

**CITY OF OAKLAND
COUNCIL/AGENCY AGENDA REPORT**

FILED
OFFICE OF THE CITY CLERK
OAKLAND
2004 OCT 28 PM 12:01

TO: Office of the City Administrator/Agency Administrator
ATTN: Deborah Edgerly
FROM: Community and Economic Development Agency
DATE: November 9, 2004

RE: **REDEVELOPMENT AGENCY RESOLUTION AUTHORIZING THE AGENCY ADMINISTRATOR TO 1) NEGOTIATE AND EXECUTE A PERMIT TO ENTER, INCLUDING INDEMNIFICATION PROVISIONS, WITH BART TO ALLOW THE AGENCY TO COMPLETE HAZARDOUS MATERIALS TESTING ON BART-OWNED PROPERTY AT THE MACARTHUR BART STATION AS PART OF THE PREDEVELOPMENT WORK FOR THE MACARTHUR TRANSIT VILLAGE PROJECT, AND 2) PAY UP TO \$60,000 FOR NO MORE THAN ONE-THIRD OF THE COST OF AN INSURANCE POLICY, AND THE POLICY DEDUCTIBLE, TO COVER THIRD PARTY LIABILITY.**

SUMMARY

The item is a request for Redevelopment Agency approval of a resolution authorizing the Agency Administrator to negotiate and execute a Permit to Enter, including indemnification provisions, with BART that will allow the Agency to conduct a Phase II hazardous materials investigation on the BART surface parking lot property at the MacArthur BART Station. The completion of this investigation is a critical part of the predevelopment work for the MacArthur Transit Village Project. The outcome of the hazardous materials investigation will be a key factor in determining the financial feasibility of the proposed project.

In addition, this resolution authorizes the Agency to cover one-third of the cost of an insurance policy that will cover third-party liability related to the Phase II hazardous materials investigation. The purchase of the insurance policy is one of the negotiated provisions in the Permit to Enter. The cost of the insurance policy, and the policy deductible, will be shared three-ways by BART, the Development team, and the Agency.

FISCAL IMPACTS

The Phase II environmental site assessment will be funded from the \$125,000 loan from the California Pollution Control Finance Authority that was appropriated for this purpose by the Agency in February 2002. The funds are located in a Project specifically set up for this loan (Fund 9213, Project P187430). The loan will be repaid by tax increment revenue appropriations from the Broadway/MacArthur/San Pablo Redevelopment Project Area.

Item: _____
CED Committee
November 9, 2004

Authorization to execute a Permit to Enter with BART will commit the Redevelopment Agency to indemnify BART against the potential cost of remediating BART property if immediate clean-up action is required by a regulatory agency. The potential cost of the remediation is not possible to determine prior to completing the site assessment. A risk analysis of the potential remediation costs was prepared by BART engineering staff and was reviewed by the Agency. According to the probability analysis, the potential costs range from \$0 to \$10 Million, with the average cost risk computing to \$282,000. The Agency's responsibility for the payment will only include tax increment revenue appropriations from the Broadway/MacArthur/San Pablo Redevelopment Project Area. The Agency is not asking for authority at this time to cover any required remediation costs and will return to the Agency for approval at a later date, if such expenditures are needed.

In addition, one of the negotiated terms of the Permit to Enter, requires the Agency to contribute up to one-third of the cost of an insurance policy for third-party liability. BART and the Developer will pay the balance. The exact cost of the policy is still being negotiated with the insurance providers but is estimated to be between \$70,000 and \$100,000. The insurance policy requires a \$50,000 deductible against any successful third-party claims. BART, the Agency, and the Development team have agreed to each pay one-third of the deductible, if a claim is filed. The Agency is requesting authorization to expend up to \$60,000 for our one-third share of the insurance policy and the deductible. The Agency's share of funding for the policy and for the deductible (if a claim is filed) will come from the Broadway/MacArthur/San Pablo Redevelopment Area Project (Fund 9529, Project P187510).

There will be no adverse impact on the General Fund as a result of executing the Permit to Enter.

