



Oakland Measure DD Community Coalition

November 20, 2012

Bay Conservation and Development Commission
50 California Street, Suite 2600
San Francisco, CA 94111

Dear Chair Wasserman and Commission Members:

This letter serves as a request from the Measure DD Community Coalition that the Bay Conservation and Development Commission condition any amendment, extension, or renewal of permit 7-06 on a requirement that the Oak to Ninth Project permittees (City of Oakland, Port of Oakland, Oakland Harbor Partners) install an interim Bay Trail throughout the entire project within 18 months of such amendment of the BCDC permit or the close of escrow for the project, whichever is sooner.

Background

The Measure DD Coalition was formed in 2003 and sanctioned by the Oakland City Council to provide public input concerning projects and expenditures designated in the 2002 Measure DD Bond. One of the key themes of the \$198M Bond was improved access to the shoreline including the Oakland Estuary, Lake Merritt, and the major creeks in Oakland.

In 2003, the Port of Oakland, trustee of the 64-acre Oak to Ninth parcel, executed an option to purchase agreement with Oakland Harbor Partners (OHP) for the Oak to Ninth development parcel. This action moved Bay Trail and public access development for this parcel out of the public realm and out of the scope of Measure DD. In 2006, the Port, City and OHP submitted Permit Application 7-06 to BCDC.

On September 7, 2010, this Coalition wrote to the BCDC Commission requesting that approval of Permit Application 7-06 be conditioned on a requirement for installation of an interim Bay Trail throughout the entire project within 18 months of permit approval. *A copy of that letter is attached as Exhibit B.*

On January 20, 2011, the Commission approved BCDC Permit Application 7-06 subject to certain conditions, including certain special conditions pertaining to interim public access at the project site. Condition II-B-4a required installation of an interim trail along two segments of shoreline within 12 months of close of escrow for the parcel sale by the Port to OHP. *See January 20, 2011 BCDC Staff Recommendation available at <http://www.bcdc.ca.gov/meetings/commission/2011/01-207-06BBRP.pdf>.*

To date, escrow has not closed. On January 26th, 2012, the Port Commission extended the deadline for close of escrow for Oak to Ninth by one year to January 31, 2013, and there is reason to expect that further extensions will occur. Unless work begins on the site by December 31, 2012, the BCDC permit will "lapse and become null and void." Accordingly, there is reason to expect that the Commission will receive a request for permit extension.

Rationale Three key points support this request:

1. The voters intended to fill the critical gap in Bay Trail continuity in the project area, and continued delay is frustrating that intent.

In November 2002, over 80% of Oakland voters passed Measure DD, which provided for parks and Bay Trail continuity in the project area. To date, Measure DD has produced substantial progress in extending the Bay Trail through other areas along the Estuary, closing gaps at Alameda Avenue, Derby to Lancaster, Fruitvale to High Street, and the Cryer Boatworks site adjacent to Union Point Park. However, no progress has been made in the Oak to Ninth area, which remains as the largest single break in the trail vision presented in the Measure DD bond language:

"Pedestrian and bicycle trail acquisition and construction along Estuary waterfront to provide continuous public access from Jack London Square to Martin Luther King, Jr. Regional Shoreline."

2. Implementation of the required interim trail by the permittees can take place prior to close of escrow.

The Port of Oakland, the current owner of the site, is one of the permittees named in permit 7-06 authorization and is subject to its conditions, even if they entail expense. The Port's January 12, 2011 Amendment to the purchase and sale agreement includes two sections that provide a clear precedent for certain expenses incurred by the permittees prior to close of escrow to be deducted from the developer's deposit credited against purchase. *These important precedents are highlighted in the attached Exhibit A.*

3. A fixed time frame is needed for providing Bay Trail access.

Economic conditions have slowed the Oak to Ninth development schedule and public access to this shoreline in the past and may do so again in the future. Under the repeatedly revised purchase and sale agreement and open space ground lease, deadlines for close of escrow have been May 2008, June 2010, January 2012, and January 2013. So long as public access to this site remains tied solely to the close of escrow, there is no date certain by which public access will be attained. We encourage the Commission to require construction of the entire interim trail within 18 months of permit amendment or close of escrow, whichever is earlier, or by some other date to be fixed by the Commission. (Interim trail at the shoreline in the leased section of the parcel would be delayed until February 28, 2016, 60 days after the expiration of the lease.)

