



CITY OF
HAYWARD
HEART OF THE BAY

DATE: March 5, 2013

TO: Mayor and City Council

FROM: Assistant City Manager

SUBJECT: South Hayward BART Transit Oriented Development: Approval of Amendment to Owner Participation Agreement – Extension of Construction Timelines

RECOMMENDATION

That City Council adopts the attached resolution (Attachment I) authorizing the City Manager to negotiate and execute the First Amendment to the Owner Participation Agreement (“First Amendment”) for the South Hayward BART Transit Oriented Development (“TOD Project”) to modify the timelines for commencement of construction and completion of construction and to clarify the parties’ intent with regards to collateralization and enforcement of remedies upon an Event of Default.

SUMMARY

The Council approved the Owner Participation Agreement (the “OPA”) for the South Hayward BART Transit Oriented Development (the “Project) on July 26, 2011. This document memorializes the various terms and conditions of the development and, most importantly, documents the various security mechanisms and remedies to protect the City in a case of default by either of the developers. This is particularly important given the joint and several liability provision imposed by the State Department of Housing and Community Development (HCD) as a condition of acceptance by the developers of Proposition 1C grant funding for the project.

To synchronize the OPA deadlines with the adoption and implementation of the Parking Action Plan at the South Hayward BART station and the surrounding neighborhood, Eden Housing and JMJ Development (collectively the “Developers”) have requested a four (4) month extension of the Project construction commencement and completion deadlines such that construction of the Project must commence by August 15, 2013 and must be completed by September 15, 2015.¹ The Developers have further requested language intended to clarify the parties’ intent with regards to collateralization and enforcement of remedies upon an Event of Default to facilitate obtaining financing for the Project.

¹ Per the current terms of the OPA, construction of Phase 1 of the Project must commence by April 15, 2013 and must be completed by May 15, 2015.

BACKGROUND

The South Hayward BART Station Access Authority (the “JPA”) was created to manage station and parking access around the South Hayward BART station and the surrounding neighborhood. The JPA commissioned a Parking & Access Study Report (the “Access Study”) to study parking and access issues at the South Hayward BART Station and in the surrounding neighborhood. The Parking & Access Study Report was completed in November of 2012, several months after the original anticipated completion due to the outreach and engagement necessary to develop parking strategies more in line with community interests. Implementation of the parking action plan recommended in the Access Study and recommended by the JPA Board of Directors (the “Action Plan”) then required action by the City Council and BART Board of Directors.

On February 19, 2013, the City Council considered and approved² an Action Plan for the South Hayward BART Joint Powers Authority and established a Mixed-Use Preferential Parking District and Parking Permit Program for Residents and Commuters. Additionally, the BART Board is scheduled to meet on March 14, 2013 to consider, review and approve similar recommendations made to it by the JPA Board. The JPA Board is scheduled to meet at the end of March to implement the matters approved by the City Council and the BART Board.

The Developers have requested an extension of the Project commencement and completion deadlines under the OPA to reflect the delayed timing of the adoption and implementation of the JPA Action Plan. The OPA has various provisions related to the City’s secured interest and remedies upon default of the Developers. This is particularly important given the joint and several liability provision imposed by the State Department of Housing and Community Development (HCD) as a condition of acceptance by the developers of Proposition 1C grant funding for the project. This joint and several liability means that the City would be liable for repayment of these grant funds in the event of a default by either of the developers, resulting in the inability to complete the project. The OPA was entered into as of June 19, 2012, by and among the City of Hayward (the “City”), Eden Housing, Inc., a California nonprofit public benefit corporation (“Eden” or the “Affordable Developer”) and JMJ Development, LLC, a Delaware limited liability company (“JMJ” or the “Market Rate Developer”). Per the current terms of the OPA, construction of Phase 1 of the Project must commence by April 15, 2013 and must be completed by May 15, 2015.

The Developers have also requested language seeking to clarify the parties’ intent as it relates to the OPA provisions associated with the collateralization and enforcement of remedies upon an Event of Default. The clarifying language is intended to facilitate obtaining private financing for construction of both the affordable and market rate elements of the project.

² February 19, 2013 Council Meeting: <http://www.ci.hayward.ca.us/CITY-GOVERNMENT/CITY-COUNCIL-MEETINGS/2013/CCA13PDF/cca021913full.pdf>

DISCUSSION

Owner Participation Agreement (OPA)

Under the current terms of the OPA, construction of the Project must commence by April 15, 2013 and be completed by May 15, 2015. These deadlines were set very intentionally to provide the City with security with respect to the State grant funding being utilized for the Project. The OPA also has various provisions related to the City's secured interest and remedies upon default of either of the Developers.

