

AGENDA REPORT

TITLE: Public Hearing and Authorization for the Executive Director to Execute an Amendment to the Amended and Restated Option to Purchase and Ground Lease Real Property, and Execute a Tidelands Trust Exchange Agreement, a Purchase and Sale Agreement, an Open Space Ground Lease, a Marina Ground Lease and Other Related Documents for the Oak to Ninth District Project

AMOUNT: \$4,500,000.00 at close of escrow, with \$13,500,000.00 payable on or before June 1, 2015, in addition to interim annual rental revenue of at least \$750,000.00 between close of escrow and June 1, 2015

PARTIES INVOLVED:

Corporate Name/Principal	Location
Oakland Harbor Partners, LLC Michael Ghielmetti Dana G. Parry	Pleasanton, California
Signature Properties Michael Ghielmetti	Pleasanton, California
Reynolds & Brown Dana G. Parry	Concord, California
State Lands Commission Paul Thayer, Executive Director	Sacramento, California

TYPE OF ACTION: Resolution and Ordinance

SUBMITTED BY: Pamela Kershaw, Acting Director of Commercial Real Estate 

COMMITTEE ASSIGNED: Commercial Real Estate

SCHEDULED FOR COMMITTEE: December 2, 2009

APPROVED BY: Omar Benjamin, Executive Director 

FACTUAL BACKGROUND

In November of 2003 the Port of Oakland ("Port") and Oakland Harbor Partners, LLC ("Developer") executed an Option to Purchase and Ground Lease Real Property ("Original Option Agreement") for property known as the Oak to Ninth District (the "Property"). In brief, the Original Option Agreement granted the Developer an option to purchase fee title to the entire approximately 64 acre Property for \$18,000,000.00. The Agreement for Purchase and Sale and Ground Lease of Property and Escrow Instructions ("Purchase and Sale Agreement"), attached as an exhibit to the Original Option Agreement, and which developer intended to execute after exercising its option rights, required that the Developer provide a

Pollution Legal Liability Policy ("PLL Policy") or fund an alternative escrow account and a Remediation Cost Cap Insurance Policy ("Cost Cap Policy") or fund an alternative escrow account for the entire Property; and required the Developer to remediate the Property in accordance with a Response Plan to be approved by the California Environmental Protection Agency, Department of Toxic Substances Control ("DTSC"), at the Developer's then-estimated remediation cost of \$16,000,000.00.

Over the past few years, the Original Option Agreement was subsequently amended on several occasions. The Board of Port Commissioners ("Board") approved the most recent Amended and Restated Option to Purchase and Ground Lease Real Property Agreement ("Amended Option Agreement") in July of 2008. These various amendments included, among other matters, a shift in the close of escrow date from May of 2008 to June of 2010 to account for the Superior Court litigation then pending on the Environmental Impact Report (EIR) for the project, and added provisions allowing a ground lease of the approximately 32-acre open space portion of the Property ("Open Space") to permit the Developer to remediate and improve the Open Space, prior to the ultimate transfer of fee title of the Open Space to the City, consistent with the City land use entitlements approved for the project and the 2004 Tidelands Trust Exchange Act. The Amended Option Agreement also required the Developer to provide a Completion Guaranty for the remediation of the Open Space and record a Restrictive Covenant on the remaining approximately 32 acres of the Property ("Development Parcels") prohibiting the development of the Development Parcels while the Restrictive Covenant was in place (and not until the Cost Cap Policy was in place) and requiring the Developer to obtain the PLL Policy and Cost Cap Policy, and complete all remediation required under the Response Plan for the Open Space. A brief summary of the key terms of the original 2003 transaction along with the current transaction terms as amended in 2008, is attached to this Agenda Report for reference.

Under the Amended Option Agreement both the Port and the Developer are required to perform various due diligence and predevelopment tasks in order to move the transaction toward a potential close of escrow. One of the key requirements is that the Developer obtain City approval of the project entitlements and certification of the project EIR. The Developer began working with City staff on the entitlements, along with other due diligence matters in 2004. During the course of the project entitlement review, between 2004 and 2006, approximately 20 public meetings were held by the City, through its various advisory Boards, Commissions, and staff. These public meetings included several facilitated public input workshops that took place in February through April of 2005, and resulted in the publication of a public outreach and community input plan in May of 2005. Ultimately hundreds of individuals and/or organizations were invited to participate in this public process. After several hearings before the Landmarks Preservation Advisory Board, the Parks and Recreation Commission, and the City Planning Commission, the Oakland City Council took final action to approve the project entitlements and certify the project EIR in July of 2006. An illustrative site plan of the project approved in July of 2006 is attached to this Agenda Report for information purposes. A detailed list of the various public meetings held by the City on the Oak to Ninth Project, as well as all the key staff reports and published documents including the EIR documents, is available on line at the City's

website, www.oaklandnet.com, by clicking on the Oak to Ninth Project link on the homepage.

In late July of 2006, project opponents filed legal petitions in Alameda County Superior Court challenging the project entitlements issued by the City and the adequacy of the City's EIR. In January of 2008, after various litigation proceedings, the court ruled on the project entitlements and adequacy of the EIR. The ruling identified certain deficiencies in the EIR analysis and suspended all further approvals on the Project pending a further order of the court. The deficiencies in the EIR identified by the court were subsequently addressed by the City. In January of 2009, after considering the revisions proposed to the EIR, the Oakland City Council approved several amendments to the EIR and submitted the revised EIR to the court for its review. Shortly thereafter, project opponents filed a new suit against the revised EIR in court. This second suit was dismissed by the court in May of 2009. In August of 2009, the court accepted the modifications to the EIR required under its ruling in the first lawsuit. In a detailed 55-page order, the court analyzed the changes to the EIR and evaluated and rejected the project opponents' remaining legal challenges to the EIR. This court order concluded by rejecting each of the project opponents' contentions regarding the adequacy of the EIR and dismissed their petitions as without merit, upholding the revised EIR as adequate.

In October of 2009, project opponents filed a notice of appeal of the Superior Court ruling on the EIR. That appeal is now pending with the State Court of Appeal; it is estimated that it will take approximately one year before a hearing and decision by the Court of Appeals on the matter. The Amended Option Agreement provides for tolling of its term until final resolution of a challenge to the EIR. Thus, it appears that a close of escrow will not occur by June 1, 2010 as previously anticipated, and now may not occur until approximately the first half of calendar year 2011.

Nonetheless, due to the complexity of this transaction and the requirement for approval of key aspects of the transaction by the California State Lands Commission and State Department of Toxics and Substance Control, Port staff continues to undertake and complete, in compliance with the requirements of the Amended Option Agreement, to the extent possible, various closing obligations and due diligence tasks in anticipation of an expeditious close of escrow after the end of the tolling period. In addition, CEQA provides that when a Lead Agency certifies an EIR and approves a project, and then a legal action is brought to challenge the adequacy of the EIR, a Responsible Agency such as the Port must assume that the EIR complies with CEQA where there is no court injunction pending against the project. Here, there is no court injunction pending against the Oak to Ninth Project; to the contrary, the trial court determined that the City's revised EIR is adequate and complies with CEQA. The Developer and Port staff have been working to finalize, and revise as necessary, the various transaction documents in order to present these matters to the Board for consideration. The proposed transaction revisions better align the deal structure with current real estate and financial lending market realities, and are described in greater detail in the paragraphs that follow.

ANALYSIS

Since execution of the Amended Option Agreement in July of 2008, many adverse changes have occurred in both the financial and real estate markets resulting in a uniquely challenged setting in which to complete such a complex real estate transaction as the Oak to Ninth project. In mid 2009 the Developer approached the Port to request certain amendments to the Amended Option Agreement in order to make the project easier to finance and ultimately market during the financial crisis and stagnant real estate market currently gripping the nation. Port staff and the Developer have been negotiating potential changes to the transaction in light of these realities. Discussion of the key proposed revisions to the deal documents is included in the paragraphs that follow, with a brief summary of the key terms of the proposed transaction also provided in an attachment to this Agenda Report. The purpose of pursuing the proposed transaction revisions and requesting authorization to execute the transaction documents at this time is to allow all parties to be poised to close escrow expediently once the Court of Appeal rules on the EIR appeal. The key proposed changes to the transaction documents and structure are as follows:

1. Purchase and Sale Agreement: As stated above, the Original Option Agreement envisioned that fee title to the Property would be transferred to the Developer at close of escrow for a purchase price of \$18,000,000.00, along with the obligation on the part of the Developer to provide a PLL Policy and Cost Cap Policy and to remediate the Property in accordance with the DTSC-approved Response Plan. As a result of the legislation authorizing a Tidelands Trust Exchange required for this transaction, transfer of the entire Property to the Developer is no longer feasible because approximately one half of the Property remains or will be subject to the Tideland Trust and must be held in fee title by a Tidelands Trustee. The project entitlements approved by the City in 2006 assume that the City will ultimately be the owner and Tidelands Trustee of the Open Space. The Development Parcels, the remaining approximately 32 acres of the Property, will be owned by the Developer. This change in the amount and structure of the fee transfer of the original 64 acre Property was the major reason for the 2008 amendments to the Original Option Agreement, including the Open Space Ground Lease between the Port and the Developer for the Open Space subject to the Tidelands Trust, and the scaling back of the Property subject to the Purchase and Sale Agreement from the originally planned 64 acres to approximately 32 acres.

Notwithstanding the changes in the configuration of the potential Property transfers, the purchase price has remained the same as that established in 2003: \$18,000,000.00. This price was based upon an appraisal of the Property performed in 2003. That appraisal established the Property's fair market value at \$34,000,000.00, less the Developer's then-estimated \$16,000,000.00 in remediation costs to be incurred by the Developer, resulting in a cash value to the Port of the transaction of \$18,000,000.00. Since 2003, when the original appraisal was completed, the Developer's estimate to remediate the Property has risen dramatically. The Developer's most current estimate to remediate the Property is approximately \$23,000,000.00. A 2007 updated appraisal of the Property concluded

that, based upon the revised remediation estimates and including both the benefits and conditions of the project entitlements granted for the project in 2006, the cash value to the Port of this transaction, including sale of the Development Parcels, is \$15,000,000.00. Despite this most recent appraisal of the Property, the Developer's purchase price of \$18,000,000.00 remains unchanged.

In light of the recent downturn in the real estate markets, the tightening of the credit markets affecting the entire nation since late 2008, the resultant shrinkage of lending sources, and the current depressed state of the real estate market, the Developer requested that the Purchase and Sale Agreement be further amended to allow for a partial payment of the purchase price at close of escrow, with the balance of the purchase price to be paid to the Port on or before June 1, 2015. The balance of the purchase price would be secured by a Promissory Note and Deed of Trust recorded on the title to the Development Parcels at close of escrow. The Developer has proposed paying 25% of the purchase price to the Port at close of escrow, which equates to \$4,500,000.00, with the remaining 75% of the purchase price, which equates to \$13,500,000.00, to be paid on or before June 1, 2015. Between close of escrow and final payoff of the purchase price secured by the Promissory Note and Deed of Trust, the Developer would be the owner of the Development Parcels and ground lessee of the Open Space and Marinas and would be responsible for the management and maintenance of the Property. The Developer would also be required to provide the Port with an annual payment equivalent to 75% of the net revenue from the Property (which is defined as gross revenues less payments for the Developer's property/possessory interest taxes). Utilizing the current gross rental income from the Property of \$1,400,000.00 per year as an example, the Port would receive approximately \$847,500.00 per year (gross revenue less property taxes of \$270,000.00 x 75%) until payoff of the Promissory Note. Should the revenues from the Property drop below their current level, the Port would be guaranteed a minimum annual payment of not less than \$750,000.00. This interim revenue sharing arrangement equates to an annual interest rate payment of 5.6% - 6.3% on the Promissory Note to the Port. Neither the interim revenue payments nor the initial 25% payment of the purchase price would be credited against the balance owed on the Promissory Note. If the Promissory Note is not paid off in full by June 1, 2015, the Port would have the right to foreclose on the Deed of Trust, retain the original 25% purchase price payment of \$4,500,000.00, and retain the interim annual rental payments.

