



FILED
OFFICE OF THE CITY CLERK
OAKLAND

2013 APR 11 AM 9:10 **AGENDA REPORT**

TO: DEANNA J. SANTANA
CITY ADMINISTRATOR

FROM: Michele Byrd

SUBJECT: Oak to 9th: Early Purchase
of Affordable Housing Parcels

DATE: March 27, 2013

City Administrator
Approval

Date

4/3/13

COUNCIL DISTRICT: 2

RECOMMENDATION

Staff recommends that the City Council approve a resolution that (1) authorizes staff to exercise the early purchase option to purchase affordable housing parcels at the Oak to Ninth/Brooklyn Basin Development, and (2) authorizes a put agreement with Oakland Harbor Partners providing for the resale of the parcels to Oakland Harbor Partners at the City's option.

EXECUTIVE SUMMARY

The 2006 Development Agreement ("DA") between the City and Oakland Harbor Partners ("OHP") for the Oak to Ninth/Brooklyn Basin Project (the "Project") includes provisions for the development of affordable housing on the Project site. This obligation was intended to be satisfied through a Redevelopment Agency purchase of two parcels, Parcels F and G, from OHP at a discount for the provision of affordable housing. OHP was obligated to remediate contamination on the affordable housing parcels at its expense as necessary to get closure from the regulatory agencies, as well as improve the parcels as needed to render them finished parcels. The Agency was required to purchase the parcels when OHP completes the site improvements and remediation, although the Agency was given the option to purchase them earlier, with a further discount, with OHP continuing to be obligated to install the site improvements and remediate the site.

The City has stepped in to the housing obligations of the dissolved Redevelopment Agency. Staff is recommending that Council authorize the City to exercise the City's optional right to purchase the affordable housing parcels prior to the developer's completion of site improvements and remediation work, the so-called "Early Purchase Option." Along with exercise of the Early Purchase Option, staff is recommending that the City enter into an associated "Put Option Agreement" with OHP, which would obligate the developer at the City's option to re-purchase the parcels from the City for its original purchase price at a later date. Acquiring the affordable housing parcels now, along with the put option, rather than waiting until the site improvement

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and remediation work has been completed, which would trigger the City's obligation to purchase the parcels anyway, is recommended due to the benefits that come with the early purchase and a greater flexibility of options for staff in the future, as described below.

OUTCOME

Staff believes that the early purchase and put option combination have a number of advantages to the City: (1) the City will receive an additional early purchase discount on the affordable housing parcels, estimated at about 10%, on the purchase price; (2) the early purchase will utilize housing bond funds currently held by the Oakland Redevelopment Successor Agency and reserved for this purpose; (3) the early purchase will give OHP working capital to commence development of the Oak to Ninth project; (4) OHP will continue to be obligated to perform the site improvement work and the remediation work at its own expense; (5) it may be possible for the City to sell the parcels to a third party, with or without affordable housing obligations, and then use the sales proceeds for affordable housing development elsewhere, if the community groups agree to amend the Cooperation Agreement to allow for greater off-site development; (6) the City will be able to require OHP to re-purchase the parcels at the original sales price under the put option, thus protecting the City from the risk of a decrease in market value; and (7) any sales proceeds from a third party sale or sale to OHP would go to the City as housing successor for affordable housing purposes. Staff has made significant progress in negotiating provisions adequately securing OHP's site work obligations and put option obligation following the early purchase.

BACKGROUND/LEGISLATIVE HISTORY

The overall Oak to 9th/Brooklyn Basin development is projected to comprise approximately 3,100 housing units, along with over 200,000 square feet in retail space, 29.9 acres of parks and public open space, two renovated marinas and restoration of an existing wetland area. The 63.82 acre Project required a General Plan Amendment, and rezoning much of the property from industrial to a mixed use, higher density Planned Waterfront Zoning District-4. In recognition of the value created by transforming the land from industrial to mixed residential and commercial, community groups negotiated a variety of community benefits provisions to be included in the Development Agreement, including provisions for parks, local hiring and affordable housing.

