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OAKLAND
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**REDEVELOPMENT AGENCY OF THE
CITY OF OAKLAND
AGENDA REPORT**

TO: Agency Administrator
ATTN: Deborah Edgerly
FROM: Community and Economic Development Agency
DATE: June 28, 2005

RE: **RESOLUTION APPROVING AND AUTHORIZING THE AGENCY ADMINISTRATOR TO ENTER INTO A MUTUAL RELEASE AND COVENANT NOT TO SUE WITH FC OAKLAND, INC. AND THE SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD CONCERNING ALL KNOWN EXISTING CONDITIONS OF POLLUTION AT, UNDER, OR ORIGINATING FROM THE UPTOWN PROJECT AREA, WHICH CONSISTS OF APPROXIMATELY 6.5 ACRES LOCATED BETWEEN SAN PABLO AVENUE ON THE WEST, TELEGRAPH AVENUE ON THE EAST, THOMAS L. BERKLEY WAY (FORMERLY 20TH STREET) ON THE NORTH, AND 19TH STREET ON THE SOUTH IN THE CITY OF OAKLAND, OR FROM ADJACENT AND NEARBY PROPERTIES; AND AUTHORIZING RECORDATION OF A DEED RESTRICTION FOR USE OF UPTOWN PROJECT AREA.**

SUMMARY

The Community and Economic Development Agency (CEDA) is recommending approval of an Agency resolution approving and authorizing the Agency Administrator to enter into a mutual release and covenant not to sue (the "Mutual Release") with FC Oakland, Inc. ("FC Oakland") and the San Francisco Bay Regional Water Quality Control Board (the "Regional Board") concerning all known existing conditions of pollution at, under, or originating from the Uptown Project Area (the "Property", as illustrated on Attachment A), which consists of approximately 6.5 acres located between San Pablo Avenue on the west, Telegraph Avenue on the East, Thomas L. Berkley Way (formerly 20th Street) on the north, and 19th Street on the South in the City of Oakland, or from adjacent and nearby properties; and authorizing recordation of a deed restriction for use of the Property.

The proposed Mutual Release will effectively release the Agency and FC Oakland from Regional Board jurisdictional cleanup liability at the Property as long as certain conditions are met. Pursuant to the Mutual Release, the Regional Board agrees not to take legal action against the Agency and FC Oakland related to all conditions of pollution at, under, or originating from the Property or adjacent and nearby property that was disclosed to the Regional Board, or is reasonably discernable from the investigations, reports or any other information that had been submitted to the Regional Board prior to the effective date of the Mutual Release. Moreover, the Mutual Release protects the Agency and FC Oakland from claims asserted by third parties for contribution under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

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The Mutual Release is conditioned upon the Agency and FC Oakland implementing the Regional Board-approved Remedial Action Plan/Risk Management Plan ("RAP/RMP") for the Property. The Agency and FC Oakland must similarly ensure that the RAP/RMP is implemented by contractors retained to develop the Property and any other parties who assume responsibility for any aspect of the remediation and risk management at the Property.

The Agency is also required to record with the Alameda County's Recorder's Office a deed restriction on the Property that will restrict the land use, restrict use of groundwater, notify future owners and occupants of subsurface conditions, and restrict excavation of soil.

FISCAL IMPACT

There is no fiscal impact associated with adoption of the proposed resolution.

BACKGROUND

On July 20, 2004, the Agency approved Resolution No. 2004-38 C.M.S., and the City approved Resolution No. 78728 C.M.S., authorizing the Agency Administrator and the City Administrator to enter into a LDDA, ground lease and related documents with Uptown Partners, LLC, predecessor to FC Oakland, a single purpose entity Forest City formed to develop the Uptown Project (the "Project"). The LDDA was executed on October 14, 2004. Among other obligations on the part of the Agency, City and FC Oakland, the LDDA requires FC Oakland to remediate all hazardous materials on the Property. The LDDA further stipulates that FC Oakland and the Agency work cooperatively to develop and to present to the Regional Board a remediation plan, including a risk management plan, to assure that the remediation and redevelopment of the Property are protective of human health, safety and the environment. Lastly, pursuant to the LDDA, the Agency and FC Oakland agreed to obtain from the Regional Board a Mutual Release which provides that upon implementation of the approved RAP/RMP, neither the Agency, nor FC Oakland will be liable for undertaking further site investigation or remediation activities for hazardous materials conditions that existed prior to and as of the redevelopment of the Property.