Although the proposed changes to the Purchase and Sale Agreement result in a smaller cash payment to the Port in the initial close of escrow fiscal year, now anticipated to be fiscal year 2010-2011, the requested amendments are not entirely unexpected in light of the ongoing financial and real estate crisis. In addition, as a result of the proposed changes, the total cash received from the Property by the Port between 2010 and 2015 will be higher than the total cash that would have been collected by the Port if the transaction were to close for the full purchase price amount in 2010 (\$18,000,000.00), due to the annual interim revenue sharing arrangement described above. Furthermore, the phased payment of the purchase price allows the Developer to better time the transaction closing with the anticipated

start of actual construction of the project, which, due to the economy, is now further into the future than originally planned.

2. Environmental Implementation and Liability Measures: Since execution of the 2003 Original Option Agreement, the Developer has been working with Port staff, City staff, and DTSC staff to develop the Response Plan which will govern remediation of the Property. The draft Response Plan was released by DTSC for public review and comment on November 4, 2009 with the public comment period ending on December 18, 2009. Once DTSC has had an opportunity to review the comments received during this period, and require the Developer to make any necessary changes to the Response Plan, the Response Plan can be approved by DTSC. Approval of the Response Plan is one of the Developer's performance obligations prior to close of escrow on the Property. In light of the current schedule for public review of the draft Response Plan, it appears that this obligation may be completed well before close of escrow. Port staff has been working with, and providing feedback to, the Developer and DTSC throughout the course of the development of the draft Response Plan over the past several years.

As mentioned above, the Original Option Agreement required that the Developer perform the remediation of the Property in accordance with the DTSC-approved Response Plan at a cost estimated by the Developer at that time to be \$16,000,000.00. The Developer was also required to obtain a PLL Policy and a Cost Cap Policy for the Property at close of escrow. The Amended Option Agreement approved by the Board in 2008 still requires that the Developer spend at least \$16,000,000.00 to remediate the Property and provide the PLL Policy at close of escrow, but allows the Developer to secure the Cost Cap Policy in phases, based on the development phases for the project, with only the Cost Cap Policy for Phases I and IA required to be provided at close of escrow. The Amended Option Agreement also required that the Developer deliver to the Port a Completion Guaranty at close of escrow, in an amount equal to the clean up cost estimate for the Open Space which would still be held by the Port in fee at close of escrow and subject to the Open Space Ground Lease. This Completion Guaranty would be reduced as remediation of the Open Space occurred and the outstanding estimated costs to remediate the remainder of the Open Space were reduced. The Amended Option Agreement also required the Developer to record a Restrictive Covenant on the Development Parcels prohibiting the development of the Development Parcels while the Restrictive Covenant was in place (and not until the Cost Cap Policy was in place) and requiring the Developer to obtain the PLL Policy and Cost Cap Policy, and complete all remediation required under the Response Plan for the Open Space. Thus, the Restrictive Covenant was intended to link future development rights on the Development Parcels with the provision of environmental protections on the Open Space until fee title to the Open Space can be transferred to the City.

The amendments currently being proposed as part of this report, include the ability for the Developer to delay the provision of the environmental implementation and liability measures (PLL Policy, Cost Cap Policy and Completion Guaranty) until the earliest to occur of commencement of remediation, a material physical change to the

Property or June 1, 2015, concurrent with the timeframe required for payoff of the Promissory Note. Thus, the Developer would still have the affirmative obligation to remediate the Property and spend at least \$16,000,000.00 to do so, provide the PLL Policy for the Property, provide the Cost Cap Policy for the Property in phases, and provide the Completion Guaranty if the Open Space Ground Lease is executed, but would have the right to delay provision of some of these environmental implementation and liability measures to coincide with the Developer's anticipated timeframe for commencement of construction on the Property. The obligation to provide these environmental implementation and liability measures would be secured by the Deed of Trust recorded at close of escrow on the title to the Development Parcels. Moreover, the amendments currently being proposed still obligate the Developer to record a Restrictive Covenant that prohibits a material physical change to the Development Parcels while the Restrictive Covenant is in place. If these environmental implementation and liability measures are not provided at the time required, the Port would have the right to foreclose on the Development Parcels, terminate the Open Space Ground Lease, and terminate the Marina Lease.

Thus, the 64 acre Property is bound with, and subject to, these obligations, consistent with the intention of the Original Option Agreement. In addition, during this interim period after close of escrow, but prior to full payoff of the Promissory Note and performance and provision of all secured obligations of the Deed of Trust, the Developers' ability to perform construction related activities on the Development Parcels and to introduce land uses or activities other than those light industrial or commercial purposes which are the same or similar to those existing on the Development Parcels as of the effective date will be severely limited. Furthermore, the amendments currently being proposed also obligate the Developer during this interim period to respond to any regulatory agency directives, clean up orders or response initiatives that arise after close of escrow (in addition to implementing the DTSC-approved Response Plan); performance of this obligation would also be a secured obligation of the Deed of Trust. These proposed revisions allow the Developer some flexibility to provide these environmental implementation and liability measures at a later date when commencement of project construction is more likely to occur, yet still provide the same level of environmental assurances and protections for the Port.

3. Tidelands Trust Exchange Agreement: Since execution of the Original Option Agreement, in order to effectuate a potential fee title transfer of portions of the Property to the Developer, the proposed transaction required the Port to obtain State Lands Commission approval to remove or alter configuration of the Tidelands Trust on the Property. In 2004 the State Legislature approved SB1622 which authorizes, among other matters, a boundary line agreement, a Tidelands Trust exchange and sale of portions of the Property, subject to subsequent approval by the State Lands Commission of an Exchange Agreement implementing the legislative authorization.

In sum, SB1622 authorizes an exchange of certain Tidelands Trust lands that are no longer useful for Tidelands Trust purposes ("Exchange Out Land") for other lands, not now subject to, but that will be useful for the Tidelands Trust (the "Exchange In

Lands”) and authorizes the sale of the Exchange Out Land and other portions of the Property (together the Development Parcels) to the Developer. The remaining portions of the Property which continue to be useful for Tidelands Trust Purposes (i.e., the Open Space) for, among other matters, public open space and public streets will be affirmed as granted Tidelands Trust lands. Upon close of escrow, the Development Parcels will no longer be subject to the Tidelands Trust.

More specifically, SB 1622 requires any Exchange Out Land be replaced with Exchange In Land not now subject to, but necessary to and supportive of the Tidelands Trust, and of equal or greater dollar value than the Exchange Out Lands. Along with authorizing determination of the exact acreage of the Exchange Out Land, SB 1622 establishes certain additional parameters for the Exchange In Lands; the Exchange In Land must be located in certain geographic areas of Oakland and be selected based upon certain priorities: First Priority – land in the Estuary Plan area, Second Priority – land adjacent to the Estuary Plan area, Third Priority – land in the Inner Harbor, and Fourth Priority – land within the Outer Harbor and including the Oakland Army Base. If no qualifying Exchange In Land can be found, funds equal in value to the value of the Exchange Out Land would be deposited with the State into a fund to be used for future purchases by the Port of land that would qualify as Exchange In Land.

In approximately 2005 Port staff began to search for potential Exchange In Land to comply with the terms of SB 1622. This search consisted of an examination and analysis of the various parcels available within the four priority areas mentioned above. The analysis focused on key factors such as availability of a parcel, potential land uses for which the parcel can be utilized now and in the future, environmental contamination of the parcel, and the value of the parcel. As a result of these efforts, Port staff examined over 40 potential parcels of Exchange In Lands, including several parcels which were suggested by community representatives. Most of these parcels were either not immediately available for purchase, were being utilized now or planned for future utilization by land uses inconsistent with the Tidelands Trust, were parcels that had evidence of significant environmental contamination, or were parcels already owned by or planned for acquisition/utilization by other public agencies such as the City or the State of California. Further detail of the Exchange In Land analysis conducted to date is provided in an attachment to this Agenda Report.

In 2007, the State Lands Commission requested that the appraisal of the Property completed in 2003 be updated to consider whether the Property's value had changed as a result of the project entitlements granted by the City for the development as well as to account for changing market values since the previous appraisal. The 2007 appraisal determined that, with consideration given to the Developer's updated estimated remediation costs, the value added from the project entitlements and the changes in real estate market conditions, the value of the Property was approximately \$15,000,000.00. Based upon this 2007 appraisal, the value of the Exchange Out Lands is approximately \$2,400,000.00. Thus, any

proposed Exchange In Lands must have, among other matters, a value equal to or greater than \$2,400,000.00 in order to qualify for use as Exchange In Lands.

As a result of this analysis, Port staff believes that the appropriate Exchange In Land consistent with SB 1622 is the Army Reserve Parcels acquired by the Port in June of 2007. The Army Reserve Parcels are located within the boundaries of the former Oakland Army Base, in the Fourth Priority area identified in SB 1622, and are surrounded by Tidelands Trust encumbered properties on all sides. The Parcels were purchased by the Port for \$4,400,000.00 (\$2,000,000.00 greater in value than the Exchange Out Land). The Army Reserve Parcels do not require any further remediation, pursuant to the Finding of Suitability to Transfer (FOST) that was prepared for the property transfer. The Port and City land use plans and intentions for the Army Reserve Parcels include utilizing the site for maritime related industrial activities, with the potential to incorporate this land into a planned intermodal rail facility. Thus, it is a suitable property for use for Tidelands Trust activities. For all of the reasons above, Port staff believes that the Army Reserve Parcels qualify as the Exchange In Land in compliance with SB 1622. Port staff and Commission staff agreed that port acquisition of the Army Reserve Parcels was in anticipation of later consideration of the Parcels as the Exchange In Parcel. In the meantime, as earlier noted, Port staff has continued to search for a qualifying Exchange In Parcel. The Port holds the Army Reserve Parcel in trust pending its consideration as the Exchange In Parcel.

While the Developer has been pursuing the project entitlement approvals, Port staff and the Developer have been meeting regularly and working with the staff of the State Lands Commission for the past few years to draft specific terms of the Exchange Agreement implementing the transaction authorized by SB 1622. The proposed Exchange Agreement, as required by SB 1622, provides for, among other matters, environmental implementation and liability measures for the benefit of the State and the Port as a Trustee, as explained above. It is anticipated that shortly after the Port authorizes execution of this Exchange Agreement, the State Lands Commission will consider approval of authorizing its Executive Director to execute the Exchange Agreement. The State Lands Commission, Port and the Developer will all be required to execute the Exchange Agreement prior to close of escrow.

4. Open Space Ground Lease: As mentioned previously, the Amended Option Agreement allows for title to the Open Space to either be transferred to the City concurrently with close of escrow, or alternatively the Developer would have the right to ground lease the Open Space from the Port at close of escrow and perform the necessary remediation of the Open Space in phases under the terms of the Open Space Ground Lease.

Once this remediation of the Open Space is completed, fee title would then transfer to the City in phases, and the accompanying ground lease for that phase would terminate. The schedule for the ultimate completion of this phasing of remediation could run for several years prior to the transfer of the last phase of the Open Space to the City. While the Developer is the lessee of these properties, property

management and maintenance obligations of the Open Space would be assumed by the Developer, who would in turn ground lease the Open Space from the Port for \$1 per year.

However, since the Port remains on the title to the Open Space during this interim period prior to ultimate fee transfer to the City, the Amended Option Agreement also requires that the remediation and PLL Policy and Cost Cap Policy obligations of both the Open Space and the Development Parcels be imposed upon the owner of the Development Parcels (Developer) until fee transfer of the Open Space to the City is completed. These obligations would be in the form of a Deed of Trust discussed above recorded on the title of the Development Parcels at close of escrow. In addition, the Restrictive Covenant prohibits any material physical changes on the Development Parcels until all the secured obligations of the Deed of Trust, including the environmental implementation and liability measures, are provided in addition to the payoff of the balance on the Promissory Note. The proposed Open Space Ground Lease form is largely unchanged from that approved as part of the Amended Option Agreement, with the exception of some minor clarifying amendments to the maintenance obligations during the term of the Lease and to provide for termination rights for the Port if the Developer fails by June 1, 2015 to perform obligations secured by the Deed of Trust recorded on the Development Parcels, among other matters.

