

CITY OF OAKLAND

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2013 MAR 27 AM 10:29

AGENDA REPORT

TO: DEANNA J. SANTANA
CITY ADMINISTRATOR

FROM: Fred Blackwell

SUBJECT: ENA with WODG for Caltrans
Property at 5th & Kirkham Streets

DATE: March 14, 2013

City Administrator
Approval

Date

3/18/13

COUNCIL DISTRICT: 3

RECOMMENDATION

Staff recommends that the City Council approve:

Resolution Authorizing an Exclusive Negotiating Agreement with West Oakland Development Group, LLC for Development of the Blocks Surrounded by 5th, 7th, Kirkham and Magnolia Streets in West Oakland.

OUTCOME

This authorization will allow the City Administrator to negotiate and enter into an Exclusive Negotiating Agreement ("ENA") with West Oakland Development Group, LLC ("WODG") to determine the feasibility of WODG's Project proposal, to complete environmental testing, CEQA review, and to negotiate the terms and conditions for the acquisition of surplus Caltrans Property by the City from Caltrans and the disposition of the Property to and the development of the Project by WODG. Entering into this ENA does not constitute a binding commitment on the part of the City to any project or developer for the Caltrans Property.

BACKGROUND/LEGISLATIVE HISTORY

California Department of Transportation ("Caltrans") owns surplus property in West Oakland (the "Caltrans Property" or "Property"): (1) a 2.76 acre site on the block bounded by 5th Street to the south, 7th Street to the north, Kirkham Street to the west and Union Street to the east and (2) a 0.69 acre site directly across the street on the south-half block bounded by 5th Street to the south, 7th Street to the north, Union Street to the west and Magnolia Street to the east (see map included as *Attachment A*).

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Caltrans has offered the Caltrans Property for lease or sale to the City and other public entities under the Surplus Lands Act. Caltrans responded to the City's request to sell the Property to the City for the purpose of developing a transit-oriented mixed use project.

The Caltrans Property is located in a Transit Oriented Development Overlay Zone ("S-15"). In 2005, the Property was identified as an "opportunity site" in the West Oakland Village Action Report prepared by the City of Oakland, Oakland Housing Authority and San Francisco Bay Area Rapid Transit District ("BART"). The Property is still identified as an "opportunity site" in the draft West Oakland Specific Plan ("WOSP") currently under development by the City of Oakland (i.e. Office of Neighborhood Investment and Department of Planning, Building and Neighborhood Preservation) and its consultant JRDV Architects. The WOSP is scheduled for completion and then adoption by City Council in December 2013.

WODG is a limited liability company made up of four members: Alliance for West Oakland Development, House of Change, DCSI and Tomorrow's Answer. WODG desires to acquire the Caltrans Property and proposes development of the Property in multiple phases (the "Project") as part of a larger transit-oriented development around the West Oakland BART station. WODG owns a developable parcel of 3.89 acres at 1357 – 5th Street, across the street from both the Caltrans Property and the BART site. WODG's proposed Project on the Caltrans Property is consistent with what will be recommended in the draft WOSP.

On November 16, 2004, the City Council, through City Resolution No. 78892 C.M.S., designated the 2.76 acres of Caltrans Property as an "Infill Opportunity Zone," enabling the City to facilitate transit-oriented mixed use development by modifying traffic standards. That designation terminated after four years.

On September 16, 2005, the Agency, pursuant to Resolution No. 2005-0046 C.M.S., entered into a 12-month ENA with 7th Street Partners, LLC for the purpose of evaluating the feasibility of developing a transit-oriented development on the 2.76 acre parcel of the Caltrans Property. Alliance for West Oakland Development was a member of 7th Street Partners, along with McGrath Properties. The ENA was extended for 12 months after the initial 12-month period and expired on September 16, 2007. By the end of the ENA period, parties were not able to agree on terms for the purchase of the 2.76 acre parcel or the responsibility for site cleanup costs. However, during the ENA period, 7th Street Partners did retain Environmental Resources Management to complete Phase I of the Environmental Investigation. As the ENA expired, Phase II of the Environmental Investigation was beginning.

On July 1, 2008, the City, pursuant to City Resolution No. 81317 C.M.S., entered into a contract with Northgate Environmental Management, Inc. to conduct both Phase I and Phase II Environmental Investigation for multiple sites in West Oakland, including the 2.76 acre parcel of Caltrans Property (but not the 0.69 acre parcel of Caltrans Property, which has no environmental testing on record). This contract was funded by an U.S. Environmental Protection Agency's

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Brownfields grant. Testing found contamination on the site. The Phase II report was completed on December 11, 2011 and the City later submitted it to the California State Department of Toxic Substances Control (“DTSC”), the state agency that oversees the development of contaminated properties, for review and approval, before a Remedial Action Plan can be developed.

WODG intends to propose a Project that will be consistent with the recommendations to be put forth in the WOSP (with regard to unit counts, building heights, density, etc.) so that the CEQA evaluation process for the Project may rely on the CEQA approval of the WOSP, to the extent possible, thereby expediting the Project’s entitlement process. A draft Environmental Impact Report (“EIR”) for the WOSP is underway and expected to be released for public review in July 2013. The City should enter into ENA with WODG now so that the timing for the CEQA work for the Plan and Project can be well coordinated.

Developer’s Proposal

In Phase 1, WODG proposes that the Property be used for interim service parking to replace BART’s existing parking at the West Oakland BART station while a mixed-use project is developed on the BART-owned site. BART intends to reactivate an Exclusive Negotiating Agreement with WODG to develop the BART site. In Phase 2, WODG proposes the development of two buildings on 2.76 acres of the Property, which would be: 1) a 196-unit housing development on a two-story parking podium with 98 parking spaces, and 2) a 367-unit housing development on a two-story parking podium with 188 parking spaces. Concurrently during Phase 1, WODG proposes to build a 1,500 car parking garage on 1357 – 5th Street so that BART parking can be moved there permanently before Phase 2 of the Project can begin. In Phase 3, WODG proposes the development of mid-rise residential and/or office buildings with street level retail at 1357 – 5th Street adjoining the 1,500 car parking garage. Lastly, WODG proposes developing a building of up to 80 housing units on the remaining .69 acre parcel of the Property at a later phase.

ANALYSIS

The Caltrans Property suffers from significant environmental contamination because of its former uses as a freeway and truck driver training facility. The scope and cost of environmental mitigation will play a major role in sales price negotiations and readying the Caltrans Property for a housing development.

