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OAKLAND

2014 MAR 27 PM 12:47

# AGENDA REPORT

**TO:** FRED BLACKWELL  
CITY ADMINISTRATOR

**FROM:** Gregory Hunter

**SUBJECT:** Reaffirmation of Tax Credit Guarantees  
for Fox Theater Project

**DATE:** March 11, 2014

City Administrator

Date

Approval

3/26/14

COUNCIL DISTRICT: 3

## RECOMMENDATION

Staff recommends that the City Council approve:

**A Resolution Reaffirming Obligations Authorized By ORA Resolution No. 2006-0073 C.M.S. Assume, Reaffirm And Ratify Guarantees And Indemnities Required For Tax Credit Financing For The Fox Theater Project Including A Guarantee By Agency In Favor Of The Tax Credit Investment Entities Relating To The Historic Tax Credits And New Markets Tax Credits In Event The Tax Credits Are Not Awarded Or Are Recaptured By The Internal Revenue Service As A Result Of Non-Compliance With IRS Tax Credit Requirements By For Or Its Affiliated Entities**

## OUTCOME

The Redevelopment Agency of the City of Oakland ("Agency") provided various guarantees and indemnities to the Historic Tax Credit (HTC) and New Markets Tax Credit (NMTC) investor(s) for the Fox Theater Project (Project"). This legislation will authorize the Oakland Redevelopment Successor Agency ("ORSA") to assume the Agency's obligations by providing the investor(s), Banc of America Community Development Corporation ("BoA CDC") and related entities with two Assumption, Reaffirmation and Ratification of Indemnity documents for the 2006 and 2009 HTC and NMTC transactions for the Project.

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## **BACKGROUND/LEGISLATIVE HISTORY**

The Fox renovation is one of the most unique rehabilitation projects ever undertaken by the Agency. Because it combined new building technology with historic preservation, the challenges to this project were: (1) to preserve the building and modernize it at the same time; (2) to ensure that the City's requirements have been met to make the building systems fully compliant with current codes, (3) to balance the need for seismic safety with historic building integrity; (4) to preserve architectural detail and still accommodate all new mechanical, electrical and plumbing requirements; and (5) to ensure compliance with HTC regulations while meeting the needs of the theater's operators and users. The fact that the building stood vacant for over forty years compounded these renovation challenges.

The substantial development costs necessary to manage these complexities required the Agency to enter into a series of ownership and financial structures, and various agreements to ensure that the Project would receive HTCs and NMTCs needed to finance the Project. These are summed up as follows:

On July 19, 2005, the Agency and City Council ("City") approved resolutions authorizing a Disposition and Development Agreement (DDA) between the Agency and Oakland Renaissance NMTC, Inc. ("ORNMTC"), a non-profit corporation, that was required to apply for and accept HTCs- Agency Resolution No. 2006-0046 C.M.S. and City Resolution No 79382 C.M.S.

On July 18, 2006, the Agency and City approved resolutions authorizing an Amended and Restated DDA between the Agency and ORNMTC, which was later assigned to a newly created non-profit corporation called Fox Oakland Theater Inc. ("FOT"). FOT replaced ORNMTC and was established specifically as the entity to control the Project via a ground lease and DDA, and to own and manage the other financial entities created to capture the HTCs-Agency Resolution No. 2006-0057 C.M.S. and City Resolution No. 80057 C.M.S.

On July 15, 2008 the Agency approved Resolutions No. 2008-0075 C.M.S. through 2008-0080 C.M.S. authorizing the Agency Administrator to: (1) amend the DDA to provide for a Bridge Loan to FOT for \$7,450,000 to pay for increased project costs; (2) to enter into a Tenant Improvement Grant Agreement with GASS Entertainment Inc., the selected theater operator, for \$2,000,000 to pay for theater tenant improvements; (3) to enter into a loan agreement with Fox Theater Master Tenant, LLC ("FTMT"), which is controlled by FOT via the ground lease and DDA, for \$2,700,000 to pay for additional theater tenant improvements and restaurant tenant improvements; (4) to enter into a loan agreement with the Oakland School for the Arts (OSA) for \$2,300,000 to fund the school tenant improvements; (5) to apply for, accept and appropriate grant funds from: (a) California Cultural And Historical Endowment Grant for \$1,400,000; (b) Department Of Housing And Community Development Infill Infrastructure Grant for \$10,000,000; and

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(c) a Federal Housing And Urban Development Grant for \$3,000,000; and (6) to accept and appropriate \$68,750 in historic mitigation funds from Signature At Broadway Grand LLC.