An interim Bay Trail is needed now to help mitigate the consequences of the repeated delays and uncertainty noted above.

We thank the Commission for considering this request.

Measure DD Community Coalition Interim Bay Trail Drafting Committee:

Naomi Schiff
John Sutter
Sandra Threlfall

Copy to: Robert Batha, Chief of Permits (bobb@bcdc.ca.gov)

Exhibit A

Agenda Report for January 12 2012 Amendment to the Agreement for Purchase and Sale and Ground Lease of Real Property in the Oak to Ninth District (p.93 of 188)

located at http://www.portofoakland.com/pdf/boar_shee_120112.pdf

BOARD MTG. DATE: 1/12/12

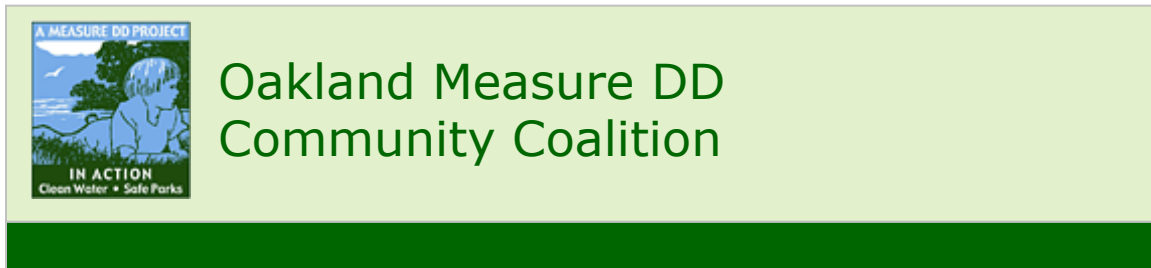
the Port retains the entire deposit amount. If close of escrow occurs on or before January 31, 2013 then the deposit amount is credited towards the purchase price.

3. Environmental Obligations Deducted from Deposit: If the Port receives a directive to investigate or remediate any part of the Property from a regulatory agency prior to the close of escrow, the costs of the Port's response to that directive shall be deducted from the Developer's deposit amount held by the Port. Thus, only the amount of deposit actually held by the Port at close of escrow would be credited against the Developer's purchase price payment owed to the Port. Likewise, these directive response costs would also be credited against the Buyers obligation to spend at least \$16 million in remediation costs on the Property, consistent with the limitations of the existing Purchase and Sale Agreement related to qualifying costs.
4. Waiver of Buyers Closing Conditions: Certain buyer closing conditions shall be waived or affirmatively acknowledged as completed by the Port (such as Tenant and/or Landlord Estoppel obligations, Master Indenture Covenant, stormdrain maintenance manual preparation, etc.) in order to minimize future closing efforts and limit the potential for any future disputes that could result in further delay.
5. Elimination of Port Liquidated Damages Payment: The \$500,000 liquidated damages payable by the Port as a result of an inability to close escrow due to the Port's Master Indenture Covenant shall be eliminated to minimize the risk for the Port related to other potential transactions occurring during the same twelve month period as the new proposed close of escrow date on this transaction.
6. Leasing Flexibility: The Port would be granted the right to enter into property rental agreements with tenants for use of the Property, utilizing our standard form of agreements, for a term length of up to January 2013 or longer, with a copy of the executed agreement provided to the Developer, but with no tenant or landlord estoppel required.
7. Performance Milestones and Regulatory Permit Costs: The Developer shall have the right to submit invoices to the Port for reimbursement for certain third party costs associated with the obtainment of outstanding regulatory agency permits and approvals required for the project such as the Regional Water Quality Control Board and Army Corps of Engineers each quarter, up to a maximum amount of \$72,292 each quarter, which equates to ½ of the quarterly deposit increase payment. At close of escrow, only the amount of deposit actually held by the Port at close of escrow shall be credited against the purchase price, with the remaining balance of the purchase price payable by the Developer at closing. This provision is intended to both somewhat offset the cash flow impact of the significant increase in the Developer's deposit being collected by the Port, and also incentivize the Developer to continue to pursue readying the site for development during the upcoming year such that project financing is more readily obtainable.