A draft of the Exclusive Negotiating Agreement with WODG is shown in *Attachment B*. In short, during the ENA period, WODG will:

- Determine financial feasibility of Project and obtain financing for the Project

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- Add a partner to the development team with demonstrated experience successfully developing projects comparable in type and size to the Project
- Order appraisals for the Property
- Negotiate a sales price with Caltrans
- Complete environmental assessment and submit to DTSC for review and approval
- Prepare a Remedial Action Plan and submit to DTSC for review and approval
- Complete Project environmental review process pursuant to the California Environmental Quality Act (“CEQA”)
- Prepare an EIR for the Project, first issuing the Notice of Preparation (“NOP”) and finally certifying the EIR
- Obtain project entitlements including any relevant zoning and land use permits
- Negotiate the terms and conditions of a Disposition and Development Agreement (“DDA”) with the City

Once WODG completes these ENA activities and if all parties agree on terms and financial feasibility, staff will return to the City Council with a recommendation to execute a DDA between the City and WODG, to transfer the Caltrans property to WODG via a double escrow sale, without any expenditure of City funds. That is, the City would buy the Caltrans site using a “simultaneous close”, whereby the City would acquire the site from Caltrans and with funds from WODG, and sell it to WODG as part of the same closing.

PUBLIC OUTREACH/INTEREST

WODG is comprised of four members, three of which are West Oakland-based organizations with rich community relations who will deliver local support for the Project. During the ENA period, WODG will hold at least one public meeting in order to present the proposed Project and gain community support.

In addition, the recommendations put forward in the draft WOSP, including the transit-oriented development around the West Oakland BART station, are the result of extensive community input. Since the start of the WOSP planning process in July 2011, the WOSP team has convened at least 80 various community forums, including community workshops and meetings with the advisory committees to engage community member and stakeholder input. Now that the Plan and EIR documents are nearing a level of formality, the WOSP team is extending the WOSP completion date to allow for even more time to address outstanding concerns and build consensus for the forthcoming Specific Plan recommendations.

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COORDINATION

This report has been coordinated with the City Attorney's Office, Department of Planning, Building and Neighborhood Preservation, Environmental Services Division, JRDV Architects, WODG, and Caltrans.

COST SUMMARY/IMPLICATIONS

The proposed legislation does not commit the City to expenditure of any funds. WODG will bear sole responsibility for all costs associated with developing the Project, including appraisal fees, consultant fees, legal fees, and financing and banking expenses. The ENA shall require payment of a \$25,000 Project Expense Payment by WODG for purposes of reimbursing City for its staff costs and third party expenses.

Following the ENA period, if all parties agree on terms and financial feasibility, staff would return to the City Council to recommend entering into a DDA between the City and WODG for the simultaneous conveyance of the Caltrans Property to the City and from the City to WODG via a double escrow sale. WODG will be solely responsible for purchase price and closing costs.

POLICY ALIGNMENT

The Caltrans Property is located in the West Oakland Priority Development Area ("PDA"), a designation by two regional agencies, the Metropolitan Transportation Commission and the Association of Bay Area Governments. PDA areas are prioritized for funding and other support from regional agencies. It is the intention of these agencies to focus the region's growth within PDAs such as West Oakland, and to focus new housing and transportation investments in these areas.

The S-15 Transit Oriented Development zoning immediately around the West Oakland BART station facilitates dense, mixed-use development and includes a reduced parking requirement.

The Property is identified as an opportunity site in the WOSP and the Project proposed will be consistent with what will be recommended in the draft WOSP, currently under preparation and scheduled for City Council adoption in December 2013.

The Project supports the West Oakland Redevelopment Plan by eliminating a blighted condition, attracting new uses to the area, and minimizing or eliminating environmental hazards.

The goals of the West Oakland Transit Village Action Report are maintained through the development of this Property into housing and retail within a multimodal transit area.

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SUSTAINABLE OPPORTUNITIES

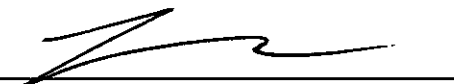
Economic: This Project will take a vacant, blighted, underutilized and contaminated site and turn it into an economically productive use. The addition of approximately 500 new housing units on the Property could attract 1000 new residents to the area, which will contribute to the revitalization of vacant retail sites and stimulate job creation through increased demand for local services and shopping opportunities. Potential benefits include increased housing stock, new jobs from new commercial development, and increased tax revenue to the City.

Environmental: As an infill project that develops in already built-up areas, this Project reduces the pressure to construct on agricultural and other undeveloped land, and thereby contributes to the prevention of urban sprawl. Remediating a contaminated site and bringing it into productive use contributes greatly to the revitalization of West Oakland. The location of the Project in proximity to major public transportation nodes will likely encourage project residents and retail customers to use BART and AC Transit.

Social Equity: The members that make up WODG have deep West Oakland community roots. WODG will be adding a partner to the development team who has experience and success with vertical developments. Such a collaboration is an opportunity for WODG to build its capacity and learn from an experienced developer while representing the interests of those served by its community-based members. This Project will increase housing choices and income diversity in a historically low-income rental neighborhood.

For questions regarding this report, please contact Hui-Chang Li, Urban Economic Analyst II, at 510-238-6239.

