



CITY OF HAYWARD
AGENDA REPORT

AGENDA DATE 12/07/04
AGENDA ITEM 8
WORK SESSION ITEM _____

TO: Mayor and City Council

FROM: City Manager

SUBJECT: Blue Rock Country Club Project - Approval of Assignment Agreement for Financing, from Hayward 1900 to HSBC Realty Credit Corporation (USA).

RECOMMENDATION:

It is recommended that the City Council adopt the attached resolution approving the Assignment Agreement for the Blue Rock County Club project from Hayward 1900, Inc., to HSBC Realty Credit Corporation (USA).

DISCUSSION:

The City Council approved the Development Agreement for the Blue Rock Country Club project with developer, Hayward 1900, Inc., in April 1998. The Development Agreement provides that Hayward 1900 must obtain the consent of the City prior to assigning its rights under the agreement. As is common with projects of this magnitude, Hayward 1900 is requesting that the City consent to the assignment of the Development Agreement to HSBC Realty Credit Corporation (USA) for the purpose of obtaining the requisite financing for the project. A letter from Steve Miller, the President of Hayward 1900, requesting the assignment is attached as Exhibit A.

The Assignment Agreement is for purposes of obtaining project financing only. It is anticipated that Hayward 1900 will continue to perform all of the obligations of the Development Agreement, as it has to date. Hayward 1900 has previously borrowed from HSBC to finance a portion of its project costs. The requested assignment will provide additional security to the bank for this next round of project financing. The Assignment Agreement does not grant HSBC any present rights under the Development Agreement. In the event of default by Hayward 1900, HSBC will step into the position of Hayward 1900 as an "Owner," as that term is defined in the Development Agreement. In the event that HSBC assumes title to the Blue Rock property, through foreclosure or otherwise, HSBC shall assume all the obligations of the "Owner" under the Development Agreement. Should HSBC subsequently seek to transfer its rights under the Development Agreement to a successor developer, the consent of the City Council is required, although that consent cannot be unreasonably withheld. To that end the Assignment Agreement proposes criteria for a successor developer, if the occasion arises. To qualify for future assignment, the successor developer must have at least seven years of experience in real estate development, the financial capability to purchase the property, and previous experience developing a project of the scope of that envisioned for Blue Rock, with a satisfactory history of

performance. With these assurances in place, staff recommends approval of the Assignment Agreement.



Jesús Armas, City Manager

Attachments: Exhibit A: Letter from Steve Miller with Assignment Agreement enclosed

Draft Resolution

HAYWARD 1900, INC.

November 30, 2004

VIA MESSENGER

Mr. Jesus Armas
City Manager
City of Hayward
777 B Street
Hayward, CA 94541-4214

Re: Blue Rock Development Agreement—Assignment of Development Agreement

Dear Jesus:

Hayward 1900, Inc. hereby requests that the City Council approve the enclosed Assignment of the Development Agreement to HSBC Bank. The Assignment is being requested solely for financing purposes and will be effective only if and when Hayward 1900 defaults on its loan obligations to HSBC Bank.

HSBC Bank (formerly Hong Kong and Shanghai Bank) is based in London and is the second largest global banking institution. Hayward 1900 deals with the HSBC Bank branch located in San Francisco. Hayward 1900 has previously borrowed from HSBC Bank to finance a portion of its project costs, including the initial grading of the site. The Bank made the existing loan on the strength of the value of the Hayward 1900 real estate as undeveloped and unentitled land. In order to finance the second phase of grading, Hayward 1900 seeks to increase substantially the size of the loan. To do so, the Bank requires an assignment of the Development Agreement, since it is underwriting the loan based on the value of the land as entitled for development of a residential and golf course community.

HAYWARD 1900, INC.

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Under the terms of the Assignment, the Bank will have no right to exercise any of the owner's rights under the Development Agreement and will not be responsible for performance of any of the owner's obligations unless and until there is a default under the terms of the loan. Hayward 1900 will continue to exercise all of the owner's rights and to be responsible for performance of all of the owner's obligations. If there is a foreclosure or the Bank otherwise takes ownership of the property, it agrees, in the Assignment, to then perform all of the owner's obligations under the Development Agreement. If the Bank takes title to the property and then sells the property to a third party, that third party must be approved by the City of Hayward in order to get the benefits of the Development Agreement. Certain criteria for the City's reasonable approval of a successor developer are set forth in the Assignment.