PROJECT DESCRIPTION

Pursuant to the terms of the LDDA, FC Oakland proposes to develop a mixed-use project consisting of at least 700 residential units, 14,500 square feet of neighborhood-serving retail and a public park on the Property.

The principal environmental contaminants of concern in the Uptown Project Area are lead (in both surface soils and lead-based paint in existing structures), asbestos (in existing structures), chlorinated solvents (in groundwater) and benzene (in soil and groundwater). In 2004, the Agency completed a comprehensive soils and groundwater assessment program to further identify and characterize the contaminants present on and beneath the Property. The findings of the environmental assessment were used to prepare the aforementioned RAP/RMP, which establishes the cleanup methods, scope and standards to be implemented at the Property.

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The RAP/RMP was prepared in close consultation with staff of the Regional Board. A RAP/RMP that is acceptable to staff of the Regional Board is a prerequisite for the Regional Board authorizing legislation to enter into the Mutual Release with the Agency and FC Oakland.

KEY IMPACTS

Pursuant to the Mutual Release, the Regional Board would agree not to take legal action against FC Oakland and the Agency relating to the known contaminants present at the Property once the cleanup is completed in accordance with the RAP/RMP. However, the Mutual Release applies only to the Regional Board and the Regional Board authority, and not to other state and federal agencies. The following is a summary of the principle provisions of the draft Mutual Release.

The Mutual Release applies to the Agency, FC Oakland, Inc, subsequent purchasers, owners, tenants, owners associations, tenants associations, lenders, and any occupants of the Property, as well as all of their respective directors, officers, shareholders, managers, members, employees, partners, affiliates, agents, contractors, successors, and assigns, and their respective successors in interest (collectively referred to as the "Released Parties").

Pursuant to the Mutual Release, the Regional Board agrees not to take legal action against the Released Parties relating to the "Known Conditions" at the Property. "Known Conditions" means all conditions of pollution at, under, or originating from the Property or adjacent and nearby property that were disclosed to the Regional Board from the RAP/RMP prior to the effective date of the Mutual Release. Moreover, the Mutual Release protects the Released Parties from claims asserted by third parties for contribution under CERCLA.

The Mutual Release is conditioned upon the Agency and FC Oakland implementing the Regional Board-approved RAP/RMP. The Agency and FC Oakland must similarly ensure that the RAP/RMP is implemented by contractors retained to develop the Property and any other parties who assume responsibility for any aspect of the remediation and risk management at the Property. The Agency is also required to record with the Alameda County's Recorder's Office a deed restriction on the Property that will restrict the land use, restrict use of groundwater, notify future owners and occupants of subsurface conditions, and restrict excavation of soil.

Under the terms of the Mutual Release, the Regional Board reserves the right to take action against the Released Parties if they, to the extent they have control over the Property, fail to satisfy any of the following three conditions: (1) exercise due care at the Property with respect to the Known Conditions; (2) implement and comply with the RAP/RMP; and (3) cooperate in providing reasonable access to the Property for remediation and monitoring purposes and construction, maintenance, and repair of any necessary remediation and/or monitoring system required by the Regional Board, the Alameda County Health Care Services, or the City of Oakland Fire Services Agency.

The Mutual Release applies only to the Regional Board and the Regional Board authority. However, the Department of Toxic Substances Control (DTSC) was briefed about the

history and conditions of pollution at the Property by Regional Board staff, and the Agency and FC Oakland have met and reviewed the Property conditions with DTSC. While not binding, DTSC confirmed that it is comfortable with the Regional Board's role as lead oversight agency and its remedial and risk management requirements.

SUSTAINABLE OPPORTUNITIES

Economic

The Uptown redevelopment infill project sponsored by FC Oakland will take blighted, underutilized and contaminated sites and turn them into an economically productive use by building a large-scale housing project that includes a retail component.

Environmental

By developing in already built-up areas, this project reduces the pressure to construct on agricultural and other undeveloped land, and thereby contributes to the prevention of urban sprawl. Moreover, the redevelopment of a "brownfield" site, contaminated by hazardous materials, into productive use contributes greatly to the revitalization of this underutilized neighborhood in the Central District.

Equity

FC Oakland will comply with the City's contracting programs, including the Small/Local Business Construction Program, the Small/Local Business Professional Services Program (L/SLBE) and the Local Employment Program. All of the workers performing remediation and construction work for Agency funded projects must be paid prevailing wage rates. FC Oakland will also be subject to the Living Wage Ordinance.

DISABILITY AND SENIOR CITIZEN ACCESS

FC Oakland's project design must comply with the requirements of the Americans with Disabilities Act.