Respectfully submitted,



Fred Blackwell, Assistant City Administrator

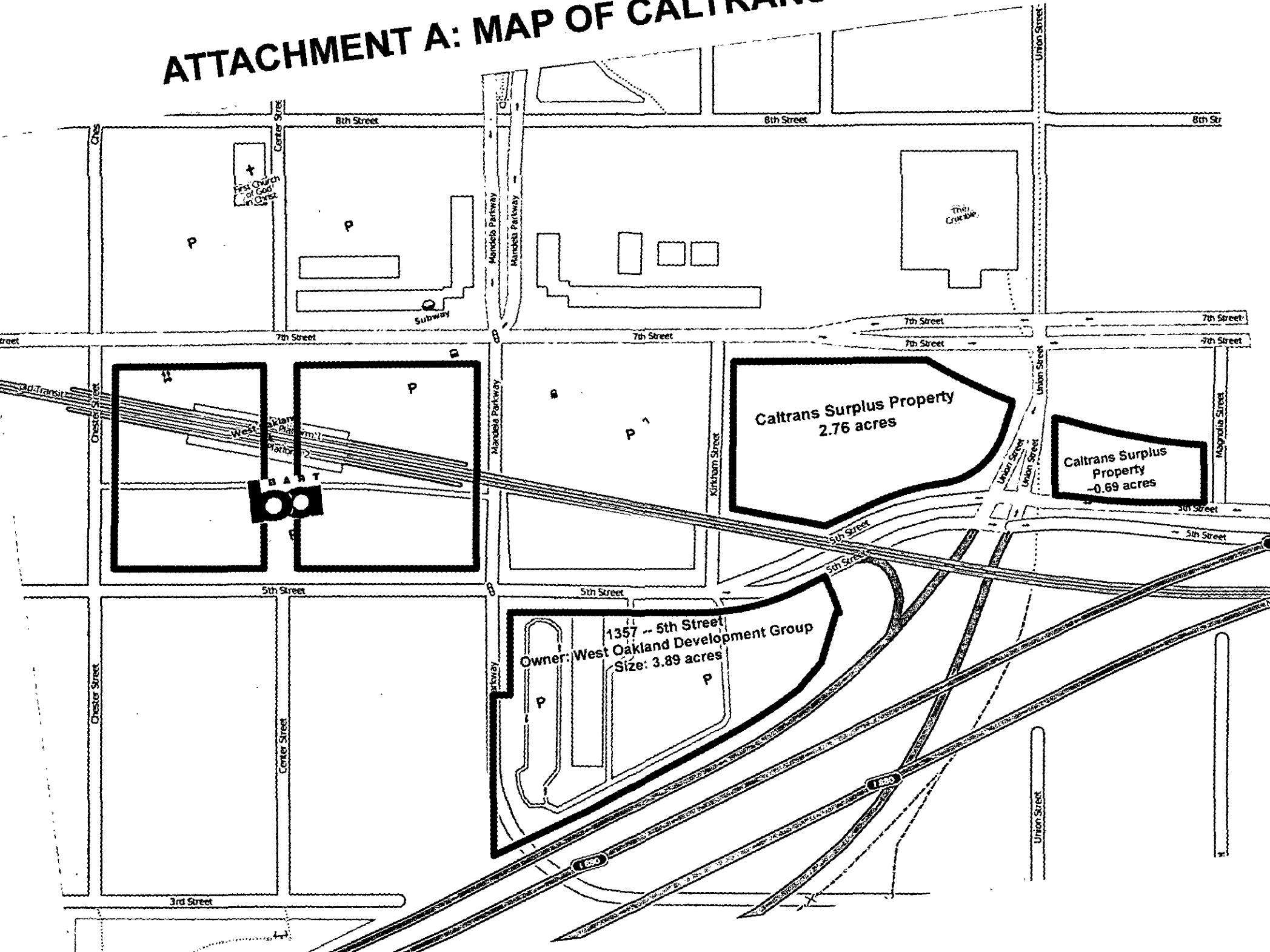
Reviewed by:
Gregory Hunter
Office of Neighborhood Investment

Patrick Lane, Redevelopment Manager

Prepared by:
Hui-Chang Li, Urban Economic Analyst II

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ATTACHMENT A: MAP OF CALTRANS PROPERTY



**EXCLUSIVE NEGOTIATING AGREEMENT
(5th & Kirkham property)**

This Exclusive Negotiating Agreement (the "Agreement" or "ENA"), is made and entered into as of this _____ day of _____, 2013, by and between the City of Oakland (the "City"), a municipal corporation, and West Oakland Development Group, LLC ("WODG" or "Developer"), a California limited liability company (together, the City and WODG are referred to as the "Parties"), pursuant to City Council Resolution No. _____ C.M.S., adopted on _____, 2013.

RECITALS

A. The California Department of Transportation ("Caltrans") owns two parcels totaling up to 3.5 acres within the West Oakland Redevelopment Project Area on the blocks bounded by 5th, 7th, Kirkham and Magnolia Streets (the "Caltrans Property" or the "Property"), as further described in the attached Exhibit A. Caltrans has offered the Caltrans Property for lease or sale to the City and other public entities under the Surplus Lands Act.

B. WODG is a limited liability company made up of Alliance for West Oakland Development, House of Change, DCSI and Tomorrow's Answer. WODG desires to acquire the Caltrans Property and proposes development of the Property in multiple phases (the "Project") as part of a larger transit-oriented development around the West Oakland BART station. In Phase 1, WODG proposes that the Property be used for interim service parking to replace BART's existing parking at the West Oakland BART station while a mixed-use project is developed on the BART-owned site. BART plans to reactivate an Exclusive Negotiating Agreement with WODG to develop the BART site. In Phase 2, WODG proposes the development of two buildings on the 2.76 acre parcel of the Property, which would include: 1) a 196-unit housing development on a two-story parking podium with 98 parking spaces, and 2) a 367-unit housing development on a two-story parking podium with 188 parking spaces. Concurrently during Phase 1, WODG proposes to develop on property owned by WODG at 1357 – 5th Street located across the street from the Property, a 1,500 car parking garage so that BART parking can be moved there permanently before Phase 2 of the Project can begin. In Phase 3, WODG proposes the development of mid-rise residential and/or office buildings with street level retail at 1357 – 5th Street adjoining the 1,500 car parking garage. Lastly, WODG proposes developing a building of up to 80 housing units on the remaining .69 acre parcel of the Property at a later phase.

C. The City and Developer wish to enter into this Agreement to explore the possibility of developing the Property for transit-oriented residential and other purposes. The City and Developer recognize and acknowledge that the feasibility of the development proposed by Developer has not been determined to the satisfaction of the City, and the purpose of this Agreement is to allow the City and Developer to determine the feasibility of the Project proposal, to perform environmental analysis of the Project, and to negotiate the terms for the acquisition of the Property by the City from Caltrans, and the disposition of the Property to and the development of the Project by Developer.

NOW THEREFORE, the City and Developer agree as follows:

1. NEGOTIATIONS

1.1. Length of Negotiation Period

Unless extended by mutual agreement, the period for exclusive negotiations between the Parties under this Agreement shall be for twelve (12) months, commencing on the date of this Agreement and terminating twelve months thereafter (the "Negotiation Period"); provided, however, that the Negotiation Period may be terminated earlier pursuant to the termination provisions of this Agreement. The City Administrator or his or her designee, at his or her sole and absolute discretion, may extend the Negotiation Period in writing for an additional period not to exceed a total extension of 180 days (the "Extended Negotiation Period"), provided that Developer has made acceptable progress and has, among other requirements as more particularly described below, provided evidence during the Negotiation Period that the Project is feasible within mutually agreed upon timeframes and terms.

1.2. Good Faith Negotiations

The Parties shall negotiate diligently and in good faith during the Negotiation Period toward a Disposition and Development Agreement ("DDA") and or similar instrument. The Parties contemplate that the negotiations regarding the DDA will commence after mutual execution of this Agreement, and will continue while Developer submits certain information to the City and the Parties undertake preliminary planning and analysis of the Project.

