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DATE: October 6, 2009

TO: Mayor and City Council

FROM: Assistant City Manager
City Attorney

SUBJECT: Approval of Terms Related to the 238 Corridor Settlement Agreement

RECOMMENDATION

That the City Council adopts the attached two Resolutions, which: (1) approve the terms of the proposed 238 Corridor Bypass Settlement Agreement; (2) authorize related expenditures from the 238 Corridor Bypass Settlement Trust Fund not to exceed \$6,000,000 to implement the programmatic components of the Settlement Agreement; (3) authorize related expenditures from the 238 Corridor Bypass Settlement Trust Fund not to exceed \$2,000,000 to implement the administrative structure of the Settlement Agreement and which will be reimbursed from the proceeds of the sale of 238 Corridor LATIP properties; and (4) authorize the City Manager to sign the final document as approved by the applicable court, assuming there are no major changes in the terms as presented herein..

SUMMARY

The issues and controversies surrounding the proposed 238 Corridor Bypass Project and the related properties owned by Caltrans have been disrupting the community of Hayward for over 40 years. Recent events have created both motivation and a window of opportunity to resolve these issues. The California State Department of Transportation, representatives of the Public Interest Law Project, and the City have been negotiating resolution for over two years.

A Settlement Agreement has been reached by all parties and now needs approval by the respective policy bodies/clients of each party. As part of the settlement process, a Class Action Complaint has been filed in State Court to formally envelop the Settlement Agreement. Since the Complaint has been filed, the approval of the Settlement Agreement by the parties is timely and essential. Therefore, Council is being asked to formally approve the terms of the Settlement Agreement as defined herein and authorize the related expenditure of funds.

BACKGROUND

Back in the early 1970's, the California State Department of Transportation planned to construct a 238 Corridor Bypass Freeway Project through the City of Hayward and parts of Unincorporated Alameda County. That project has long been abandoned by Caltrans as a result of previous legal actions and concentrated community engagement.

In 1982, the State enacted Government Code §§14528.5, *et seq*, to allow local jurisdictions through the Alameda County Transportation Authority (ACTA) to develop a Local Alternative Transportation Improvement Program (LATIP) to help relieve traffic congestion in Central Alameda County in place of the originally planned 238 Corridor Bypass. The LATIP is to be funded by the proceeds from the sale of property that was originally purchased and accumulated by Caltrans for the 238 Corridor Bypass project.

In 2009, the Governor of the State of California directed Caltrans to move expeditiously to sell all property that was not needed for existing projects and to minimize the Department's role as property managers throughout the State. However, the long-existing Federal Court action of *La Raza Unida v. Volpe* remains "open" and unresolved, the result of which has made the sale and disposition of the 238 Corridor properties by Caltrans difficult.

Consequently, Caltrans, the Public Interest Law Project and Peder J.V. Thoreen of Altshuler Berzon LLP (collectively referred to herein as PILP), and the City have been engaged in intense negotiations to resolve the issues alleged in the previous *La Raza v. Volpe*, and to arrive at a settlement agreement that allows all parties to move forward: Caltrans to sell the land and cease being property managers and the City of Hayward and the Unincorporated Alameda County to heal the wounds the controversy created in the community; and to plan for the productive development of the swath of land that runs from the existing 238 freeway to the north to the southern borders of the City of Hayward.

As part of this settlement process, on September 28, 2009, PILP filed a class action complaint on behalf of the residential tenants currently residing on 238 Bypass Corridor properties owned by the Caltrans. As defendants in this complaint, PILP named Caltrans and the City of Hayward. The complaint was filed with the knowledge and concurrence of Caltrans and the City, and is a concluding step in the process to formalize the Settlement Agreement that has been hammered out over the last two plus years. In order for the State Court to entertain the Settlement Agreement as a resolution of the complaint and all the related issues and to conclude their proceedings quickly, all parties must approve the terms of the Agreement. Therefore, Council is being asked to approve the terms at this time so that the City's legal representatives can comfortably say to the Court that the City finds the terms of the Agreement acceptable.