5. Marina Lease: The Original Option Agreement gave the Developer the right to lease the existing two marina areas adjacent to the Property from the Port, for an annual rental payment of \$1 plus participation rent in the amount of 5% of the gross revenues beginning no later than the 8th year after the effective date. In addition, the Developer has an affirmative obligation to substantially reconstruct the Clinton Basin Marina improvements and commence construction of new improvements to the Fifth Avenue Marina within certain early term milestones for each. These original provisions remain largely intact since the Original Option Agreement, but amendments are now proposed as part of this action to tie this Marina Lease back to the obligations secured by the Deed of Trust, in such a way that the Port would have the right to also terminate the Marina Lease if the obligations secured by the Deed of Trust are not performed by June 1, 2015. In addition, the timing for commencement of construction of the aforementioned marina improvements may be adjusted to coincide with the current timeframes for development of the uplands portion of the Property.
6. Other Minor Edits: There are other minor edits proposed to the Amended Option Agreement and its various exhibits and form documents that are intended to provide internal consistency among the various documents and clarify the intent and meaning of various terms and provisions. While these more minor or technical edits do not warrant significant discussion within this Agenda Report they are intended to clarify and simplify the document for ease in implementation and ensure internal consistency in language throughout the various related aspects of this complex transaction.

Based upon the analysis contained above, Port staff believes that the proposed revisions to the transaction structure and documents described within this Agenda Report are reasonable and appropriate based upon the current financial and real estate market realities, which will undoubtedly linger for some time into the future. Authorization of these proposed revisions will provide the Developer with greater flexibility to finance this transaction, and ultimately develop the project, while providing the Port with fair market value and environmental assurances for the Property. Once the Court of Appeal rules on the EIR matter, and presuming that ruling is supportive of the Superior Court's decision, approval of these transaction revisions and authority to execute these agreements will allow close of escrow to occur expeditiously thereafter.

Staff recommends that the Board open the public hearing to receive public testimony on the proposed actions, and then once members of the public have had an opportunity to address the Board, close the public hearing. Staff further recommends that upon consideration of any input received during the public hearing, that the Board adopt the appropriate findings under the California Environmental Quality Act ("CEQA"), approve the requested amendments to the Amended Option Agreement, and authorize the Executive Director to execute the Exchange Agreement, the Purchase and Sale Agreement, the Open Space Ground Lease, the Marina Ground Lease and any other accompanying transaction agreements supporting those documents, and make any necessary findings related to that authorization.

BUDGET & FINANCIAL IMPACT

In light of the current litigation filed against the City's revised EIR for the project, the close of escrow date is difficult to determine with certainty at this time, but will most likely not occur by June of 2010 as previously anticipated. It is now anticipated that close of escrow may occur during the second half of fiscal year 2010-2011, although this is dependent upon the outcome and timing of the current litigation. Until close of escrow, the Port will continue to retain full ownership and possession of the Property, receive all revenues from tenants on the Property and provide required maintenance of the Property.

With the proposed changes to the Amended Option Agreement, the Developer will be paying only 25% of the purchase price at close of escrow, which equates to \$4,500,000.00, with the remaining 75%, which equates to \$13,500,000.00, secured through a Promissory Note and Deed of Trust recorded on the Property payable on or before June 1, 2015. The Port will also receive 75% of the net revenue from the Property during this interim five year period, with a minimum annual payment of \$750,000.00, which equates to 5.6% interest on the Promissory Note balance, but with the potential for receiving an actual annual payment of approximately \$847,500.00 to the Port, which equates to 6.3% interest on the Promissory Note. If the full balance payable on the Promissory Note is not paid by June 1, 2015, the Port has the right to foreclose on the Promissory Note and Deed of Trust, retain the initial \$4,500,000.00 payment, and retain the interim annual rental revenue share.

STAFFING IMPACT

There will be no impact to Port staffing as a result of the proposed action.

SUSTAINABILITY

Approval of the proposed transaction will provide many economic, environmental and social equity benefits for the City and the region, and will support many sustainability concepts. The proposed project represents an opportunity to redevelop an underutilized property which is no longer necessary for Port maritime or aviation purposes, and to provide housing units, commercial space, recreational marinas and public open space and parks to the City and the region. As stated in the City staff reports prepared for the project entitlement approvals by the City Council in 2006, the proposed project will also provide many economic benefits to the local economy. The proposed project will provide affordable housing units for the City, available to a wide range of income levels and families. The proposed project will also generate new tax increment funds for the City Redevelopment Agency which can be used for projects within the Central City East Redevelopment Plan Area and the Central District Urban Renewal Plan Areas of Oakland. The proposed project will provide jobs for local residents during construction, and will also provide jobs during operation of the project in connection with the commercial businesses associated with the development and with the maintenance of the parks, open space and landscaping areas within the project.

In addition, the project site has been used for many years for industrial purposes and the soils reports indicate that much of the soil on the site contains contaminants. The Developer will be obligated to remediate the Property consistent with the DTSC-approved Response Plan, which will greatly improve the environmental condition of the Property.

The project will also provide new venues for public access to the waterfront with the approximately 32 acres of public access and open space on the Property, much of which is presently not available to the public, and will also include completion of a significant segment of the Bay Trail along the perimeter of the Property. The conditions of approval and EIR mitigation measures imposed by the City on the project entitlements granted by the City Council also include many other sustainability measures which the Developer will be required to adhere to during construction and operation of the project.

ENVIRONMENTAL

The City of Oakland, as the land use permitting agency with the principal responsibility for deciding whether to approve the Oak to Ninth Project and for imposing mitigation measures and conditions of approval, is the Lead Agency for the project for purposes of CEQA. In May of 2004, the City issued a Notice of Preparation, which officially commenced the CEQA process for the project. The City then released the Draft EIR for public review on August 31, 2005, and published a Final EIR on February 1, 2006. A list of the City staff reports and public notices issued for the EIR for the project, along with electronic versions of the Draft EIR, Final EIR and other related EIR and CEQA documents for the project are available on the City's website at www.oaklandnet.com, by clicking on the link to the Oak to Ninth Project on this homepage.

The City Council approved the project entitlements and certified the project EIR in July of 2006. As described above, the project opponents then brought suit in the Alameda County Superior Court to challenge the adequacy of the City's EIR. The trial court ruled that several impacts were not adequately analyzed in the original EIR and it ordered that the City suspend any further project approvals. In response to the court's ruling, the City Council prepared revisions to the EIR and certified the revised EIR in January 2009. In August 2009, the trial court determined that the revised EIR complied with CEQA and adequately addressed the deficiencies it had identified. The court therefore vacated its prior order suspending the Project approvals. As noted above, the case is currently on appeal.

Unless and until it is enjoined by the California Court of Appeal, as a Responsible Agency under CEQA, the Port must presume that the EIR prepared and certified by the City, and evaluated and upheld by the Superior Court, complies with the requirements of CEQA. In particular, Section 21167.3(b) of the Public Resources Code provides that, in the event a legal action or proceeding is commenced to challenge an EIR, but no injunction is granted by the court, Responsible Agencies shall assume that the EIR complies with CEQA and shall grant its approval or disapproval based on the required timeframes for reaching a decision. This statutory provision goes on to explain that an approval by a Responsible Agency in such a circumstance "shall constitute permission to proceed with the project at the applicant's risk pending final determination of the action or proceeding". As a Responsible Agency, the Port is required to consider the City's EIR and revised EIR and then reach its own conclusions on whether and how to approve the real estate transaction needed for the project.

The Port's actions in consummating the transaction contemplated herein would not create any additional or substantially increased environmental impacts, as compared with the impacts for the project that the City has already evaluated in its EIR and its revised EIR. In addition, there have been no project changes, no changes in the circumstances surrounding the project, and no new information since the City's certification of the revised EIR in January 2009 that would give rise to a requirement under CEQA to prepare a supplemental or subsequent EIR. The amendments to the Option Agreement that are contemplated involve various aspects of implementing the real estate transaction needed for the project, but they do not alter the scale, nature or impacts of the project in any material way. Finally, because the project as approved by the City and evaluated in the EIR and revised EIR will result in impacts that cannot be mitigated to a less than significant level, the Port also is required to adopt its own Statement of Overriding Considerations. Proposed CEQA findings and a proposed Statement of Overriding Considerations are attached to this Agenda Report.

MARITIME AND AVIATION PROJECT LABOR AGREEMENT (MAPLA)

MAPLA does not apply to Commercial Real Estate projects.

OWNER CONTROLLED INSURANCE PROGRAM (OCIP)

OCIP does not apply to the proposed action.

GENERAL PLAN

Approval of the proposed action is consistent with the General Plan, as the development project entitlements approved by the City Council in 2006 included amendments to the General Plan to accommodate the proposed project and ensure consistency with the Oakland General Plan.

INDENTURE COMPLIANCE

It has been determined that the Property to be sold or otherwise transferred is unnecessary for Port purposes or harbor development. It is further expected that, as of the Close of Escrow, the Property proposed to be sold or otherwise transferred will not, together with other Port properties disposed of during the 12-month period ending on the day of such transfer, constitute a Significant Portion of the Port (as defined in each of the Port's Master and Intermediate Lien Trust Indentures). The Board hereby directs that the proceeds of such sale or transfer(s) shall be deposited in the Port Revenue Fund and shall be used in accordance with the applicable provisions of the Indentures.

Furthermore, pursuant to Section 3.3 of the Purchase and Sale Agreement, the Port is required to perform certain obligations prior to the Close of Escrow to ensure compliance with the applicable provisions of the Master Indenture. Specifically, the Port may not dispose of any Port facilities prior to the Close of Escrow if such disposition would cause the Port to be unable to meet the test outlined in the second preceding paragraph (or other applicable tests under the Indentures) at the time of the Close of Escrow. While the Port could delay the Close of Escrow until such time as it is able to satisfy such requirements, the Purchase and Sale Agreement would require it to pay liquidated damages of \$2,470.00 to the Developer for each day that the Close of Escrow is so extended.

LIVING WAGE

The Living Wage requirements do not apply to the proposed action.

OPTIONS

1. After conducting a public hearing, adopt CEQA findings and authorize execution of the proposed revised transaction documents as recommended in this Agenda Report, which will allow the project to move forward toward a close of escrow as soon as possible;
2. Do not conduct a public hearing or adopt CEQA findings or authorize execution of the proposed revised transaction documents, which may result in the Developer being unable to exercise the option and close escrow on the transaction; or
3. After conducting a public hearing, adopt CEQA findings and authorize execution of some alternative amendments to the Amended Option Agreement and related documents based upon direction provided by the Board, which, depending on the nature of those alternative amendments, may require further negotiation with the

- Developer to determine the feasibility of those amendments with respect to the ability to ultimately close escrow on the transaction; or
4. Continue the matter for further discussion.