Section 6.1 of the Blue Rock Country Club Development Agreement, entered into between the City and Hayward 1900, Inc. in April, 1998, allows assignment of any of Hayward 1900's interests, rights or obligations under the Development Agreement with the written consent of the City. Under the terms of the Agreement, the City must promptly consent to an assignment if certain specified requirements are met. As demonstrated below, these requirements are met and we respectfully request the City's consent to the assignment to HSBC Bank.

1. Hayward 1900 is not in default under the Development Agreement. The City recently determined, in connection with its September 4, 2004 approval of an extension of the precise plan and tentative map for the project, that Hayward 1900 is in compliance with the Development Agreement. As you are aware, we proceeded with on site grading during the past building season, have plans to begin construction of the school and Village A in the spring and to continue with mass grading of the site. We plan to submit the first final subdivision map for the project in early December.

2. HSBC Bank is capable and willing, as evidenced in the proposed Assignment of Development Agreement to which they will acknowledge and agree, to comply with the Development Agreement and have agreed to assume the obligations thereunder in the event title is passed to HSBC Bank in the event of default under the loan to Hayward 1900.

3. HSBC Bank prepared the attached proposed Assignment, which includes an acknowledgement and agreement to the terms by HSBC. We have worked with the City Attorney's office on the proposed Assignment; they have reviewed the draft and responded with comments. HSBC and we have addressed these comments.

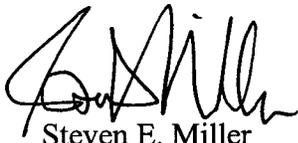
HAYWARD 1900, INC.

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We are excited about the progress we have made over the past year in construction of the project. Approval by the City of the Assignment of the Development Agreement to HSBC will enable us to secure the financing necessary to continue with construction next spring. In the meantime, we will be working closely with City staff to implement the project conditions of approval and secure review of our grading, subdivision map and other plans needed to construct the project.

We respectfully request the City's consent to the Assignment of the Development Agreement to HSBC Bank. Thank you for your consideration, and please call should you have any questions.

Sincerely,



Steven E. Miller
President/CEO

cc. Joan H. Story, Esq.
Andrea Clay, Esq.

ASSIGNMENT OF DEVELOPMENT AGREEMENT

THIS ASSIGNMENT OF DEVELOPMENT AGREEMENT, dated as of _____, 2004 (this "Assignment"), is made between **HAYWARD 1900, INC.**, a California corporation ("**Borrower**"), and **HSBC REALTY CREDIT CORPORATION (USA)**, a Delaware corporation ("**Lender**").

As security for the due and punctual payment of each sum now or hereafter due from Borrower to Lender, and for the due and punctual performance of each and every obligation now or hereafter existing of Borrower to Lender, under or in connection with the Loan made pursuant to the provisions of that certain Credit Loan Agreement dated _____, 2004, by and between Borrower and Lender (as modified, amended, restated or supplemented from time to time, the "**Credit Agreement**"), the Note (as defined in the Credit Agreement) and other documents evidencing the Loan (collectively the "**Loan Documents**"), Borrower hereby assigns to Lender, as additional collateral, all of Borrower's right, title and interest in and to that certain Blue Rock Country Club Project Development Agreement dated as of April 8, 1998, by and between Borrower and the City of Hayward (the "**City**"), recorded on April 16, 1998, in Official Records of Alameda County as Instrument No. 98128317 (the "**Development Agreement**").

Borrower represents and warrants that Borrower is the true holder of the owner rights under the Development Agreement, that Borrower has not assigned or granted a security interest therein to anyone other than Lender and no other lien or encumbrance of any kind or nature exists against Borrower's interest in the Development Agreement, and that Borrower's interest therein is not subject to any claim, setoff, defense or deduction. Borrower agrees that Borrower shall not further assign (except in connection with a transfer of the Project permitted under the terms of the Credit Agreement) or encumber the Development Agreement and, subject to such limitation, this Assignment shall be binding on and inure to the benefit of the respective assigns and successors in interest of Borrower and Lender.