DISCUSSION

Individual terms of the Agreement have been discussed with Council at numerous Closed Sessions as negotiations progressed and as issues arose for which the City's negotiators needed Council guidance and/or concurrence. The Agreement is in the final stages of being formalized with all

Exhibits completed and cross-checking of documents verified. The terms of the Agreement are as follows:

❖ Programmatic Elements

- Lump Sum Stipend (LSS): This is a cash payment to every residential Tenant Household living in the Corridor as of January 1, 2010. Comprised of a “relocation payment” and a “moving stipend” using Caltran’s existing policies as the basis for calculations, modified to meet the current conditions. The City will issue LSS payments to all Corridor households, in and out of the City. The City and Alameda County are negotiating a separate Agreement to assure an exchange of like value between the City and the County. (See Exhibit I for a description of potential payments by household size and income levels.)
- New, Low-income Housing: 237 new low-income housing units developed in the Corridor between now and 2023, generally using the City’s Inclusionary Housing Ordinance (IHO) as a vehicle (1,500 to 2,000 new housing units possible). This number is to be offset by
 - Any units in the previous “La Raza” complexes that continue their restricted status at least fifteen (15) years beyond their current expiration date.¹
 - The number of Corridor SFR’s successfully purchased by Low Income Corridor tenants as part of the OPHP.
 - 10% of the units available and “affordable” to Low Income Households from a project built in the Corridor by Alameda County or the number of units actually occupied by eligible Corridor Tenants, whichever is greater.²
 - 20% of the South Hayward TOD (Montana/Wittek Project) low income units or the number of units actually occupied by Eligible Corridor tenants, whichever is greater.

In addition, the City agrees to continue application of some affordable unit requirements to development of the Corridor after the 237 low-income units are constructed (i.e., similar to IHO). Current Corridor residents (i.e., Class Members) will be given occupancy preference wherever possible and allowed by program/funding guidelines.

¹ Council will recall that back in the early 1980’s, the City built or caused to be built several apartment complexes that were intended at that time to be “replacement” housing for units that were going to be destroyed as a result of construction of the planned 238 Corridor Bypass. Some of these complexes have completed their restricted status (maintenance of affordable unit rates) and decided not to renew. Others will be expiring in the next 1-5 or more years. Any units in these complexes that are continued in a restricted status for at least 15 additional years will count toward completion of the 237 low-income units.

² Alameda County has indicated that they may want to build a low-income senior project in the Corridor in proximity to San Lorenzo Creek and Casa Sandoval. However, they have no immediate or specific plans to do so.

- Opportunity to Purchase Home Program (OPHP)
 - Opportunity to purchase a home in Hayward or Alameda County will be offered to all Eligible Corridor SFR Tenants. Eligibility is based in part on:
 - ✓ Living in the 238 Corridor two-years or more as of January 1, 2010 in a single-family residential unit (SFR) owned by the State Department of Transportation (Caltrans), and being a recognized tenant (i.e., have signed the applicable rental agreement for the occupied property.).
 - ✓ Being a “tenant in good standing” with Caltrans.
 - Eligible Corridor SFR Tenants must use 100% of LSS if participating in OPHP.
 - Maximum assistance is limited to 30% of purchase price or \$75,000, whichever is less (including LSS).
 - Eligible Corridor SFR Tenants must qualify for the respective Federal and State funding available at the time, and also qualify for conventional financing (with the assistance of the OPHP subsidies)
 - Occupants are eligible to purchase the home they occupy or other homes. Homes may be in Corridor or elsewhere in the City. Caltrans has modified their process to provide this flexibility.
 - So far, 107 homes in the Corridor have been designated “eligible to purchase”, 45 homes “ineligible to purchase”, and 41 homes “unclassified” (primarily Bunker Hill; see Exhibit II.) These designations are tentative. The decision-making process for classifying the 41 unclassified homes is specified in the Agreement, will occur over the next year, and will be transparent. City staff is continuing to work with Caltrans and to move as many homes as possible to the “Eligible” list from the “Ineligible” and “Unclassified” lists. Therefore, the number of eligible to purchase homes is growing. (Please refer to Exhibit II for explanations and lists provided Caltrans Tenants at the 9/28/09 meeting.)
 - Priority order defined for both purchase of an existing, occupied home and for service within the OPHP.
 - Price will be at “Fair Market Value”.
 - There is a detailed appraisal process, including instructions and a review.
 - Homes will undergo pre-purchase inspections, and that information will be shared with both Caltrans and the prospective buyer.