Based upon the terms and conditions listed above, staff believes that a one-year extension to the close of escrow date is acceptable, if combined with the other suggested amendments to the Purchase and Sale Agreement listed within this report. The proposed package of amendments will minimize or eliminate the risk to the Port from a delay in closing and should strengthen the Port's position with respect to leasing revenues on the property during the interim period. Furthermore, the requested extension recognizes the extremely challenging real estate capital markets present today and provides the Developer

Exhibit B

September 7, 2010 Coalition Letter to Commission



September 7, 2010

Bay Conservation and Development Commission
50 California Street, Suite 2600
San Francisco, CA 94111

Dear Chair Randolph and Commission Members:

This letter serves as a request from the Measure DD Community Coalition that, as a condition of its permit, the Bay Conservation and Development Commission require the Oak to Ninth Project developer to install an interim Bay Trail throughout the entire project within 18 months of issuance of the BCDC permit.

Background

The Measure DD Coalition was formed in 2003 and sanctioned by the Oakland City Council to provide public input concerning projects and expenditures designated in the 2002 Measure DD Bond. One of the key themes of the \$198M Bond was improved access to the shoreline which included the Oakland Estuary, Lake Merritt, and major creeks in Oakland. Measure DD designated \$22M for park projects and continuation of the SF Bay Trail along the Estuary shoreline. These projects were in compliance with the Estuary Policy Plan adopted in 2000 by the City Council as a component of the General Plan. A majority of the Oak to Ninth Avenue area is public trust land which cannot be privatized. Accordingly, no housing was proposed for the Oak to Ninth Avenue area in the General Plan.

In 2003, the Port of Oakland, trustee of the 64-acre Oak to Ninth parcel, entered into an exclusive negotiating agreement with Oakland Harbor Partners (OHP) for the Oak to Ninth development parcel. OHP proposed a project that did not reflect Oakland's Estuary Policy Plan for this area.

In 2004, Senator Perata initiated legislation on behalf of the Port of Oakland to trade out 8.75 acres of sovereign public trust lands so that housing could be built on the Oak to Ninth site. Senate Bill 1622 passed and was chaptered as Chapter 542, Statutes of 2004.

In 2006, the Oakland City Council amended the Estuary Policy Plan to incorporate the proposals of OHP for 3,100 housing units and a 40% decrease in open space for the area. The initial proposed schedule for the construction of the project was 2008 through 2022.

In spring 2010, the purchase agreement for the Oak to Ninth Avenue property was revised to permit a delay: the Port of Oakland received 25% down with the understanding that construction

would not begin before a final payment which could occur as late as 2015. The revisions also included an extension opportunity at 2015.

Rationale for this Request

1. Delay is frustrating the clear intent of the voters. In November 2002, over 80% of Oakland voters passed Measure DD. The bond language specified:

Waterfront Trail and Parks Acquisition and Construction including \$22 million for acquisition and development of the following parks along the Estuary waterfront:

** Estuary Park at mouth of Lake Merritt Channel into the Estuary*

** Meadows Park at 5th Avenue*

** New park in area of 9th Avenue Terminal*

** Union Point Park at 23rd Avenue*

Only the last of these parks and trail segments has been constructed. The others have been put on hold because they fall within the Oak to Ninth parcel. When the City and Port of Oakland determined that the General Plan would not fit the intent of the designated developer, the City Council amended the plan and approved a delay in construction of the San Francisco Bay Trail in the Oak to Ninth area.

Measure DD's capital expenditure plan included \$41,245,982 for Waterfront Trail and Parks Acquisition and Construction. Beginning in 2003, expenditures of these funds have yielded substantial progress in extending the Bay Trail through other areas along the Estuary. However, no progress has been made in the Oak to Ninth area.

Further, under the City's development agreement with OHP, completion of any interim portion of the Bay Trail is **not required until 2020 at the soonest!**

(See Exhibit C, Phasing Schedule excerpt, which calls for interim trail segments at the completion of Phase I of the development, expected to be five years from the project start after OHP makes final payment in 2015.)

The voters' intentions are being fulfilled in all areas specified in the Measure DD bond language except within the Oak to Ninth parcel. An interim Bay Trail is needed now to help mitigate this delay.

2. There is no certain time frame for providing Bay Trail access. Economic conditions have affected the Oak to Ninth development schedule in the past and may do so again in the future, with the potential to further delay access to this public trust shoreline. An interim Bay Trail is needed now to help mitigate this uncertainty by filling this critical gap in Trail continuity.

Our thanks to the Commission for considering this request.

Measure DD Interim Bay Trail Drafting Committee:

Sandra Threlfall

James E. Vann

Naomi Schiff