The Parties contemplate that the DDA will set forth the terms and conditions for the conveyance of the Property to Developer (contingent on the sale of the Property by Caltrans to the City), the development of the Project on the Property by Developer, and subsequent uses of the Property by Developer and any successors-in-interest to the Property. The conceptual proposal for the Project prepared by Developer, as described in the Recitals to this Agreement, shall serve as the basis for such negotiations, with the understanding that no commitment has been made by the City or Developer to the Project as set forth therein. The DDA will provide that the negotiated purchase price shall be paid in full to the City by Developer in escrow and these funds will be used in turn to purchase the Property from Caltrans in a double escrow. The City shall have no financial responsibility with respect to the transfer of the Property or Project development. The DDA shall provide that the sale of the Property by the City to Developer shall be "as-is" (subject to Section 2.5) and that Developer shall release and indemnify the City for any liability related to environmental contamination or remediation. Close of the simultaneous escrow for the transfer of the Property from Caltrans to the City, and from the City to Developer, will occur when the required CEQA review has been completed, Project entitlements, and design review have been approved, and Project financing is in place, as well as other negotiated preconveyance milestones specified in the DDA. The City will have the right to review and approve

Project plans and specifications. The DDA will include negotiated Project commencement and completion dates. The DDA will include standard restrictions on transfer of the Property prior to Project completion, a right of reverter on the Property if the Project is not developed according to the schedule (which shall be extended for reasonable delays), as well as other standard DDA provisions.

If the terms of a mutually satisfactory DDA (or similar instruments) have not been negotiated by Developer and City staff during the Negotiation Period, or if the City and Caltrans are otherwise not prepared to enter into a purchase and sale agreement for the Property during the Negotiation Period, or if the City Council declines to authorize the purchase of the Property from Caltrans or the DDA (or similar instruments) with Developer for any reason, then, without further action, this Agreement shall automatically terminate and no Party shall have further rights or obligations with respect to the other.

1.3. Exclusive Negotiations

The City shall not negotiate regarding development of the Property with any other person or entity during the Negotiation Period.

2. **SCHEDULE OF PERFORMANCE**

The Parties shall perform the following activities during the Negotiation Period and within the time periods set forth below:

2.1. Project Team

a) Within 90 calendar days of the commencement of the Negotiation Period, Developer shall submit to the City the following:

(i) A description of the specific financial structure and legal structure of the proposed development team in a form that reasonably satisfies the City that the Project is feasible. This shall include a written description of the specific and general roles, responsibilities, and obligations of Developer, Developer's members and partners, and any other entity participating in the legal entity established by Developer for purposes of developing the Project. Additionally, the written description of roles, responsibilities, and obligations shall identify the principals and other personnel, to the extent identified, from each participating party by name, title or position, and areas of responsibility within the development entity.

(ii) Copies of balance sheets and income/loss statements, prepared in accordance with generally accepted accounting principles, and other financial documentation as reasonably requested by the City covering the last two years of Developer, Developer's members or partners, and any other entity participating in the legal entity established by Developer for purposes of developing the Project, except for any entities that will enter

into partnership agreements, operating agreements, joint venture agreements, or similar instruments with the Developer per Section 2.1(c)(i).

- (iii) All documents related to Developer's corporate, LLC, or partnership status, and the status of its members or partners, including but not limited to articles of incorporation, by-laws, and proof of good legal standing.
 - (iv) A detailed description, including references, of the Project development team's experience. The team shall cover at a minimum, the architect, the candidate structural engineers, the candidate general contractors, and the marketing and real estate firm for the proposed undertaking.
 - (v) A written statement concerning any litigation in which Developer or Developer's partners or members is a party that may have an impact on the negotiations. Developer shall provide to the City copies of any litigation documents or filings in connection with such litigation within ten (10) calendar days of the City's written request.
- b) Within 90 calendar days of the commencement of the Negotiation Period, Developer shall add a member to the Project development team with demonstrated experience successfully developing projects comparable in type and size to the Project.
 - c) Within 150 calendar days of the commencement of the Negotiation Period, Developer shall submit to the City the following:
 - (i) All documents related to Developer's corporate, LLC, or partnership status, and the status of its members or partners, including partnership agreements, operating agreements, joint venture agreements, and lists of members of boards of directors.
 - (ii) Copies of balance sheets and income/loss statements, prepared in accordance with generally accepted accounting principles, and other financial documentation as reasonably requested by the City covering the last two years of any entity entering into an agreement with the Developer, as listed in Section 2.1(c)(i).

2.2. Market Research

- a) Within 180 calendar days of the commencement of the Negotiation Period, Developer shall undertake a market feasibility study to determine the product mix and type that is most viable for the Project

2.3. Project Design

- a) Within 180 calendar days of the commencement of the Negotiation Period, Developer shall hold at least one public meeting in the community in order to

present its proposed development plan for the construction of the Project. Developer shall hold such additional community meetings as reasonably required by the City. The City shall assist Developer in facilitating community meetings.

- b) Within 180 calendar days of the commencement of the Negotiation Period, Developer shall submit to the City the following:
- (i) The Schematic Design Plans for the Project. The term "Schematic Design Plans" means schematic drawings, exterior elevations, site plans, floor plans and a garage layout, a landscaping plan, schematic plans for street and sidewalk improvements, and a sample materials board.

The Schematic Design Plans shall demonstrate how principles of environmental sustainability will be incorporated to meet the City's Green Building Requirements for non-residential new construction development, which includes a completed checklist under the Leadership in Energy and Environmental Design (LEED) Green Building Rating System published by the U.S. Green Building Council for new construction of commercial buildings, exceed Silver Certification under LEED, and receive a Green Building Certification. Project design shall include substantial use of such green building techniques as energy-conserving design and appliances, water-conserving fixtures and landscape, recycled-content building materials, and low waste construction techniques.

- (ii) A plan to incorporate public art in the Project.
- (iii) A list of all public improvements, if any, presently anticipated or required for the Project. For purposes of this subparagraph, the term "public improvements" shall include without limitation such matters as: (1) any permanent closure or rerouting of any existing public streets or sidewalks; (2) any traffic signals that may need to be replaced or installed; (3) any street lights that may need to be replaced or installed; and (4) any act that may be required to be performed as a mitigation measure under any environmental document for the Project or as a condition to the issuance of any governmental permit for the Project and any other improvement currently anticipated to be required to develop the Project.

2.4. Environmental Site Assessment, Environmental Review, Planning and Other Permits and Approvals

- a) Within 60 calendar days of the commencement of the Negotiation Period, the City shall provide to Developer all existing environmental, geological, engineering and other reports within the City's possession or control pertaining to the condition of the Property.
- b) Within 60 calendar days of the commencement of the Negotiation Period, Developer shall retain environmental and professional design consultants, subject to City review and approval, to prepare all necessary environmental

documentation required to conduct environmental review under the California Environmental Quality Act (“CEQA”) for the Project. Except as otherwise specifically provided for below, all environmental documents shall be prepared within the time periods required by CEQA. Developer’s environmental consultant shall compare the proposed Project with the development program assumed under the draft West Oakland Specific Plan currently under preparation.

