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CITY OF OAKLAND



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June 15, 2010

**HONORABLE CITY COUNCIL**  
Oakland, California

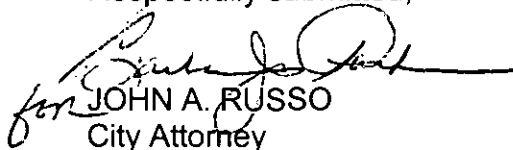
**Subject: RESOLUTION APPROVING SETTLEMENT OF OAKLAND AIRPORT PLAZA HOTEL L.P. V. CITY OF OAKLAND FINANCE & MANAGEMENT AGENCY, REVENUE DIVISION (ALAMEDA SUPERIOR COURT CASE NO. RG09446651), BY OBLIGATING PLAINTIFF TO DISMISS LAWSUIT AND TO PAY CITY \$57,793, WHICH REPRESENTS INTEREST OWED ON LATE-PAID REAL PROPERTY TRANSFER TAXES, IN EXCHANGE FOR RELEASE OF LIEN ON REAL PROPERTY AND RELIEF FROM PENALTIES FOR LATE-PAID TAXES (FINANCE AND MANAGEMENT AGENCY; REAL PROPERTY TRANSFER TAXES)**

Dear President Brunner and Members of the City Council:

Pursuant to section 401 of the Charter, and the direction of the Council at its May 18, 2010, closed session, the City Attorney has prepared and requests your approval of a resolution authorizing settlement of the above-entitled lawsuit by the entry of a settlement agreement obligating Plaintiff to dismiss the lawsuit and to pay the City \$57,793, which represents interest owed on late-paid real property transfer taxes, in exchange for release of a lien on the property and relief from penalties for late-paid taxes.

Attached hereto are the proposed Resolution and Settlement Agreement.

Respectfully submitted,

  
for JOHN A. RUSSO  
City Attorney

Attorney Assigned:  
Kevin D. Siegel

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Approved as to Form and Legality

  
Oakland City Attorney's Office

## OAKLAND CITY COUNCIL

Resolution No. \_\_\_\_\_ C.M.S.

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**RESOLUTION APPROVING SETTLEMENT OF OAKLAND AIRPORT PLAZA HOTEL L.P. V. CITY OF OAKLAND FINANCE & MANAGEMENT AGENCY, REVENUE DIVISION (ALAMEDA SUPERIOR COURT CASE NO. RG09446651), BY OBLIGATING PLAINTIFF TO DISMISS LAWSUIT AND TO PAY CITY \$57,793, WHICH REPRESENTS INTEREST OWED ON LATE-PAID REAL PROPERTY TRANSFER TAXES, IN EXCHANGE FOR RELEASE OF LIEN ON REAL PROPERTY AND RELIEF FROM PENALTIES FOR LATE-PAID TAXES (FINANCE AND MANAGEMENT AGENCY; REAL PROPERTY TRANSFER TAXES)**

**WHEREAS**, on or about December 21, 2005, Oakland Airport Plaza Hotel L.P. ("Plaintiff") deposited \$172,500 into escrow to satisfy its Real Property Transfer Tax obligation (Oakland Municipal Code Chapter 4.20, the "Real Property Transfer Tax Ordinance") in connection with Plaintiff's acquisition of property interests in and to real property commonly known as 150 Hegenberger Road, Oakland (APN 044-5020-005-43, the "Subject Property"); and

**WHEREAS**, Plaintiff's escrow agent only remitted \$17,250 for transfer taxes due to the City, purportedly due to a clerical error; and

**WHEREAS**, in the fall of 2008, the Finance and Management Agency ("FMA") discovered the tax delinquency and initiated an administrative proceeding to collect (1) the tax obligation balance (\$155,525) and (2) penalties and interest due because of the delinquency, pursuant to the Real Estate Transfer Tax Ordinance; and

**WHEREAS**, Plaintiff conceded it owed \$155,525 to satisfy its tax obligation but sought to be excused from the penalties and interest obligation on the ground that the late payment was caused by a clerical error; and

**WHEREAS**, on or about January 14, 2009, after an administrative hearing, FMA issued a final administrative decision ("Administrative Decision") that Plaintiff owed the taxes as well as penalties and interest; and

**WHEREAS**, on or about January 20, 2009, FMA recorded a lien against the Subject Property for \$261,103 (which represents taxes, penalties and interest); and

**WHEREAS**, on or about January 29, 2009, Plaintiff paid the delinquent taxes (\$155,525) but continued to withhold the penalties and interest; and

**WHEREAS**, on or about April 15, 2009, Plaintiff filed a Petition for Writ of Mandate and Complaint for Declaratory Relief (Alameda Superior Court Case No. RG09446651, the "Lawsuit"), seeking to vacate the Administrative Decision and to be excused from any obligation to pay penalties and interest; and

**WHEREAS**, on or about April 5, 2010, the Alameda Superior Court entered a Judgment vacating the Administrative Decision and requiring a new administrative hearing; and

