FILED
OFFICE OF THE CITY CLERK
OAKLAND

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Approved as to form and legality

Deputy City Attorney

# OAKLAND CITY COUNCIL

## RESOLUTION NO. 83934 C.M.S.

**RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR TO NEGOTIATE AND EXECUTE AN ENVIRONMENTAL REVIEW FUNDING AND INDEMNITY AGREEMENT WITH PROLOGIS PROPERTY, LP, A DELAWARE LIMITED PARTNERSHIP AND CCIG OAKLAND GLOBAL, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY (OR THEIR RELATED OR AFFILIATED ENTITIES) (COLLECTIVELY "DEVELOPER") REGARDING THE PROPOSED MIXED-USE PROJECT ON THE FORMER OAKLAND ARMY BASE ("PROJECT") WITH RESPECT TO: (1) ALLOCATING RESPONSIBILITY FOR ENVIRONMENTAL REVIEW COSTS BETWEEN THE CITY AND THE DEVELOPER AND (2) DEFINING THE PROCEDURE FOR DEFENDING AND INDEMNIFYING THE CITY OF OAKLAND FOR THE INITIAL PROJECT APPROVALS IN A FORM AND CONTENT SUBSTANTIALLY IN CONFORMANCE WITH THE ATTACHED DOCUMENTS, WITHOUT RETURNING TO CITY COUNCIL**

**WHEREAS,** the City of Oakland, through its predecessor in interest, the Redevelopment Agency of the City of Oakland ("Agency"), and Developer's predecessors in interest entered into that certain Exclusive Negotiating Agreement ("ENA"), dated January 22, 2010, for the potential redevelopment of a portion of the former Oakland Army Base ("OARB"), including City development of the public infrastructure ("Public Improvements"), and Developer construction and operation of a mixed use (logistics and warehousing), commercial, including billboards, maritime, rail, and open space uses ("Private Improvements"). Together the Public Improvements and the Private Improvements constitute the "Project"; and

**WHEREAS,** to effectuate the Project, the City Council will consider for approval a Lease Disposition and Development Agreement ("LDDA") for approximately 130 acres of the OARB ("LDDA Property") and related attached agreements, together with the associated environmental compliance documentation, the "Environmental Document" (together, "Initial Project Approvals"); and

**WHEREAS,** to address the costs associated with the preparation, review and production of the Environmental Document, among other things, the ENA was amended on August 10, 2010 by a First Amendment to the ENA (the "First Amendment"); and

**WHEREAS**, the First Amendment provided that the Agency shall contract with LSA Associates, Inc. ("LSA") to prepare the Environmental Document. LSA's contract for the

Environmental Document was not to exceed $360,000, with a cap on the Agency's contribution toward the contract amount of $240,000 and with Developer being responsible for all costs exceeding the Agency's cap; and

**WHEREAS**, LSA's costs have exceeded the agreed upon maximum contract cost of $360,000, and the final amount has not been determined; and

**WHEREAS**, in accordance with the public-private nature of this Project and additional Environmental Document costs beyond those originally anticipated, the City and Developer (together, the "Parties") desire to set forth their final cost sharing agreement for Environmental Document preparation and processing ("Environmental Document Preparation Costs"); and

**WHEREAS**, in accordance with the public-private nature of the Project, the Parties also desire to set forth the litigation review process and indemnity provisions related to the Initial Project Approvals; and

**WHEREAS**, the Parties enter this Agreement separately from the LDDA and its attached agreements associated with the Initial Project Approvals so that if any of those agreements are not executed, or if executed and subsequently terminated or invalidated, this Agreement will survive such non-execution or termination; now, therefore be it

**RESOLVED:** This Agreement is not a Project under CEQA. Moreover, the activities covered under this Agreement are not projects under CEQA, and/or are exempt from environmental review under CEQA. Specifically, this Agreement only sets forth the terms and conditions for the City and Developer funding obligations for planning and feasibility studies under CEQA Guidelines section 15262, and/or litigation expenses related to such studies, so it can be seen with certainty that there is no possibility that the Agreement may have a significant effect on the environment and therefore is also exempt under Section 15061(b)(3) of the CEQA Guidelines. Moreover, by entering into this Agreement, the City is not committing itself or agreeing to undertake any definite course of action or project. The City retains the absolute sole discretion to make decisions under CEQA, including deciding not to proceed with any project. No development shall proceed unless and until the parties have negotiated, executed and delivered mutually acceptable agreements based upon information produced from the CEQA environmental review process and on other public review and hearing processes and subject to all governmental approvals; and be it

**FURTHER RESOLVED:** The City Council finds and determines that this action complies with CEQA for the reasons stated above and the Environmental Review Officer is directed to cause to be filed a Notice of Exemption with the appropriate agencies; and be it