On October 31, 2006 the Agency and City approved resolutions authorizing amendments to the DDA between the Agency and FOT. The amendments modified and/or added the following guarantees and indemnities by the Agency:

- Modifying the Existing Loan Repayment Guarantee from the Agency to FOT for a Conventional Loan to FOT not to Exceed \$6,500,000, and the Existing Contingent Loan Not to Exceed \$3,530,000 for Costs Associated with Obtaining HTCs and NMTCs, to Include Operating Costs within the Scope of the Guarantees;
- A Guarantee by the Agency in Favor of the Tax Credit Investment Entities for (A) Completion of the Fox Theater Rehabilitation Work in Compliance with Applicable Laws and the Historic Tax Credits Requirements, (B) Payment of Carrying Costs through Lease Up, and (C) that the Project Is Free of Liens Upon Completion of Rehabilitation;
- A Guarantee by Agency in Favor of the Tax Credit Investment Entities Relating to the HTCs and NMTCs in the Event the Tax Credits Are Not Awarded or Are Recaptured by the Internal Revenue Service (IRS) as a Result of Non-Compliance With IRS Tax Credit Requirements by FOT or Its Affiliated Entities;
- Environmental Indemnification for the Lenders and Tax Credit Investors to Protect Against Existing and Future, Known or Unknown Environmental Matters.

On May 19, 2009 the Agency approved a resolution authorizing an amendment to Resolution No. 2008-0077 C.M.S. to divide the \$2.7 million loan to FTMT into two loans, (1) a \$1.4 million loan to FTMT for restaurant tenant improvements, and (2) a \$1.3 million loan to Friends of the Oakland Fox ("FOOF"), Agency Resolution No. 2009-0061 C.M.S.

On January 5, 2010 the Agency approved a resolution authorizing an additional \$2.0 million loan to FOT to pay for: (1) sub-contractors for changes in the design, construction and installation of mechanical, electrical and plumbing systems due to changing code requirements, modified tenant program requirements and unforeseen conditions; (2) modifications to the wrap building and the future restaurant space required by the National Park Service ("NPS") and the State Office of Historic Preservation ("SHPO") in order to ensure historic tax credit status; (3) outstanding State and Federal taxes, Agency Resolution No. 2010-0010 C.M.S.

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These resolutions allowed the project to reach substantial completion. The OSA opened in January 2009, the Fox Theater and the Den opened in February 2009, and Rudy's Can't Fail Café opened June 1, 2011.

Per Assembly Bills 1x26 and 1484, the Oakland Redevelopment Successor Agency ("ORSA") is the successor to all rights and obligations of the Agency pursuant to the provisions of Health and Safety Code Section 34173, including ORSA's obligations under the DDA and under various guaranties entered into in connection with the financing and the tax credits used to fund the development.

### ANALYSIS

The Fox Theater project just went through the process of retiring two NMTC-enhanced loans totaling \$31.0 million through Bank of America and the Charter School Development Corporation. ORSA had previously worked with the investors to include the various guarantees, indemnities and DDA obligations on each of the Recognized Obligation Payment Schedule ("ROPS"). These obligations have been approved by the State Department of Finance on each OPS, although to date no payments have been required for any of the guarantees. As part of the unwind of the two NMTC enhanced loans, the tax credit investor has requested that ORSA formally assume and reaffirm its obligations under the guarantees. **The proposed Assumption and Reaffirmation does not increase or change the liability of ORSA under the agreements,** but rather just formalizes the fact that ORSA, as the successor to the Agency, is now obligated under these guarantees.

The guarantees protect the investor in the event that the tax credits are recaptured. Recapture events could occur if the project or FOT is not compliant with NMTC or HTC re regulations. The guarantees remain in place until expiration of the statute of limitations for an IRS audit of the NMTCs and the HTC's, which is generally three years after the expiration of the respective compliance periods for each tax credit, namely seven (7) years for the NMTCs and five (5) years for the HTC's. All of these recapture periods will be completed by December 31, 2018 at which time the guarantees will end.

### COORDINATION

The Office of Neighborhood Investment coordinated this report with the City Attorney's Office, outside counsel for FOT and the Budget Office. The documents have also been reviewed by BoA CDC and its attorneys.

