

CITY OF OAKLAND
AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND
2004 JAN -8 PM 3:46

TO: Office of the City Manager
ATTN: Deborah Edgerly
FROM: Finance and Management Agency
DATE: January 20, 2004

RE: **A REPORT AND RESOLUTION AUTHORIZING THE CITY MANAGER ENTER INTO AN AGREEMENT WITH THE TRUST FOR PUBLIC LAND TO ACCEPT A GIFT-IN-PLACE OF DESIGN AND CONSTRUCTION SERVICES AND EQUIPMENT AND MATERIALS VALUED AT \$350,000 FOR IMPROVEMENTS TO BERTHA PORT PARK**

SUMMARY

The Trust for Public Land (TPL) is a national non-profit, which was founded for the preservation of open space for community health and enjoyment. TPL has been active over the past few years in the development and improvement of urban parks. With the assistance of community partners, TPL provides services needed to create public parks and playgrounds in predominantly low-income communities throughout the Bay Area. TPL has proposed to partner with the City of Oakland in the improvement of Bertha Port Park and to make a gift of design and construction services and equipment and materials valued at \$350,000 for improvements to the City. Staff, citizens and elected officials have met with TPL over the past year. Staff recently met with TPL in an attempt to resolve a number of issues and to create a process for future projects. At the end of December, the City Manager signed a letter of intent to move forward with the project, based on the agreement developed during the discussions with TPL.

This report and resolution recommends that the City Council:

- Authorize the City Manager to enter into an agreement with TPL for the proposed improvements to Bertha Port Park;
- Waive bidding requirements for the prime contractor to be hired by TPL;
- Authorize the City Manager to accept the gift of design and construction services and equipment and materials valued at \$350,000 for improvements, once they are completed and;
- Provide direction to the City Manager regarding the TPL's request for waiver of all City development and construction fees and charges related to the project.

FISCAL IMPACT

As these improvements are a gift, they will not require any out of pocket expenditure of City funds. The agreement does provide for a possibility of a City contribution towards the cost of material upgrades, but any expenditures, should the City decide to contribute, would be minimal and would be absorbed in the adopted budget. The agreement also calls for the City's on-going

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maintenance of the improvements. Staff feels that the contractual maintenance standards are consistent with the City's own standards, which should result in little or no additional costs. Finally, should the Council direct staff to forgive certain fees and charges, the City's revenues would be minimally impacted.

BACKGROUND

The Trust for Public Land (TPL) is a national non-profit, which was founded for the preservation of open space for community health and enjoyment. TPL has been active over the past few years in the development and improvement of urban parks. TPL has proposed to make a gift to the City of design and construction services and materials valued at \$350,000 for improvements to Bertha Port Park and has been working with staff, citizens and elected officials for several months. Staff recently met with TPL in an attempt to resolve a number of issues and to create a process for future projects. At the end of December, the City Manager signed a letter of intent to move forward with the project, based on the agreement developed during the discussions with TPL.

KEY ISSUES AND IMPACTS

The attached Agreement for Gift of Construction of Bertha Port Park sets forth terms of the gift proposed by TPL. The terms vary from the City's standard development, design or construction arrangements with for-profit contractors. Policy and legal/risk issues are identified and discussed below.

Contractor License Requirements: The State Contractor's License Board requires licensed contractors to perform some of the improvements TPL proposes to deliver and TPL intends to hire a licensed contractor to perform the work. Public entities are further required to contract directly with licensed contractors under state law; however, TPL is not a licensed contractor. (See, Bus. & Prof. Code § 7028.15) Therefore, TPL and the City will jointly hire the prime contractor and sign the construction agreement to satisfy the state requirement. The agreement will include a provision making TPL solely responsible and liable for managing the work, issuing payments and resolving financial claims that arise under the prime construction agreement.

Assignment of Rights & City as "Additional Insured": In order to assure that the City can pursue future claims for design and/or construction problems, if any, TPL has agreed to assign to the City the right to enforce terms and conditions of the agreements of the architect and prime contractor upon completion of the project. In addition to naming the City as an "additional insured" on the TPL policy, TPL has agreed to require the landscape architect and the prime contractor to name the City as an "additional insured" on insurance certificates.

Limited Liability: The Gift Agreement includes a provision limiting TPL's liability to an amount equal to the Gift Cost (estimated to be \$350,000), regardless of negligence or fault. Although this provision may limit the City's right to sue TPL for damages in excess of the Gift Cost, the City could pursue claims against TPL's insurance policy as an "additional insured", up to the policy limits. TPL will provide insurance that meets the City's standard insurance requirements for this type of project.

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City Indemnification of TPL: Although TPL has agreed to indemnify the City to a limited extent through construction of the project, the Gift Agreement includes a provision that requires the City to indemnify TPL upon completion and acceptance of the Gift (work and improvements). Claims in any way related to TPL's acts, omissions to perform a duty imposed by law or by the Gift Agreement, or the result of TPL's gross negligence or willful misconduct are excluded from the City's duty to indemnify TPL.