Housing & Community Development (HCD) Grant Funding

The Project is partially funded with approximately \$18 million of Proposition 1-C Bond "Round II" Infill Infrastructure Grant and Transit Oriented Development Housing Program Funds (the "HCD IIG Funds"). Because the City is jointly and severally liable for the appropriate use and timing of use of the HCD IIG Funds under the IIG Disbursement Agreement (which governs the disbursement of the Funds), the City required security under the terms of the OPA.

The City Council originally approved the OPA for the Project on July 26, 2011³. The staff report associated with the approval included a discussion related to the risks associated with the joint and several liability required by HCD. The City holds a deed of trust on the property being developed so that in the case of default by either of the developers, the City could utilize the value of the property to repay any grant funds expended at the time of default to HCD. The City also maintains the ability to step into the developers' role and cure the default through a variety of mechanisms, including securing a replacement developer. These remedies all create security for the City. It is difficult to quantify the City's potential exposure at any given point, as this will fluctuate during the project timeline and with the amount of HCD funds disbursed.

During the construction period, when the amount of HCD IIG Funds disbursed increases and the City IIG deeds of trust may be subordinated to the construction lender, the City will still have security through its deed of trust, but there is a greater risk that the subordinated deeds of trust will not make the City whole in the event of a Developer default. However, as construction progresses, the underlying value of the property increases and the risk of default may decrease. The City also retains the step-in rights described below until project completion. Further, based on HCD's actions on defaulted projects to date, and the fact that the IIG funds (as Prop 1C funds) are required to be used for TOD projects and cannot be used for other State budget items, staff anticipates that, in the event of a Developer default, HCD is more likely to enter into a work-out agreement with the City than to call the HCD IIG Funds due. There is no way to completely eliminate the risk to the City given the joint and several liability provision required

³ July 26, 2011 Agenda Report (begins on page 320): <http://www.hayward-ca.gov/CITY-GOVERNMENT/CITY-COUNCIL-MEETINGS/2011/CCA11PDF/cca072611full.pdf>

by HCD for the IIG funds. However, the OPA contains appropriate mechanism[s] to help mitigate the City's risk and exposure.

Option and Right to Step In: Prior to completion of construction, the City will have the right to acquire the Phase 1 property and take over Phase 1 if the Developers default. The City's right to acquire the Phase 1 property and take over Phase 1 will be provided through several methods. First, the City will require the Developers to assign their purchase contracts for the Phase 1 property to the City. This assignment will permit the City to complete the purchase of the Phase 1 property (or portion thereof) in the event of a Developer default. The City will also have the option to purchase the Phase 1 property in the event of a Developer default. The option will permit the City to step in as the owner of the Phase 1 property (or portion thereof) so that it can cause the completion of construction of Phase 1. In addition, the City will require the Developers to assign their work products (e.g., design drawings, plans and specifications, engineering reports, etc.) to the City. This will permit the City to use the work product in the event it needs to replace the Developers. The OPA will provide some protection and associated step-in rights to Eden and JMJ Development in that if one entity defaults, the City will seek remedies against the defaulting entity and its property only. This will permit the City to work with the non-defaulting party to complete Phase 1.

The proposed First Amendment also clarifies the parties' intent regarding the "step-in" rights outlined above in order to facilitate the developers' ability to obtain financing for the Project. The Amendment restates and clarifies the concept that, once the developers close on their respective construction loans, the City cannot declare Eden in default for JMJ's actions and vice-versa. The banks wanted to include their specific language in addition to the original language.

In addition, the Affordable Development portion of the Project is also funded with approximately \$16 million of Transit Oriented Development Program Funds (the "HCD TOD Funds"). Under the regulations governing the use of the TOD Funds, Eden must complete construction of the Affordable Development no later than February 1, 2016. If a recipient of TOD Funds cannot demonstrate to satisfaction of HCD that the project will be completed within the disbursement extension timeline, HCD may revoke any disbursement extension previously granted. Failure to meet the established performance-based milestone requirements for the disbursement deadline extension or the TOD Rental Housing Loan Milestone Dates may result in the elimination of the TOD loan award. These timelines were taken into consideration when staff negotiated the current construction commencement and completion dates in the OPA.

To ensure timely completion, the City required that the OPA contain construction commencement and completion deadlines, which acknowledge the HCD TOD deadlines and contain provisions that, if the Project is not being completed on schedule, the City would have "step-in" rights to declare the Developer(s) in default and complete the project so that HCD would not be able to declare a default and require repayment of funds disbursed.