- c) Within 90 calendar days of the commencement of the Negotiation Period, Developer’s CEQA consultant shall develop a Project description suitable for environmental review purposes and shall submit this to the City for City review and approval.
- d) Within 150 calendar days of the commencement of the Negotiation Period, Developer shall identify all relevant zoning, design review, environmental review and code requirements for the Project and shall submit all necessary and applicable zoning permit applications and other land use permit applications for the Project. Specifically, Developer’s CEQA consultant shall review the West Oakland Specific Plan Environmental Impact Report (EIR) to determine if it is adequate for CEQA clearance of the proposed Project, any additional work that may be required, and if there is anything unique about the Project and/or its location. Developer’s CEQA consultant shall meet with the City to discuss the proposed CEQA approach. Developer shall submit a schedule identifying when approval of all such zoning, design review, environmental review and code requirements for the Project will be obtained.
- e) Within 180 calendar days of the commencement of the Negotiation Period, Developer’s CEQA consultant shall, based on the specific CEQA approach for the Project in d) above, prepare a draft scope of work, based upon the City’s “Guidelines for Environmental Consultant Contracts Concerning Private Development Projects” (dated 1/5/2012, as amended), for City review and approval, that analyzes the specific environmental topics and type of CEQA document that are required to complete CEQA clearance – Initial Study, Addendum and/or Supplemental/Subsequent EIR.
- f) If a Supplemental/Subsequent EIR is required, then, within 210 calendar days of the commencement of the Negotiation Period, Developer’s CEQA consultant shall cause the issuance of a Notice of Preparation, subject to City review and approval.
- g) If an Addendum and/or other non-EIR CEQA document is required, then within 240 calendar days of the commencement of the Negotiation Period, Developer’s CEQA consultant shall submit to the City an administrative draft of the CEQA document.
- h) Within 360 calendar days of the commencement of the Negotiation Period, Developer shall ensure that the required CEQA review has been completed, including filing of a Notice of Determination and/or Notice of Exemption, and

Developer shall have obtained all necessary zoning permits determined appropriate by the Planning Department.

The City shall cooperate with Developer to attempt to ensure the timely processing of the environmental review and zoning permits. However, any such efforts by the City are independent of the City's jurisdiction and authority to issue any reviews or approvals including, without limitation, CEQA or zoning approvals. Nothing in this Section shall be interpreted to imply that the City is required to issue any approvals or permits for any improvements, or to obligate the City to influence the City's independent authority to issue CEQA and zoning approvals.

2.5. Environmental Remediation

The Property is contaminated. The Parties, along with Caltrans, will work together to enter into an agreement with the Department of Toxic Substance Control ("DTSC") regarding environmental remediation of the Property. During the Negotiation Period, the Parties will investigate the use of possible outside funding sources (including an EDA Brownfield grant, California Pollution Control Finance Agency CalREUse loan, and/or an EPA Brownfield Clean-up Revolving Loan Fund grant/loan) to complete environmental remediation.

2.6. Project Economics

- a) Concurrently with completion of the Project description suitable for environmental review purposes, Developer shall submit:
 - i. Detailed and itemized project pro formas that are linked to the schedule for construction of the Project. Pro formas shall include a Project development budget, a statement describing the sources and uses of funds, a five-year cash flow analysis, and an annotated operating budget to a level of detail reasonably acceptable to the City
 - ii. A detailed Project development schedule, which shall include schedules for construction and absorption of the Project's units and retail spaces.
 - iii. A list of lenders and investors that will be approached for financing the Project
- b) By the end of the Negotiating Period, as such Negotiation Period may be extended pursuant to this Agreement, Developer shall submit letters of intent from lenders and equity partners, if any, expressing willingness to provide Project financing.

2.7. Purchase Price

- a) Within 10 calendar days of the commencement of the Negotiation Period, Developer shall retain at its sole expense two Caltrans-approved independent appraisers to independently appraise the fair market value of the Property.

Notwithstanding the above, Developer shall not be required to retain appraisers if Developer and Caltrans have agreed upon a purchase price for the Property and separate appraisals are otherwise unnecessary.

b) The appraisals will be conducted per the terms of an Appraisal Agreement between Caltrans and the City. The appraisers will make independent determinations of the fair market value of the Property at its highest and best use under assumptions agreed to by the City, Developer and Caltrans. The term "fair market value" shall mean the highest price on the date of valuation that would be agreed to by a seller being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing, each dealing with each other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available. City, Caltrans, and Developer representatives will meet with the appraisers prior to commencement of work for the purpose of clarifying instructions, answering any questions or providing needed information. There will be a pre-submission meeting where City, Caltrans, and Developer representatives will review the appraisal reports in draft form. Any communications with the appraisers relating to the appraisal work shall be held at joint meetings where City, Caltrans, and WODG representatives are present.

c) Within 130 calendar days of the commencement of the Negotiation Period, Developer shall submit to Caltrans and the City the final appraisal reports of the fair market value of the Property prepared by the appraisers. The written appraisal shall fully set forth the assumptions, factual information, market data, reasoning and conclusions of the appraisers.

d) In the event that the difference between the two appraisals is within 15% of the higher of the two appraisals, the appraisals will be averaged to determine the final purchase price. Caltrans has agreed that the purchase price will be reduced by the cost to clean the Property of hazardous materials contamination to its highest and best use, by an amount not exceed \$250,000, and this amount will be held in escrow until Developer submits invoices for the actual clean up.

3. CITY APPROVAL OF SUBMISSIONS

Within 15 City business days after the City receives any information or documents required to be submitted by Developer pursuant to Section 2 of this Agreement, the City shall inform Developer of its acceptance or rejection of the submission. (For purposes of this Agreement, a "City Business Day" shall exclude weekends, City holidays, and City mandatory business shutdown days or furlough days.) The City may approve those portions of a submission that are satisfactory and reject those portions that are not, or may approve all or a portion of a submission subject to conditions requiring further submissions for City review and approval. If the City rejects all or any part of a submission, the City shall provide to Developer written notice of the reasons for such rejection within said 15-day period. Developer shall then have

15 business days to correct or supplement its submission to respond to the City's rejection. City shall consider in good faith approving Developer's reasonable request for an extension of the 15-day response period for a submission based on factors not within Developer's control, provided, however, that any extension shall not otherwise negatively impact the Schedule of Performance or extend the Negotiation Period. Approvals on behalf of the City shall be granted by the City Administrator, or his or her staff designees.