City Maintenance: The Gift Agreement contains provisions requiring the City to provide maintenance, including but not limited to "periodic removal of litter and debris, removal of trash from receptacles, restoration and maintenance of landscaping, irrigation, concrete work and masonry, and regular mowing of lawn areas and pruning of trees and shrubs." The provision is consistent with City park maintenance policies; however, this contractual requirement will require City to deploy maintenance staff or contractors to Bertha Port on a regular basis to avoid breach of contract.

Bidding: TPL has requested that the City waive bidding requirements for the prime contract. The City's bidding requirements are set forth in Oakland Municipal Code 2.08.050 and can be waived by the City Council upon a finding that it is in the "best interests of the City" to do so. Therefore, the City Council may waive bidding requirements for the prime contractor.

Design, Equipment and Materials: TPL will manage the project. In order to assure that design and equipment and materials will operate with and are consistent with existing City facilities, expertise or training, TPL has agreed to consider and accommodate recommendations of City staff regarding those features. Additionally, City has agreed to offer supplemental funding, as necessary and if budget funds are available, to facilitate its recommendations if the substitute costs exceed costs of the original design, equipment or materials or otherwise increase project costs.

Waiver of Fees and Charges: TPL has requested that the City waive all permit fees and charges related to the Bertha Port Park Project. TPL feels that they have already spent an inordinate amount of staff time on this project and, in order to devote the maximum funds to actual physical improvements, requests that Council waive any and all City fees and charges. TPL normally pays such city fees and charges in other communities. *Should the City Council deem to waive fees and charges, as requested by TPL, staff recommends that the Council do so as a one-time exception, rather than to establish a precedent for future projects.*

SUSTAINABLE OPPORTUNITIES

This project will help improve the quality of the City's open space areas for current and future generations.

DISABILITY AND SENIOR ACCESS

The proposed improvements meet ADA Accessibility guidelines for Buildings and Facilities.

ALTERNATIVE RECOMMENDATION(S)

None

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ACTION REQUESTED OF THE CITY COUNCIL

Staff recommends that Council:

- Authorize the City Manager to enter into an agreement with TPL for the proposed improvements to Bertha Port Park;
- Waive bidding requirements for the prime contractor to be hired by TPL;
- Authorize the City Manager to accept the gift of design and construction services and equipment and materials valued at \$350,000 for improvements, once they are completed and;
- Provide direction to the City Manager regarding the TPL's request for waiver of all City development and construction fees and charges related to the project.

Respectfully submitted,



William E. Noland
Interim Agency Director
Finance and Management Agency

Attachments

- 1) Resolution
- 2) Agreement

APPROVED AND FORWARDED TO THE
CITY COUNCIL:


OFFICE OF THE CITY MANAGER

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DRAFT

OAKLAND CITY COUNCIL

RESOLUTION No. _____ C.M.S.

A RESOLUTION AUTHORIZING THE CITY MANAGER ENTER INTO AN AGREEMENT WITH THE TRUST FOR PUBLIC LAND TO ACCEPT A GIFT-IN-PLACE OF DESIGN AND CONSTRUCTION SERVICES AND EQUIPMENT AND MATERIALS VALUED AT \$350,000 FOR IMPROVEMENTS TO BERTHA PORT PARK

WHEREAS, the Trust for Public Land desires to make certain improvements to Bertha Port Park located in the City of Oakland; and

WHEREAS, the Trust for Public Land proposes to make a gift of design and construction services and equipment and materials valued at \$350,000 for these improvements to the City of Oakland; and

WHEREAS, the Trust for Public Land has submitted terms and conditions for design and construction of the gift of improvements, which are set forth in the agreement included with the City Manager's report dated January 20, 2004 (referred to hereafter as "Gift Agreement"); and

WHEREAS, the Oakland City Council feels it would be in the best interests of the City of Oakland to accept this gift; now therefore, be it

RESOLVED: That the City Manager is authorized to enter into the Gift Agreement with the Trust for Public Land for design and construction services and equipment and materials for said improvements, , to accept the gift of completed improvements and to waive any and all City of Oakland development and construction fees and charges, if directed to do so by Council; and, be it

FURTHER RESOLVED: That, pursuant to Oakland Municipal Code, Title 2, Chapter 2.04, Section 2.04.050.I.5, the City Council finds and determines that it is in the best interests of the City to waive any bidding requirements for the prime construction contractor to be hired by the Trust for Public Land to build improvements and hereby waives such requirements; and be it

FURTHER RESOLVED: That the Gift Agreement has been approved by the Office of the City Attorney and a copy will be placed on file in the Office of the City Clerk.

IN COUNCIL, OAKLAND, CALIFORNIA, January 20, 2004

PASSED BY THE FOLLOWING VOTE:

AYES—BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID, WAN AND PRESIDENT DE LA FUENTE

NOES—

ABSENT—

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ABSTENTION—

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

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**AGREEMENT FOR GIFT OF CONSTRUCTION OF IMPROVEMENTS TO BERTHA
PORT PARK**

This Agreement for Construction of Bertha Port Park ("Agreement") is entered into as of _____, 2004 (the "Effective Date"), by and between the Trust For Public Land ("TPL"), a California non-profit public benefit corporation, and the City of Oakland ("City").