The affordable housing production requirements in California redevelopment law (which were not repealed by the redevelopment dissolution law) would require the production of 420 to 465 affordable housing units within the Central City East Redevelopment Project Area for low to moderate-income households in connection with the Project -- i.e. 15% of total market rate units developed under the Project. Of the affordable units, 9% would be required to be restricted and affordable to households earning 120% of Area Median Income ("AMI") or below, and 6% of units would be required to be restricted and affordable to households earning 50% of AMI or below. The range in possible units is dependent on whether 300 of the Project units would be built on Parcel N (which is outside the Central City East Redevelopment Project Area) or instead

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distributed amongst parcels within the Central City East Project Area. These units would be deed-restricted for affordable housing for 55 years.

Due to this affordable housing production requirement, the developer agreed to set aside and sell Project Parcels F and G for affordable housing at a slight discount from cost. Under the DA, the Redevelopment Agency was required to purchase the two parcels after the developer, at its cost, performed the site work necessary to render the parcels as "finished parcels" and remediate contamination as necessary to receive a "no further action" letter from regulators. The purchase price was set at the lesser of (1) fair market value less \$2 million (\$1 million per parcel), or (2) developer's cost to acquire, maintain, improve and remediate the properties along with overhead and return on equity. The fair market value would be determined through a dueling appraisal process. In addition, OHP agreed to provide a \$2 million subsidy for the development of the affordable housing units (payable upon obtaining building permits).

As part of the deal in the DA, the Redevelopment Agency was given the "Early Purchase Option" to acquire the parcels at any time prior to the site work being completed. The purchase price under an Early Purchase scenario would be the same as under a later purchase, except that the Agency would receive an additional discount (on top of the \$2 million discount), calculated according to a formula factoring in the time of purchase and developer's financing costs. OHP would still be required to perform the site improvement and remediation work at its own cost after the early purchase. The purchase price could later be adjusted downward after OHP performs this work if developer costs ends up being less than the price paid under the formula pegged to fair market value.

As part of the approval of the Project in 2006, the Agency also entered into a Cooperation Agreement with the Oak to Ninth Community Benefits Coalition, a consortium of four community organizations. The Cooperation Agreement among other things requires the Agency to purchase the affordable housing parcels per the DA and ensure that at least 465 affordable housing units are developed. Most of the units would be developed on the affordable housing parcels, although up to 77 units could be developed off-site in designated areas of the Central City East Project Area, subject to a variety of conditions. The development obligations under the Cooperation Agreement are subject to the economic feasibility of the development and the availability of funds from the Low and Moderate Income Housing Fund or other sources to subsidize the development.

In 2006, the total estimated cost of the development of 420-462 affordable housing units (assuming construction commencing in 2008-2013) was estimated to be roughly \$250 million, and the City/Agency's projected subsidies for site acquisition and construction were estimated to be in the neighborhood of \$140 million.

Since the dissolution of the Redevelopment Agency, the Agency's housing obligations for the Project (and other affordable housing obligations) were transferred to the City of Oakland as housing successor. Thus, the requirement to purchase Parcels F and G for affordable housing is now with the City, although it will be funded from affordable housing funds now held by the

Oakland Redevelopment Successor Agency ("ORSA"). The obligations to purchase the affordable housing parcels and develop the required affordable housing units have been listed on ORSA's Recognized Obligation Payment Schedules ("ROPS"). On ROPS 13-14A, governing payments from July through December of 2013, \$23.6 million of housing bond proceeds has been allocated for the land purchase.

Since the actual construction of the vertical development likely won't occur for a few years out, the California Department of Finance ("DOF") would not allow ORSA to retain housing funds for the construction, and instead indicated that ORSA would need to request RPTTF (property tax) funds on a later ROPS at the point when construction of the affordable units would begin.

Late last year, OHP approached the City with a proposal to begin active development of the Project. Assuming they can reach agreement with the City, OHP says that they are ready to close their purchase of the Oak to Ninth site from the Port as soon as May 1, and start construction on Phase 1 by the end of 2013.

