

CITY OF OAKLAND



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**COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE**  
Oakland, California

**Subject:** City Attorney's Report Highlighting Legal Issues and Risks re  
Resolution Authorizing the Agency Administrator to (1) Execute an  
Agreement that will Allow the Agency to Complete Hazardous  
Materials Testing on BART-Owned Property at the MacArthur BART  
Station and (2) Pay up to \$60,000 for Insurance to Cover Liability to  
Third Parties

Dear Chairperson Brunner and Members of the Committee:

**SUMMARY**

The purpose of this report is to highlight the legal issues and risks associated with the proposed resolution regarding the MacArthur Transit Village Project ("Project"). (Item 9 on the Committee's November 9, 2004 agenda.) The resolution authorizes the Agency administrator to (1) indemnify BART so that BART will allow the Agency to complete hazardous materials testing at the MacArthur BART Station parking lot as part of the pre-development work related to the Project; and (2) pay up to \$60,000 of the cost of insurance to cover liability to third parties.

Specifically, the Community Economic Development Agency ("CEDA") requests Agency approval to execute an agreement with BART for the Agency to:

- 1) conduct environmental testing at the MacArthur BART station,
- 2) pay the cost of any required clean up of the testing site,
- 3) pay the cost of any third-party claims related to the testing, and
- 4) pay up to one-third of the cost of an insurance policy, and policy deductible, up to \$60,000, to cover a portion of the liability for claims or lawsuits.

*The proposed agreement caps the Agency's liability for clean up and third-party claims at the amount of the tax increment generated by the Redevelopment project area.*

## **BACKGROUND**

The Agency, BART and the developer, a team consisting of Aegis Equity Partners, Shea Properties and BUILD (BRIDGE Urban Infill Land Development LLC), recently executed an Exclusive Negotiating Agreement that delineates predevelopment work the team will complete. All parties agree that Phase II environmental testing must be done at the site, where former dry cleaning facilities may have deposited underground contaminants.

Phase II testing has been delayed because BART requires that the Agency or Developer assume all liability related to the testing. In order to facilitate the MacArthur Transit Village development, the Agency Administrator committed to seek Agency authorization to assume the liabilities associated with Phase II testing.

- The testing will be done on property owned by BART, not by the Agency. The Agency will be required to pay the costs of any clean up required by regulatory agencies even if the Project does not proceed.
- Neither BART nor the development team, MacArthur Transit Community Partners LLC, is willing to bear liability associated with the testing, beyond the cost of an insurance policy and deductible. Both BART and the Developer are relying on the Agency to cover potential costs.
- BART has required indemnification by developers at other transit villages, including Richmond BART and the Fruitvale station. In both instances the developers were non-profit entities with limited assets. They were not “deep pockets.”

## **RISKS**

### Immediate Costs to the Agency

- The Agency will pay up to one-third of the cost of an insurance policy to cover potential claims and lawsuits. The Agency’s share of the cost is anticipated to be no more than \$33,334.
- The Agency will pay for testing on the BART parking lot. The Agency has authorized acceptance of a \$125,000 loan from a State agency for the testing.

### Potential/Future Costs to the Agency

- The Agency proposes to cap liability at the amount of increment generated by the Broadway/MacArthur/San Pablo Redevelopment Project.
- Subject to the cap, the Agency will bear the entire cost of clean up of the BART parking lot if, after the Agency’s testing, a regulatory agency requires site clean up.
- BART’s risk analysis concluded that remediation costs may range from \$0 to \$10 million. They determined that the average risk remediation costs total about \$282,000, however, in a worst case scenario, the Agency could be required to fund a \$10 million clean up effort, subject to the cap.
- The Agency will be required to pay for any damage to BART property caused by the testing. The Agency’s contract with the consultant performing the testing

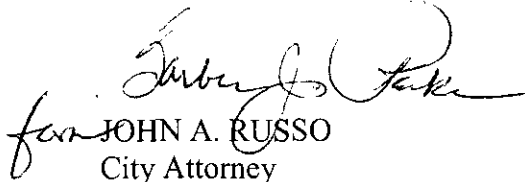
should include a provision requiring the contractor to assume liability for damages he causes.

- Subject to the cap, the Agency will be required to pay any award to third-party claimants for damages or injury they suffer as a result of the environmental testing. An insurance policy will be purchased to cover the cost of these claims, up to \$10 million.
- The Agency will pay one-third of the cost of the deductible for any third-party claim award. The Agency's share of the deductible is estimated at \$17,000.
- Subject to the cap, the Agency will be responsible for paying the amount of third party claims that exceeds the \$10 million aggregate claim limit.

### CONCLUSION

BART is requiring Agency or the developer indemnify BART for potential clean up of contaminants and lawsuits and claims associated with the environmental testing scheduled for the MacArthur BART parking lot. The City Attorney's Office has highlighted the issues and risks associated with the approval of the proposed agreement.

Respectfully submitted,

  
for JOHN A. RUSSO  
City Attorney

Attorney Assigned:  
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