RECITALS

A. The City owns real property in West Oakland neighborhood, more particularly described on Exhibit A attached hereto and commonly referred to as Bertha Port Park, located at 8th and Wood Streets, bordered on the south by Goss Street, Oakland, California, commonly known as Bertha Port Park (the "Property").

B. TPL is in the process of raising private funds ("Park Funds") for a project at the Park consisting of the design, construction and construction management of certain physical improvements ("Improvements") which together will comprise new park facilities at the Property (collectively, the "Project"). On _____, 2004, the City Council approved a Letter of Intent dated December __, 2003 and signed by TPL and the Interim City Manager, attached hereto as Exhibit B, pursuant to which the City Council, by Resolution No. _____, (i) acknowledged that TPL had raised the Park Funds for the Project, (ii) approved the concept plan for the Park ("Concept Plan") attached as Attachment 2 to the LOI, (iii) approved this contract in form as it was attached to the LOI as Attachment 1, and (iv) agreed to accept a gift-in-place ("Gift") of the Project, valued at approximately Three Hundred and Fifty Thousand Dollars (\$350,000) (the "Gift Cost"), the amount of Park Funds TPL will raise. Of the Gift Cost, at least Two Hundred and Sixty Thousand Dollars (\$260,000) will be devoted to in-the-ground Improvements.

C. Item 1 of the LOI states that prior to construction of the Improvements, TPL and the City will enter into a contract specifying the terms and conditions under which construction of the Improvements shall occur at the Property. The parties desire by this Agreement to specify those terms and conditions, and to provide a procedure and requirements for the completion of the Project by TPL and the City's acceptance of the Project as a Gift.

D. By this Agreement the parties also wish to ratify all actions taken by TPL with regard to the Project prior to the Effective Date of this Agreement, and to incorporate into this Agreement by reference all Exhibits attached hereto and their Attachments.

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Now, therefore, the parties agree as follows:

1. Ratification of TPL's Activities. The City and TPL hereby ratify and approve all actions, agreements, costs and expenditures taken, incurred or made by TPL prior to the Effective Date of this Agreement relating to the Project, and incorporate into this Agreement by reference all Exhibits attached hereto, and their respective Attachments.

2. Gift-In-Place. The City agrees to accept the Improvements to be designed and constructed in accordance with the LOI as a gift-in-place valued at the Gift Cost, subject to their completion as set forth herein.

3. Scope of Work. TPL shall, in accordance with the LOI, (a) retain an architect or designer ("Design Professional") to prepare plans and construction details for the Improvements ("Construction Plans and Details"); (b) designate a project manager ("Project Manager") to supervise the Design Professional, supervise plan submission (below at Section 9) and manage the Contractor and the Project; (c) retain a construction contractor ("Contractor") to construct the Improvements, and prepare a construction contract ("Construction Contract") which contains terms and conditions satisfactory to TPL in its sole and absolute discretion, and includes the language in Attachment 2 hereto; (d) together with, or through, the Project Manager and Contractor, submit the Construction Plans and Details to the City for approval in accordance with the process set forth in Section 9; (e) pay the cost of all of the above (except permitting and all other City fees, which the City shall waive) and the cost of construction of the Improvements, in an amount not to exceed the Gift Cost; and (f) construct the Project. All persons and entities hired by TPL for the Project, including without limitation the Design Professional, Project Manager, and Contractor, and each of their subcontractors, independent contractors, agents and employees, shall be collectively referred to herein as the "Contracting Parties."

4. Selection of Professionals. TPL may select any Design Professional, Project Manager, Contractor and other Contracting Party, and may enter into agreements with any of the foregoing and any other Contracting Parties, in its sole and absolute discretion; provided, however, that each person or entity legally required to hold a license to work for the Project shall hold such required license and shall keep it in force during Term of this Agreement. TPL agrees further to require licensed professionals and construction contractors hired by TPL to work on the project to name City as an "additional insured" and, once the Project is complete, to assign to the City all rights to enforce such agreements with such licensed professionals and construction contractors.

5. Term. The Effective Date of this Agreement is the date set forth in the first paragraph of this Agreement. This Agreement shall expire on the date upon which the City executes the Acceptance Letter described in Section 15, below, or upon such

earlier date as either party terminates this Agreement in accordance with Section 17, below.

6. Concept Plan for Project. The Concept Plan for the Project is attached to the LOI as Attachment 2, and through the Resolution and by this Agreement is approved by the City.

7. Access to Property. The City hereby grants to TPL and all Contracting Parties full, complete and unrestricted access to the Property during the Term of this Agreement.

