



FILED  
OFFICE OF THE CITY CLERK  
OAKLAND

2016 MAY 19 PM 4:22

# AGENDA REPORT

**TO:** Sabrina B. Landreth  
City Administrator

**FROM:** Mark Sawicki  
Director, EWD

**SUBJECT:** Amending City Charter Regarding  
Authority to Lease for 99 Years

**DATE:** May 16, 2016

City Administrator Approval

Date:

5/19/16

## RECOMMENDATION

**Staff Recommends That The City Council Receive The Report And Recommend Possible Action Directing Staff To Prepare The Proposed Legislation To Place A Charter Amendment For Voter Approval On The November 8, 2016 General Election Ballot To Authorize The City Council To Lease Real Property For A Term Of Up To Ninety-Nine Years.**

## EXECUTIVE SUMMARY

The charter amendment proposed for voter approval at the November 2016 General Election would amend **Article X, Section 1001. Leases, Sales** of the Charter of the City of Oakland ("City Charter") to increase the City's authority to lease City-owned real property from a maximum of 66 years to 99 years. This will make it more feasible to develop and finance projects with long-term ground leases rather than an outright sale of property and make it easier to comply with Resolution No. 85324 C.M.S., the City's 2014 policy to lease rather than sell City-owned property.

## BACKGROUND / LEGISLATIVE HISTORY

The City Charter has been amended several times with regard to the authority for the term of leases. The 1931 City Charter amendment limited a lease term to 25 years. The 1953 City Charter amendment limited a lease term to 50 years. The 1969 City Charter amendment authorized the current 66 year lease term.

Following the 1969 City Charter amendment, the City adopted Ordinance No. 7952 C.M.S., on March 18, 1969, which formulated and established procedures for the sale and lease of City-owned real property. Currently the City Charter, **Article X, Section 1001. Leases, Sales**, limits the City's authority to lease property for a term of 66 years or less.

The City adopted Ordinance No. 10142 C.M.S., on October 27, 1981, which established procedures for the sale and lease of non-surplus City-owned real property.

Item: \_\_\_\_\_  
CED Committee  
May 31, 2016

The City Council adopted Resolution No. 85324 C.M.S., on December 9, 2014, which established a general policy to lease rather than sell City property. However for a number of development projects, including affordable housing, staff has found that a lease term of 66 years significantly impacts feasibility. Several developers have indicated they might consider Lease Disposition and Development Agreements (“LDDAs”) if the City could offer a longer lease term, such as 99 years, but would not consider a LDDA of 66 years. Because the City is limited to 66 years by the City Charter, these projects have instead been approved as sales despite the policy to lease rather than sell City property. These affordable housing projects include Fruitvale Transit Village Phase IIA.

This City Charter amendment, requiring voter approval, is expected to make it easier to use long term leases for development projects rather than sales of land. While it has been City policy to lease rather than sell land, the City has found it difficult to convince developers to lease land for 66 or less years when the project improvements will last 100 or more years. The loss in project value for the developer can end up being more than the land value in some cases. Even when there is a lease, such as projects with a below market land price, developers often require/request that the lease include an option to purchase the site at a future time.

### **ANALYSIS AND POLICY ALTERNATIVES**

Following is the proposed amendment redlined to the existing City Charter section:

**Article X, Section 1001. Leases, Sales** The Council shall have authority to lease or sell real and personal property owned or controlled by the City in accordance with such uniform procedure as it shall adopt by ordinance, provided, however, that no lease of real property shall be for a term in excess of ~~sixty-six~~ ninety-nine years.

Once the City Council approves a resolution to place a charter amendment on the November 8, 2016 General Election, the City Clerk will coordinate and process the necessary materials to be submitted to the Alameda County Registrar of Voters and Board of Supervisors.

The alternative to longer term leases is of course the sale of the property instead, but it is the policy of the City to lease whenever feasible. The East Bay Housing Organization and many of its members which are non-profit developers have highlighted that affordable housing developed with Low Income Housing Tax Credits, the largest source of funding for these projects, requires longer term leases to refinance deferred debt. A letter dated November 13, 2015 from East Bay Asian Local Development Corporation’s attorney, Gubb and Barshay LLP, regarding Fruitvale Village Phase 2 proposed at least 90 year leases and provided a clear explanation of why it is required, See Attachment A.

Item: \_\_\_\_\_  
CED Committee  
May 31, 2016

### **FISCAL IMPACT**

This proposed City Charter amendment will be included with all of the City's other November 2016 election ballot measures and the cost will not be known until after the election. Based on the 2014 election, when there were five City of Oakland measures, the average cost for a measure was \$139,000. The cost of including this Charter amendment on the ballot with the City's other election activities is approximately \$100,000 to \$200,000. The cost would include eight language translations, binding, printing and any other extended language based needs as determined by the Alameda County Registrar of Voters. The maximum one-time cost to process this amendment is \$200,000. Overall election funding will be included in the FY 2016-17 proposed Midcycle Budget *amendments in The General Purpose Fund (1010), City Clerk Organization (03121), Election Funding Project (A343410)*.

The long term fiscal impact is hard to quantify. There is likely to be short term land sale revenue reduction and long term rental income increases. In addition the City may still chose to sell rather than lease if there are other City benefits, such as transient occupancy tax, or if the project is not feasible without a land sale, such as a residential condominium project.