RECOMMENDATIONS AND RATIONALE

Staff recommends that the Council and Agency approve the proposed Agency resolution authorizing the Agency Administrator to enter into a mutual release and covenant not to sue with FC Oakland and the Regional Board concerning all known existing conditions of pollution at, under, or originating from the Property.

The successful reuse and redevelopment of the Uptown Project Area by FC Oakland will transform an underutilized and environmentally contaminated area located in the center of downtown Oakland into productive economic use by creating an attractive transit-oriented residential development. The proposed legislation will enable the Agency and FC Oakland to

limit liability for the contamination on the site once it has been cleaned up in accordance with the RAP/RMP. The Mutual Release will also provide FC Oakland's debt and equity partners with additional assurances that any potential long-term liability arising out of the environmental condition of the Property has been mitigated by reaching agreement on cleanup goals and standards with the State's lead agency for the Project.

ACTION REQUESTED OF THE AGENCY

It is recommended that the Agency approve an Agency resolution authorizing the Agency Administrator to enter into a mutual release and covenant not to sue with FC Oakland, Inc. and the San Francisco Bay Regional Water Quality Control Board concerning all known existing conditions of pollution at, under, or originating from the Uptown Project, which consists of approximately 6.5 acres located between San Pablo Avenue on the west, Telegraph Avenue on the East, Thomas L. Berkley Way (formerly 20th Street) on the north, and 19th Street on the South in the City of Oakland, or from adjacent and nearby properties; and authorizing recordation of a deed restriction for use of the Property, and to execute deed restrictions on the property as required by the mutual release and covenant not to sue.

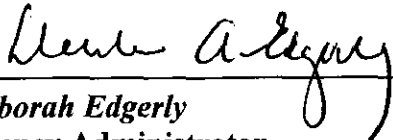
Respectfully submitted,



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Jens Hillmer
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**APPROVED AND FORWARDED TO
THE COMMUNITY AND ECONOMIC
DEVELOPMENT COMMITTEE**



**Deborah Edgerly
Agency Administrator**

APPROVED AS TO FORM AND LEGALITY:
OFFICE OF THE CITY CLERK

W. Milner

2005 JUN 15 PM 2:30
Agency Counsel

REDEVELOPMENT AGENCY OF THE CITY OF OAKLAND

RESOLUTION No. _____ C.M.S.

RESOLUTION APPROVING AND AUTHORIZING THE AGENCY ADMINISTRATOR TO ENTER INTO A MUTUAL RELEASE AND COVENANT NOT TO SUE WITH FC OAKLAND, INC. AND THE SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD CONCERNING ALL KNOWN EXISTING CONDITIONS OF POLLUTION AT, UNDER, OR ORIGINATING FROM THE UPTOWN PROJECT AREA, WHICH CONSISTS OF APPROXIMATELY 6.5 ACRES LOCATED BETWEEN SAN PABLO AVENUE ON THE WEST, TELEGRAPH AVENUE ON THE EAST, THOMAS L. BERKLEY WAY (FORMERLY 20TH STREET) ON THE NORTH, AND 19TH STREET ON THE SOUTH IN THE CITY OF OAKLAND, OR FROM ADJACENT AND NEARBY PROPERTIES; AND AUTHORIZING RECORDATION OF A DEED RESTRICTION FOR USE OF UPTOWN PROJECT AREA.

WHEREAS, the City of Oakland ("City"), the Redevelopment Agency of the City of Oakland ("Agency") and FC Oakland, Inc. ("FC Oakland"), successor to Uptown Partners, LLC, are parties to a Lease Disposition and Development Agreement ("FC LDDA") whereby FC Oakland is the developer of the approximately two blocks (6.5 acres) of land bounded by Thomas L. Berkley Way (formerly 20th) on the north, Telegraph Avenue on the east, 19th St. on the south, and San Pablo Avenue on the west in the Uptown Activity Area of the Central District Urban Renewal Area commonly referred to as the Uptown Project; and

WHEREAS, the Agency has conducted extensive environmental site assessments, subsurface investigations, and groundwater investigations at the Property, which have indicated the presence of chemicals in soil, groundwater and soil gas at the southeastern portion of the Property, and residual metals (primarily lead) and chemicals in soils at the Property at multiple locations and depths; and

WHEREAS, the FC LDDA requires the Agency and FC Oakland to secure approvals from the San Francisco Bay Regional Water Quality Control Board (the "Regional Board") of a final Remediation Action Plan/Risk Management Plan (the "RAP/RMP") for the Property; and