RECOMMENDATION

It is recommended that the Board pursue Option 1 above, and;

Open the public hearing and receive public testimony on the matter;

Close the public hearing;

Adopt the attached CEQA findings and Statement of Overriding Considerations;

Adopt a resolution authorizing the Executive Director to execute an amendment to the Amended Option Agreement consistent with the analysis and discussion contained within this Agenda Report;

Adopt an Ordinance authorizing the Executive Director to execute an Exchange Agreement with the State Lands Commission, and the Developer in conformance with this Agenda Report;

Adopt an Ordinance authorizing the Executive Director to execute a Purchase and Sale Agreement in conformance with this Agenda Report;

Adopt an Ordinance authorizing the Executive Director to execute an Open Space Ground Lease in conformance with this Agenda Report;

Adopt an Ordinance authorizing the Executive Director to execute a Marina Lease in conformance with this Agenda Report;

Adopt an Ordinance authorizing the Executive Director to execute a Restrictive Covenant in conformance with this Agenda Report;

Adopt an Ordinance authorizing the Executive Director to execute a Deed of Trust in conformance with this Agenda Report;

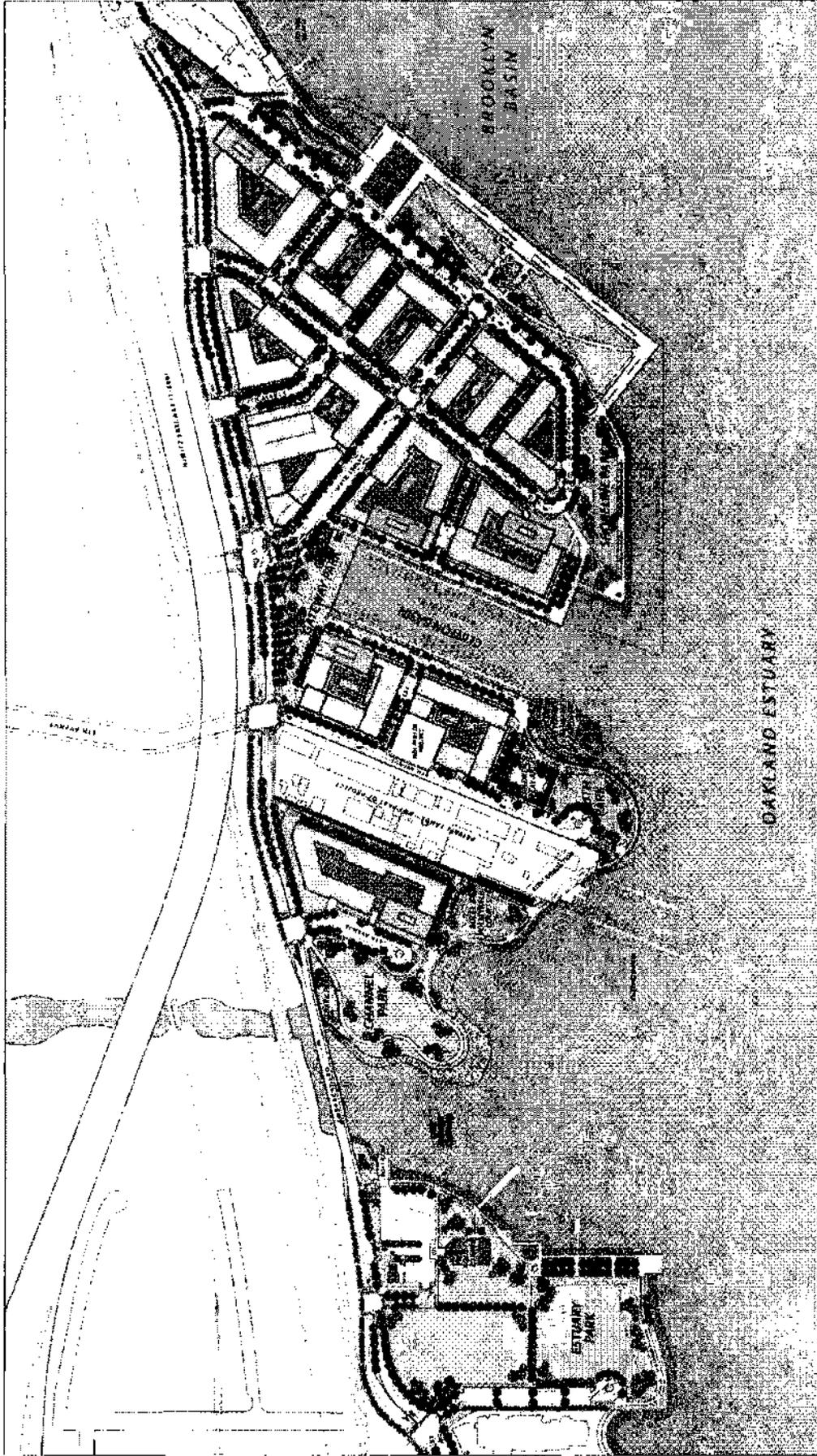
Adopt a Resolution approving the procedures adopted for and the selection and submitting of the Army Reserve Parcels as the Exchange In Parcel in compliance with SB 1622 and, pending approval of the Exchange Agreement and the Port's selection of the Army Reserve Parcel as the Exchange In Parcel, to hold the Army Reserve Parcel in trust;

Adopt a Resolution authorizing the Executive Director to execute a Promissory Note in conformance with this Agenda Report; and

Authorize the Executive Director or his designee to execute such related transaction agreements and such additional documents as may be necessary to carry out this authority provided that such documents are approved by the Executive Director or his designee and approved by the Port Attorney as to form and legality.

Attachments:

1. Illustrative Diagram of Oak to Ninth District Project
2. Summary of Key Terms of the Transaction
3. Trust Exchange Parcel Analysis
4. CEQA findings and Statement of Overriding Considerations

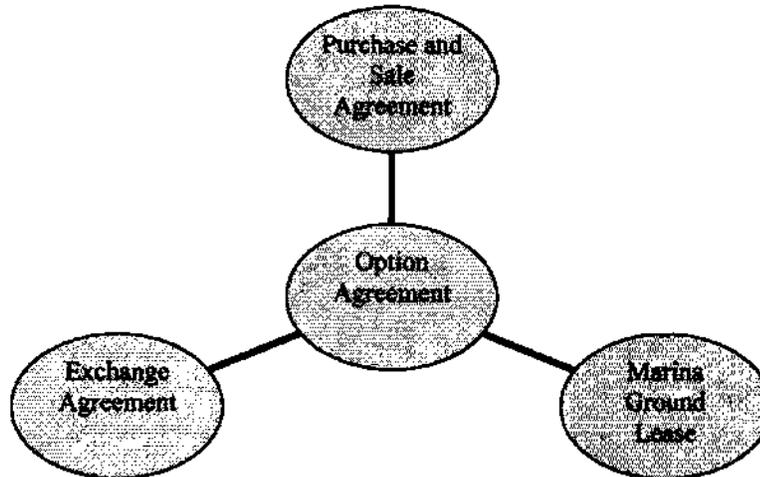


ILLUSTRATIVE DEVELOPMENT PLAN

Summary of Key 029 Deal Structure Changes from 2003-Present

Key Terms of Original 2003 Option Agreement Transaction Structure approved by Board:

- Transfer all 64 acres to Developer in fee title at close of escrow
- \$18 million purchase price (based upon 2003 appraisal value of \$34 million, less estimated \$16 million remediation costs)
- Developer obligated to spend \$16 million to remediate property
- Developer obligated to obtain PLL Insurance and Cost Cap Insurance at close of escrow on entire site
- Ground Lease for Marinas, obligation to improve marinas to first class condition
- Close of escrow by May of 2008



Major Milestones and Intervening Events during 2003-2008:

2004 - Trust Exchange legislation adopted which authorized removal of Tidelands Trust from ½ of site and other ½ of site remains Trust property and must be owned by a Trustee Agency, any net loss of Granted Trust lands from the site must be replaced with an “exchange in” property of greater or equal monetary value made subject to the Granted Trust

July 2006 - Land use entitlements for project approved by City (Dev Agmnt, EIR, Vesting TTM, etc.), including provisions which allow City to take fee title to Open Space Trust lands as Trustee Agency

July 2006 - Challenge to land use entitlements and EIR filed

2006 – State Lands Commission (SLC) remediation consultant confirms that remediation costs of property exceed \$16 million, estimate closer to \$23 million

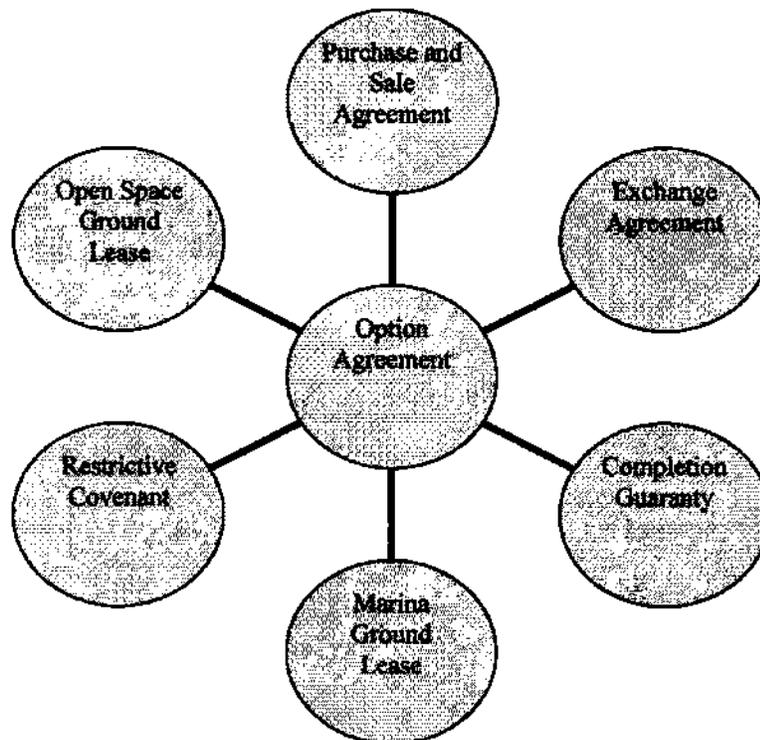
January 2007 - new appraisal obtained at request of SLC which determines fair market value of property sale at \$15 million, includes assumptions related to City entitlements and revised remediation estimates

June 2007 - Port acquires Army Reserve property for \$4.4 million, potential “exchange in” parcel

January 2008 – Superior Court ruling issued determining certain aspects of City EIR inadequate, along with certain aspects of Development Agreement, Developer and City begin work to remedy EIR deficiencies

Key Terms of Current Amended Option Agreement Structure, approved by Board in July 2008:

- Transfer approx. ½ property to Developer in fee title (residential portion) and ½ property to City (open space, public streets, etc.)
- \$18 million purchase price remains unchanged
- Developer still obligated to spend \$16 million to remediate property
- Developer obligated to obtain PLL Insurance for entire property at close of escrow
- Marina Ground Lease unchanged
- Close of escrow shifted to June 2010
- Developer obligated to obtain Cost Cap Insurance at close of escrow for Phase I and Phase 1A only, subsequent Cost Cap Insurance for later phases deferred until later dates when construction commences
- Ground Lease for Open Space between Port and Developer created to allow Developer to remediate property prior to transfer to the City if desired rather than transfer fee title to City at close of escrow
- Completion Guaranty required at close of escrow if Open Space Ground Lease executed to ensure remediation of Open Space lands can be completed
- Restrictive Covenant recorded at close of escrow on residential fee sale property to prohibit residential project development until all environmental insurance/Guaranty provided for property



Major Milestones and Intervening Events since 2008 Agreement Approved:

August-September 2008 – Major financial crisis in US banking and investment industry takes hold, collapse of Lehman Brothers, financial bailouts and buyouts of AIG, Merrill Lynch and other institutional lenders and banks, ripple effects on other economies/markets

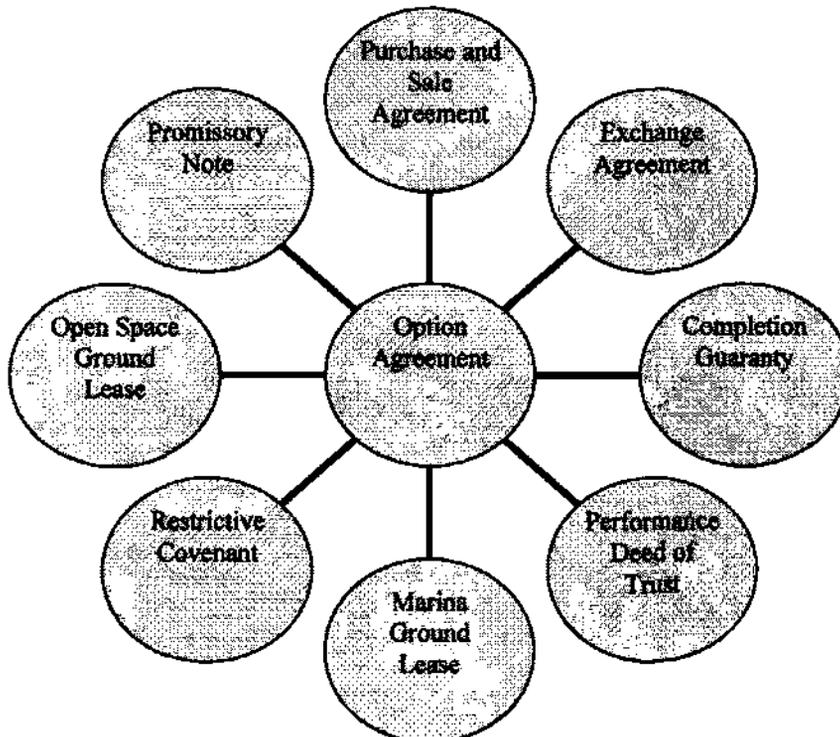
March 2009 & September 2009- Developer approached Port requesting changes to October 2008 deal structure, requested flexibility in order to better attract financing in light of tight lending markets and requested the ability to defer some upfront costs until residential market rebounds