8. Compliance with Law; Permits for Construction. All contracts entered into by or on behalf of TPL for the design and construction of the Improvements shall require that the Improvements comply with all federal, state and local laws, ordinances, rules and regulations, including without limitation the City of Oakland Building Code and all applicable City building standards, including, but not limited to the California Administrative Code, Titles 8, 17, and 19; Title 24 of the California Administrative Code as that Code would be applied to construction of a public building constructed with public funds; California Health and Safety Code Sections 1400 through 1421; the Occupational Safety and Health Act; the Uniform Building Code, International Conference of Building Officials, 1998 Edition; and the Americans with Disabilities Act Standards for Accessible Design as they would be applied to construction of a public building by a public entity, in effect at the time of execution of this Agreement or which may hereafter be in effect at any time during the Term hereof. When permits for construction of the Improvements are required by the City, the City shall respond to all requests for permits within thirty (30) calendar days of submission by TPL or any Contracting Parties of such requests, and all fees for such permits shall be waived by the City.

10. Periodic Reports and Inspections by TPL. During construction of the Improvements, TPL's Project Manager shall periodically report to the City regarding the status of construction of the Improvements, consult with the City upon reasonable request by the City regarding construction of the Improvements, and provide the City with monthly, written status reports regarding construction of the Improvements.

11. Construction Inspections by the City. The City, at its own cost, may conduct periodic on-site inspections to ensure that construction of the Improvements is in conformance with the Construction Plans and Details as approved by the City. All inspections required by the City at any time during the Project shall be made within two (2) business days of a request for inspection by TPL.

12. Repair of Damage; Hazardous Materials.

(a) Repair of Ordinary Damage to Property. If, during the Term of this Agreement, any portion of the Property is damaged by any of the activities of TPL or anyone acting by or through TPL, with the exception of any disturbance of the Property

necessary to construct the Improvements, TPL shall immediately notify the City of such damage, and TPL shall thereafter remedy such damage and restore the Property to its previous condition subject to the City's inspection, review and approval which shall not be unreasonably withheld. If TPL fails to commence repair of such damage within a reasonable time and diligently pursue such remedy to completion, the City may, but shall not be obligated to, remedy such damage at a reasonable cost, which shall be paid by TPL. The foregoing notwithstanding, TPL shall not be responsible for any restoration, repair or remediation of the Property arising out of or relating to the existence, discovery or disturbance of any Hazardous Materials (defined below).

(b) Hazardous Materials: Clean Up by the City, Termination by TPL. "Hazardous Materials" are defined as any substance the existence or removal of which is regulated by any federal, state, county or local laws, ordinances, rules or regulations. TPL has performed a Historical Survey of the Property to determine whether there is a likelihood that there are Hazardous Materials at the Property, and the City has reviewed and accepted the Historical Survey and all Hazardous Materials reported therein, as set forth in the LOI. If during construction of the Improvements TPL or the Contractor or any of their agents or employees suspects or determines that there are Hazardous Materials at the Property, TPL shall immediately stop all work on the Project and notify the City. Within thirty (30) days after such notification, the City shall inform TPL of its remediation strategy, if any. If the City undertakes and can completely remediate the Property at the City's sole cost and expense within a period of time acceptable to TPL in its sole discretion, TPL will continue with the Project after such remediation is complete. If the City either fails to undertake, or undertakes but fails to complete, remediation within the period of time acceptable to TPL, TPL may terminate this Agreement with notice to the City, after which TPL shall have no further obligations hereunder.

13. Insurance.

(a) TPL shall require the Design Professional and the Contractor to maintain at all times during the Term, insurance described in the certificate attached hereto as Exhibit C.

(b) TPL's compliance with the provisions of this Section shall in no way relieve or decrease TPL's indemnification obligations under this Agreement or any of TPL's other obligations hereunder. TPL shall be responsible, at its expense, for separately insuring TPL's personal property.

14. Indemnification.

(a) During the Term of this Agreement until the issuance by the City of the Acceptance Letter described in Section 15, TPL shall indemnify, defend and hold harmless, up to an amount equal to the Gift Cost and no more, the City and its officers, agents and employees for any and all loss, expense, damage, injury, liability and claims for injury to or death of any person, including employees, contractors and agents of TPL, or loss of or damage to property, resulting directly or indirectly from any activity

undertaken pursuant to this Agreement, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on City, except and to the extent that such loss, damage, injury, liability or claim is the result or partially the result of the negligence or willful misconduct of the City, and except that TPL shall not indemnify the City for any claims arising out of or relating in any way to Hazardous Material in, on, under or around the Property or the Project.

(b) After the issuance by the City of the Acceptance Letter described in Section 15, or after termination of this Agreement for any reason, whichever is sooner, City shall indemnify, defend and hold harmless TPL and its directors, officers, agents and employees for any and all loss, expense, damage, injury, liability and claims thereof for injury to or death of any person or loss of or damage to property, resulting directly or indirectly from any activity undertaken pursuant to this Agreement, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on, TPL, except and to the extent that such loss, damage, injury, liability or claim is the result or partially the result of any act of, or any omission to perform some duty imposed by law or by this Agreement on TPL or is the result of the gross negligence or willful misconduct of TPL, or is a consequence of TPL's performance of any work required pursuant to Sections 9, 12(a) or 15 after City's issuance of the Acceptance Letter. The City's indemnity obligations described in this Section 14(b) shall survive completion, expiration, or, if applicable, earlier termination of this Agreement.

