) remain unchanged:

“Except as provided in Sections 2.4 and 3.4, the Owner Affordable Housing Unit Requirement for the North Plan Area shall be allocated as follows: (i) thirty-seven percent (37%) shall be Owner Moderate Income Units, (ii) seventeen percent (17%) shall be Owner Low Income Units, and (iii) forty-seven percent (47%) shall be Owner Very Low Income Units.”
2.3 Section 2.1(d) is amended and shall be replaced in whole with the following to reflect the increased percentage of For-Rent Owner Moderate Income Units constructed by the Owner:

"The allocation of For-Rent Owner Inclusionary Units in Residential Projects shall be approximately seventy-five percent (75%) Owner Moderate Income Units and twenty-five percent (25%) Owner Low Income Units, rounded up or down as appropriate to the nearest Residential Unit. On Block N4P3, the Owner Moderate Income Units shall be affordable to households earning up to 120% of Area Median Income."

2.4 Section 2.1(e) is amended and shall be replaced in whole with the following to reflect the increased percentage of For-Rent Owner Affordable Housing Units:

“Owner Affordable Housing Units shall, in accordance with Section 2.1(j) hereof, consist of 13% For-Sale and 87% For-Rent Residential Units.”

2.5 Section 2.1(g): Section 2.1 is hereby amended to add the following to the end of paragraph 2.1(g):

"On Block N4P3, the maximum percentage of Owner Inclusionary Units in a For-Rent Residential Project shall be 34.9%.”
2.6 To reflect the reduction of the percentage of Owner Moderate Income Units that are For-Sale Owner Moderate Income Units versus For-Rent, Section 2.1(j) is amended as follows:

The phrase "82.3%" in Section 2.1(j) that refers to the percentage of Owner Moderate Income Units constructed as For-Sale units shall be deemed amended to refer to "16.9%".


4.1 North OPA in Full Force and Effect. Except as otherwise amended hereby and as previously revised to reflect various non-material changes, all terms, covenants, conditions and provisions of the North OPA shall remain in full force and effect.

4.2 Successors and Assigns. This Fifth Amendment is binding upon and will inure to the benefit of the successors and assigns of the Former Agency, Successor Agency, the Owner, and, as applicable, the City, subject to the limitations set forth in the North OPA.

4.3 Recitals. The Recitals in this Fifth Amendment are included for convenience of reference only and are not intended to create of imply covenants under this Fifth Amendment. In the event of any conflict or inconsistency between the Recitals and the terms and conditions of this Fifth Amendment, the terms and conditions of this Fifth Amendment shall control.

4.4 Counterparts. This Fifth Amendment may be executed in any number of counterparts, all of which, together shall constitute the original agreement hereof.
IN WITNESS WHEREOF, the Successor Agency has caused this Fifth Amendment to be duly executed on its behalf and the Owner has signed or caused this Fifth Amendment to be signed by duly authorized persons, all as of the day first above written.

Authorized by Successor Agency Resolution No. ____-14, adopted __________, 2014

SUCCESSOR AGENCY

Successor Agency to the Redevelopment Agency of the City and County of San Francisco, a public body organized and existing under the laws of the State of California

By ___________________________

Tiffany J. Bohee
Executive Director

Name: __________________________

Title: __________________________

Approved as to Form:

DENNIS J. HERRERA,
City Attorney

By __________________________

Heidi J. Gewertz
Deputy City Attorney

FOCIL-MB, LLC, a Delaware limited liability company

By: __________________________
EXHIBIT A
BLOCK N4P3 LEGAL DESCRIPTION

(TO BE ADDED)