OHP understands that, given the dissolution of the Redevelopment Agency and the resulting loss of housing funds, there is considerable uncertainty at this time as to the feasibility of developing 465 units of affordable housing on the two parcels. Therefore, OHP has offered to give the City the put option to allow the City to sell back the property to OHP for its original purchase price. OHP has proposed that the put option be exercisable any time from December 31, 2015, through December 31, 2018. Should the City exercise the put option, the affordable housing restrictions on the parcels would be terminated. Nothing in the Put Option Agreement would prevent the City from selling the parcels to a third party, either for affordable housing development or for some other use.

ANALYSIS

In their initial proposal, OHP estimated the current fair market value of the two parcels, less the required \$2 million reduction, at \$28,400,000, and estimated the early purchase discount at \$2,840,000, for an estimated purchase price of \$25,560,000. The actual fair market value of the parcels will be determined through a dueling appraisal process set forth in the DA. Should the appraisal support a purchase price over the \$23,600,000 set aside in the ROPS 13-14A, the City will need to amend the ROPS to reflect the higher purchase amount. (This would be subject to Oakland Oversight Board and DOF review and approval, and the exercise of the early purchase option would be contingent on sufficient funds being identified in the ROPS to cover the purchase.)

ORSA has included both the purchase of the affordable housing parcels and the development of the units per the Cooperation Agreement as enforceable obligations on previous ROPS, although payment amounts for those obligations were not entered since no payments were to be due during those ROPS periods. DOF has not questioned the enforceability of either the DA purchase obligations or the Cooperation Agreement development obligations on previous ROPS.

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ROPS 13-14A will cover July through December of this year. This is the period during which any Early Purchase will be consummated. ROPS 13-14A, adopted by ORSA and the Oversight Board and now under review by DOF includes \$23,600,000 for in estimated funding for the purchase of Parcels F and G under the DA. The ROPS also includes a \$45,000,000 estimate for future development subsidies towards construction of the affordable units on Parcels F and G.

To secure OHP's obligation to purchase back the parcels in 2016-2018 under the put option, OHP has agreed to set aside 35% of the purchase price into an escrow account. Should OHP fail to purchase back the property under the put option, the City would be able to sell the property to a third party, claim any difference between the sale proceeds received by the City and the purchase price originally paid by the City as liquidated damages, and recover these funds out of escrow. OHP has also agreed to maintain a net worth in an amount sufficient to cover their obligations under the put option.

The DA requires OHP at its own expense to remediate hazardous materials contamination on the affordable housing parcels, as well as the open space parcels to be acquired by the City, and imposes obligations on OHP to secure its obligations to remediate should the City acquire the property prior to the completion of the remediation work. First, OHP is required to either obtain environmental insurance or set aside secured remediation funds covering uninsured work. Second, OHP must enter into a liability limiting agreement with the regulatory agency, the Department of Toxic Substances Control, and that agreement must be structured to protect the City. Third, OHP must indemnify the City for environmental liability.

OHP has informed the City that it is in the process of obtaining insurance coverage that will cover contamination on the affordable housing parcels. Staff is in the process of reviewing the level of coverage. OHP has indicated that it has entered into a liability limiting agreement with DTSC, which includes the affordable housing parcels, and that this agreement benefits the City. Staff and legal counsel are in the process of reviewing that agreement, along with proposed indemnification language.

OHP is also responsible for performing site improvement work on the affordable housing parcels as needed to render the parcels into "finished parcels." As a condition of obtaining subdivision approval from the City for the project, OHP will enter into a subdivision improvement agreement with the City that will require bonds securing OHP's obligation to install the improvements. Should OHP fail to timely move ahead with gaining subdivision approval, the Put Agreement will allow the City to exercise the option and force OHP to buy back the property irrespective of the 2016-2018 put option period.

OHP has also submitted a construction schedule for Phase 1 of the Oak to Ninth project. Should OHP fail to commence construction on Phase 1 by the scheduled date, the City would be able to undo the early purchase by requiring OHP to buy back the property irrespective of the 2016-2018 put option period.