August 2009 – Superior Court ruling issued finding that revised EIR is sufficient

October 2009 – Notice of Appeal of Superior Court ruling filed on EIR

Proposed Key Terms of Revised Transaction Structure:

- Transfer approx ½ property to Developer in fee title (residential portion) and ½ property to City (open space)
- \$18 million purchase price remains unchanged, *however Developer will pay 25% of purchase price at close of escrow (\$4.5 million) and pay the 75% balance of the purchase price (\$13.5 million) on or before June 1, 2015 secured by a Promissory Note and Performance Deed of Trust, in addition to a payment of 75% share of the net rental income from the property (gross revenues less property taxes) annually to the Port (with such payments guaranteed at a minimum of \$750,000 per year) in lieu of interest payments (equivalent to min of 5.6% interest)*
- Developer still obligated to spend \$16 million to remediate property *further obligated to affirmatively respond to any and all Agency directives or orders requiring remediation, monitoring or sampling of soil immediately upon close of escrow, including matters that are not related to the Project RAP*
- Marina Ground Lease unchanged, *other than Port has the right to terminate if Developer does not perform all secured obligations of the Performance Deed of Trust by June 1, 2015*
- Open Space Ground Lease between Port and Developer remains to allow Developer to remediate property prior to transfer to the City if desired, *Port also has the right to terminate if Developer does not perform all secured obligations of the Performance Deed of Trust by June 1, 2015, and Port also has review and approval authority over any new property use agreements of 1 year or more term until Deed of Trust removed*
- Close of escrow pushed out until resolution of Appeal, *most likely won't occur until FY 2010-2011*
- Developer allowed to delay obtainment of PLL Insurance for entire property after close of escrow until June 2015
- Developer allowed to delay obtainment of Cost Cap Insurance for Phase I and Phase IA after close of escrow until June 2015, *then can obtain in subsequent discreet development phases thereafter*
- Developer allowed to delay posting of Completion Guaranty to ensure remediation of Open Space lands ground leased by Port after close of escrow until June 2015 *but no Material Physical Changes allowed on property until that time*
- Restrictive Covenant still recorded at close of escrow on residential fee transfer properties to prohibit Material Physical Changes to property, *which includes development of residential uses, until Deed of Trust removed*
- Performance Deed of Trust in favor of Port recorded on residential fee transfer property at close of escrow *securing the obligations to provide the Completion Guaranty, the PLL Insurance, the Cost Cap Insurance for Phase I and IA, along with payment of the balance of the purchase price on the Promissory Note and Annual Rental Share Payments, failure to perform these secured obligations on or before June 1, 2015 will trigger the Port's right to foreclose on the Deed of Trust and also terminate Open Space Ground Lease and Marina Lease*



Trust Exchange Parcel Analysis and Recommendation for Approval of Army Reserve Property as the Trust Exchange Parcel

Chapter 542, Statutes 2004 (“SB 1622”) approves a proposed exchange of Granted Lands¹ -- tide and submerged lands granted to the City of Oakland by the Legislature within the Oak Street to 9th Avenue Property – for certain lands not now subject to the Public Trust or the Legislative Grants (“Trust Exchange Parcel”). *SB 1622, Sec. 4.* By virtue of the exchange authorized by SB 1622, certain Granted Lands with the Oak Street to 9th Avenue Property, the Oak Street to 9th Avenue Exchange Lands, will be freed from the Public Trust and the Legislative Grants and the Trust Exchange Parcel will be made subject to the Public Trust and the Legislative Grants (“SB 1622 Exchange”).

SB 1622 authorizes the State Lands Commission (“Commission”) to approve the SB 1622 Exchange if the Trust Exchange Parcel meets certain conditions, including satisfaction of specific selection criteria. *Ibid.* The Commission established procedures for effectuating the SB 1622 Exchange, including procedures for ensuring all reasonable efforts have been made to locate and for reviewing and approving or disapproving the Port’s selection of a Trust Exchange Parcel. *SB 1622, Sec. 7.*

This submission details Port staff’s efforts to find a parcel that meets the SB 1622 selection criteria for the Trust Exchange Parcel including (1) an extensive investigation to locate parcels that might meet the SB 1622 selection criteria; (2) a parcel-by-parcel analysis of the more than 40 parcels identified in that investigation; and (3) staff’s identification of a Trust Exchange Parcel.

SUMMARY OF CONCLUSION

As described in more detail below, Port staff separately analyzed each parcel it identified regardless of whether those parcels were available for sale. Staff’s investigation concluded that no property presently available in the first three Priority Areas, the Estuary Plan Area, adjacent to the Estuary Plan Area, or in the Middle Harbor, met the SB 1622 selection criteria. The Port concluded property located in the former Oakland Army Base, the Fourth Priority Area – the Outer Harbor, where the Army Reserve is located (“Army Reserve Property”) met the criteria for the Trust Exchange Parcel. The Port acquired the Army Reserve Property in 2007.

Analysis of the title and boundary history of the area in which the Army Reserve Property is located shows that the Army Reserve Property is not now subject to the Public Trust or the Legislative Grants. Its environmental condition is such that no further remediation is required. A land use covenant restricts uses of the Army Reserve Property, but not inconsistently with the Public Trust or the Legislative Grants. The value of the Army Reserve Property (\$4,396,860.00) is equal to or greater than the value of the Oak Street to 9th Avenue Exchange Lands (\$2,400,000).

¹ Unless otherwise noted, capitalized terms in this submission are defined as set forth in SB 1622.

The Army Reserve Property is a portion of the lands described in Section 2(o) of Statutes 2005, Chapter 664. In that legislation, the Legislature recognized that certain lands, specifically including the Trust Exchange Parcel, are essential for the Port to acquire to expand the Port's terminal and transportation capacity and meet BCDC's 2020 cargo throughput demand forecasts. Stats. 2005, Chap. 664, sec. 2(o). Acquisition of the Army Reserve Parcel will benefit the Public Trust and the Granted Lands Acts by facilitating development, construction and expansion of the Port's Outer Harbor Marine Terminals through the provision of additional intermodal rail facilities and ancillary maritime support services on the site. These additional facilities and services will (1) allow increased container throughput and reduce the share of truck traffic versus rail traffic in and around the Port's marine terminals and on regional roadways, (2) facilitate construction of numerous environmental design strategies to minimize air quality impacts from this facility on surrounding communities and provide substantial economic benefits to the Port, the local community, and the region and (3) comply with and implement regional land use plans, including the intended reuse of the Oakland Army Base as set forth in the Oakland Base Reuse Authority Final Reuse Plan for the former Oakland Army Base dated July 31, 2002 and the Granted Lands Acts (or other such acts applicable to the Port) as such use is for "improvement and conduct of a harbor and construction of structures and utilities necessary or convenient for the promotion and accommodation of commerce and navigation. . . ."

As a consequence, staff submits that Port acquisition of the Army Reserve Property promotes the purposes or objectives of the Legislative Grants and the Port Improvement Plans and is consistent with the Public Trust.

DISCUSSION

I. Selection Criteria

A. SB 1622 Criteria

SB 1622 requires a proposed Trust Exchange Parcel be approved by the Commission according to procedures established by the Commission. In order to approve a proposed Trust Exchange Parcel, the Commission must decide that the proposed Trust Exchange Parcel:

- Promotes the purposes or objectives of the Estuary Plan, the Legislative Grants, or the Port Improvement Plans, as applicable, to extent those purposes or objectives are consistent with the Public Trust;
- Has been selected according to certain criteria set forth in SB 1622; and
- Is equal to or greater in value than the value of the Oak Street to 9th Avenue Exchange Lands.

SB 1622 contains two categories of specific criteria for the Trust Exchange Parcel: location and use

1. Location Priority

SB 1622 establishes 4 geographic areas in which a Trust Exchange Parcel may be located and prioritizes the four areas. *SB 1622, Sec. 4(b)(2)*. The geographic areas and their priority are:

- First Priority Area -- the Estuary Plan Area (shoreline of the Estuary from approximately, but not including, the Howard Terminal to Damon Slough);
- Second Priority Area -- contiguous to the Estuary Plan Area (but waterward of I-880);
- Third Priority Area -- within the Inner Harbor area; and
- Fourth Priority Area -- within the Outer Harbor area (including properties within the former Oakland Army Base).

In its investigation, Port staff considered the first two Priority Areas together because of their physical proximity and as a matter of common sense. In this submission, the Estuary Plan Area and the contiguous Estuary Plan Area are referred to collectively as the Consolidated Estuary Plan Area.² If a qualifying Trust Exchange Parcel is not available in the Consolidated Estuary Plan Area, the selection criteria require the Port to acquire property, in descending order of priority, in the remaining Priority Areas. The remaining Priority Areas, the Inner and Outer Harbor Areas, are largely owned or controlled by the Port.

SB 1622 also provides that, if a Trust Exchange Parcel is not approved by the Commission or that the Port has made all reasonable efforts to locate a Trust Exchange Parcel and no qualifying Trust Exchange Parcel is available, the exchange agreement may provide that funds for acquisition of the Trust Exchange Parcel be deposited into the Kapiloff Land Bank, Pub.Res. Code § 8610, to be held for acquisition of a Trust Exchange Parcel meeting the selection criteria.

2. Use Limitations

SB 1622 requires the Trust Exchange Parcel, if located in the First or Second Priority Areas, support or relate to the purposes or objectives of the Estuary Plan to the extent these purposes are consistent with the Public Trust.³ If the only land available within the First Priority Area is designated in the Estuary Plan for a use not consistent with the Public Trust, the Port may acquire such lands if its acquisition supports or relates to the purposes or objectives of the Public Trust and the Legislative Grants.⁴ If the Trust Exchange Parcel is located in the Third or Fourth

² The Consolidated Estuary Plan Area is, in general, bounded by I-880 on the north, the Oakland Estuary on the south, Clay Street on the west and Hegenberger Road on the east.

³ Along with the traditional purposes of commerce, navigation, or fishery, purposes consistent with the Public Trust identified in SB 1622 are: open space, public access, water-related recreation, commercial services to visitors as necessary, plant and animal habitat and circulation to and along the waterfront. SB 1622, Secs. 4(g), 4(j)(2)

⁴ The purposes or objectives of the Legislative Grants include establishment, improvement and conduct of a harbor and construction of structures and utilities necessary or convenient for the promotion and accommodation of commerce and navigation. The grant which conveyed portions of the Oak Street to 9th Avenue Property to the City of Oakland is particularly directive: "that said lands shall be used by said city . . . , *only* for the establishment,

Priority Area its use must be consistent with the Legislative Grants or Port Improvement Plans, to the extent the purposes and objectives of the Port Improvements Plans are consistent with the Public Trust and Legislative Grants.

B. Proposed Additional Technical Requirements

Believing further information regarding a Trust Exchange Parcel was necessary for the Commission's consideration in accordance with SB 1622, staff of the Commission proposed certain additional technical requirements relating specifically to the situation and status of that property. In sum, those proposed requirements are:

- Description and discussion of the present and proposed uses of the proposed Trust Exchange Parcel.
- Information on valuation of a proposed Trust Exchange Parcel.
- Information on the environmental status of a proposed Trust Exchange Parcel.

This submission includes such information.

C. Other Necessary Information

In addition to the requirements of SB 1622, the very nature of the exchange transaction required certain information be known and understood before the SB 1622 selection criteria could be applied to any specific parcel.

1. Extent of Oak Street to 9th Avenue Exchange Lands

The area of the Oak Street to 9th Avenue Exchange Lands must be determined in order to determine their value for purposes of the exchange. Because of the complex and sometimes confused title history of the Oakland Waterfront including the Oak Street to 9th Avenue Property, a serious question arose over the extent of Granted Lands and therefore the boundary between Granted Lands and After-Acquired Lands. The location of that boundary would determine the extent of the Oak Street to 9th Avenue Exchange Lands.