Neither this Assignment nor any action or actions on the part of Lender shall constitute an assumption by Lender of any obligations under the Development Agreement, and Borrower shall continue to be liable for all obligations thereunder, Borrower hereby agreeing to perform each and all of Borrower's material obligations under the Development Agreement and to enforce performance by the City of each and every material obligation to be performed by the City. Borrower hereby agrees to indemnify and hold Lender free and harmless for, from and against any loss, cost, liability or expense (including without limitation attorneys' and accountants' fees) resulting from any failure of Borrower so to perform, excluding liability or expenses arising from the gross negligence or willful misconduct of Lender. Borrower hereby agrees to comply with all the terms of the Development Agreement and to take such steps and to perform such acts as may be necessary or desirable to secure the City's performance under the Development Agreement. Upon Lender or any third party's acquisition of title to the Property (through foreclosure, deed in lieu thereof, or otherwise), Lender, or such third party purchaser, hereby agrees to perform each and all

obligations under the Development Agreement arising during the period of time that Lender or such third party holds title to the Property.

Following any Event of Default, Lender shall have the right at any time (but shall have no obligation) to take in its name or in the name of Borrower or otherwise such action as Lender may at any time and from time to time determine to be necessary to cure any default under the Development Agreement or to protect the rights of Borrower or Lender thereunder. Lender shall incur no liability if any action taken by it or in its behalf in good faith, pursuant to the foregoing, shall prove to be in whole or in part inadequate or invalid, and Borrower agrees to hold Lender free and harmless from and against any loss, costs, liability, or expense (including without limitation attorneys' and accountants' fees) to which Lender may become exposed, or which Lender may incur, in exercising any of its rights under this Assignment, excluding loss, cost, liability or expense resulting from the gross negligence or willful misconduct of Lender.

Borrower hereby irrevocably constitutes and appoints Lender as Borrower's true and lawful attorney-in-fact, after the occurrence and during the continuance of an Event of Default under the Credit Agreement, to enforce in Borrower's name or in Lender's name or otherwise all rights of Borrower under the Development Agreement. It is hereby recognized that the power of attorney herein granted is coupled with an interest and shall not be revocable.

As additional security for the payment of all obligations of Borrower to Lender under the Loan Documents, Borrower hereby assigns and transfers to Lender, and hereby covenants and contracts to assign and transfer to Lender, all of Borrower's right, title and interest in and to any other or future contracts related to the Property and construction of the Improvements to be entered into between Borrower and the City.

This Assignment is for security purposes only. Lender shall have no right under this Assignment to enforce the Development Agreement, and Borrower shall retain the right to enforce the Development Agreement, until either (i) an Event of Default (as defined under the Credit Agreement) has occurred, Lender has filed a Notice of Default, Lender has commenced foreclosure proceedings and Lender has obtained the appointment of a receiver to take possession of the Property, or (ii) Lender has otherwise acquired title to the Property (either case hereinafter referred to as a "Foreclosure Event"). So long as no Foreclosure Event has occurred Borrower shall have the right, upon notice to Lender, to enter into such amendments of the Development Agreement as Borrower deems, in the exercise of its reasonable business judgment, to be in the best interests of the Project, without Lender approval so long as any such amendment does not result in (i) a termination of the Development Agreement, or (ii) a decrease in the value of the Project such that the ratio of outstanding principal of the Loan to the appraised value of the Project will be greater than forty two and eighty-six hundredths percent (42.86%).

Upon the occurrence of a Foreclosure Event, Lender may, at its election and without further notice to Borrower, succeed to and proceed to enforce all of the rights, interests and remedies of Borrower under the Development Agreement, and/or, subject to the terms set forth in the attached consent from the City of Hayward, reassign its right, title and interest in the

Development Agreement to any person or entity in Lender's discretion upon notice to the Borrower but without any requirements for Borrower's consent.

The exercise of any rights under this Assignment shall not be deemed to cure or waive any default under the Credit Agreement or other Loan Documents, or waive, modify or affect any notice of default under the Credit Agreement or other Loan Documents or invalidate any act done pursuant to such notice.

THIS ASSIGNMENT IS AND SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA.

This Assignment is referred to in and is entitled to the benefit of the Credit Agreement of even date herewith. **Upon reconveyance of the Deed of Trust securing Borrower's obligations under the Loan Documents, this Assignment shall automatically terminate and be of no further force and effect. Notwithstanding the foregoing, Lender hereby agrees to execute, at Borrower's expense, such documents as may be reasonably required to further evidence such termination.**

Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Credit Agreement.