- The purchase process is also detailed and includes multiple purchase opportunities both in scope and in quantity per tenant in an attempt to assure that as many tenants as possible successfully migrate to homeownership.
- Program Administration will be handled by City. This will cause the City to hire additional staff and incur costs, all of which will be reimbursed from the proceeds of the sale of LATIP properties: Program Administrator, Hearing Officer, office support, office supplies and equipment.

In order for the OPHP to be effective, the City will need to utilize any and all State and Federal housing programs available to the City and the tenants at the time the program is implemented. In addition, the City agrees to make at least \$500,000 per year for the two years available through the City's 1st Time Home Buyer's program. This total \$1,000,000 is included in, and is not in addition to, the capped \$6,000,000 identified herein.

- Dispute Resolution: There is an extensive Dispute Resolution process defined in the Agreement. This would be for situations where the tenant believed that their income levels had not been correctly calculated, they had not been fairly assessed for home purchase qualifications, etc. This will be the role of the Hearing Officer, and the purpose of being so detailed here is to make every attempt to resolve future programmatic disagreements administratively, and not in the courts.

❖ Settlement Agreement Dependent on Other Actions:

The Settlement Agreement is tied to the successful passage of AB 1386; to the successful conclusion of the newly filed State Court complaint referenced above; to the successful adoption of supporting policies and procedures by the California Transportation Commission; and to the dismissal of La Raza v. Volpe in Federal Court. Should any one of these connected activities not be concluded successfully, the Settlement Agreement will be in jeopardy, and at best force negotiations among Caltrans, PILP, and the City to resume; at worst, there will be no movement on or closure to the outstanding 238 Corridor issues or disposal of any land at this time.

- AB 1386³: This bill was sponsored initially by Assembly Woman Hayashi and later co-sponsored by Senator Corbett. It has passed both the Assembly and the Senate and is in the Governor's Office for signature with the active support of Caltrans.

The purpose of the bill is to replace old "housing requirements" from previous judicial and legislative actions with the programmatic elements of this new Settlement Agreement as described above. It, too, is connected to the Settlement Agreement in that it specifically provides for the old sections of the legislation to remain in effect if the State Class Action

³ http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1351-1400/ab_1386_bill_20090917_enrolled.pdf

Complaint is not successfully concluded and the Settlement Agreement approved by the State Court.

In addition, it provides some administrative clean-up language that is needed for funding and implementing the LATIP. And, it removes any reference or current/future applicability of Government Code §§54235, *et seq.*, also known as the “Roberti Legislation”.

- Class Action Complaint in State Superior Court⁴: As stated above, this was filed on 9/28/09 by PILP, with the knowledge and consent of Caltrans and the City of Hayward. Its primary purpose is to provide a vehicle for formal approval and proper legal application of the Settlement Agreement.
- Formal Adoption of Necessary Policies and Procedures by the CTC: Consistent with the Settle Agreement and AB 1386, the CTC will need to assure that existing policies by Caltrans and the Commission are administratively in place to support the programmatic elements of the Settlement Agreement. These have to do with such items as the length of time someone must be a resident in the Corridor, which single-family residential properties are available for whom to purchase, and internal appraisal processes.
- Dismissal of *La Raza v. Volpe*: Once the Court issues the Final Order of Approval in the State Superior Court Class Action Complaint approving the Settlement Agreement, Caltrans and the City, with agreement by PILP, will need to seek dismissal of the Federal Court Class Action, *La Raza v. Volpe*. Until that occurs, Caltrans is not able to sell property, and neither Caltrans nor the City will implement the new programs defined in the Settlement Agreement.
- Finally, the Settlement Agreement also relies on certain defined releases that must be signed by the Class Members pursuant to program implementation and/or receiving benefits under the Agreement. These releases are designed to close the door on past issues and concerns with as much finality as legally possible in exchange for the programs and benefits defined in the Settlement Agreement.

FISCAL IMPACT

While the total estimated costs associated with the Settlement Agreement are listed in the following table, the actual cash cost to the City of Hayward for the LSS and OPHP programmatic components

⁴ *Robert Swanson, Deborah Frederick, Tracy Asturias, Mary Ann Olguin, John Eliksen, Beverly Maris, Katherine Matthew, CalTrans Tenants Organization, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs,*

vs.