15. Final Acceptance. Upon notice from TPL that the Improvements are complete in accordance with the approved plans and details, and that TPL has obtained all necessary regulatory approvals, and upon submission to the City of lien releases as required by Section 16, below, City shall, within ten (10) business days of delivery of such notice by TPL, perform a final inspection of the Improvements, and the City shall thereafter accept the Improvements within three (3) business days of such inspection, which acceptance shall not be delayed or unreasonably withheld, by delivering to TPL a letter of final acceptance (the "Acceptance Letter"). Upon receipt of the Acceptance Letter, TPL shall remove all of its personal property from the Property, shall repair, at TPL's cost, any material damage to the Property caused by such removal or caused by TPL's construction activities on the Property, and shall (with the exception of the land underneath the Improvements and the Improvements) restore the Property to its condition prior to construction of the Improvements.

16. Delivery of Improvements. TPL shall deliver the Improvements and shall provide City with fully executed unconditional lien releases from the Contractor and from any Contracting Party who has delivered a Preliminary Notice to the City as defined in California Civil Code Section 3097. Upon delivery of the Improvements, TPL shall assign to the City all warranties and guaranties for the Improvements, if any, and any rights it has to remedies for latent defects in the Improvements.

17. Default; Termination.

(a) City's Right to Terminate. Any failure by TPL to perform or comply with any of the terms, covenants, obligations, conditions or representations made under this Agreement shall constitute an event of default by TPL. TPL shall have a period of fifteen (15) days from the date of written notice from the City of such failure within which to cure such default, or if such default is not capable of cure within such 15-day period, TPL shall have a reasonable period of time to complete such cure if TPL promptly undertakes action to cure the default within such 15-day period and uses reasonable efforts to complete the cure within a reasonable time after receipt of notice of the default. If TPL fails to cure such default within the foregoing time periods, the parties agree that because the Project is a Gift from TPL to the City, the City will suffer no monetary damages from this failure to cure, and that it would be impracticable or extremely difficult to fix the City's actual damages, if any were in fact sustained by the City as a result of such failure to cure. The parties therefore agree that in such event the City shall have the right, as its sole remedy hereunder, to terminate this Agreement and complete the Project at the City's sole cost.

(b) TPL's Right to Terminate. TPL may terminate this Agreement and the Project (i) for cause, including without limitation (A) for failure by the City to perform or comply with any of the terms, covenants, obligations, conditions or representations made under this Agreement, (B) if the City fails to approve the Initial Designs as set forth in Section 3 or to remediate the Property as discussed in Section 12(b), and (C) in the event that any funding necessary for the Project is rescinded, withdrawn, cancelled or re-appropriated, or is otherwise no longer available for the Project; and (ii) without cause in its sole discretion, including without limitation because TPL has determined to abandon or indefinitely postpone the Project, in any case upon giving ten (10) calendar days' written notice to the City of termination of this Agreement and the Project.

18. Maintenance. The City will be responsible for maintenance of the Improvements after execution of the Acceptance Letter by the City. The City agrees to maintain the Improvements taking into consideration ongoing comments from the community, including but not limited to: periodic removal of litter and debris, removal of trash from receptacles, restoration and maintenance of landscaping, irrigation, concrete work and masonry, and the regular mowing of lawn areas and pruning of shrubs and trees.

19. Miscellaneous.

(a) This Agreement contains the entire understanding between the parties as of the date of this Agreement, and supercedes any and all prior written or oral negotiations, discussions, understandings and agreements, all of which are merged herein. If any provision of this Agreement is determined to be invalid, such determination shall not affect the validity of any other provisions of this Agreement.

(b) This Agreement and its Exhibits may be amended or modified only by a writing signed by both TPL and the City.

(c) Except as expressly provided to the contrary, in the case of approvals, consents and determinations to be made by the City hereunder, TPL may rely solely on those made by _____ or his or her designee.

(d) Unless otherwise expressly provided herein, any notice given under this Agreement shall be effective only if in writing and given by delivering the notice in person or by sending it first-class or certified mail with a return receipt requested or by Express Mail, return receipt requested, with postage prepaid, or by generally accepted overnight courier, as follows:

TPL:

Reed Holderman
Vice President - Western Region
The Trust For Public Land
116 New Montgomery Street, Suite 300
San Francisco, CA 94105

CITY:

Oakland, CA

(e) The obligations of the City under this Agreement shall survive expiration or earlier termination of this Agreement. The obligations of TPL under this Agreement shall terminate upon issuance of the Acceptance Letter and compliance by TPL with Section 16, above, or upon earlier termination of this Agreement.

(f) The City and TPL agree to do such things, perform such acts, and execute, acknowledge and deliver such documents as may be reasonably necessary, proper and usual to carry out all of the terms of, transactions contemplated by, and purposes of, this Agreement.

(g) This Agreement shall be governed by and interpreted under California law.

(h) Time is of the essence in the performance of this Agreement and each and every obligation hereunder.

(i) Attachment 1 contains additional terms and conditions TPL shall follow and adhere to during the Term of this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first written above.