WHEREAS, FC Oakland and the Agency have secured approval of the RAP/RMP and will complete soil and groundwater remediation and post-remediation groundwater and soil/gas monitoring in accordance with the approved RAP/RMP, including any amendments thereto; and

WHEREAS, the FC LDDA requires the Agency and FC Oakland to seek a commitment from the Regional Board that it will not name the Agency, FC Oakland, subsequent purchasers, owners, tenants, owners associations, tenants associations, lenders, and any occupants of the Property, as well as all of their respective directors, officers, shareholders, managers, members, employees, partners, affiliates, agents, contractors, successors, and assigns, and their respective successors in interest, as dischargers or responsible parties in any Regional Board enforcement order with regard to known conditions of pollution, solely by virtue of being involved in the purchase, leasing, ownership, and redevelopment of the Property; and

WHEREAS, the Agency and FC had specifically requested that the Regional Board issue a Mutual Release and Covenant Not to Sue ("Mutual Release") to the Agency and FC Oakland for the Property; and

WHEREAS, as a condition of entering into the Mutual Release with the Agency and FC Oakland, the Regional Board intends to approve a Deed of Restriction for Use of Property (the "Deed Restriction") to be recorded with the Alameda County Recorder's Office, which will (1) restrict the excavation of soil and require notification to future owners and occupants of subsurface conditions, (2) restrict the use of groundwater for all uses, including, but not limited to, drinking, irrigation, and industrial uses; and (3) be binding against successors and require that the uses and development of the Property be consistent with the approved RAP/RMP including future amendments thereto; now therefore be it

WHEREAS, the City of Oakland, as the Lead Agency for this Project for purposes of environmental review under the California Environmental Quality Act of 1970 ("CEQA"), has prepared a focused Environmental Impact Report analyzing the significant environmental effects and mitigation measures in accordance with the California Environmental Quality Act, Public Resources Code § 21000, et seq.; and

WHEREAS, on February 18, 2004, the City Council in accordance with CEQA Guidelines § 15090 certified that the Final Environmental Impact Report ("EIR") on the Project has been completed in compliance with CEQA, the Guidelines for Implementation of the California Environmental Quality Act (14 CCR sections 15000, et seq.); and

WHEREAS, the Agency, as a "Responsible Agency" under the California Environmental Quality Act of 1970 ("CEQA"), has independently reviewed and considered the environmental effects of the project as shown in the EIR and other information in the record; now, therefore, be it

RESOLVED: That the Agency hereby finds and determines on the basis of substantial evidence in the record that the EIR fully analyzes the potential environmental effects of the project and incorporates mitigation measures to substantially lessen or avoid any potentially significant impacts in accordance with CEQA. None of the circumstances necessitating preparation of additional CEQA review as specified in CEQA and the CEQA Guidelines, including without limitation Public Resources Code Section 21166 and CEQA Guidelines Section 15162, are

present in that (1) there are no substantial changes proposed in the project or the circumstances under which the project is undertaken that would require major revisions of the EIR due to the involvement of new environmental effects or a substantial increase in the severity of previously identified significant effects; and (2) there is no "new information of substantial importance" as described in CEQA Guidelines Section 15162(a)(3); and be it further

RESOLVED: That the Agency Administrator or her designee is hereby authorized to cause to be filed with the appropriate agencies a Notice of Determination for this action; and be it further

RESOLVED: That the Agency hereby authorizes the Agency Administrator or her designee to enter into the Mutual Release with the Regional Board and FC Oakland; and be it further

RESOLVED: That the Agency hereby authorizes the Agency Administrator to execute a Deed of Restriction to be recorded with the Alameda County Recorder's Office, which will (1) restrict the excavation of soil and require notification to future owners and occupants of subsurface conditions, (2) restrict the use of groundwater for all uses, including, but not limited to, drinking, irrigation, and industrial uses; and (3) be binding against successors and require that the uses and development of the Property be consistent with the approved RAP/RMP including future amendments thereto; and be it further

RESOLVED: That all documents related to this action shall be reviewed and approved by the Agency's Counsel prior to execution; and be it further

RESOLVED: That the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the Agency's decision is based are respectively: (a) the Community & Economic Development Agency, 250 Frank H. Ogawa Plaza, 5th Floor, Oakland CA; (b) the Community & Economic Development Agency, and (b) the Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1st Floor, Oakland, CA.

IN AGENCY, OAKLAND, CALIFORNIA, _____, 2005

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS , BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, AND CHAIRPERSON DE LA FUENTE,

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____
LATONDA SIMMONS
Secretary of the Redevelopment Agency
of the City of Oakland, California