### **PUBLIC OUTREACH / INTEREST**

There have been a number of City processes looking at public lands policy, such as the public lands working group of the Oakland Housing Cabinet. The issue of long term lease versus sale of land has been discussed in this and other forums. In addition, the issues have been discussed during approval of Exclusive Negotiating Agreements ("ENAs") and L/DDAs that have come to the City Council since the policy to lease rather than sell City property was approved in December 2014. There have been pro and con arguments for applying this policy and its implications on negotiating a feasible transaction, but it is the limit to the 66 years or less lease term that ends up being a sticking point. Even when it has been agreed that below market transfers of land should be leased rather than sold, such as for affordable housing projects, it has been difficult to structure transactions with leases of 66 years or less.

### **COORDINATION**

This report and legislation have been coordinated with the Public Lands Working Group of the Oakland Housing Cabinet as well as staff from the City Attorney's Office, Clerk's Office and the Budget Office. The proposed City Charter amendment has also been discussed with East Bay Housing Organization and many of its member non-profit developers. All of these groups support increasing the City's authority to enter into leases from 66 to 99 years.

## **SUSTAINABLE OPPORTUNITIES**

***Economic:*** The Charter amendment will allow the City to promote economic development goals today, while preserving the City's ability to benefit from future economic development projects. The amendment will increase the options for development projects on leased land where the City as landlord can influence operation and changes in uses over the long term.

***Environmental:*** The City will expand options to promote new development that will be required to meet the current high standards for sustainable development including the City's Green Building Ordinance for Private Development Projects. Most of the City development sites are appropriate higher density transit oriented development near Bay Area Rapid Transit (BART) Stations or along major Alameda-Contra Costa Transit District bus lines on commercial corridors.

***Social Equity:*** This amendment is especially appropriate for subsidized projects such as affordable housing where it will expand the City's options for preserving long term affordable restrictions for housing built on City land.

## **CEQA**

This action of amending a general policy about the term of ground leases does not have any potential environmental effects and is exempt from CEQA under Sections 15061(b)(3)(general rule, which exempts activities that can be seen with certainty to have no possibility for causing a significant effect on the environment), 15301(existing facilities), 15378(b)(5)(administrative activities of government that will not result in direct or indirect physical changes in the environment), 15162 (projects consistent with general plan and zoning) and 15262 (feasibility and planning studies).

**ACTION REQUESTED OF THE CITY COUNCIL**

Staff recommends that the City Council receive the report and recommend possible action directing staff to prepare the proposed legislation to place a Charter Amendment for voter approval on the November 8, 2016 General Election ballot to authorize the City Council to lease real property for a term of up to ninety-nine years.

For questions regarding this report, please contact Patrick Lane, Acting Manager of Project Implementation at (510) 238-7362.

Respectfully submitted,



Mark Sawicki  
Director, Economic And Workforce  
Development Department

Prepared by:  
Patrick Lane, Acting Manager  
Project Implementation

Attachment A  
Gubb and Barshay LLP letter dated November 13, 2015, regarding Fruitvale Village Phase 2

## Attachment A

Law Offices of  
**GUBB & BARSHAY LLP**

505 14<sup>th</sup> Street, Suite 1050  
Oakland, California 94612

Telephone: (415) 781-6600  
Facsimile: (415) 781-6967  
sbarshay@gubbandbarshay.com

November 13, 2015

East Bay Asian Local Development Corporation  
1825 San Pablo Avenue, Suite 200  
Oakland, CA 94612-1517

Re: Fruitvale Village Phase 2

Ladies and Gentlemen;

A substantial part of the financing needed to construct the Project will be equity contributed by a tax credit investor. The amount the investor will contribute to the Partnership will depend, in large part, on the amounts of tax credits expected to be allocated to the investor.

For debt to be included when determining the amount of tax credits for which a Project is eligible, a loan used to finance the Project must be treated as true debt for federal income tax purposes. Among other things, the owner must be able to show the loan has a reasonable possibility of repaying the loan at the end of its term. This can be particularly difficult to show on projects that have soft debt that continues to accrue interest throughout the loan term.

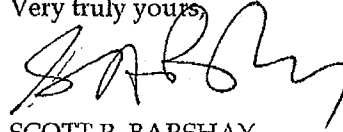
The investor will run a residual value analysis to compare the projected value of the project in year 55 with the expected accrued debt in year 55. For tax purposes, the investor assumes that the owner would obtain a new loan to refinance the year 55 debt. The size of the loan that the owner is able to get in year 55 needs to equal or exceed the expected value of the project in year 55. To determine the size of that new loan, the analysis takes into account the termination of the tax credit provisions in year 55 and other reasonable assumptions about the owner's ability to refinance the year 55 debt. Many investors want to assume the owner will be able to get a new 30-year loan to refinance the accrued debt.

When the project is owned in fee simple, the owner's new loan can be as long as necessary to make the residual analysis work. But the analysis is different with a ground lease—once the ground lease terminates, the lender's collateral disappears. No lender would make a 30-year loan on a 10-year lease.

For many projects, particularly those that serve special needs and have lower cash flow, you may need a large number of years to pay off the owner's year 55 loan. We have seen investors require 90-year leases. A determination of the exact term that will be required cannot be made accurately until we have more final numbers and have identified a tax credit investor in the Project.

If the residual analysis does not allow the classification of the soft loans as true debt, the attorney for the tax credit investor will be unable to write a tax opinion approving the investment. Based on my experience with ground lease projects, I think it is quite unlikely the Project would be able find a tax credit investor to invest in the Project if it has only a 66-year lease.

Very truly yours,

A handwritten signature in black ink, appearing to read 'S. Barshay', written over the typed name.

SCOTT R. BARSHAY