BACKGROUND

Since 1993, the City has been working jointly with BART and the MacArthur BART Citizens Planning Committee (CPC), comprised of community residents and representatives of neighborhood organizations, in a planning process for the development of the MacArthur Transit Village. The proposed project site encompasses the area from Telegraph Avenue to Highway 24 between 40th Street and West MacArthur Boulevard. The Agency and BART jointly released an RFP to solicit interest for a new development team for the MacArthur Transit Village project on September 5, 2003. The RFP called for a mixed-use project with a residential focus. A total of 5 development teams submitted proposals under the RFP. The RFP selection panel selected MacArthur Transit Community Partners, LLC (MTCP), a limited liability company that consists of a partnership between Aegis Equity Partners, Shea Properties, and Bridge/BUILD (BRIDGE Urban Infill Land Development, LLC) to be the project developer. The City Council authorized the Agency Administrator to negotiate a three-party Exclusive Negotiating Agreement (ENA) between the Agency, BART, and MTCP on June 1, 2004.

As part of the ENA, the Agency has agreed to complete Phase II hazardous materials testing on the site. The testing will be funded by the \$125,000 loan from the California Pollution Control Finance Authority that was approved for this purpose by the Agency in February 2002. The Agency

completed the Phase I hazardous materials analysis in July 2002. The analysis indicated a number of parcels as having potential contamination issues from former uses, including gas stations and dry cleaning facilities. One of the former dry cleaning facilities was located on the existing BART parking lot property. Based on this information, the Agency determined that Phase II investigation on the BART property, which includes soil and groundwater samples, would be required.

The completion of the Phase II testing has been delayed due to negotiations with BART related to access to their property. BART staff informed the Agency that it is the current BART policy to require indemnification against any required clean-up or potential legal action related to any hazardous materials testing that is completed on their property for the purpose of real estate development by an outside party. This policy is intended to protect BART against costs related to any immediate action required by environmental regulatory agencies due to contamination found on their property during testing, if the proposed project does not go forward. BART required full indemnification for access to its site for the Phase II testing that was completed on BART property at the Fruitvale and Richmond BART Stations.

Agency and BART staff have been working to resolve this issue since October 2002. In May 2003, Agency and BART staff held a meeting with the environmental regulatory agency, the Alameda County Health Agency, to see if they could agree to not require any immediate clean-up action as a result of the completion of the Phase II tests. This agreement would be with the understanding that if any development were to be completed on the site, a clean-up would occur when the project moved forward, and if the development did not occur, the site would remain a paved surface parking lot. Alameda County stated that they could not guarantee that they would not stipulate an immediate clean-up should a problem be found during testing.

The Agency also attempted to pursue state legislation through the City of Oakland's 2003 legislative agenda, that would allow for environmental testing to occur on a site owned by a public agency for project feasibility but would not require remediation if the use of the site does not change and if the current use of the site is not a contributing factor to the contamination. This legislation would have facilitated the redevelopment of underutilized urban properties by reducing the potential risk of a public agency ending up responsible for remediation costs for contamination they did not create when there is no change of use in the property. To date, however, the Agency has been unable to find a sponsor for this legislation.

Having exhausted these other potential solutions, the City Manager and the BART General Manager met to discuss BART's request for indemnification from the City in May 2003. At this meeting, the then City Manager agreed to make a recommendation to the Agency to agree to the clean-up indemnification provisions in the Permit to Enter. On September 29, 2004, the City Administrator met with the BART General Manager, development team, and staff. At this last meeting, an agreement was reached regarding third party indemnification whereby the parties (BART, the Agency, and the development team) would each pay a share of third-party indemnification insurance.

KEY ISSUES AND IMPACTS

The Permit to Enter with BART will allow the Agency to gain access to BART's property to complete Phase II hazardous materials assessment on their property. The Permit contains the following key indemnification provisions:

- The Agency will be responsible for any damage to BART property, exacerbated contamination conditions, or lawsuits that occur as result of negligence on the part of the Agency or our consultants during the testing.
- The Agency will agree to cover the full cost of any immediate remediation action required by a regulatory agency based on the results of the Phase II assessment, only if the action is required even if the property remains in its current land use, as a paved surface parking lot.
- The Agency, BART, and the Development team agree to share three-ways the cost of an insurance policy that will cover third-party liability against any future lawsuits that relate to the results of the Phase II assessment. In addition, the Agency, BART, and the Development team agree to share three-ways the \$50,000 deductible on the insurance policy, if a third-party lawsuit claim is filed.

The indemnification language does not include any required expenditure by the Agency if contamination is found but immediate action is not required by the regulatory agency. In this circumstance, the cost of the remediation will be considered as part of the overall development cost. If the project is not able to go forward, the Agency will not be responsible for cleaning BART's property if it is not required by a regulatory agency to continue use as a parking lot.