THE CALIFORNIA DEPARTMENT OF TRANSPORTATION; and THE CITY OF HAYWARD,

is capped at \$6,000,000.⁵ These funds will come from the 238 Corridor Bypass Settlement Trust Fund (Fund #431-5121-9xxx.)

In addition, the City will likely expend another not-to-exceed amount of \$2,000,000 to administer the programs defined in the Settlement Agreement. These funds will initially also come from the above identified fund; however, they will be reimbursed from the sale of the 238 Corridor Bypass LATIP properties.

The above identified costs do not include any costs that may be associated with producing or causing the production of the 237 new low-income units between now and 2023.

<u>RESPONSIBLE ENTITY</u>	<u>COSTS</u>	<u>SOURCE</u>
City of Hayward	\$6,000,000	\$5 million from 238 Housing Trust Fund; \$1 million from 1 st Time Home Buyers
City of Hayward	\$2-3,000,000	State & Federal housing program funds (roughly estimated)
Alameda County	\$500,000	State & Federal housing program funds, including County's 1 st Time Home Buyer funds.
City of Hayward as Administrative Agent for Payments and Programs.	\$1-2,000,000	Proceeds from sale of excess properties
City of Hayward as Program Administrator: Pre-purchase Home Inspections	\$25-50,000	Proceeds from sale of excess properties
Department of Transportation (using outside contractor): Survey of Tenants/Data Collection	\$75-100,000	Proceeds from sale of excess properties
Department of Transportation (using outside contractor): Appraisals	\$250,000 - \$350,000	Proceeds from sale of excess properties and/or internal costs
TOTAL ESTIMATED COSTS	<u>\$9,850,000 to \$12,000,000</u>	

PUBLIC CONTACT

Negotiations over the past two plus years have been conducted among the specific parties through their representatives. Given that these negotiations were intended to resolve issues identified in previous legal actions and required future legal actions to implement them, it would have been inappropriate to conduct these negotiations in the public realm. However, a meeting of all 238

⁵ A small portion of this will be offset by value reimbursement from Alameda County to offset the amount of LSS payments the City will make to 238 Corridor Bypass residents in Unincorporated Alameda County.

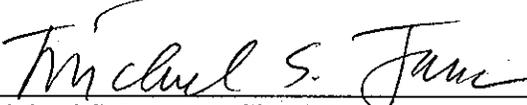
Caltrans Corridor tenants, Caltrans, PILP, and the City was held on September 28, 2009, at 7:00 pm at Centennial Hall. The terms of the Settlement Agreement as defined herein were presented in that public meeting along with Exhibits I and II of this report and copies of AB 1387.

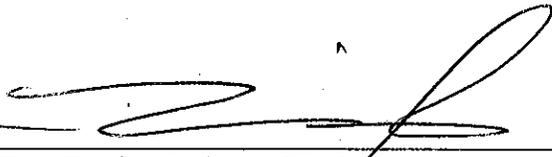
It was noted at the conclusion of that meeting that additional meetings will be held going forward to assure that all tenants know what is happening and have an opportunity to continue to get clarifying information as the process rolls forward. Caltrans will post on the 238 Corridor web site⁶ any and all documents as they are ready for public viewing as well as other relevant information like dates and schedules as they are developed. This web site has not been maintained and will be updated and made more prominent on the District 4 Main page as this process unfolds.

NEXT STEPS

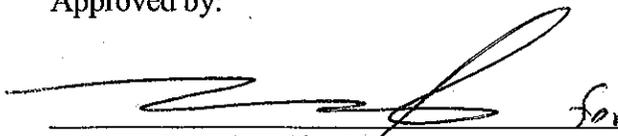
1. Governor's signature on AB 1386: no later than October 11, 2009.
2. Formal signature/approval of the Settlement Agreement.
3. Resolution of the Class Action Complaint in State Superior Court.
4. Dismissal of La Raza v. Volpe.
5. CTC rescission of 238 Corridor Bypass project.
6. CTC approval of LATIP: no later than June 2010.
7. Hiring of staff to implement program.
8. Program implementation.
9. Start sale/disposition of 238 Corridor properties: estimated at no later than July 2010.
10. Complete programmatic elements of LSS and OPHP: estimated to be no later than July 2012, since OPHP is a two-year commitment.
11. Complete construction of 237 new low-income units: no later than end of CY 2023.