After a thorough review of the title and boundary history of the Oak Street to 9th Avenue Property, the Port and the State agreed on the location of the boundary between Granted Lands and After-Acquired Lands. By virtue of that agreement, the Port and the Commission agree that the Oak Street to 9th Avenue Exchange Lands comprise approximately 8.28 acres of Granted Lands.

2. Value Information

improvement and conduct of a harbor, and for the construction, maintenance and operations thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation” Stats. 1911, Chap. 654, Section 1 (emphasis supplied).

Whether the value of a Trust Exchange Parcel is equal to or greater than the value of the Oak Street to 9th Avenue Exchange Lands is a function of (1) the fair market value of the Oak Street to 9th Avenue Exchange Lands determined by an appraisal and (2) the fair market value of the Trust Exchange Parcel determined either by an appraisal or by its fair market value.

The fair market value appraisal of the of the Oak Street to 9th Avenue Exchange Lands has been completed and approved by the staff of the Commission for submission to the Commission. The value of the 8.28 acre Oak Street to 9th Avenue Exchange Lands is \$2,400,000. Thus, the proposed Trust Exchange Parcel must have a fair market value equal to or greater than \$2,400,000.

3. Relation to and Compliance With the Option Agreement

SB 1622 recognized that the Port is in the process of reconfiguring itself in response to regional and local environmental concerns, including greater efficiency in moving containers to their destinations with the least relative environmental impact. SB 1622 also recognized that portions of the Oak Street to 9th Avenue Property were no longer useful for purposes of the Public Trust or the Legislative Grants, while other portions were useful for those purposes. Consequently, the Port encouraged removal of defunct and dilapidated industrial uses. As a result, SB 1622 acknowledged that a mixed-use development proposed was part of the Port's efforts to transform the Estuary shoreline of the Oak Street to 9th Ave Property. To implement that effort, the Port entered into an Option agreement with Oakland Harbor Partners, LLC. ("OHP").

Before OHP exercises the Option to acquire portions of the Oak Street to 9th Avenue Property, certain conditions precedent must be satisfied. A critical condition precedent was City approval of an EIR for the proposed project, which authorized construction of a mixed-use development. After litigation challenging the City's compliance with the California Environmental Quality Act ("CEQA") in approving the entitlements, the City certified an Environmental Impact Report approved by the Superior Court that considered and approved such entitlements. An appeal of the Superior Court's decision has been filed.

Exercise of the Option will in turn require the Port and OHP to enter into a Purchase & Sale Agreement.

4. Availability

In establishing procedures for reviewing the Port's selection of a Trust Exchange Parcel, the Commission's staff held that a Trust Exchange Parcel should be available in conjunction with the Commission's consideration or approval of an exchange agreement. This requirement was consistent with the Port's objective. The transaction with OHP requires that the Port, once OHP exercise its Option to purchase portions of the Oak Street to 9th Avenue Property and enters into the Purchase & Sale Agreement with the Port, deliver portions of the Oak Street to 9th Avenue Property, including the Oak Street to 9th Avenue Exchange Lands, with title free of the Public Trust. Stated another way, the SB 1622 Exchange, including acquisition of the Trust Exchange Parcel, must be concluded in time for the Port to be able to deliver to OHP the portion of the Oak Street to 9th Avenue Property identified in the Purchase & Sale Agreement with title unencumbered by any Public Trust claim. Thus, another critical selection criterion is that the

proposed Trust Exchange Parcel be available and committed for acquisition or has been acquired at the time an exchange agreement memorializing the SB 1622 Exchange is submitted for Commission approval.

5. Timing of Trust Exchange Parcel Acquisition

The requirement of availability raises significant practical issues. Real property acquisitions require considerable and time-consuming preparation, including environmental due diligence. To coordinate acquisition of a qualifying Trust Exchange Parcel with Commission consideration of the exchange agreement and exercise of the Option by OHP triggering Port obligations requires much anticipation and planning.⁵ In that light, the staffs of the Commission and the Port agreed that the Port may acquire a parcel with trust funds in anticipation of later submission of the parcel acquired to the Commission for consideration and possible approval as the Trust Exchange Parcel and that, in the meantime, the Port would hold the potential Trust Exchange Parcel in trust. In sum, the staffs of the Commission and the Port agreed that merely acquiring a parcel with trust funds would not make such a parcel ineligible for consideration as a Trust Exchange Parcel. Each of the staffs committed to recommend such procedures to their respective Commissions.

6. Projected Use and Trustee

Any Trust Exchange Parcel must be useful for Public Trust purposes and have a trustee steward committed for its management. For potential exchange parcels within the Second to Fourth Priority Areas, projected uses are Public Trust-consistent port priority uses managed by the Port itself. In the First Priority Area, projected uses may be Public Trust-consistent, but given the Port's reconfiguration and revisions to the Port Area Line another trustee agency must be identified and agreement reached to accept and manage a Trust Exchange Parcel consistent with SB 1622.

7. Environmental Constraints

Finally, given the past land use history of the Consolidated Estuary Plan Area, one could expect that many potential properties would be contaminated with hazardous materials. The Commission's practice is not to accept on behalf of the State property contaminated with hazardous materials into the Public Trust without (1) the property being fully remediated or (2) an approved remediation plan with guaranteed funding to complete the approved remediation being in place.

Even so, the presence of contamination did not automatically disqualify a parcel from consideration. Contaminated property may sometimes be developed for Public Trust-consistent, commercial/industrial uses without significant remediation costs and that its purchase price might be reduced because of contamination. The presence of contamination might preclude

⁵ Given these constraints, condemnation of a Trust Exchange Parcel is not a realistic option. Condemnation actions take considerable time, are expensive and would ultimately deplete the value of an exchange parcel.

property from being utilized as open space, a use consistent with the Estuary Plan, without completion of expensive and time-consuming remediation necessary to make that property suitable for human contact. Consequently, when remedial measures had not been approved, undertaken, or completed for an identified parcel, Port staff considered the presence of contamination as a factor in the determination of whether that property was “available.”

II. Investigation of Available Properties Meeting the Selection Criteria

In sum, Port staff’s search for and investigation of a Trust Exchange Parcel consisted of the following elements:

- (1) Compiling and analyzing Port staff’s knowledge of the four Priority Areas identified in SB 1622 about property the Port owns, has owned, or requires for its operations;
- (2) Review of public land use plans, feasibility studies and Port improvement plans affecting those Priority Areas;
- (3) Retention of a knowledgeable real estate broker to identify properties available for sale in the Priority Areas not already owned or controlled by the Port;
- (4) Review of publicly available documents regarding potential or proposed public plans or acquisitions in the Priority Areas not otherwise owned or controlled by the Port;
- (5) Discussion with public agencies of potential or proposed acquisitions and experience with properties in the Priority Areas not otherwise owned or controlled by the Port;
- (6) Frequent meetings with community representatives interested in application and implementation of the Estuary Policy Plan (“Community Representative”) impacting certain of the Priority Areas, meetings in which a Commission representative also participated; and
- (7) Thorough investigation of properties or projects identified by the Port’s broker, suggested by the Community Representatives or Commission staff, revealed in publicly available documents, or uncovered by Port staff. The investigation included personal observation and direct contact with governmental officials, real estate brokers or property owners representing or familiar with such properties or concepts.

As a result of these activities and efforts, the Port’s investigation uncovered and then Port staff carefully considered more than 40 potential acquisition parcels. **Attachment 1** lists the properties unearthed and investigated.

III. Analysis of Identified Potential Trust Exchange Parcels

This submission explains the Port’s consideration, with the selection criteria in mind, of each identified potential Trust Exchange Parcel and the basis for Port staff’s recommendation to the Port Commission that the Port acquire and propose the Army Reserve Property as the Trust Exchange Parcel.

A. Parcels Identified in the Consolidated Estuary Plan Area

1. Land Use Context

a. Estuary Plan Issues

The Estuary Plan is one component of the City's General Plan. In addition, the City is currently considering the need for and how to preserve its existing industrial base. In recent years, Oakland experienced an expansion of housing development in the Consolidated Estuary Plan Area. This development took place in what had been, for the most part, former industrial areas. Currently, industrial areas within the Consolidated Estuary Plan Area are the focus of tremendous redevelopment pressure. This pressure emanates from the development community's desire to redevelop older industrial areas into residential or live/work, mixed use projects and regional and statewide issues surrounding the time, expense and stress of commuting and desire to create and live in a more urban area and to reduce one's carbon footprint. Pressure to redevelop is particularly heavy on properties immediately adjacent to the Estuary due in large part to the amenity created by proximity to the Estuary.

On the other hand, due to concern with loss of the City's traditional industrial base and the jobs generated by that industry, the City posed potential alternatives for redesignation of certain areas of the Estuary Plan (outside of the Port). While these alternatives contemplate much of the area remaining industrial, the City anticipates more mixed-use development, including both commercial and residential development. In November 2005, the Community and Economic Development Agency of the City Council discussed this matter in an open public meeting. The City Council directed City staff to pursue further study of these potential redesignation areas within the Estuary Plan. In 2006 the City Council amended the Estuary Plan and zoning regulations to accommodate additional residential uses in portions of properties immediately adjacent to the Estuary located in many traditionally industrial enclaves. Importantly, the City recognized the need for continued Port expansion and for ancillary Port services to be located nearby the working Port, largely in portions of the City closest to the Seaport and the Airport.

In early 2009, the City initiated another land use study of a smaller subsection of the area, known as the Central Estuary Specific Plan, an effort which is underway at this time, and is examining many of these same issues of land use compatibility and the changing character of the Oakland waterfront. In sum, it is fair to state that the land use status of Consolidated Estuary Plan Area is in flux, but is trending to a more mixed use nature which accommodates residential uses in close proximity to traditional industrial uses.

2. Measure DD

In 2002, the citizens of Oakland enacted Measure DD, a nearly \$200 million bond measure. Measure DD authorizes, among other things, expenditure of \$53 million in bond funds to acquire and build the Waterfront Trail Project along the Estuary from Jack London Square to the Martin Luther King Regional Shoreline. This measure was adopted to enhance the Estuary shoreline for the benefit of citizens of Oakland. The Measure DD Oakland Waterfront Trail Bay Trail Feasibility & Design Guidelines ("Waterfront Trail Study") examined each segment of the proposed trail.

Port staff reviewed the Waterfront Trail Study to discover any sites identified that might be appropriate to acquire for a Trust Exchange Parcel and to which Measure DD funds were not already committed. The Waterfront Trail Study recognizes that, as part of the development entitlement process, shoreline improvements would likely be required as a condition of development. Such conditions would most probably be imposed by the San Francisco Bay Conservation and Development Commission (“BCDC”) (as part of its public access and design review process), the City, in connection with issuance of all land use entitlements in the Estuary Plan area, or the Army Corps of Engineers (“Corps”) as mitigation for a Clean Water Act dredge and fill permit. Consequently, acquisition with public funds of parcels proposed to be included in the trail and construction of the desired Waterfront Trail Project improvements may be unnecessary; private property owners will likely be required to install these improvements as a condition of development permits.

In addition, certain parcels which the shoreline trail must traverse are presently occupied by operating businesses. Some of these businesses require access to the Estuary inconsistent with public access or use (such as the Gallagher & Burke aggregate operation, etc.).

With this information and the selection criteria discussed in Section I, above, the Port evaluated each of the 40+ parcels.

3. Broker-Identified Available Properties

The Port considered each parcel in the Consolidated Estuary Plan Area that NAI-BT Commercial (“Broker”) identified as being available for sale.

In summary, the Port’s investigation disclosed properties identified by the Broker as available in the Consolidated Estuary Plan Area were industrial properties, the zoning and or Estuary Plan designation of which did not support or relate to the purposes or objectives of the Public Trust or the Legislative Grants. The available properties were isolated from the Estuary and near the 880 freeway, were in neighborhoods comprised predominantly of either industrial uses or single family residences or in areas where the City is currently contemplating or pursuing zoning redesignation to permit additional residential uses on former industrial sites. Some sites had been previously disposed of by the Port in a Board of Port Commissioners-approved restructuring plan and thus had been previously found unusable for purposes identified in SB 1622. In addition, environmental remedial measures had not been approved, undertaken, or completed regarding the identified parcels.

For a variety of reasons, including those above, Port staff submits the properties identified by the Broker did not meet the selection criteria.