The Developers have moved the Project forward. In addition to the OPA execution and JPA approvals noted above, they have: submitted building plans which are nearly final and upon which building permits may be issued soon; submitted an application and will soon commence

demolition of the existing abandoned Perry & Key building; and the City has agreed to issue multifamily tax-exempt bonds to finance the Affordable Project (the TEFRA hearing before the City Council is scheduled for later this March). A \$562,000 Neighborhood Stabilization Program loan from the County of Alameda and a \$900,000 HOME loan from the City for the affordable development closed on March 1. However, the Developers have been unable to move the conventional construction financing forward until after the discretionary approvals of the JPA Action Plan are approved by both the City Council and the BART Board. With these approvals now nearly complete, the Developers will be able to move forward. However, they will not be able to secure the necessary financing and commence construction by the required April 15, 2013 OPA deadline. They have requested a four (4) month extension of the construction commencement date to August 15, 2015. This extension is reasonably necessary to coordinate construction with the timing of adoption and implementation of the JPA Action Plan.

The Project is estimated to take twenty-four (24) months to complete. The Developers have confirmed that it is not possible to accelerate construction to meet the May 15, 2015 completion deadline, without incurring tremendous cost. Therefore, the Developers have requested that the OPA completion date also be extended four (4) months to September 15, 2015. This extension is reasonably necessary to reflect the extension of the commencement date in order to coordinate construction with the timing of adoption and implementation of the JPA Action Plan.

The original completion deadline was set in order to provide the City adequate time to “step in” and complete the Project by HCD’s deadline of February 1, 2016. If the Project were not substantially complete by the extended deadline of September 15, 2015, it is less likely that the City would have sufficient time to “step in” and complete the project to meet the HCD 2016 deadline. Therefore, it will be incumbent upon the City to be vigilant during the construction period and, in the event that the project meets obstacles that will jeopardize timely completion, take appropriate action. In such an event, the City would meet and confer with the Developer experiencing problems⁴, determine the cause and necessary solutions, and, if necessary, declare a default, step in and complete the Project timely.

The Project OPA contains provisions for the City to act in the event of Project major delays. With the amendment of the OPA to provide these extensions, the City must employ those provisions and remain vigilant.

ECONOMIC IMPACT

The successful development of the SHB-TOD Project will have an immense positive economic impact on south Hayward. The commencement of the housing construction in this area should spur the development of the area. Proposed nearby projects would likely re-commence their planning, leading to construction. The development of housing in the area should lead to stronger interest from retailers, and thereby, planning and construction of retail centers. Initial development under Phase 1 of the Project would also have a positive economic impact by

⁴ The Developers’ construction schedule, as is industry norm, contains adequate time sensitivity for rain delays for both the winters of 2013-14 and 2014-15.

creating approximately 500 immediate high-quality construction, design and engineering service jobs through the three-year development cycle. Total Phase I Project costs are estimated to be more than \$100 million, exclusive of land costs. Extension of the commencement and construction completion deadlines under the OPA Agreement will result in a brief delay in the positive economic impacts associated with the development of this project.

FISCAL IMPACT

Extending the construction completion deadline to September 15, 2015 will have no fiscal impact on the City's General Fund, so long as the Project is completed on time. If either of the Developers defaults during construction, the City has the right to step in and complete the Project (subject to a meet and confer process with the non-defaulting developer). The extension of the commencement and completion deadlines reduces the time the City has to complete the Project or to find a replacement developer. If the Project is not completed within the HCD timelines, the City, together with the Developers, will be jointly and severally liable to repay up to \$18 million in IIG funds disbursed by HCD to the Project.

In addition, failure to complete the affordable housing development that is part of the Project would jeopardize \$16 million in HCD TOD permanent financing for the affordable development, which requires a certificate of occupancy for the project by the statutory deadline of February 1, 2016. Loss of this permanent financing would jeopardize feasibility of the Project at the projected levels of affordability. If the Project is slightly late, the City and the Developers could, at that time, request from HCD a reasonable workaround of the HCD IIG and TOD timelines, but there is no guarantee that HCD will be able to provide such a workaround.

NEXT STEPS

Upon approval by the City Council, the City Manager will execute the First Amendment in a manner that is consistent with the recommendations outlined in this staff report.

Prepared by: John DeClercq, Project Manager

Recommended by: Kelly McAdoo, Assistant City Manager

Approved by:



Fran David, City Manager

Attachments:

Attachment I: Resolution

CITY COUNCIL OF THE CITY OF HAYWARD

RESOLUTION NO. 2013-_____

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
HAYWARD AUTHORIZING THE CITY MANAGER TO
NEGOTIATE, EXECUTE AND IMPLEMENT A FIRST AMENDMENT
TO THE OWNER PARTICIPATION AGREEMENT FOR THE SOUTH
HAYWARD BART TRANSIT ORIENTED DEVELOPMENT

WHEREAS, the City of Hayward (the “City”), Eden Development Corporation (“Eden”) and JMJ Development LLC (“JMJ”), as the successor in interest to Wittek Development LLC and Montana Property Group LLC, are parties to that certain Owner Participation Agreement (the “OPA”) that governs the development and operation of Phase I of the South Hayward BART TOD Project, all as more specifically described in the staff report accompanying this Resolution (the “Staff Report”); and