**FURTHER RESOLVED**: That the City Administrator is authorized to negotiate and execute an Indemnity Agreement with the Developer indemnifying the City of Oakland regarding the Proposed Mixed-Use Project on the OARB with respect to: (1) allocating responsibility for Environmental Review costs between the City and the Developer and (2) defining the procedure for defending and indemnifying the City of Oakland for the Initial Project Approvals in a form and content substantially in conformance with **Exhibit A**, attached hereto and incorporated

herein by reference without returning to City Council; and be it

**FURTHER RESOLVED:** That the City Administrator and his or her designee is authorized to take whatever action is necessary with respect to negotiating and executing the Indemnity Agreement and CEQA/NEPA Funding Reimbursement Agreement consistent with this Resolution and its basic purposes.

IN COUNCIL, OAKLAND, CALIFORNIA, JUN 19 2012

**PASSED BY THE FOLLOWING VOTE:**

AYES - ~~BROOKS~~, BRUNNER, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, SCHAAF and PRESIDENT REID – 7

NOES - ~~0~~

ABSENT - ~~0~~

ABSTENTION - Brooks - 1

ATTEST: LaTonda Simmons
LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

DATE OF ATTESTATION: _____

**EXHIBIT A**

**ENVIRONMENTAL REVIEW FUNDING AND INDEMNITY AGREEMENT**

# OAKLAND ARMY BASE ENVIRONMENTAL REVIEW FUNDING AND INDEMNITY AGREEMENT ASSOCIATED WITH INITIAL PROJECT APPROVALS

This Oakland Army Base ("**OARB**") Environmental Review Funding and Indemnity Agreement ("**Agreement**") is made and entered into this day ___ of _____, 2012, by and between Prologis Property, LP, a Delaware limited partnership ("**Prologis**"), and CCIG Oakland Global, LLC, a California limited liability company ("**CCIG**") (or Prologis' and CCIG's related or affiliated entities) (collectively "**Developer**"), and the City of Oakland, acting both in its capacity as an independent municipal corporation and as the successor agency to the Redevelopment Agency of the City of Oakland (together the "**City**"), each a "**Party**," collectively the "**Parties**," to this Agreement.

## RECITALS

A. The City, through its predecessor in interest, the Redevelopment Agency of the City of Oakland ("**Agency**"), and the Developer, themselves or through their respective predecessors in interest, entered into that certain Exclusive Negotiating Agreement ("**ENA**"), dated January 22, 2010, for the potential redevelopment of a portion of the former OARB, including (inter alia) the City's remediation of Hazardous Materials and development of the public infrastructure ("**Public Improvements**") and Developer's construction and operation of a mixed-use project, including logistics and warehousing, commercial, including billboards, maritime, rail, open space uses and other approved uses ("**Private Improvements**"). Together the Public Improvements and the Private Improvements constitute the "**Project**".

B. To effectuate the Project, the City Council will consider (1) the approval a Lease Disposition and Development Agreement ("**LDDA**") for approximately 140 acres of the OARB ("**LDDA Property**") and related, attached agreements and (2) the adoption of an Initial Study/Addendum , the "**Environmental Document**" (together, "**Initial Project Approvals**").

C. The ENA was amended on August 10, 2010 by a First Amendment to the ENA (the "**First Amendment**").

D. The First Amendment provided that the Agency shall contract with LSA Associates, Inc. ("**LSA**") to prepare the Environmental Document. LSA's contract for the Environmental Document was not to exceed three hundred and sixty thousand dollars ($360,000). The LSA costs have exceeded the agreed upon maximum contract cost of three hundred and sixty thousand dollars ($360,000). The final amount of all third-party contractor Environmental Document Preparation Costs (defined below) has not been determined, but is currently anticipated be about five hundred and three thousand dollars ($503,000).

E. In accordance with the public-private nature of this Project and additional Environmental Document costs beyond those originally anticipated and to avoid any disputes, the Parties desire to set forth their final cost sharing agreement for Environmental Document preparation and processing ("**Environmental Document Preparation Costs**") associated with Initial Project Approvals.

F. In accordance with the public-private nature of the Project, the Parties also desire to set forth the litigation review process and indemnity provisions related to the Initial Project Approvals.

G. The Parties enter this Agreement separately from the LDDA and its attached agreements associated with the Initial Project Approvals such that if any of those agreements are not executed, or if executed and subsequently terminated or invalidated, this Agreement will survive such non-execution or termination.

## AGREEMENT

**NOW THEREFORE**, in accordance with the following terms, the Parties agree as follows:

1. **Incorporation of Recitals.** The Parties agree that the Recitals set forth above are true and correct and are incorporated herein.