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The DA provides that OHP will contribute \$2 million to the City to subsidize affordable housing development on the affordable housing parcels, due upon the issuance of building permits for each parcel. Currently, the DA contemplates the OHP contribution only subsidizing affordable housing developed on-site. OHP has agreed that the subsidy will continue should the City sell the parcels to a third party and develop the affordable housing off-site. However, OHP's subsidy would decrease, by the amount of any "profit" realized by the City on a third party sale, i.e. the difference between the sale price and the original purchase price, up to \$1 million. For example, if the City purchases the land for \$23 million and then sells the land for \$23 million or less, then OHP must contribute the full \$2 million to off-site development. If the City sells the land for \$23.5 million, then OHP owes only \$1.5 million for the off-site housing subsidy. If the City sells the land for \$24 million or more, then OHP owes only \$1 million. This agreement guarantees that the City will receive no less than \$2 million regardless of the ultimate sales price.

Given an uncertain but seemingly improving economy, it appears that the alternative that provides the most benefit to all parties is for the City to exercise the Early Purchase Option, while receiving the Put Option allowing for later repurchase of the site by OHP at the City's discretion. By executing the Early Purchase Option, the City receives a substantial discount on the purchase price, OHP receives working capital to commence with development, and the City would be protected from a loss in property value by virtue of the secured put option.

Under the Cooperation Agreement, the City is obligated to build 465 units of affordable housing, if economically feasible. Under the current terms of the Agreement, up to 77 of those units may be built off-site in specified areas of the project area and the remainder are to be built on Parcels F and G. The last calculations with regards to costing out the development of the vertical construction of the on-site affordable housing units was completed over six years ago, so staff will be developing cost estimates for various development options (on and off-site) to update calculations to determine how best to proceed, especially in light of the loss of on-going redevelopment tax increment for affordable housing development, and will be preparing recommendations on that front at a later date. However, regardless of how Council eventually decides to proceed with the actual development of the affordable housing units, exercising the Early Purchase Option and entering into the Put Option Agreement now provides the City with the greatest amount of flexibility later on.

PUBLIC OUTREACH/INTEREST

Throughout 2005 through 2006, a number of public community meetings and hearings were held to seek input on the overall Project development and conditions of Planning and environmental approvals. In addition, a series of stakeholder meetings was held with advocates interested in securing public benefits associated with the development, including affordable housing.

In evaluating the early purchase issue, staff has had multiple discussions with community organizations, including parties to the Cooperation Agreement as well as the affordable housing development community, and will continue to consult closely with these groups as it moves forward with determining the best ways to develop the required affordable housing units.

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COORDINATION

Housing staff is working with the City Attorney's Office to review resolutions and all legal agreements associated with the Early Purchase Option Agreement and the Put Option Agreement. Housing staff is also coordinating with staff from the Office of Neighborhood Investment, which is overseeing the coordination of the overall Oak to 9th mixed use development, and with Planning staff, who are charged with oversight of the Conditions of Approval for the Project. The Real Estate division has been enlisted to complete the City's appraisal for Parcels F and G. Finally, the Budget Office has already budgeted the funds from the 2011A-T Subordinated Housing Bond Fund.

COST SUMMARY/IMPLICATIONS

Pending the outcome of the appraisal process, the cost to the City to purchase the affordable housing parcels is expected to be no more than \$23.6 million. These funds are currently budgeted from the 2011A-T Subordinated Housing Bond: Fund 1885 (ORSA fmd 9785), Org 89929 (Housing Development), Account 58312, Project L439410 (Program codes SC07 and SC18). This is also reflected as an Enforceable Obligation by the State Department of Finance on the City's Recognized Obligation Payment Schedule (ROPS) III, line #422, <http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak037615.pdf>

The costs to develop the affordable units themselves are not currently known, and will depend on the building construction type, size and affordability of units, and other funding sources, available, amongst other factors.

By purchasing the parcels now, the City will benefit from a discounted price. Purchasing the property now also will give staff greater flexibility to decide how best to proceed with the development of the affordable housing units themselves.