This Assignment may be executed in one or more counterparts, all of which when taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, Borrower and Lender have executed this Assignment as of the date set forth above.

BORROWER:

HAYWARD 1900, INC.,
a California corporation

By: _____

Name: _____

Its: _____

LENDER:

HSBC REALTY CREDIT CORPORATION
(USA), a Delaware corporation

By: _____

Mee Mee Kiong
Senior Vice President

CONSENT

The City hereby consents to the foregoing Assignment of Development Agreement and agrees as follows:

1. Prior to Lender's acquisition of title to the Property, the City agrees that in the event of a breach by Borrower of any of the terms and conditions of the Development Agreement, the City will give written notice to Lender of such breach. Lender shall have the option, but shall not be obligated, to remedy or cure said breach within ninety (90) days from the receipt of such notice of breach, or such longer time as is reasonably necessary to cure such default if the same cannot reasonably be cured within said ninety (90) days, including, if it is necessary for Lender to acquire title to the Property in order to cure such default, such time as may be necessary for Lender to acquire title to the Property through foreclosure or otherwise.

2. The City hereby consents to the assignment to Lender of the Borrower's rights as the "Owner" under the Development Agreement, such assignment to be effective upon such time as Lender shall acquire title to the Property through foreclosure or otherwise, and thereafter Lender shall have the right to act as the "Owner" under the Development Agreement.

3. Any further assignment of the Development Agreement to a third party who acquires title to the property directly from Lender or through a foreclosure of the property by Lender (in either case, a "Successor Assignee") shall be subject to the City's consent in accordance with Section 6.1 of the Development Agreement. For purposes of the City's consent under Section 6.1 of the Development Agreement, a Successor Assignee shall be deemed "willing and capable" of complying with the terms and conditions of the Development Agreement if such Successor Assignee satisfies the following criteria:

(i) Successor Assignee shall be a real estate developer or real estate development company with not less than seven (7) years of experience in the development field; and

(ii) Successor Assignee shall have either (i) the financial capability to purchase the Property for a price of not less than \$30,000,000 (such capability may partially include loan financing), or (ii) a financial status comparable to or better than Hayward 1900, Inc., as Hayward 1900, Inc.'s financial status exists as of the date of this Consent;

(iii) Successor Assignee shall have previously developed or participated in the development of at least one project of similar scope, quality and nature as that proposed by Hayward 1900 and envisioned in the Development Agreement; and

(iv) if determined by the City to be relevant at the time, the Successor Assignee has no record of (a) a material violation of City of Hayward ordinances or ordinances of other local jurisdictions, (b) a default under any development agreement entered into with the City or other local jurisdiction with respect to any material obligation thereunder, or (c) a material violation of or default under any City development/construction related

requirement or mandate; in the event the City rejects a proposed Successor Assignee on this basis of a prior material violation, it shall adopt written findings setting forth the specific grounds for the rejection.

The City shall have the right to establish such alternative tests of "willing and capable" as it may reasonably choose to apply to a Successor Assignee who does not meet the foregoing test.

The foregoing is Consent is provided this ___ day of December, 2004.

CITY OF HAYWARD, a municipal corporation

By: _____
Name: _____
Its: _____

ACKNOWLEDGED AND AGREED TO BY THE UNDERSIGNED:

HSBC REALTY CREDIT CORPORATION (USA), a
Delaware corporation

By: _____
Name: Mee Mee Kiong
Its: Senior Vice President

DRAFT

HAYWARD CITY COUNCIL

RESOLUTION NO. _____

Introduced by Council Member _____

mal
12/2/04

**RESOLUTION APPROVING THE ASSIGNMENT
AGREEMENT FOR THE BLUE ROCK COUNTRY CLUB
PROJECT**

BE IT RESOLVED that the City Council of the City of Hayward hereby approves the Assignment Agreement for the Blue Rock Country Club project from Hayward 1900, Inc., to HSBC Realty Credit Corporation (USA) in a form approved by the City Attorney.

IN COUNCIL, HAYWARD, CALIFORNIA _____, 2004

ADOPTED BY THE FOLLOWING VOTE:

AYES:

NOES:

ABSTAIN:

ABSENT:

ATTEST: _____
City Clerk of the City of Hayward

APPROVED AS TO FORM:

City Attorney of the City of Hayward