4. PROJECT EXPENSE PAYMENT

Developer shall make a payment of \$25,000 to the City (the "Project Expense Payment" or "PEP") within 10 calendar days of the date of this Agreement for purposes of reimbursing City for its staff costs and third party expenses as set out in the budget attached to this Agreement as Exhibit B. Payment of the PEP shall be in the form of a check, wired funds, or a letter of credit in favor of the City drawn by an institution satisfactory to the City. The PEP is non-refundable. In the event that this Agreement is terminated or the Parties fail to reach agreement for any reason, the PEP will not be returned to Developer, except for any PEP funds that have not been expended by the City. The PEP budget may be modified by the City from time to time so long as such amendments are reasonable and do not cause the budget to exceed the total amount of PEP authorized by this Agreement. Developer agrees that in the event Developer requests an extension of the Negotiation Period, Developer will consider in good faith a request by the City to increase the PEP to cover the City's staff costs and reasonable expenses that are otherwise eligible PEP expenses, if the initial PEP has been exhausted or the remaining PEP is insufficient to cover such expenses. At the request of Developer, the City shall provide a report to Developer on expenditures from the PEP made by the City. Developer shall give at least three (3) business days of advanced notice to the City for such a request.

5. EFFECT OF NEGOTIATIONS

Developer understands and acknowledges that any DDA resulting from the negotiations arising from this Agreement shall become effective only if and after such DDA has been considered and approved by the City Council in their sole and absolute discretion, and only if and after such DDA has been executed by the City Administrator. Developer understands that the City Council retains the sole and absolute discretion to approve or not approve the Project or any alternative project proposed by Developer. If the terms of a mutually satisfactory DDA have not been negotiated by Developer and City staff during the Negotiation Period, or if the City Council declines to authorize a DDA for any reason, then, without further action, this Agreement shall automatically terminate and no Party shall have further rights or obligations with respect to the other.

6. TERMINATION AND EXTENSIONS

6.1. Time of the Essence

Time is of the essence in this Agreement. Any Party's failure to timely perform according to the terms and conditions of this Agreement shall be considered a material breach of this Agreement.

6.2. Notice to Developer of Breach

In the event that Developer fails to materially perform any of Developer's obligations pursuant to the terms and conditions of this Agreement within the time herein specified, the City shall promptly give Developer notice of such default. Developer shall have a period of 15 business days from receipt of such written notice from the City to Developer within which to cure such default.

6.3. Remedies Upon Developer Default

If Developer fails to cure any material default during the cure period described above, this Agreement may be terminated upon written notice of termination from the City, and thereafter no Party shall have any further rights or obligations hereunder.

6.4. City Discretion to Extend Time for Performance

Notwithstanding the above, if the City determines that it is in the best interest of the City, the City may extend the time for Developer's performance of any of the terms and conditions of this Agreement. Any such extension beyond the Negotiation Period shall be granted in the City's sole and absolute discretion, and in no event shall this provision be construed as conveying any right or entitlement to an extension.

6.5. Default by City

If the City fails to cure any material default during the cure period described above, this Agreement may be terminated upon written notice of termination from Developer, and thereafter no Party shall have any further rights or obligations hereunder.

7. **INDEMNIFICATION**

Each of the Parties hereby covenants, on behalf of itself and its permitted successors and assigns, to indemnify, defend (with legal counsel reasonably satisfactory to the indemnified Party), save and hold harmless the other Party and their respective agents, officers, officials, employees and other representatives of the indemnified Party from all claims, demands, liabilities, actions or causes of actions, including without limitation, reasonable attorney's fees and litigation costs, arising out of or resulting from, or in connection with the negligence or willful misconduct of the indemnifying Party with respect to this Agreement, including, but not limited to, the indemnifying Party's actions or lack of actions with respect to the Property, the negotiation and execution of this Agreement, or the negotiation and execution of a DDA for the Project.

8. **LIMITATIONS**

This Agreement does not obligate the City to transfer the Property to Developer or any other person, nor does it obligate the City to approve the Project or any other project. Developer acknowledges and agrees that no City commitment to move forward with the Project can be made other than by an action by the City Council and subject to the requirements of CEQA and other applicable laws, and understands that any such action will be at the City's sole and

absolute discretion. Any costs incurred by Developer, Developer's members or partners, or other members of the Project development team to comply with its obligations under this Agreement or to negotiate the DDA shall be the sole responsibility of Developer, and in no event shall the City have any responsibility to pay for or reimburse Developer for any of said costs.

Developer understands and acknowledges that the City is subject to the City of Oakland Sunshine Ordinance and the California Public Records Act, and therefore recognizes that the City shall make information regarding the Property, the Project, Developer, and this Agreement available to the public upon request as required by said laws.

9. CAMPAIGN CONTRIBUTION RESTRICTIONS

Developer is aware of and shall abide by the prohibition on campaign contributions from contractors doing business with the City between commencement of contract negotiations and either (a) 180 days from completion of contract negotiations, or (b) termination of contract negotiations, as set forth in the Oakland Campaign Reform Act. Developer acknowledges that it has executed and submitted to the City a Contractor Acknowledgement of City of Oakland Campaign Contribution Limits.

10. NON-DISCRIMINATION

Developer agrees that there shall be no discrimination against, or segregation of, any person, or group of persons, on account of sex, race, color, age, marital status, religion, disability, creed, national origin, ancestry, sexual orientation, Acquired Immune Deficiency Syndrome (AIDS) or AIDS-Related Conditions (ARCS) in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property, nor shall Developer establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, buyers, lessees, subtenants, sublessees or vendees of the Property.

11. NO ASSIGNMENT

This Agreement is personal to Developer and is not assignable to any other person or entity without the prior written consent of the City. Any attempt to assign this Agreement or any part of the Agreement without the prior written consent of the City shall constitute a breach of this Agreement and shall be void and of no force and effect.

12. INFORMATION

Upon Developer's request, the City shall promptly furnish Developer all material information within its possession or control concerning the Property, including without limitation, copies of all topographical surveys, environmental reports, engineering studies, soil-bearing test data, and any similar reports and studies with respect to the Property.

13. NOTICES

All notices under this Agreement shall be sufficiently given if delivered, faxed (but only if simultaneously served by another method herein specified), or mailed by registered or certified mail, postage prepaid, addressed to:

DEVELOPER: West Oakland Development Group, LLC
1357 5th Street,
Oakland, CA 94607
Att'n: Mr. Jabari J. Herbert

CITY: City of Oakland,
Office of Neighborhood Investment
250 Frank H. Ogawa Plaza, Ste. 5313,
Oakland, CA 94612
Att'n: Ms. Hui-Chang Li

Copy to:

Oakland City Attorney's Office
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612
Att'n: Daniel Rossi

If mailed, the written notice shall be deemed received and shall be effective three (3) business days after deposit in the United States mail in the State of California or upon actual receipt by the addressee if earlier.