**WHEREAS**, on May 18, 2010, the City Council considered whether to approve a settlement of this case in which the Plaintiff would pay interest in the amount of \$57,793, but not penalties, and dismiss the Lawsuit in exchange for release of the lien; and

**WHEREAS**, consistently with the direction provided by the City Council in closed session, the City Attorney's Office and counsel for Plaintiff have prepared a Settlement Agreement to resolve the Lawsuit, the form of which is attached hereto; now therefore be it resolved

**RESOLVED:** The City Administrator, or his designee, is authorized to enter the Settlement Agreement, in substantially the same form as attached hereto, subject to final approval by the City Attorney.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - DE LA FUENTE, KERNIGHAN, NADEL, QUAN, BROOKS, REID,  
KAPLAN, AND PRESIDENT BRUNNER

NOES -  
ABSENT -  
ABSTENTION -

ATTEST:

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LATONDA SIMMONS  
City Clerk and Clerk of the Council of  
the City of Oakland, California

## SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between Oakland Airport Plaza Hotel, L.P. ("Petitioner"), on one hand, and the City of Oakland ("Respondent"), on the other hand, and shall be effective as of the last date signed below ("Effective Date").

### A. RECITALS

1. On or about December 21, 2005, Petitioner acquired property interests in and to real property located at 150 Hegenberger Road, Oakland, California, APN 044-5020-005-43 ("Subject Property"). Petitioner's property interest in the Subject Property is evidenced by an Assignment and Assumption of Lease ("Assignment") recorded as Document No. 2005541358 in the Official Records of Alameda County on December 21, 2005 ("Subject Transfer").

2. At the time of the Subject Transfer, only \$17,250 was received by the Alameda County Recorder from Petitioner's escrow agent for payment of the City of Oakland transfer tax for the transaction. The actual City of Oakland transfer tax owed for the Subject Transfer was \$172,500, pursuant to Chapter 4.20 of the Oakland Municipal Code.

3. In 2008, Respondent discovered the underpayment and made various demands on Petitioner to pay the \$155,250 due for the underpaid transfer tax, together with interest and penalties thereon pursuant to Oakland Municipal Code Chapter 4.20. Petitioner administratively appealed Respondent's additional assessments seeking a re-determination of the sum demanded by Respondent to remove the interest and penalties on the grounds that the underpayment resulted from a mistake by the Recorder in invoicing Petitioner's escrow agent for the transaction. Respondent denied Petitioner's appeal for redetermination with a written letter dated January 14, 2009. On or about January 20, 2009, Respondent recorded a Special Lien

against the Subject Property as Document No. 2009020063 in the Official Records of Alameda County based on the underpaid transfer tax ("Special Lien"). Petitioner caused Respondent to be paid the "principal" balance due for the transfer tax, \$155,250, on or about January 29, 2009.

4. The balance of interest on principal tax, penalties and interest on penalties (in the amount of \$130,570.30) imposed for the delayed payment of the transfer tax for the Subject Transfer was placed on the real property tax assessment imposed by the Alameda County Assessor against the Subject Property for the 2009-2010 tax year.

5. On or about April 13, 2009, Petitioner filed a Petition for Writ of Mandate and Complaint for Declaratory Relief in the matter entitled, Oakland Airport Plaza, L.P. v. City of Oakland, et al., Alameda Superior Case No. RG09446651 (the "Action") challenging Respondent's denial of Petitioner's administrative appeal for redetermination. An administrative record was prepared and lodged by Respondent, the matter was fully briefed, and a hearing was held before the Hon. Frank Roesch, Dept. 31.

6. On March 5, 2010, the Court granted Petitioner's Petition for Writ of Mandate, entering Judgment in favor of Petitioner on April 5, 2010 and causing the Clerk to issue a Peremptory Writ of Mandate to Respondent on April 6, 2010, true and correct copies of which are attached hereto as Exhibit 1 and Exhibit 2, respectively.

7. On April 16, 2010, Petitioner timely filed a Memorandum of Costs for \$3,630.92 in recoverable court costs against Respondent as the prevailing party, which sum is now part of Petitioner's Judgment against Respondent.

The parties now desire to settle all claims between them that arise out of, relate to or are the subject of the Subject Transfer and/or the Action, and agree as follows.

B. TERMS

1. Respondent hereby acknowledges that absent this Settlement Agreement, a reversal of the Judgment in favor of Petitioner or a further administrative appeal proceeding in compliance with the Judgment and the Peremptory Writ of Mandate, the sums claimed by Respondent under the Special Lien and on the real property tax assessment for the Subject Property are not due, payable or collectible by Respondent.

2. Within ten (10) days of the Effective Date of this Settlement Agreement, Petitioner shall pay Respondent \$57,793.00 in full satisfaction of Petitioner's City of Oakland transfer tax obligation for the Subject Transfer.

3. Upon receipt of the payment referenced in paragraph B.1, above, Respondent shall deliver to Petitioner's counsel an executed original Release of Lien in substantially the same form attached hereto as Exhibit 3.