SUSTAINABLE OPPORTUNITIES

Through the course of developing the Project (including the actions described herein), the following sustainable opportunities will be realized:

Economic: The Oak to 9th project will provide considerable economic benefit to the City through construction jobs, increased property taxes and transfer taxes, additional housing and employment opportunities, and increased access to the City's waterfront.

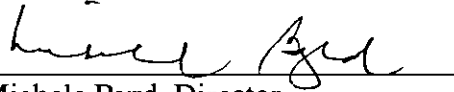
Environmental: The Oak to 9th project will facilitate cleanup of toxic locations and provide increased areas for recreation along the City's waterfront.

Social Equity: The Oak to 9th project will provide at least 15% of the housing as affordable to very low, low, and moderate income households. In addition, the DA provides requirements for

small local business utilization, local hiring and job training, prevailing wages, and equal benefits.

For questions regarding this report, please contact Michele Byrd, Director of Housing and Community Development, at 510-238-3714.

Respectfully submitted,



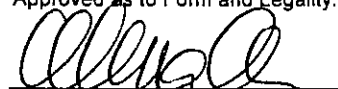
Michele Byrd, Director
Department of Housing and Community Development

Reviewed by:
Norma Thompson
Manager, Housing Development

Prepared by: Christia Katz Mulvey
Housing Development Coordinator
Housing Development Services

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Approved as to Form and Legality:


Office of the City Attorney

OAKLAND CITY COUNCIL

RESOLUTION No. _____ C.M.S.

RESOLUTION (1) AUTHORIZING EXERCISE OF THE EARLY PURCHASE OPTION TO PURCHASE AFFORDABLE HOUSING PARCELS AT THE OAK TO NINTH/BROOKLYN BASIN DEVELOPMENT, AND (2) AUTHORIZING A PUT AGREEMENT PROVIDING FOR THE RESALE OF THE PARCELS TO OAKLAND HARBOR PARTNERS AT THE CITY'S OPTION

WHEREAS, the Oak to 9th/Brooklyn Basin Development (the "Project") proposed by developer Oakland Harbor Partners ("OHP") and approved by the City in 2006 is projected to comprise approximately 3,100 housing units, along with over 200,000 square feet in retail space, 29.9 acres of parks and public open space, two renovated marinas and restoration of an existing wetland area; and

WHEREAS, under affordable housing production requirements in California redevelopment law, development of the Project would require the production of 420 to 465 affordable housing units within the Central City East Redevelopment Project Area for low to moderate-income households in connection with the Project; and

WHEREAS, under the Development Agreement ("DA") for the Project, OHP agreed to set aside and sell Project Parcels F and G (the "affordable housing parcels") for affordable housing at a discount to the Redevelopment Agency after performing site work and environmental remediation ; and

WHEREAS, the Redevelopment Agency was given an "Early Purchase Option" in the DA to acquire the affordable housing parcels at any time prior to the site work and remediation work being completed, and receive an additional early purchase discount; and

WHEREAS, OHP would still be required to perform the site work and remediation work at its own cost after the Early Purchase; and

WHEREAS, on June 20, 2006 and July 18, 2006, the City Council and the Oakland Redevelopment Agency (1) approved Resolution No. 79981 C.M.S. certifying the Environmental Impact Report, SCH No. 2004062013, consisting of the Draft EIR, the Final EIR, and the Addendum to the EIR (the "EIR") for the Oak to Ninth Mixed Use Development Project; and

WHEREAS, following the City's certification of the EIR and approval of the Project, two lawsuits were filed in Alameda County Superior Court ("Court") challenging, among other claims, the City's certification of the EIR; and

WHEREAS, in response to a Court Order and Judgment and Peremptory Writ, the City circulated a document entitled "Revisions to the Analysis in the Oak to Ninth Project EIR (SCH No. 2004062013) Prepared to Comply with the Alameda County Superior Court Order in Case No. RG06-280345 and Case No. RG06-280471" ("Revisions to the EIR"); and