14. GOVERNING LAW

This Agreement shall be construed in accordance with the laws of the State of California, except for those provisions preempted by federal law.

15. ATTORNEYS' FEES

In the event that any Party commences litigation to enforce the terms of this Agreement, the prevailing party in such litigation shall be entitled to recover its costs and fees incurred in such action, including reasonable attorneys' fees.

16. COUNTERPARTS

This Agreement may be signed in multiple counterparts which, when signed by both Parties, shall constitute a binding agreement.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the Parties have executed this Exclusive Negotiating Agreement as of the date first written above.

“CITY”

CITY OF OAKLAND,
a municipal corporation

By: _____
City Administrator

Approved as to form and legality:

By: _____
Deputy City Attorney

“DEVELOPER”

WEST OAKLAND DEVELOPMENT GROUP, LLC
a California limited liability company

By: Alliance for West Oakland Development, its Member

By: _____

Its: _____

By: DSCI, inc., its Member

By: _____

Its: _____

By: House of Change, Inc., its Member

By: _____

Its: _____

By: Tomorrow’s Answer Youth Development Program, its Member

By: _____

Its: _____

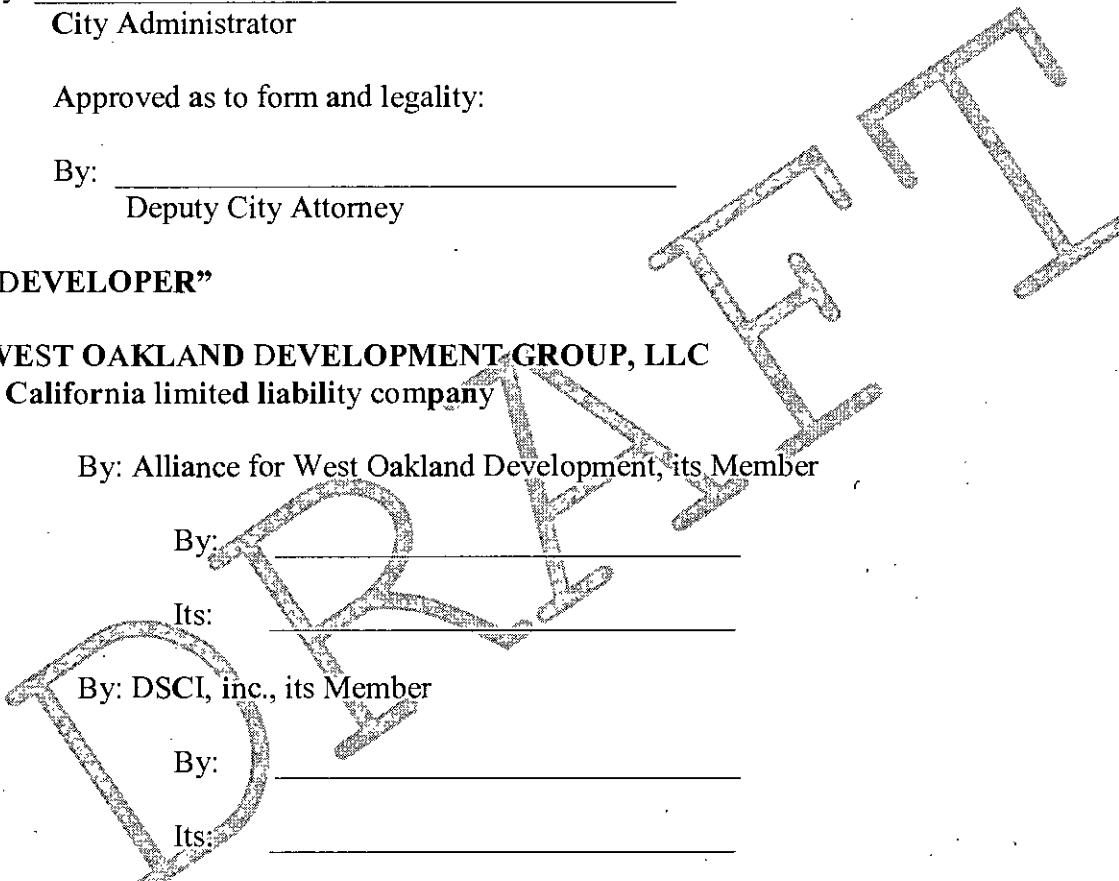


EXHIBIT A
(5th & Kirkham ENA)

Property

Subject property consists of two Caltrans surplus properties situated in the County of Alameda, City of Oakland, State of California.

The first site is 2.76 acres on the block bounded by 5th Street to the south, 7th Street to the north, Kirkham Street to the west and Union Street to the east

The second site is about 0.69 acre, located directly across the street on the south-half block bounded by 5th Street to the south, 7th Street to the north, Union Street to the west and Magnolia Street to the east.