2. **Funding of Environmental Document Preparation Costs.** The Environmental Document Preparation Costs associated with Initial Project Approvals shall be shared by the City and Developer pursuant to the terms of this section.

a) The Parties shall equally share the portion of the Environmental Document Preparation Costs related to costs and fees charged to the City by any third-party contractor (excluding attorney fees, which shall be the responsibility of the party retaining the attorney) up to five hundred and three thousand dollars ($503,000).

b) Developer's payment of its share of Environmental Document Preparation Costs is due upon the LDDA Effective Date, as that term is defined in the LDDA.

c) Any Environmental Document Preparation Costs in excess of five hundred and three thousand dollars ($503,000) shall be paid for by the City.

d) Developer shall not pay Environmental Document Preparation Costs associated with City staff or City attorney review or processing.

e) The City shall seek reimbursement of the Environmental Document Preparation Costs from all other developers with projects on the City-owned OARB property that rely on the Environmental Document. Such reimbursement shall be based on a "fair share" allocation calculated on a per acre basis (of the City-owned OARB property) and due no later than the earlier to occur of (i) the effective date of any conveyance agreement between the City and such developer (including, but not limited to, any purchase agreement, lease, ground lease, (lease) disposition and development agreement or similar document) and (ii) the approval of the applicable project. Such payments shall be distributed by the City to the City and Developer on a pro rata basis, based on the percentage of costs paid by a Party pursuant to Sections 2(a) and 2(c) above.

f) In the event the LDDA with Developer is terminated for any reason other than default by Developer, the City shall undertake commercially reasonable efforts to seek reimbursement from any future developer of a project on the LDDA Property (or portion thereof) that relies on the Environmental Document for its approval. Such payments shall be distributed first to Developer to reimburse its full share of the Environmental Document Preparation Costs, after which time any additional reimbursement shall be kept solely by the City. If the LDDA terminates because of a default by Developer, then the City has no obligation to reimburse Developer for Environmental Document Preparation Costs pursuant to this Section 2(g).

3. **Initial Project Approval Litigation Review Process and Indemnification**. The litigation defense indemnification required for Initial Project Approvals shall be pursuant to the terms of this section. As a public-private partnership, the City and Developer agree to the following process for indemnifying the City and determining whether to proceed in defending any litigation action that may be brought by a third party against the City to attack, set aside, void or annul the Initial Project Approvals ("**Action**"):

a) Developer's ENA deposit of fifty thousand dollars ($50,000) shall, at the time the ENA is terminated, remain with the City as security for litigation costs related to defense of any Action associated with the Initial Project Approvals until distributed pursuant to Section 3(e) below. Said security deposit may be drawn down as provided for in subsection (e), below.

b) If an Action is filed, upon receipt of the petition, the Parties will have 20 days to meet and confer regarding the merits of the Action and to determine whether to defend against the Action, which period may be extended by the Parties' mutual agreement so long as it does not impact any litigation deadlines. The City and Developer mutually commit to meet all required litigation timelines and deadlines.

c) If the Parties mutually agree to defend against the Action, the Parties shall defend jointly, with counsel acceptable to the City and Developer, and enter a joint defense agreement, which will include among other things, provisions regarding confidentiality, appeals and a cost allocation pursuant to which Developer shall reimburse the City for its prorata share of costs (to be calculated based on the lease area as compared to the overall acreage of land covered in the Environmental Document project description) incurred defending the Action and fulfilling any judgment, including all appeals as set forth in that agreement.

d) If the City elects, in its sole and absolute discretion, not to defend against the Action, it shall deliver written notice to Developer, and if Developer elects to defend against the Action without the City's participation, Developer shall defend, indemnify, and hold harmless the City, the City Council, and its respective agents, officers, and employees from any liability, damages, claim, action, cause of action, judgment (including City costs to effectuate such judgment), loss (direct or indirect), or proceeding (including legal costs, attorneys' fees, expert witness or consultant fees, City Attorney or staff time, expenses or costs).