4. Analysis of Sites Suggested by Community Representatives and Commission Staff

Port representatives met many times with a State Lands Commission representative and the Community Representative.⁶ The Community Representative suggested acquisition of a number of parcels or, if no parcel was identified, the Community Representative suggested the Port undertake or underwrite “projects” not contemplated in SB 1622. Port staff diligently investigated and considered each proposal that was suggested.

a. G&B Site

The Community Representative suggested acquisition of a portion of a site presently owned by an affiliate of the De Silva Construction, Gallagher & Burke (“G&B Site”). The G&B Site is located just south of the High Street Bridge on the Estuary and has been identified for acquisition as part of the City’s Waterfront Trail Project.

The G&B Site is not currently listed as available on the market; in fact, the City investigated purchasing a portion of the G&B Site as part of the City Measure DD bond measure project and was advised no part of the property was for sale. At the request of the Commission staff, Port representatives also investigated whether the G&B Site was available for acquisition. In 2006, through the Port’s broker, Port staff contacted the property owner to determine if the property owner was amenable to selling a portion of the property near the water’s edge to the Port for potential public access. The Port’s broker reported back to the Port the owner was not interested in selling any portion of the property.

As a result, Port staff submits this property did not meet the selection criteria.

b. U.S. Audio Site

The Community Representative suggested acquisition of another similar site, US Audio. The Waterfront Trail Study also identifies this site for acquisition as part of the Measure DD projects. Port staff investigation of this property disclosed that the US Audio site is not currently listed for sale. Based on communication with City representatives, the Port was advised the City has been attempting to acquire this property as part of the Waterfront Trail Project without success. According to City documents, the owner has agreed to grant the City a public access easement on the property for purposes of implementing Measure DD improvements on the site, and the City has listed this as a Measure DD funded project.

As a result, Port staff submits this property did not meet the selection criteria.

c. Bicycle Bridge

The Community Representative suggested the Port acquire or contribute funds for a pedestrian/bicycle bridge over the railroad tracks and under the I-880 freeway near the Oak Street to 9th Avenue Property (“Bicycle Bridge”). The Bicycle Bridge would be, in significant part, geographically located beyond any of the four Priority Areas specified in SB 1622 for the

⁶ See Attachment 2.

location of the Trust Exchange Parcel. In addition, the Bicycle Bridge would not involve acquisition of real property that would be available for an exchange.

Port staff investigation disclosed that, according to City staff, the Bicycle Bridge has not been approved by the City in any City Council-approved funding program. Its design has not been finalized. For the Bicycle Bridge to move forward, potentially insurmountable easement or right of way issues with the Union Pacific Railroad lines or Caltrans must first be resolved.

At a subsequent meeting with Port and Commission representatives, the Community Representative concurred that the Bicycle Bridge was not a viable Trust Exchange Parcel candidate. For this reason, as well as those matters mentioned above, Port staff submits this concept did not meet the selection criteria.

d. Silviera Property

The Community Representative also suggested acquisition of a portion of the Silviera property adjacent to the Estuary in the vicinity of the Oak Street to 9th Avenue Property. The Waterfront Trail Project designated that property for acquisition.

For a variety of reasons, explained below, this small parcel is not appropriate for acquisition as the Trust Exchange Parcel. In recent litigation between City, OHP, the Port and Silviera in Silviera sought assurance that he would not be forced to sell his property. As a result, it is unlikely that any mutually agreeable transaction involving property acquisition can be reached between the Port, OHP or this particular property owner. And no portion of the Silviera property is presently available for sale.

As a result, Port staff submits this property did not meet the selection criteria.

e. Park Street Triangle

In early 2007, the Community Representative suggested to the Commission staff acquisition of property known as the "Park Street Triangle" as a suitable Trust Exchange Parcel. Commission staff advised Port staff of this suggestion in March 2007.

Port investigation disclosed that, as presently envisioned in the City's identified preferred alternative, which could change as a result of further study, the project entails acquisition of a sliver of private property adjacent to two existing businesses for street widening and reconfiguration purposes and abandonment of a segment of an existing City street for provision of a trail and public pocket park. The existing businesses affected are resistant to the property acquisition proposed in the traffic study. Consequently, condemnation may be required if the project is to move forward. The public trail and park improvements are proposed on existing City owned property. This project remains listed on the City's Measure DD project list for further evaluation. In sum, there is no need for the Port to acquire property in the Park Street Triangle for Public Trust or Legislative Grant purposes.

As a result, Port staff submits this property did not meet the selection criteria.

f. Greenway

The Community Representative suggested the Port install a “greenway” over an area generally identified as an approximately 60 foot wide portion of property immediately alongside the Webster Street right of way on the western side of Webster Street, from the I-880 freeway to the Estuary side of Embarcadero Roadway, a distance of about 4 blocks (“Webster Green”). These parcels run directly above and immediately adjacent to the Webster Street Tube, a main connection to the island community of Alameda. CalTrans owns the proposed Webster Green property. As with the Bicycle Bridge discussed above, this project is not identified, explicitly or otherwise, in SB 1622. In addition, similar to the Bicycle Bridge, the Webster Green would not involve acquisition of real property that would be available for an exchange.

Port staff investigation disclosed no private ownership to any of the Webster Green property. The City owns the fee in Webster Street. The Port currently has two Surface Use Agreements with CalTrans for operation of surface parking lots. CalTrans has had to conduct various seismic improvement projects on the Alameda Tube and conducts ongoing maintenance of this State owned roadway on a regular basis. The Port concluded that CalTrans would not be willing to sell the fee title to these properties. For this reason, as well as those matters mentioned above, Port staff submits this concept did not meet the selection criteria.

g. Pier 29 Parcel

The Community Representative suggested a further potential Trust Exchange Parcel, what is known as the Pier 29 Parcel. The Pier 29 Parcel is located adjacent to the Park Street Bridge. The Port investigated the site.

The Pier 29 Parcel has been the site of restaurant for more than 30 years. According to City records, the Parcel is situated on the site of a former steel foundry with a high potential for contamination. The Pier 29 Parcel is not a necessary acquisition for the Waterfront Trail Project.

The most recent Waterfront Trail Project plan indicates that the proposed shoreline trail will swing out in the Estuary in front of this Parcel. In addition, at least half of the Pier 29 Parcel extends into the Estuary itself, implicating both Corps and BCDC jurisdiction issues.

Port staff met with the Measure DD project manager and was advised the Pier 29 Parcel is not technically part of the Measure DD trail. Other than conceptual ideas about making the Pier 29 Site some kind of future park along the trail, park installation, maintenance, or operation are unfunded. In addition, that portion of the Pier 29 Parcel extending into the Estuary itself is not necessary to be acquired as it likely is subject to the Public Trust and to regulatory jurisdiction of both the Corps and BCDC, limiting its use to Public Trust consistent uses. Finally, the environmental condition of the Pier 29 Parcel is suspect; environmental remediation has not been approved, undertaken, or completed. The Pier 29 Parcel was subsequently acquired by a new owner who has reopened the restaurant on site as a Tiki bar.

As a result, Port staff submits this property did not meet the selection criteria.

h. Proposed Shoreline Park at Former Oakland Army Base

The Community Representative proposed the Port acquire the area in the former Oakland Army Base that is proposed for a shoreline park next to the Bay Bridge. That parcel was part of the conveyance by the United States Army to the City of Oakland. As part of the exchange authorized by Statutes of 2005, Chapter 664, the Shoreline Park area was granted to the City of Oakland subject to the public trust. Consequently, as this property is already subject to the public trust, Port staff submits it would not qualify as a Trust Exchange Parcel.

i. Tidewater Avenue Access

The Community Representative suggested a possible Trust Exchange Parcel: acquisition of a 12 foot wide strip of property running along and adjacent to Tidewater Avenue. According to the Community Representative this parcel would allow pedestrian access from High Street to the East Bay Regional Park District shoreline property adjacent to Tidewater Avenue and could connect with the proposed Waterfront Trail. Tidewater Avenue is privately owned; it is not a public dedicated street. There is, however, an existing 50 foot wide "non exclusive perpetual easement and right of way, for use as a roadway for vehicles of all kinds, pedestrians and animals, for water, gas, oil and sewer pipelines and for telephone, electric light and power lines, together with the necessary poles or conduits to carry said lines, . . ." that runs down Tidewater Avenue from its connection with High Street to past the East Bay Regional Parks District property abutting Tidewater. As a result, Port staff submits this suggested property right would not qualify as the Trust Exchange Parcel.

j. Property in the City of Alameda

The Community Representative most recently suggested a property in the City of Alameda on Clement Street, between Walnut Street and Oak Street. Property in the City of Alameda is not eligible as the Trust Exchange Parcel. Property in the City of Alameda, including the property suggested by the Community Representative, is not located in any priority area identified in SB 1622: (1) it is not located in the First Priority Area -- the Estuary Plan Area (shoreline of the Estuary from approximately, but not including, the Howard Terminal to Damon Slough) -- as the Estuary Plan encompasses only property located in the City of Oakland; (2) it is not located in the Second Priority Area -- contiguous to the Estuary Plan Area (but waterward of I-880) as it is separated from the Estuary Plan Area by the Estuary itself; (3) it is not located in the Third Priority Area -- within the Inner Harbor area; and (4) it is not located in the Fourth Priority Area -- within the Outer Harbor area (including properties within the former Oakland Army Base). As a result, Port staff submits the suggested property would not qualify as the Trust Exchange Parcel.

k. Summary

After the numerous meetings or discussions over the years between Port representatives, the Community Representative and Commission staff, other than set forth above, neither the Commission staff nor the Community Representative suggested any other properties for acquisition for the Trust Exchange Parcel.

The properties or projects suggested by the Community Representative had many common drawbacks including the facts that the parcels were not available for sale; their environmental

condition was unresolved and they would necessarily remain in their current condition until, sometime in the undefined future, construction or improvement funding could be obtained, an acceptable manager identified and long-term maintenance and operation assured. In addition, some parcels suggested were already committed to public trust uses or were outside the geographic scope of the priority areas identified in SB 1622.

B. Analysis of Other Potential Sites Uncovered by the Port (“Non-Listed Sites”)

As already noted, Port staff’s investigation of property for acquisition as a Trust Exchange Parcel encompassed additional potential parcels not brought to the Port’s attention by the Broker, the Commission Staff, or the Community Representative. Those parcels were discovered in the Port’s review of documents discussing land use and planning concepts and potential acquisitions in the Consolidated Estuary Plan Area.

With the above matters in mind, Port staff evaluated each Non-Listed Parcel identified in the Waterfront Trail Study from Union Point Park to the Martin Luther King Shoreline. Each Non-Listed Site was separately evaluated for compliance with the selection criteria. Many of the Non-Listed Sites complied with certain of the selection criteria, but did not meet the critical criteria of timely availability. Other Non-Listed Sites meeting some of the selection criteria had already been acquired or were part of a potential development that would likely require, as a condition of approval, developer/landowner improvement or inclusion of the parcel in the Estuary Trail. In addition, their environmental condition was either suspect, unknown or unresolved affecting their availability or us. In sum, Port staff submits none of the Non-Listed Sites met the selection criteria.

Port staff considered acquisition of an additional site in the Consolidated Estuary Plan Area: the Duke Energy tank site located at the northerly end of the Estuary Plan area near to the Port’s offices at 530 Water Street. Periodic negotiations with Duke Energy disclose many issues that must be resolved satisfactorily before any Port acquisition could occur. Among those issues are both purchase price and responsibility for remediation of contamination. In sum, Port staff submits the Duke Energy tank site is not available and therefore does not appear to meet the selection criteria.

C. Analysis of Properties in the Priority Areas Three and Four

The recognized need for redevelopment and reconfiguration of the Port’s marine terminals is a regional, statewide and national priority and benefit. Use of funds to purchase property in the Seaport Area (encompassing the Outer and Middle Harbors) is consistent with the region’s and state’s interests in more efficient and less impactful goods movement. One site in these priority areas meets all the selection criteria: the Army Reserve Property⁷ in the Outer Harbor, the Fourth Priority Area. The Army Reserve Property is located within, but was not part of, the area acquired by the Port in the Oakland Army Base (“OARB”) exchange.

⁷ The Army Reserve Property is composed of two parcels of real property known as Building 762 parcel (approximately 1.682 acres) and Building 780 parcel (approximately 5.078 acres), totaling 6.76 acres.