WHEREAS, under the terms of the OPA, Eden and JMJ are required to commence construction of the Phase I of the South Hayward BART TOD Project (the “Project”) by April 15, 2013 and complete construction of the Project by May 15, 2015; and

WHEREAS, the OPA contemplates that the Bay Area Rapid Transit Authority (“BART”) will convey a 174-space satellite overflow parking lot property along the east side of Dixon Street (the “East Lot”) to JMJ just prior to the start of construction, but the closure and conveyance of the East Lot was conditioned on the City and BART providing adequate replacement parking; and

WHEREAS, the South Hayward BART Station Access Authority (the “JPA”) was created to manage station and parking access at the South Hayward BART station and in the surrounding neighborhood; and

WHEREAS, the JPA commissioned a Parking & Access Study Report (the “Access Study”) to study parking and access issues at the South Hayward BART Station and in the surrounding neighborhood and the Access Study provided several alternatives to address concerns related to the loss of parking at the East Lot; and

WHEREAS, the Access Study was completed November 2012, several months after the originally anticipated completion date; and

WHEREAS, implementation of parking action plans discussed in the Access Study and recommended by the JPA Board of Directors (the “Action Plan”) requires approval by the City Council and BART Board of Directors; and

WHEREAS, the City Council adopted the Action Plan at its February 19, 2013 meeting, and the BART Board of Directors will consider adoption of the Action Plan in March of 2013; and

WHEREAS, the approval and implementation of the Action Plan will allow for the closure of the BART East Lot and will enable BART to transfer the BART East Lot as contemplated under the OPA; and

WHEREAS, to make the OPA consistent with the approval and implementation of the Action Plan, Eden and JMJ have requested a four (4) month extension of the Project construction commencement and completion deadlines; and

WHEREAS, under Section 4.22 of the OPA, the parties may amend the OPA in writing; and

WHEREAS, the City, Eden and JMJ desire to amend: (1) Section 7.8 of the OPA to extend the construction commencement deadline to August 15, 2013; and (2) Section 7.9 of the OPA to extend the construction completion deadline to September 15, 2015; and

WHEREAS, to facilitate the financing of the Project, Eden and JMJ have requested additional language be added to the OPA clarifying the parties intent with regards to collateralization and enforcement of remedies upon an Event of Default; and

WHEREAS, the City prepared and, by Resolution No. 09-025, approved the Mitigated Negative Declaration (the "Mitigated Negative Declaration") studying the environmental effects under CEQA for the Project, and thereby evaluated the environmental effects of the of the Project; and

WHEREAS, the City prepared an Addendum to that Mitigated Negative Declaration in June 2011 studying the environmental effects under CEQA for the Project; and

WHEREAS, the City Council acting as the lead agency considered the environmental effects of the South Hayward BART TOD as shown in the Mitigated Negative Declaration and related Addendum.

NOW THEREFORE, BE IT RESOLVED by the City Council of the City of Hayward that the Recitals above are true and correct and by this reference makes them a part hereof.

BE IT FURTHER RESOLVED, that the City Council hereby approves the First Amendment and authorizes the City to enter into the First Amendment.

BE IT FURTHER RESOLVED, that the City Council hereby authorizes the City Manager to execute the First Amendment on behalf of the City with such revisions as are reasonably determined necessary by the City signatory, such determination to be conclusively deemed to have been made by the execution of the First Amendment by the City signatory. A copy of the First Amendment, when executed, shall be placed on file in the office of the City Clerk.

BE IT FURTHER RESOLVED, that the City Manager is authorized to take all reasonable steps which may be necessary to implement the First Amendment and take all further actions and execute all other documents which are necessary or appropriate to carry out the First Amendment.

BE IT FURTHER RESOLVED, the City Council determines that no further CEQA analysis is required because pursuant to 14 California Code of Regulations Section 15162: (1) there have not been substantial changes in the program for the Project that would require major revisions to the Mitigated Negative Declaration; (2) there have not been substantial changes with respect to the circumstances under which the program for the Project is being implemented that would require major revisions to the Mitigated Negative Declaration; and (3) there has not been the appearance of new information that was not known and could not have been known as of the date of consideration and approval of the Mitigated Negative Declaration that are relevant to the consideration and approval of the Mitigated Negative Declaration.

BE IT FURTHER RESOLVED, that this Resolution shall take immediate effect from and after its passage.

HAYWARD, CALIFORNIA, March 5, 2013

ADOPTED BY THE FOLLOWING VOTE:

AYES: COUNCIL MEMBERS:

MAYOR:

NOES: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ATTEST: _____
City Clerk, City of Hayward

APPROVED AS TO FORM:

City Attorney