e) If Developer elects, in its sole and absolute discretion, not to defend against the Action, it shall deliver written notice to the City regarding such decision. Developer shall owe the City for its prorata share (based on the lease area as compared to the overall acreage of land covered in the Environmental Document project description) of: (i) any third party or City attorney fees and legal costs incurred by the City through date of such notice, and (ii) any petitioner incurred attorney fees and legal costs through the date of such notice. Because the final accounting of petitioner-incurred attorney fees and legal costs will not be definitively known until the close of the Action, including all appeals and motions for attorney's fees, the Parties agree they shall, within ten (10) days of the Developer's notice, meet and confer in an effort to estimate the attorneys' fees and costs incurred by the petitioner in filing the Action. If the sum of the amount in clause (i) of the preceding sentence plus one hundred and fifty percent (150%) of the amount set forth in clause (ii) of the preceding sentence is less than the ENA deposit, the City shall refund the excess amount to Developer. If the sum is higher, Developer shall pay any shortfall to the City. The refund or payment, as applicable, shall be paid within ninety (90) days after the City's receipt of Developer's notice of its election not to defend against the Action. If the City is ultimately required to or agrees to pay petitioner's legal fees/costs, in conjunction with any settlement or judgment, the City shall request an accounting through the date of Developer's notice in order to facilitate the final accounting. To the extent the amount of the remaining ENA deposit exceeds Developer's obligation, the City shall pay such excess amount to Developer within thirty (30) days after the determination of petitioner's fees/costs award. If the remaining ENA deposit amount is insufficient, the City shall retain the remaining ENA deposit and the Developer shall pay the amount of the shortfall to the City within thirty (30) days of receiving an invoice from the City.

f) If Developer elects not to defend, the City has the right to proceed to defend against the Action at its sole cost and expense, except that the City shall collect such reimbursements as provided for in subsection (e), above.

g) If Developer elects not to defend or share in the City's defense, the City has right to terminate the LDDA and its associated agreements as to Developer.

h) To the extent any costs are recovered from petitioners as a result of the disposition of the Action, such recovered costs shall be distributed to the Parties pro rata pursuant to the amounts incurred by the Parties pursuant to this Agreement.

4. **No Agency Relationship.** This Agreement shall not create any agency or similar relationship among the Parties. Nothing contained in this Agreement is intended to or shall in any way be construed as a waiver of any privilege, protection, claim, right, or defense between any of the Parties on any subject whatsoever.

5. **Notice.** All notice required by this Agreement shall be provided by e-mail and overnight mail at the following addresses:

To City:

_____

_____

_____

To Developer:

Prologis Corporation_____

_Pier 1, Bay 1_____

_San Francisco, CA 94111

Attention: Legal Department_____

To Developer:

CCIG Oakland Global, LLC

c/o California Capital & Investment Group, Inc.

300 Frank H. Ogawa Plaza, Suite 340

Oakland, CA 94612

6. **Termination**. This Agreement shall remain in full force and effect until all payments and reimbursements required by Section 2 have been made and until any Action against the Initial Project Approvals addressed by Section 3 has been full disposed and all payments and reimbursements required by that Section 3 are made in full.

7. **Waiver**. The failure of any Party to insist on strict compliance with any provision of this Agreement shall not be considered a waiver of any right to do so, whether for that breach or any subsequent breach. The acceptance by any Party of either performance or payment shall not be considered to be a waiver of any preceding breach of the Agreement by the other Party.

8. **Remedies.** Each Party acknowledges that specific performance and immediate injunctive relief is an appropriate and necessary remedy for any violation or any threatened violation of this Agreement.

9. **Successors.** This Agreement shall remain in effect and be binding upon successors and assigns, except that Section 2 is personal to Developer and the City's obligation to reimburse Developer shall not be transferred or assigned.

10. **No Third Party Beneficiaries.** As a result of this Agreement, the Parties do not intend to provide any third party with any benefit or enforceable legal or equitable right or remedy.

11. **Full Agreement.** This Agreement sets forth the agreement of the Parties and supersedes and replaces any prior written or verbal agreement on these issues.

12. **Amendments.** Any amendments to this Agreement shall be in writing and signed by all Parties.

13. **Effective**. The foregoing provisions are agreed to and become effective upon signature of each Party set forth below as of the date set forth next to the signature of each Party.

14. **Governing Law.** The rights and obligations of the Parties and the interpretation and performance of this Agreement shall be governed by the laws of California. Any legal action concerning the rights and obligations of the Parties pursuant to this Agreement shall be commenced in Alameda County.

15. **Authority.** The person signing this Agreement on behalf of each Party affirms that such person is authorized to execute this Agreement on that Party's behalf.

16. **Severability.** Every provision of this Agreement is intended to be severable. If any provision of this Agreement shall be held invalid, illegal, or unenforceable by a court of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

17. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document and each signed counterpart shall be deemed an original. Faxed or emailed signature shall be of the same force and effect as original signatures.

**[WE GENERALLY DO NOT INCLUDE AF PROVISISIONS IN OUR AGREEMENTS]**
SO AGREED:

[Signatures on following page.]

**"CITY"**

City of Oakland, a municipal corporation

By: _____

Name: _____

Title: _____

Date: _____

**"DEVELOPER"**

_____
Print Name

By: _____

Its: _____

Date: _____

_____
Print Name

By: _____

Its: _____

Date: _____