BART engineering staff completed an analysis of the potential risk of remediation costs from contamination that may be present on the site. Staff from the Agency and the Public Works, Environmental Services Division reviewed the analysis. The primary concern on the site is the former dry cleaners that was located on the BART lot for about 20 years from the 1940s to the 1960s. Since that time, the property has been excavated down approximately 15 feet. Based on this information, the BART engineering staff determined that there is very limited likelihood that major remediation would be required. They computed that the average risk related to remediation costs would be about \$282,000 and that there was a 1% or less chance that the cost would be as high as \$10 Million.

The Development team has stated that the completion of the Phase II hazardous materials testing is a critical task in the analysis of the feasibility of developing the MacArthur Transit Village Project. The determination of whether or not there is significant contamination on the BART property will have an impact on the site plan and on the total development costs of the project. As a result, the Development team will not be able to meet all of the deliverable requirements of the Exclusive Negotiating Agreement (ENA), including the final project site plan and pro forma, until the testing is complete. The Development team has agreed to execute the ENA and commence the initial planning work on the project before the Permit to Enter is approved.

However, if the Permit is not approved the Developer has stated its intention to terminate the agreement.

The Phase II environmental site assessment will be completed by the Public Works Agency, Environmental Services Division. The Environmental Services Division will select a consultant from one of its standing contracts to complete the work. Under the City of Oakland contracting requirements, the consultant is required to maintain its own liability insurance policy and is required to name the Agency as an additional insured.

SUSTAINABLE OPPORTUNITIES

Economic

Potential benefits if the transit village project goes forward include increased housing stock, new permanent jobs from net new commercial development, and increased tax revenue to the City and Agency.

Environmental

Potential benefits if the transit village project goes forward include redevelopment of transit-node located land at a higher density, creating a more sustainable urban land use pattern and increased transit ridership. The use of sustainable design features will be addressed in the Disposition and Development Agreement if the project goes forward.

Social Equity

The Agency is requiring that a minimum of 20 percent of the housing units developed as part of the MacArthur Transit Village project shall be affordable. Consequently, potential benefits if the Transit Village project goes forward include the development of affordable housing.

DISABILITY AND SENIOR CITIZEN ACCESS

The execution of a Permit to Enter with BART will have no impact on disability and senior citizen access. Any future developments on the BART property will be required to comply with state and federal accessibility requirements, including Federal ADA Accessibility Guidelines, the Fair Housing Act and the State of California's Title 24 Accessibility regulations.

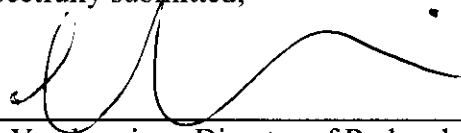
ACTION REQUESTED OF THE COUNCIL AND AGENCY MEMBERS

Staff recommends that the Agency authorize the Agency Administrator to negotiate and execute a Permit to Enter, including indemnification provisions, with BART that will allow the Agency to conduct a Phase II hazardous materials investigation on the BART surface parking lot property at the MacArthur BART Station. In addition, staff recommends that the Agency be authorized to cover one-third of the cost of an insurance policy that will cover third-party liability related to the Phase II hazardous materials investigation, and one-third of the \$50,000

Item: _____
CED Committee
November 9, 2004

deductible on the insurance policy, if a third-party lawsuit claim is filed. This agreement will allow the Agency to complete key pre-development work for a transit village at the MacArthur BART Station.

Respectfully submitted,



Dan Vanderpriem, Director of Redevelopment,
Economic Development, and Housing and
Community Development

Prepared by:
Kathy Kleinbaum
Urban Economic Analyst III

APPROVED AND FORWARDED TO THE
COMMUNITY & ECONOMIC DEVELOPMENT COMMITTEE


OFFICE OF THE CITY ADMINISTRATOR



REDEVELOPMENT AGENCY
OF THE CITY OF OAKLAND

RESOLUTION NO. _____ C. M. S.

RESOLUTION AUTHORIZING THE AGENCY ADMINISTRATOR TO 1) NEGOTIATE AND EXECUTE A PERMIT TO ENTER, INCLUDING INDEMNIFICATION PROVISIONS, WITH BART TO ALLOW THE AGENCY TO COMPLETE HAZARDOUS MATERIALS TESTING ON BART-OWNED PROPERTY AT THE MACARTHUR BART STATION AS PART OF THE PREDEVELOPMENT WORK FOR THE MACARTHUR TRANSIT VILLAGE PROJECT, AND 2) PAY UP TO \$60,000 FOR NO MORE THAN ONE-THIRD OF THE COST OF AN INSURANCE POLICY, AND THE POLICY DEDUCTIBLE, TO COVER THIRD PARTY LIABILITY.