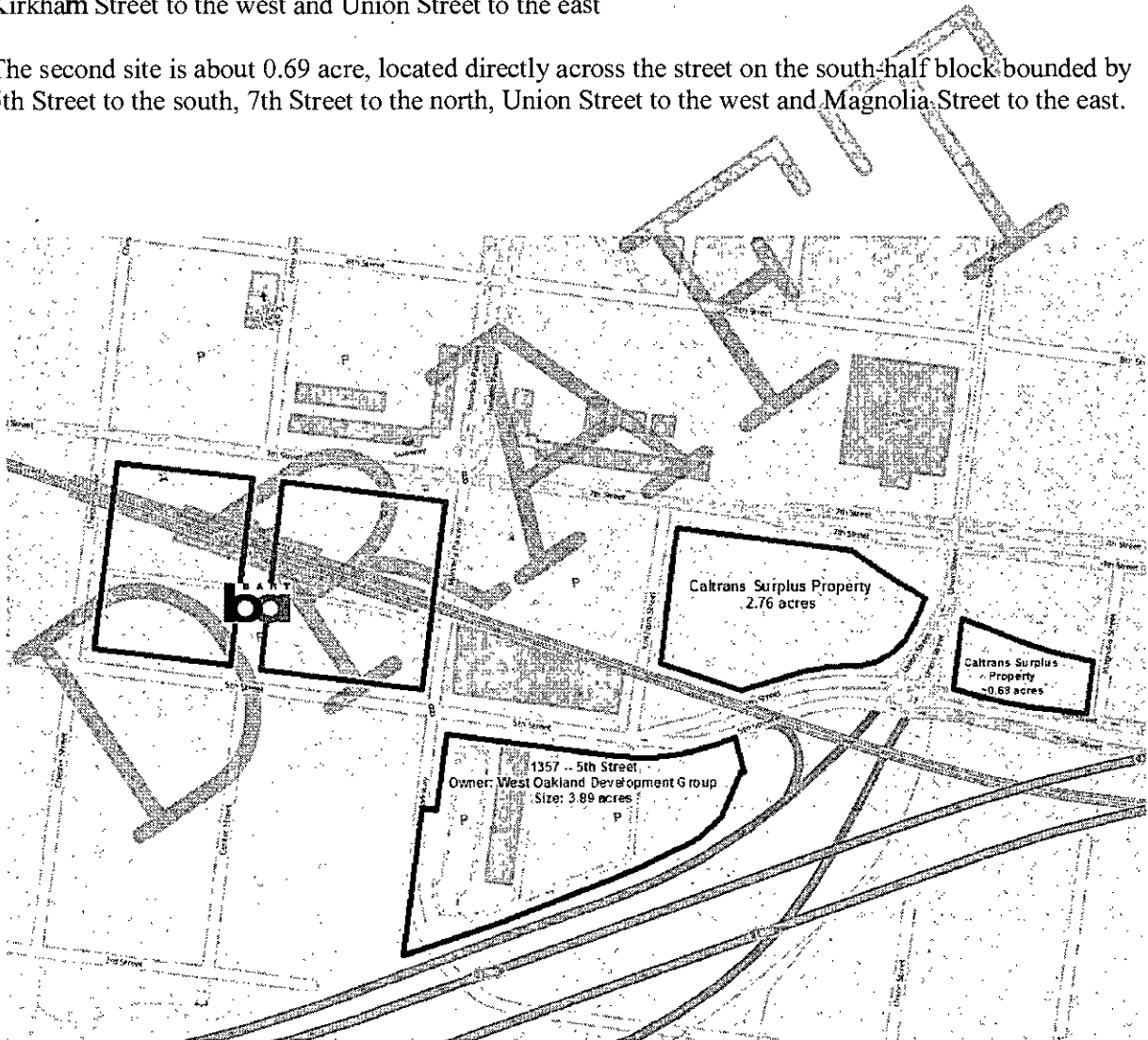


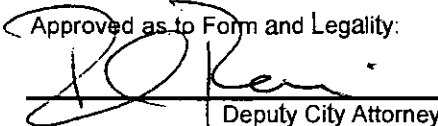
EXHIBIT B
(5th & Kirkham ENA)

Project Expense Payment Budget

Expense Items	Estimated Budget
Economic/Financial Consultant	\$15,000
Other	\$10,000
TOTAL BUDGET	\$25,000

DRAFT

2013 MAR 27 AM 10:30

Approved as to Form and Legality:

Deputy City Attorney

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

RESOLUTION AUTHORIZING AN EXCLUSIVE NEGOTIATING AGREEMENT WITH WEST OAKLAND DEVELOPMENT GROUP, LLC, FOR DEVELOPMENT OF THE BLOCKS SURROUNDED BY 5TH, 7TH, KIRKHAM AND MAGNOLIA STREETS IN WEST OAKLAND

WHEREAS, the California Department of Transportation ("Caltrans") owns two parcels totaling approximately 3.5 acres in West Oakland on the blocks bounded by 5th, 7th, Kirkham and Magnolia Streets (the "Caltrans Property" or "Property"); and

WHEREAS, Caltrans has offered the Caltrans Property for lease or sale to the City of Oakland and other public entities under the Surplus Lands Act; and

WHEREAS, West Oakland Development Group, LLC ("WODG"), a limited liability company made up of the Alliance for West Oakland Development, DSCI, Inc., House of Change, and Tomorrow's Answers, desires to acquire the Caltrans Property for the purposes of development of a high density, transit-oriented, mixed-use project around the West Oakland BART station in multiple phases; and

WHEREAS, WODG owns 1357 – 5th Street, a 3.89 acre parcel across the street from the Property and to the West Oakland BART station; and

WHEREAS, WODG proposes in Phase 1 the development of a permanent 1,500 car parking garage at 1357 – 5th Street to replace existing parking at the West Oakland BART station; and

WHEREAS, WODG proposes to reactive an Exclusive Negotiating Agreement with BART to develop a mixed-use project on the BART site in Phase 1; and

WHEREAS, WODG proposes that in Phase 1, the Property be used for interim service parking to replace BART's existing parking at the West Oakland BART station; and

WHEREAS, WODG proposes in Phase 2, after the 1,500 car parking garage is complete, the development of two residential buildings consisting of 563 units of housing on the 2.76 acre parcel of the Property bounded by 5th, 7th, Kirkham and Union; and

WHEREAS, WODG proposes in Phase 3, the development of mid-rise residential and/or office buildings with street level retail at 1357 – 5th Street, adjoining the 1,500 car parking garage; and

WHEREAS, WODG proposes in Phase 4, the development a building of up to 80 housing units on the remaining 0.69 acre parcel of the Property, located at the south-half block of 7th, Union 5th ad Magnolia; and

WHEREAS, the City and WODG wish to enter into a negotiation period to determine the feasibility of the Project proposal, to perform environmental analysis of the Project, and to negotiate the terms for the acquisition of the Property by the City from Caltrans and the disposition of the Property to and the development of the Project by WODG via a double escrow sale, understanding that this does not constitute a binding commitment on the part of the City to any project or developer for the Caltrans Property; now, therefore, be it

RESOLVED: That the City hereby authorizes the City Administrator to negotiate and enter into an Exclusive Negotiating Agreement ("ENA") with WODG for the purposes of studying and evaluating the feasibility of, and negotiating terms and conditions for, the transfer of the Caltrans Property and its development for a transit-oriented development; and be it

FURTHER RESOLVED: That the initial exclusive negotiating period will be for 12 months from the date of this Resolution, with the option by the City to extend said period by an additional 180 days with the approval of the City Administrator in her sole discretion; and be it

FURTHER RESOLVED: That the City shall require payment of a \$25,000 Project Expense Payment by WODG for purposes of reimbursing City for its staff costs and third party expenses; and be it

FURTHER RESOLVED: That the ENA shall be reviewed and approved as to form and legality by the City Attorney's Office prior to execution; and be it

FURTHER RESOLVED: That the City finds and determines, after independent review and consideration, that this action complies with the California Environmental Quality Act ("CEQA") because it is exempt from CEQA pursuant to Section 15262 (feasibility and planning studies), Section 15306 (information collection) and Section 15061(b)(3) (general rule) of the CEQA Guidelines; and be it

FURTHER RESOLVED: That the City 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 City Administrator is further authorized to negotiate and enter into agreements and take whatever action is necessary with respect to the ENA, the project, and the purchase of the Property, consistent with this Resolution and its basic purposes.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

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

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____

**LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California**