4. Upon receipt of the payment referenced in paragraph B.1, above, Respondent shall also instruct the Alameda County Assessor to remove the amount assessed in connection with the Special Lien from the real property tax assessment for the Subject Property.

5. Upon receipt of the executed original Release of Special Lien, Petitioner shall deliver to Respondent an executed Full Satisfaction of Judgment and shall cause the Action to be dismissed with prejudice, with the Court to retain jurisdiction solely to enforce the terms of this settlement under Cal. Civ. Proc. Code § 664.6.

6. Release Provision

Excepting only the obligations created by this Settlement Agreement, Petitioner and Respondent, on behalf of themselves and on behalf of each of their respective attorneys,

agents, principals, underwriters, insurers, beneficiaries, servants, representatives, employees, partners, spouses, heirs, predecessors, and successors in interest and assigns and anyone claiming by, through or under them, each hereby completely releases and forever discharges the other, and each of their past, present, and future attorneys, agents, escrow agents, title insurers, principals, underwriters, insurers, beneficiaries, servants, representatives, employees, partners, spouses, heirs, predecessors, and successors in interest and assigns and anyone claiming by, through or under such persons, of and from any and all past, present, or future claims, demands, obligations, causes of action, rights, damages, costs, losses of services, expenses and compensation of any nature whatsoever, whether based on tort, contract or any other legal or equitable theory of recovery, which in any way arise out of, relate to the Subject Transfer and/or the Action.

7. Waiver of Civil Code Section 1542

With respect to the matters herein released, the parties, and each of them, expressly intend to relinquish all claims, whether or not now known, and expressly waives any and all rights and benefits conferred on them by the provisions of Section 1542 of the Civil Code of the State of California, which reads:

A general release does not extend to claims which the creditor does not know or suspects to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor.

The parties, and each of them, understand and acknowledge the significance and consequences of such waiver of the provisions of Section 1542.

8. Warranty of Capacity to Execute Agreement

Each person executing the Settlement Agreement represents and warrants that no other

person or entity had or has any interest in any of the claims, demands, obligations, or causes of action referred to in this Settlement Agreement; that each person has the sole right and exclusive authority to execute this Settlement Agreement and to receive the settlement consideration specified herein; that execution, delivery, and performance of this Settlement Agreement and any related documents has been duly authorized by all necessary partnership, trust, corporate or municipal action; that each individual executing this Settlement Agreement and any related documents is authorized to so execute instruments of this nature on the party's behalf; and that each party has not sold, assigned, transferred, conveyed, hypothecated or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Settlement Agreement. Each party hereby agrees, on behalf of each party for which the person executes this Settlement Agreement, to indemnify, defend and hold harmless each other party to this Settlement Agreement for breach of any representation or warranty made in this paragraph.

9. Attorney's Fees

Except as provided herein, each party hereto shall bear its own attorney's fees and costs with regard to all matters referred to in this Settlement Agreement.

10. Entire Agreement

This Settlement Agreement contains the entire agreement between the parties hereto with respect to the subject hereof and may not be amended, altered, modified, or otherwise changed except by a writing executed by all parties hereto which expressly states that it is an amendment to this Settlement Agreement. All prior oral or written agreements, if any, are expressly superseded hereby and are of no further force or effect.

11. Representation of Comprehension of Settlement Agreement



In entering into this Settlement Agreement, the parties represent that they have relied on the legal advice of their attorney, who is an attorney of their own choice, and that the terms of this Settlement Agreement have been completely read and explained to them by their attorney, and that those terms are fully understood and voluntarily accepted.

12. No Admission of Liability

The parties understand and acknowledge that this Settlement Agreement constitutes a settlement of disputed claims and is not an admission of liability by any party.

13. Applicable Law

This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of California.

14. Execution

This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original. This Settlement Agreement may be executed by facsimile signature, each of which shall be deemed an original. However, original signatures will be exchanged by the parties.

15. Cooperation

The parties to this Settlement Agreement will cooperate in all manners necessary to effectuate the terms of this Settlement Agreement including, but not limited to, executing all necessary documents.

16. Interpretation

No provision of this Settlement Agreement is to be interpreted for or against any party because that party, or that party's representative, drafted such provision.

17. Binding Effect

This Settlement Agreement shall be binding upon and inure to the benefit of any beneficiaries, executors, administrators, heirs, successors, and assigns of each party.

Dated: \_\_\_\_\_

OAKLAND AIRPORT PLAZA, L.P.

By: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: \_\_\_\_\_

CITY OF OAKLAND

By: \_\_\_\_\_

Its: \_\_\_\_\_

APPROVED AS TO FORM:

Dated: \_\_\_\_\_

STEYER LOWENTHAL BOODROOKAS  
ALVAREZ & SMITH LLP

By: \_\_\_\_\_  
Edward Egan Smith  
Attorneys for Petitioner Oakland Airport Plaza, L.P.

Dated: \_\_\_\_\_

JOHN A. RUSSO, City Attorney  
KEVIN D. SIEGEL, Deputy City Attorney

By: \_\_\_\_\_  
Kevin D. Siegel  
Attorneys for Respondent/Defendant City of

Oakland