WHEREAS, the City of Oakland is working to redevelop the MacArthur BART Station and the surrounding properties into a transit village; and

WHEREAS, in July 2000, the Redevelopment Agency formed the Broadway/MacArthur/San Pablo Redevelopment Project Area, which includes the proposed transit village site; and

WHEREAS, the Redevelopment Five Year Implementation Plan for the Broadway/MacArthur/San Pablo Redevelopment Project, adopted on July 25, 2000 (Ordinance No. 12269 C.M.S.), includes the MacArthur Transit Village project; and

WHEREAS, pursuant to a joint Request for Proposals, the Agency and BART reviewed five submissions and selected a development team that consists of a partnership between Aegis Equity Partners, Shea Properties, and Bridge Housing/BUILD (BRIDGE Urban Infill Land Development, LLC), organized as MacArthur Transit Community Partners, LLC ("MTCP"); and

WHEREAS, the Agency approved the execution of a three-party Exclusive Negotiating Agreement ("ENA") between the Agency, BART and MTCP on June 1, 2004 for the development of a transit village project at the MacArthur BART Station; and

WHEREAS, under the terms of the ENA, the Agency must complete Phase II hazardous materials testing on the project site, which includes the BART property; and

WHEREAS, in February 2002, the Agency received a loan from the California

Pollution Control Finance Authority, deposited in a project account created for this loan (Fund 9213, Project P187430), to cover the costs of this analysis; and

WHEREAS, BART requires the execution of a Permit to Enter containing indemnification provisions to protect BART from unforeseen costs related to the results of any environmental site assessment prior to allowing access to their property; and

WHEREAS, the Agency has independently reviewed and considered this environmental determination, and the Agency finds and determines that this action complies with CEQA because this action on the part of the Agency is exempt from CEQA pursuant to Section 15306 (information collection), Section 15061(b) (3) (general rule) and Section 15330 (minor cleanup action) of the CEQA guidelines; and

WHEREAS, it is currently too speculative to determine that cleanup action will be required, and any future recommendation for remediation and funding for such action must be approved by the Agency after environmental review; now therefore be it

RESOLVED: That the Agency Administrator is authorized to negotiate and execute a Permit to Enter with BART for purposes of completing hazardous materials testing on the BART-owned property at the MacArthur BART Station for the MacArthur Transit Village project which includes but is not limited to, the following indemnification provisions:

- The Agency will be responsible for any damage to BART property, exacerbated contamination conditions, or lawsuits that occur as result of negligence on the part of the Agency or our consultants during the testing;
- The Agency will agree to cover the full cost of any immediate remediation action for the paved surface lot required by a regulatory agency based on the results of the Phase II assessment;
- The Agency, BART, and the Development team agree to share the cost of an insurance policy, and the policy deductible that will cover third-party liability against any future lawsuits that relate to the results of the Phase II assessment, for an amount up to \$60,000;

and be it further

RESOLVED: That the Permit to Enter shall be reviewed and approved as to form and legality by Agency Counsel prior to execution; and be it further

RESOLVED: That the Agency hereby authorizes expenditure of Agency funds for the purpose of sharing both the cost of purchasing an insurance policy for third party liability and the cost of the policy deductible from the Broadway/MacArthur/San Pablo Project Fund (Fund 9529, Project P187510), for up to \$60,000; and be it further

RESOLVED: That the Agency Administrator or her designee shall cause to be

filed with the County of Alameda a Notice of Exemption for this action; and be it further

RESOLVED: That the Agency Administrator will inform the Agency of any claims or lawsuits that require drawdown of the insurance deductible; and be it further

RESOLVED: That the Agency hereby authorizes the Agency Administrator, or her designee, to take all other actions necessary with respect to the Permit to Enter and the project consistent with this Resolution and its basic purposes.

IN AGENCY, OAKLAND, CALIFORNIA, _____, 2004

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID, WAN, AND
CHAIRPERSON DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____
CEDA FLOYD
Secretary of the Redevelopment
Agency of the City of Oakland