**COST SUMMARY/IMPLICATIONS**

The legislation does not commit ORSA to any new obligations or costs. ORSA is just formally assuming, reaffirming and ratifying obligations that have been included on the ROPS for a couple of years, including the following obligations:

Item #	Payee	Description/Project Scope	Outstanding Obligation
97	Fox Oakland Theater, Inc.	DDA obligation for investor buyout, management of entities create for the benefit of the Redevelopment Agency	\$3,530,000
98	Bank of America, NA	Loan Payment Guaranty for construction/permanent loan	\$5,379,526
99	Bank of America Community Development Corporation	New Markets Tax Credit Loan Guaranty	\$12,090,000
100	Bank of America Community Development Corporation	New Markets Tax Credit Loan Guaranty	\$1,950,000
101	National Trust Community Investment Fund III	New Markets Tax Credit and Historic Tax Credit investment Guaranty	\$15,997,284

Most of these obligations are contingent and would only require any payments should the tax credits be recaptured. It should be noted that item 97 is a real obligation that is expected to come due in the 2015-16A ROPS. The DDA requires that ORSA pay these amounts to the Fox Theater entities set up by the City and Agency to develop the Fox Theater and will be used to buy back control of the entities from the investor(s).

**POLICY ALIGNMENT**

The legislation is part of the long-term financing of the Fox Theater. This Project is consistent with the General Plan, Historic Preservation Element and Redevelopment Plan. At various times prior to development, the Project went through numerous community engagement processes.

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## **SUSTAINABLE OPPORTUNITIES**

***Economic:*** The Project brings many people downtown at night and has stimulated new investment in the food and entertainment sectors on Broadway and Telegraph Avenue. The record theater attendance has also generated increased business activity and additional revenue for surrounding restaurants, especially in the evening hours. Since the Fox Project began attracting attention, 25 new restaurants, bars, clothing stores and entertainment venues have opened in the Uptown. All of this has resulted in a more pedestrian-friendly Uptown, creating a sense of safety and vitality to this once blighted area.

***Environmental:*** The Project has preserved a historically significant structure and improved upon the physical environment in the Downtown. The Project removed dangerous and hazardous materials from an existing building and replaced them with recycled content materials and other environmentally sensitive materials. Because it is located by a BART station, the rehabilitated project has encouraged the use of mass transit and helped to reduce the reliance on automobiles and the harmful emissions that they produce

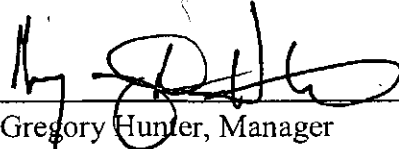
***Social Equity:*** The Project exceeded the City local hiring goals of 20% of local and small business enterprises, by employing 40% of those business enterprises. In addition, the project houses OSA, which is training and educating students, and providing them with opportunities for future employment. The Project is promoting pedestrian activity, street vitality and public safety to an area that was void of pedestrian activity and that had a high incidence of crime.

## **CEQA**

Since the Fox Project was completed over five years ago, and no changes to the physical project would be triggered by the attached legislation, there will be no effect on the environment by this new action and it is therefore exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3), which states that "CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA".

For questions regarding this report, please contact Patrick Lane, Redevelopment Manager, at 510-238-7362.

Respectfully submitted,



Gregory Hunter, Manager  
Office of Neighborhood Investment

Prepared by:  
Patrick Lane, Redevelopment Manager

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APPROVED AS TO FORM AND LEGALITY

BY: Kiran Jain  
ORSA COUNSEL

## OAKLAND REDEVELOPMENT SUCCESSOR AGENCY

RESOLUTION No. 2014- \_\_\_\_\_

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**A RESOLUTION RATIFYING THE OAKLAND REDEVELOPMENT SUCCESSOR AGENCY ASSUMPTION, REAFFIRMATION AND RATIFICATION OF GUARANTEES AND INDEMNITIES REQUIRED FOR TAX CREDIT FINANCING FOR THE FOX THEATER PROJECT INCLUDING:**

- **A GUARANTEE BY AGENCY IN FAVOR OF THE TAX CREDIT INVESTMENT ENTITIES RELATING TO THE HISTORIC TAX CREDITS AND NEW MARKETS TAX CREDITS IN EVENT THE TAX CREDITS ARE NOT AWARDED OR ARE RECAPTURED BY THE INTERNAL REVENUE SERVICE AS A RESULT OF NON-COMPLIANCE WITH IRS TAX CREDIT REQUIREMENTS BY FOR OR ITS AFFILIATED ENTITIES;**

**WHEREAS**, on July 19, 2005, the Redevelopment Agency of the City of Oakland ("Redevelopment Agency") authorized the Agency Administrator to enter into a Disposition and Development Agreement ("DDA") with Oakland Renaissance NMTC, Inc. ("ORNMTC"), a California non-profit corporation, for the renovation for the Fox Theater Project (the "Project") at the real property identified in Exhibit A; and