WHEREAS, on January 20, 2009, the City Council approved Resolution No. 81769 C.M.S. (a) rescinding Resolution No. 79881 C.M.S. to the extent that it certified the EIR, approved the CEQA Findings and Statement of Overriding Considerations, and the Mitigation Monitoring and Reporting Program; and (b) recertifying the EIR as revised by the Revisions to the EIR and Response to Comments, and readopting the CEQA Findings and Statement of Overriding Considerations and Mitigation Monitoring and Reporting Program, as revised; and

WHEREAS, the EIR provides a project-level analysis of the environmental impacts of the Project and supports all levels of approval necessary to implement the Project; and

WHEREAS, the proposed changes authorizing staff to exercise the early purchase option to purchase affordable housing parcels at the Project and authorizing a put agreement with OHP would not result in any significant effect that has not already been analyzed in the EIR, and there will be no significant environmental effects caused by the change that have not already been analyzed in the EIR; and

WHEREAS, the City Council hereby finds and determines on the basis of substantial evidence in the record that none of the circumstances necessitating preparation of additional environmental review, as specified in CEQA and the CEQA Guidelines, including, without limitation, Public Resources Code Section 21166 and CEQA Guidelines Sections 15162 or 15163 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 significant 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 defined in CEQA Guidelines Section 15162(a)(3); and

WHEREAS, each as a separate and independent basis, this action is exempt from CEQA pursuant to CEQA Guidelines Sections 15183 (projects consistent with General Plan and Zoning), 15378(b)(5) (City Council authorization of the early purchase option and a put agreement with OHP is not a project because the proposed changes are related to how the City administers the DA, and such administrative activities of the City will not independently result in a physical change in the environment) and 15061(b)(3) (no significant effect on the environment); and

WHEREAS, the City of Oakland is the transferee of the housing functions and obligations of the dissolve Redevelopment Agency per Health and Safety Code Section 34176, including Agency housing obligations and functions with respect to the DA; and

WHEREAS, the Oakland Redevelopment Successor Agency (“ORSA”) has reserved \$23,600,000 from the 2011A-T Subordinated Housing Bond Fund for the City to purchase the affordable housing parcels, and has included the purchase obligation as an enforceable obligation on the Recognized Payment Obligation Schedule (“ROPS”) 13-14A; and

WHEREAS, the actual purchase price for the affordable housing parcels will be determined by an appraisal process set under the DA; and

WHEREAS, OHP and the City have negotiated a Put Option Agreement that would allow the City, at its option, to sell back the affordable housing parcels to OHP for the original purchase price any time from December 31, 2015, through December 31, 2018; and

WHEREAS, staff has determined that it would be advantageous to the City to pursue the Early Purchase Option and the Put Option Agreement; now, therefore be it

RESOLVED: That the City hereby authorizes the City Administrator or her designee to exercise the Early Purchase Option on behalf of the City to purchase the affordable housing parcels from funds received from ORSA for this purpose; and be it

FURTHER RESOLVED: That the Early Purchase shall be contingent on the availability of sufficient funds to cover the purchase; and be it

FURTHER RESOLVED: That the City Council hereby authorizes the City Administrator to negotiate and execute a Put Option Agreement providing for the City, at its option, to sell back the affordable housing parcels to OHP for the original purchase price any time from December 31, 2015, through December 31, 2018, with the execution of the Put Option Agreement a condition to the City’s exercise of the Early Purchase Option; and be it

FURTHER RESOLVED: That the City Administrator or her designee shall file a Notice of Determination/Notice of Exemption, and an Environmental Declaration under the California Fish and Game Code (Section 711.4) with the County of Alameda; and be it

FURTHER RESOLVED: That all agreement and purchase documents shall be reviewed and approved by the City Attorney’s Office for form and legality prior to execution; and be it

FURTHER RESOLVED: That the City hereby authorizes the City Administrator or her designee to conduct negotiations, execute documents, administer the agreements, and take any other action with respect to the Early Purchase and the Put Option Agreement consistent with this Resolution and its basic purpose.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, GALLO, GIBSON MCELHANEY, KALB, KAPLAN, REID, SCHAAF and PRESIDENT
KERNIGHAN

NOES -

ABSENT -

ABSTENTION -

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