Prepared by:


Michael S. Lawson, City Attorney


Fran David, Assistant City Manager

Approved by:


Gregory T. Jones, City Manager

⁶ <http://www.dot.ca.gov/dist4/238hayward>

Attachments –

Resolution - Authorizing City Manager to Execute 238 Corridor Bypass Settlement Agreement

Resolution - Authorizing 238 Corridor Bypass Settlement Trust Fund Expenditures

Exhibit I - Table supporting calculation of LSS payments.

Exhibit II - Lists of properties by classification as presented at the 9/28/09 meeting with 238 Corridor residential tenants.

DRAFT

HAYWARD CITY COUNCIL

MSJ 10/2/09

RESOLUTION NO. _____

Introduced by Council Member _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HAYWARD AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT COMPROMISING AND SETTLING LEGAL ISSUES RELATED TO THE ROUTE 238 BYPASS PROJECT LAWSUIT ENTITLED SWANSON, et al. v. CALIFORNIA DEPARTMENT OF TRANSPORTATION, et al.

BE IT RESOLVED by the City Council of the City of Hayward that the City Manager is authorized, for and on behalf of the City of Hayward, to negotiate and execute an agreement compromising and settling legal issues related to Route 238 Bypass project lawsuit entitled Swanson, et al. v. California Department of Transportation, et al., Alameda County Superior Court No. RG09476468, and related documents that further and effectuate said settlement agreement.

IN COUNCIL, HAYWARD, CALIFORNIA, _____, 2009

ADOPTED BY THE FOLLOWING VOTE:

AYES: COUNCIL MEMBERS:
MAYOR:

NOES: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ATTEST: _____
City Clerk of the City of Hayward

APPROVED AS TO FORM:

City Attorney for the City of Hayward

DRAFT

*MMS J
10/2/09*

HAYWARD CITY COUNCIL

RESOLUTION NO. _____

Introduced by Council Member _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HAYWARD AUTHORIZING THE CITY MANAGER TO EXPEND FUNDS RELATED TO THE IMPLEMENTATION OF THE COMPROMISE AND SETTLEMENT AGREEMENT RELATED TO THE ROUTE 238 BYPASS PROJECT LAWSUIT, ENTITLED SWANSON, et al. v. CALIFORNIA DEPARTMENT OF TRANSPORTATION, et al.

WHEREAS, the City Council of the City of Hayward has authorized the City Manager to execute an agreement compromising and settling all legal issues related to the Route 238 Bypass Project lawsuit entitled Swanson, et al. v. California Department of Transportation, et al., Alameda County Superior Court No. RG09476468, and related documents that further and effectuate said settlement agreement; and

WHEREAS, said agreement requires the City of Hayward to undertake responsibility for the payment of stipends to eligible members of the class of persons who are intended to benefit from said settlement, in a total amount not to exceed \$5 million; and said agreement requires the City of Hayward to support home ownership purchase programs for eligible members of the class who are intended to benefit from said settlement, in a total amount not to exceed \$1 million during FY 2009-2010 and FY 2010-2011; and, further, said amounts are to be charged to the 238 Corridor Bypass Settlement Trust Fund, respectively; and

WHEREAS, said agreement requires the City of Hayward to undertake responsibility for certain administrative provisions set forth in the agreement, the funds for which are to be generated from the proceeds derived from the sale and disposition of the excess properties described in said agreement; and

WHEREAS, the City Council received a report, dated October 6, 2009, setting forth in detail the responsibilities of the City of Hayward set forth in said agreement, which report is hereby adopted as part of the administrative record related to such matter,

BE IT RESOLVED by the City Council of the City of Hayward that the City Manager, or his designee, is authorized to make expenditures related to execution of said agreement, in the amounts set forth above, from the 238 Corridor Bypass Settlement Trust Fund, respectively; the City Manager, or his designee, is further authorized to expend funds related to the administration of said agreement, generally in accord with the October 6, 2009 report to the City Council, incorporated by reference herein, which funds are to be generated from the proceeds derived from the sale and disposition of the excess properties described in said agreement.

**DUE TO THE COLOR
AND LENGTH OF
EXHIBITS I AND II,
THEY HAVE BEEN
INCLUDED AS
SEPARATE LINKS**