**WHEREAS**, on July 18, 2006, the Redevelopment Agency authorized the Agency Administrator to amend the DDA and permit the DDA to be assigned to Fox Oakland Theater, Inc. ("FOT") a California non-profit corporation; and

**WHEREAS**, the Redevelopment Agency evaluated the costs of renovating the Fox Theater and determined that in order to complete the project, it would need a variety of sources of financing, including: state and federal grants, private fund raising, New Market Tax Credits (NMTC), Historic Tax Credits (HTC), and financing from the Agency; and

**WHEREAS**, the Project was ultimately financed with a combination of sources of funds including NMTCs and HTCs; and

**WHEREAS**, as a condition to obtaining the NMTC and HTC investments in the Project, the Redevelopment Agency was required to provide certain guarantees and indemnities to the investor, Bank of America Development Corporation; and



**WHEREAS**, on October 31, 2006, the Agency authorized the Agency Administrator to further amend the DDA and enter into agreements with tax credit financing entities to provide the following guarantees:

1. A guarantee that the Fox theater project will be completed in accordance with the requirements of the National Park Service certification for historic property status and for eligibility for HTCs;
2. A guarantee against loss of tax credits due to a breach by FOT entities of the applicable tax credit rules and regulations;
3. A guarantee that the Fox Theater Project has funds sufficient to provide the following:
  - (a) replacement reserves,
  - (b) recurring expenses,
  - (c) debt service payments,
  - (d) preferred return for tax credit financing, and
  - (e) reserve for tax credit buyout;
4. An indemnity for protecting the tax credit financiers, and the commercial lending entity from existing and future, known or unknown losses from environmental contamination; and

**WHEREAS**, the Redevelopment Agency, consistent with the approved Amended DDA, entered into certain guaranty agreements for the benefit of the NMTC and HTC investors; and

**WHEREAS**, the Oakland Redevelopment Successor Agency ("ORSA") is the successor to all rights and obligations of the Redevelopment Agency pursuant to the provisions of Health and Safety Code Section 34173; and

**WHEREAS**, Banco of America Community Development Corporation has requested that ORSA enter into two Assumption, Reaffirmation and Ratification of Indemnity Agreements ("Reaffirmation Agreements") for the 2006 and 2009 NMTC Transactions for the Fox Theater, reaffirming that ORSA is the successor to the Redevelopment Agency and is obligated under the guaranties previously provided by the Redevelopment Agency; and

**WHEREAS**, ORSA has already assumed the guaranty obligations and has listed the guaranty obligations on the Recognized Obligation Payment Schedule ("ROPS"); and

**WHEREAS**, Since the Fox Project was completed over five years ago, and no changes to the physical project would be triggered by the this legislation, there will be no effect on the environment by this new action and it is therefore exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3), which states that "CEQA applies

only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA”, and

**WHEREAS**, the Reaffirmation Agreements do not change or increase ORSA's obligations but rather ratify that ORSA is obligated under the guaranty agreements; now, therefore, be it

**RESOLVED**: That ORSA hereby authorizes the Agency Administrator or his designee to negotiate and execute appropriate agreements with the tax credit financing entities providing tax credit financing the Fox Theater Project , including the Assumption, Reaffirmation and Ratification of Indemnity for the 2006 and 2009 NMTC transactions, and be it further

**RESOLVED**: That all documents related to this transaction shall be reviewed and approved by ORSA Counsel prior to execution, and copies will be placed on file with the Agency Secretary; and be it further

**RESOLVED**: That the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the Agency's decision is based are respectively: (a) the Community & Economic Development Agency, Projects Division, 250 Frank H. Ogawa Plaza, 5th Floor, Oakland CA; (b) the Community & Economic Development Agency, Planning Division, 250 Frank H. Ogawa Plaza, 3rd Floor, Oakland CA; and (c) the Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1st Floor, Oakland, CA.

BY SUCCESSOR AGENCY, OAKLAND, CALIFORNIA, \_\_\_\_\_, 2014

**PASSED BY THE FOLLOWING VOTE:**

AYES- BROOKS, GALLO, GIBSON McELHANEY, KALB, KAPLAN, REID, SCHAAF, and  
CHAIRPERSON KERNIGHAN

NOES-

ABSENT-

ABSTENTION-

ATTEST \_\_\_\_\_  
LATONDA SIMMONS  
Secretary of the Oakland  
Redevelopment Successor Agency