TRUST FOR PUBLIC LAND:

By: _____
Reed Holderman
Vice President – Western Region
General Manager

Date: _____

CITY:

By: _____
[Print *and* sign name above]

Date: _____

Approved as to form:

[Print *and* sign name above]
Deputy City Attorney

Date: _____

Exhibit A
(real property description)

LETTER OF INTENT

This Letter of Intent ("LOI") is entered into as of December 30, 2003, by and between The Trust For Public Land ("TPL"), a California non-profit, public benefit corporation, and the City of Oakland ("City").

Recitals

A. The City owns real property located in West Oakland commonly known as Bertha Port Park ("Property").

B. TPL, in cooperation with neighborhood representatives for West Oakland and a design professional, Hood Design, has created concept plan ("Concept Plan") for the construction of a park and other improvements ("Improvements") to Bertha Port Park (the "Project"), attached hereto as Attachment 2.

C. TPL proposes (i) to raise funds sufficient to pay for (a) the plans and construction details ("Construction Plans and Details") for the Improvements; (b) the construction and Project management services to implement the Construction Plans and Details; (c) the Improvements, and (d) TPL staff time, planning services, stewardship and educational services, community outreach and development, and outside legal fees, all in a minimum amount of Three-Hundred and Fifty Thousand Dollars (\$350,000, the "Gift Cost"), of which at least Two Hundred and Sixty Thousand Dollars shall be devoted to in-the-ground Improvements, and (ii) to donate all of the foregoing to the City as a gift-in-place ("Gift") valued at the Gift Cost, all in accordance with a written agreement to be entered into by and between the City and TPL in the form attached hereto as Attachment 1 ("Agreement").

Letter of Intent

Now, therefore, TPL intends to take the following actions, and the Interim Manager for the City ("City Manager") will recommend that the terms of the Gift, set forth in the attached Agreement, be placed on the Council meeting agenda of January 20, 2004 for consideration, approval and acceptance of the Oakland City Council as follows:

1. That the City of Oakland will agree to accept the Gift, valued at the Gift Cost, and that TPL and the City will agree to enter into the Agreement within five (5) business days of the Council approval date (the "Agreement Date");
2. That prior to the Agreement Date, the City, at its sole cost, cause a Phase I environmental investigation of the Property to be performed, and review and approve, and deliver to TPL for its review and approval, the written report

from such investigation ("Environmental Report"); provided, however, that if either TPL or the City, in either of their sole discretion, disapproves of the Environmental Report, then at the election of either party the parties will not enter into the Agreement and TPL will not perform the Project;

3. That in accordance with the terms of the Gift set forth in the Agreement,

(a) TPL will agree to,

(i) provide detailed Construction Plans and Details for the Improvements prepared by a licensed professional for submission to the City for its approval or deemed approval in accordance with the terms and conditions of the Agreement;

(ii) designate a project manager to supervise the Project;

(iii) after the City has approved the Construction Plans and Details or they are deemed approved, hire a general contractor and any other persons or entities required to construct the Improvements and to complete the Project; and

(iv) enter into a form of contract with the general contractor which (a) is prepared entirely by TPL, (b) contains terms and conditions satisfactory to TPL in its sole and absolute discretion, and (c) is not subject to the City's review, revision or approval ("Construction Contract"); and

(v) assure that City, as owner, is named as an additional insured on insurance policies and bonds provided by licensed professionals and general contractor; and

(b) TPL and the City will agree that City will sign the Construction Contract, but solely to ensure that the Construction Contract has the City's signature on it as the owner of the Project and not for any other purpose, and that the City shall not request, shall not be entitled to, and shall not receive, any rights or remedies under the Construction Contract other than the right to an assignment upon completion of the Project of TPL's claims, if any, against design and construction professionals;

4. That in accordance with the Agreement, (a) TPL will agree to be responsible to raise sufficient funds to pay all parties it hires, including without limitation all designers, the project manager and the general contractor, and to complete the Project, (b) the City will agree to be responsible to facilitate the Project in whatever ways are necessary and as required under the Agreement, and (c) the City Council upon returning to legislative session will consider waiving

all fees, including City permit fees and other City costs, associated with the Project; and

5. That the City will agree to maintain the Park after completion of the Project, also as set forth in the Agreement.

City:

By: Deborah Edgerly
Deborah Edgerly,
Interim City Manager
City of Oakland

Date: December 30, 2003

TPL: Reed Holderman
Reed Holderman,
Vice President and Western Regional Director
The Trust For Public Land

Date: December 30, 2003

Attachment 1
(City Requirements)

1. NON-DISCRIMINATION/EQUAL EMPLOYMENT PRACTICES

TPL shall not discriminate or permit discrimination against any person or group of persons in any manner prohibited by Federal, State or local laws. During the performance of this Agreement, TPL agrees as follows:

- A. TPL and TPL's subcontractors will not discriminate against any employee or applicant for employment because of race, color, creed, sex, sexual orientation, national origin, age, disability, Acquired Immune Deficiency Syndrome (AIDS), AIDS-related Complex (ARC) or any other arbitrary basis. TPL and TPL's subcontractors will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, creed, sex, sexual orientation, national origin, age, disability, Acquired Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or any other arbitrary basis. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment advertising; layoffs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. TPL agrees to post, in conspicuous places, available to employees and applicants for employment, notices setting forth the provision of this nondiscrimination clause.
- B. TPL and TPL's subcontractors will, in all solicitations or advertisements for employees placed by or on behalf of TPL, state that all qualified applicants will receive consideration for employment without regard to race, color, creed, sex, sexual orientation, national origin, age, disability, Acquired Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or any other arbitrary basis.
- C. If applicable, TPL will send to each labor union or representative of works with whom TPL has a collective bargaining agreement or contract or understanding, a notice advising the labor union or worker's representative of TPL's commitment under this nondiscrimination clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- D. Contractor shall make its goods, services, and facilities accessible to people with disabilities and shall verify compliance with the Americans with

Disabilities Act by executing **Schedule 1**, "Declaration of Compliance with the Americans with Disabilities Act," attached hereto.

- E. TPL will cause the foregoing provisions to be inserted in all subcontracts for any work covered by this Agreement, provided that the foregoing provisions shall not apply to contracts or subcontracts for standard commercial supplies or raw materials.
- F. In the event of TPL's or TPL's subcontractor's noncompliance with the nondiscrimination clause of this Agreement, this Agreement may be terminated in accord with Section 16 of this Agreement, rescinded or modified.

2. EQUAL BENEFITS

This Agreement is subject to the Equal Benefits Ordinance, Municipal Code, Chapter 2.32 requiring contractors on CITY contracts of \$25,000 or more to provide employee benefits to their employees with domestic partners equivalent to those provided to their employees with spouses. The ordinance covers all benefits that an employer offers its employees and their spouses, which include but are not limited to, health benefits, bereavement leave, family leave, retirement benefits, travel and other benefits. TPL and vendors that do not have employees or do not provide employees with spousal benefits are not required to change their benefits policies. TPL shall execute an "Equal Benefits-Declaration of Nondiscrimination" which shall be incorporated herein and attached as **Schedule 2** to this Agreement.

3. LIVING WAGE REQUIREMENTS

This Agreement is subject to the Living Wage Ordinance of Chapter 2.28 of the Oakland Municipal Code and its implementing regulations. The Ordinance requires among other things, submission of the Declaration of Compliance attached as **Schedule 3** and, unless specific exemptions apply or a waiver is granted, that TPL provide the following to its employees who perform services under or related to this Agreement:

- A. Minimum compensation – Said employees shall be paid an initial hourly wage rate of \$9.45 with health benefits or \$10.87 without health benefits. These initial rates shall be upwardly adjusted each year no later than April 1 in proportion to the increase at the immediately preceding December 31 over the year earlier level of the Bay Region Consumer Price Index as published by the Bureau of Labor Statistics, U.S. Department of Labor.

- B. Health benefits – Said full-time and part-time employees paid at the lower living wage rate shall be provided health benefits of at least \$1.25 per hour. TPL shall provide proof that health benefits are in effect for those employees no later than 30 days after execution of the contract or receipt of CITY financial assistance.
- C. Compensated days off – Said employees shall be entitled to twelve compensated days off per year for sick leave, vacation or personal necessity at the employee's request, and ten uncompensated days off per year for sick leave. Employees shall accrue one compensated day off per month of full time employment. Part-time employees shall accrue compensated days off in increments proportional to that accrued by full-time employees. The employees shall be eligible to use accrued days off after the first six months of employment or consistent with company policy, whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required 12 compensated days off. Ten uncompensated days off shall be made available, as needed, for personal or immediate family illness after the employee has exhausted his or her accrued compensated days off for that year.
- D. Federal Earned Income Credit (EIC) – TPL shall inform said employees who earn less than \$12.00 per hour that he or she may be eligible for EIC and shall provide forms to apply for advance EIC payments to eligible employees.
- E. TPL shall provide to all employees and to the Office of Contract Compliance, written notice of its obligation to eligible employees under the City's Living Wage requirements. Said notice shall be posted prominently in communal areas of the work site(s) and shall include the above-referenced information.
- F. TPL shall provide all written notices and forms required above in English, Spanish or other languages spoken by a significant number of employees within 30 days of employment under this Agreement.
- G. Reporting – TPL shall maintain a listing of the address, hire date, occupation classification, rate of pay and benefits for each of its employees. TPL shall provide a copy of said list to the Office of Contract Compliance, on a quarterly basis, by March 31, June 30, September 30 and December 31 for the applicable compliance period. Failure to provide said list within five days of the due date will result in liquidated damages of five hundred dollars (\$500.00) for each day that the list remains outstanding. TPL shall maintain employee payroll and related records for a period of four (4) years after expiration of the compliance period.
- H. TPL shall require subcontractors that provide services under or related to this Agreement to comply with the above Living Wage provisions. TPL shall

include the above-referenced sections in its subcontracts. Copies of said subcontracts shall be submitted to the Office of Contract Compliance.

4. LOCAL, SMALL BUSINESS ENTERPRISE PROGRAM (LSBE)

- A. The TPL shall comply with the CITY'S LBE/SLBE requirements or demonstrate compliance with all good faith effort requirements of the City's Professional Services Contract Program. Additionally, opportunities for training and employment shall be given to residents of the City of Oakland.
- B. The TPL shall submit information concerning the ownership and workforce composition of the TPL firm as well as its subcontractors and suppliers, by completing **Schedule 4** ("Employment Questionnaire") attached.
- C. All affirmative action efforts of the TPL are subject to tracking by the CITY. This information or data shall be used for statistical purposes only. All contractors are required to provide data regarding the make-up of their subcontractors and agents, to the extent that such data is maintained by TPL, who will perform CITY contracts, including the race and gender of each employee and/or contractor and his or her job title or function and the methodology used by the TPL to hire and/or contract with the individual or entity in question.
- D. In the recruitment of subcontractors, the City of Oakland requires all contractors to undertake nondiscriminatory and equal outreach efforts, which include outreach to minorities and women-owned businesses as well as other segments of Oakland's business community. The City Manager will track the City's MBE/WBE utilization to ensure the absence of unlawful discrimination on the basis of race, ethnicity, national origin, gender, religion, sexual orientation, or disability, and make reports quarterly, or as requested, to the CITY.
- E. In the use of such recruitment, hiring and retention of employees or subcontractors, the City of Oakland requires all contractors to undertake nondiscriminatory and equal outreach efforts which include outreach to minorities and women as well as other segments of Oakland's business community.

5. CITY OF OAKLAND CAMPAIGN CONTRIBUTIONS LIMITS

This Agreement is subject to the City of Oakland Campaign Reform Act of Chapter 3.12 of the Oakland Municipal Code and its implementing regulations if it requires Council approval. The City of Oakland Campaign Reform Act prohibits contractors that are doing business or seeking to do business with the City of Oakland from making campaign contributions to Oakland candidates between

commencement of negotiations and either 180 days after completion of, or termination of, contract negotiations.

If this Agreement requires Council approval, TPL must sign and date an Acknowledgment of Campaign Contribution Limits Form attached hereto as **Schedule 5**.

6. NUCLEAR FREE ZONE DISCLOSURE

TPL represents, pursuant to **Schedule 6** ("Nuclear Free Zone Disclosure Form"), that TPL is in compliance with the City of Oakland's restrictions on doing business with service providers considered nuclear weapons makers. Prior to execution of this agreement, TPL shall complete **Schedule 6**, attached hereto.

7. POLITICAL PROHIBITION

Monies paid pursuant to this Agreement shall not be used for political purposes, sponsoring or conducting candidate's meetings, engaging in voter registration activity, nor for publicity or propaganda purposes designed to support or defeat legislation pending before Federal, State or local government.

8. RELIGIOUS PROHIBITION

There shall be no religious worship, instruction, or proselytizing as part of, or in connection with, the performance of this Agreement.

9. CONFLICT OF INTEREST

The following protections against conflict of interest will be upheld:

- A. TPL certifies that no member of, or delegate to, the Congress of the United States shall be permitted to share or take part in this Agreement or in any benefit arising there from.
- B. TPL certifies that no member, officer, or employee of CITY or its designees or agents, and no other public official of CITY who exercises any functions or responsibilities with respect to the programs or projects covered by the Agreement, shall have any interest, direct or indirect in this Agreement, or in its proceeds during his/her tenure or for one year thereafter.

- C. TPL certifies that no one who has any financial interest in this Agreement or receives compensation for services from TPL is related by blood or marriage within the third degree to the Mayor or any one or more of the members of the City Council, CITY, City Manager, or the head of the department to which these services are to be provided pursuant to this Agreement.
- D. TPL shall incorporate, or cause to be incorporated, in all subcontracts for work to be performed under this Agreement a provision prohibiting such interests pursuant to the purposes of this section.

10. BUSINESS TAX CERTIFICATE

TPL shall obtain and provide proof of a valid CITY business tax certificate or exemption of same. In the event that TPL is required to provide a business tax certificate, it shall be maintained during the term of this Agreement.

11. TAXES

TPL shall provide to CITY the Tax Identification Number and agrees to promptly pay all duly imposed taxes, including but not limited to, any payroll taxes and business license taxes.

**Attachment 2
(Construction Contract language)**

The Construction Contract shall contain a signature line for the City to sign, with the following language above that signature line:

“The parties agree that the City is signing this Agreement as owner of the Property and for the sole purpose of compliance with state law. The City shall have no rights or remedies whatsoever under this Construction Contract, except to the assignment of any claims TPL may have against the Contractor upon completion of the Project. The City hereby assumes no responsibility for the supervision or direction of Contractor or of the Project, and shall not be liable to Contractor or any other person or entity for any payments hereunder. The City covenants and agrees that the Construction Contract shall not be subject to the City’s review, revision or approval, whether prior to or during its negotiation and execution, or after its execution.”

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ORA/COUNCIL

JAN 20 2004