IV. Analysis of Army Reserve Property For Compliance With the Selection Criteria

A. Location

The Army Reserve Property is located in one of the four Priority Areas specified in SB 1622, the Outer Harbor Area. The Outer Harbor Area is the location of 11 of the Port's marine terminals. The Army Reserve Property is located in that portion of the OARB the Port received by virtue of the OARB exchange (collectively "Port OARB").⁸ The Army Reserve Property was previously used for housing, a medical facility and recreational purposes (tennis courts); it is currently is occupied by a Veterans Clinic and other Army Reserve functions.⁹ The Army Reserve Property is a critical part of the Port's development plans for the Port OARB.

B. Environmental Status of the Army Reserve Property

No remedial activity is necessary for the Army Reserve Property given the low levels of contamination. The Final Amendment to Remediation Action Plan, Oakland Army Base, For Former Parcel 18 and Subparcels 19 And 21 ("RAP Amendment") describes site conditions, including low level contamination on the Army Reserve Property. The RAP Amendment also describes the selected "remedy" (i.e., imposition of institutional controls in the form of the Covenant to Restrict Use of Property ("LUC") described below). That the remedy does not include active remediation reflects the low levels of contamination at the Army Reserve Property.

The LUC is a standard agreement between a property owner and the California Department of Toxic Substance Control ("DTSC") describing prohibited uses, notices required to be provided to DTSC and others with an interest in the property, and what the property owner must do to ensure use of the property will not present an unacceptable threat to human health, safety or the environment. The LUC prohibits certain sensitive uses (e.g., residential housing, schools for persons under 18 years of age, day-care facilities for children, hospitals, and hospices). That the LUC is not very restrictive reflects the low level of contamination present. DTSC concluded that operation and occupancy of the Army Reserve Property in accordance with the LUC does not present an unacceptable threat to human health, safety or the environment.

The Finding of Suitability to Transfer (FOST) and FOST AMENDMENT #1 (collectively "FOST Docs") document the environmental suitability of the Army Reserve Property for transfer to the Port consistent with CERCLA. Subject to compliance with the LUC notice and the access provisions in the Deed from the Army, the FOST Docs find the property suitable for transfer. The FOST Docs contains the CERCLA covenant, i.e., all remedial action required to protect human health and the environment with respect to remaining hazardous substances has been taken prior to transfer and additional remedial action necessary post-transfer will be conducted by the Army Reserve. The Port accepts the property "as is."

⁸ The location of the Army Reserve Property in relation to its surroundings is shown in **Attachment 3**.

⁹ The existing facilities will be demolished as part of redevelopment of the Port OARB.

C. Land Title Status of the Army Reserve Property

The Army Reserve Property is free of any public trust interest. By virtue of a compromise between the City and a predecessor owner, the Army Reserve Property was determined to be part of the lands originally granted by the State to the City and, conveyed (through various means) by the City in turn to the Oakland Water Front Company and ultimately to the Southern Pacific Railroad. Title to such property free of the public trust was confirmed by the California Supreme Court. Finally, Army condemnation of the area containing the Army Reserve Property from the Southern Pacific Railroad extinguished any vestigial public trust title.

D. Valuation

Port acquisition of the Army Reserve Property resulted from a complex, integrated, three-way transaction between the United States (represented by the Department of the Army) ("Army"), a construction company hired by the Army to build replacement facilities for the Army Reserve, DTC Engineers & Constructors, LLC ("DTC") and the Port. In essence, the transaction required the Port to agree to pay DTC the sum necessary for DTC to build the Army a replacement facility. Upon completion of construction of the replacement facility by DTC, the Army agreed to convey to DTC or the Port the Army Reserve Property.

Title 10 United States Code section 18240 ("Section 18240") provides the statutory authority required for sale of Army property. Section 18240 authorizes the Army to acquire a facility needed to satisfy military requirements for a reserve component by, among other matters, exchanging an existing facility by agreement with a State, local government, local authority, or private entity. Thus, the Army has authority to exchange the Army Reserve Property for another qualifying facility. That exchange facility must not only be needed to satisfy military requirements for a reserve component, but its value "shall be at least equal to the fair market value of the facility conveyed by the United States under the agreement." In other words, the price paid by the Port for the Army Reserve Property was based on the Army's determination that it had received equal to or greater than the fair market value of the Army Reserve Property. Thus, the value of the Army Reserve Property is \$4,396,860.00, the amount paid by the Port to DTC to build the Army Reserve an equivalent facility.

As the value of the Oak Street to 9th Avenue Exchange Lands is \$2,400,000, the value of the Army Reserve Parcel is equal to or greater than the value of the Oak Street to 9th Avenue Exchange Lands.

E. Benefits of Acquisition of the Army Reserve Property

The Army Reserve Property is included within the Port's proposed plans to construct another intermodal facility near the Outer Harbor, along with other maritime support facilities and services. That facility is planned to accommodate the anticipated growth in maritime activity and container throughput over the next twenty years. Among other matters, the facility will allow for shorter container transfer times, increased container throughput and a reduction in the share of truck traffic versus rail traffic in and around the Port's marine terminals and on regional roadways. Increasing rail throughput from Port terminals, will significantly reduce diesel truck traffic and the resulting emissions and, therefore, the carbon footprint of the Port from this

growth. The new facility is expected to incorporate numerous additional environmental design strategies to minimize air quality impacts on surrounding communities, and create substantial economic benefits to the Port, the local community and the region.

Reuse of the Army Reserve Property through its incorporation into the intermodal facility and maritime support uses would be consistent with the intended reuse of the Port OARB as set forth in the Oakland Base Reuse Authority Final Reuse Plan for the Oakland Army Base dated July 31, 2002. In addition, such use is consistent with the Legislative Grants. Should the Army Reserve Property not be included in these development plans, serious design issues would confront the Port as the Army Reserve Property is inconveniently located in the middle of the proposed intermodal railyard.

The Army Reserve Parcel is a portion of the lands described in Section 2(o) of Chapter 664, Statutes 2005. In that legislation, the Legislature recognized that certain lands, specifically including the area containing the Army Reserve Parcel, are essential for the Port to acquire to expand the Port's terminal and transportation capacity and meet BCDC's 2020 cargo throughput demand forecasts. Chapt. 664, Stats. 2005, sec. 2(o).

Thus, the acquisition of the Army Reserve Property is consistent with not only Port Improvement Plans, but also with the Legislative Grants and the Public Trust. The Legislature itself confirmed that conclusion. Without acquisition of this property, the Port's efforts to develop this rail facility will be severely hindered, if not rendered infeasible ultimately frustrating the purposes Public Trust and the Legislative Grants.

V. Conclusion

The Army Reserve Parcel qualifies as the Trust Exchange Parcel as it:

- Is located in a Priority Area identified in SB 1622;
- Its environmental condition is resolved; it is subject to an LUC and no further remediation is required;
- Is not now subject to the Public Trust;
- Has a value equal to or greater than the value of the Oak Street to 9th Avenue Exchange Lands;
- Is essential for and consistent with purposes of the Legislative Grants and the Public Trust.

Thus, Port staff recommends the Board submit the Army Reserve Property for Commission approval and acceptance into the Public Trust as the Trust Exchange Parcel and, until Commission approval and completion of the exchange, continue to hold the Army Reserve Property in trust.

Attachment 1: List of All Parcels Investigated by Port

Consolidated Estuary Plan Priority Area		
AP # or Other ID	Description	Location
Unk	Duke Energy Tank Site	Adjacent to 530 Water Street
Unk	Property along Webster Street "Green" as shown in Estuary Plan	Property above existing Webster Street Tube adjacent to Webster street for 3 blocks from Embarcadero to 4 th Street
000-0425-002-42 000-0425-002-43 000-0425-002-41 000-0425-001-03	Condominiums, KTVU Studios or Port owned property	Properties Between Jack London Square and the Oak Street to 9 th Avenue Project
	Portion of Silveira Property	Adjacent to Oak to 9th Avenue Project
0000-0470-001-00	Oyster Reef Restaurant	Adjacent to Oak to 9 th Avenue Project
0000-0470-002-00	10 th Avenue Marina	Adjacent to Oak to 9 th Avenue Project
0000-0475-002-00	Former Crowley Maritime site	Brooklyn Basin
0000-0480-003-00	Executive Inn	Brooklyn Basin
0000-0485-002-00 000-495-001-00 000-0500-001-00	Embarcadero Cove	Brooklyn Basin
0000-0505-001-00	Union Point Park	Brooklyn Basin
019-0071-001-04 019-0071-001-06 019-0071-003-00 019-0071-004-00 019-0071-005-00	Con Agra	Adjacent to Union Point Park
019-0072-009-00 019-0072-011-001 019-0072-013-00	Sea Power Marine	Adjacent to Con Agra
	Park Street Triangle	Adjacent to Park St. Bridge
019-0072-009-00 019-0072-010-00 019-0072-011-00 019-0072-014-00 019-0072-015-00	Lonestar	Adjacent to Park St. Bridge
025-675-001-03	Pier 29 Restaurant	Adjacent to Park St. Bridge
025-675-001-04	Waterpark Lofts	Adjacent to Pier 29
025-675-002-01 026-0674-001-00 026-0674-002-00 026-0674-003-00 025-0674-003-00	Signature Properties	Between Park St. Bridge and High St. Bridge
025-0674-002-00	Cal Crew Boathouse	Next to Signature
025-0665-001-00	Oakland Museum Women's Board	Next to Cal Crew Boathouse
025-0663-001-00	Warehouse	Next to Oakland Museum Board
033-2250-011-04	Owens Brockway Glass	Next to Fruitvale Bridge

Consolidated Estuary Plan Priority Area		
AP # or Other ID	Description	Location
033-2250-001-01 033-2250-001-04 033-2250-001-06 033-2250-002-01 033-2250-003-01 033-2250-004-00 033-2250-005-00 033-2250-008-01 033-2250-009-02 033-2250-013-01 033-2250-017-01	U.S. Stereo and Commercial Warehouse	East of Owens – Brockway
033-2250-005-00	Self Storage and Brinks	Adjacent to High St. Bridge
034-2300-002-01	Gallagher & Burk	Adjacent to High St. Bridge
034-2300-001-00	Home Dock	Adjacent to Gallagher & Burke
W. Coast Vending	Industrial-Existing	2124 Livingston St.
Universal Metal Polishing	Industrial – Existing	2830 Ford St
Itel Container	Industrial - Existing	400 High Street
Oakland Industrial Center	Industrial - Existing	401 Lesser St.
Gallagher and Burke	Industrial	Near the High Street Bridge
Di Salvo	Industrial - Existing	4909 - 4919 Tidewater Ave
Tidewater Business Park 1	Industrial – Existing	4715 Tidewater Ave
Tidewater Business Park 2	Industrial – Existing	4719 Tidewater Ave
Bobac	Industrial – Existing	3925 Alameda Ave
NV Heathorn	Industrial - Existing	2845 Chapman St.
Esposito Plating	Warehouse -Existing	2908 Chapman
Bay City Iron Works	Industrial – Existing	2897 Chapman St
Tidewater Avenue Access	Existing private road	Between High Street and Regional Shoreline

Inner Harbor Priority Area		
AP #	Description	Location
P.G.&E. Tank Site	P.G.&E.	Howard Terminal
Schnitzer Steel	Schnitzer Steel	Adjacent to Howard Terminal ¹⁰

Outer Harbor Priority Area¹¹		
AP #	Description	Location
Army Reserve Property	U.S. Army Reserve Site	Oakland Army Base, east of Maritime Street
Proposed shoreline park	Area adjacent to Bay Bridge incline	Portion of former Oakland Army Base adjacent to south side of Bay Bridge incline

Parcels Outside of Priority Areas		
AP #	Description	Location
Clement Street Parcel	Parcel on Clement St	Between Oak and Walnut across Estuary in City of Alameda
Harley Davidson	Industrial	200 Hegenberger Rd.
Hegenburger Hamburger	Land	276 Hegenberger Rd
T D Row	Industrial	8134 Capwell Dr.
0 Pardee Drive	Land	Pardee and Hegenberger
8000 Capwell Drive	Existing Light Industrial Building	Off of Edgewater
	Bicycle/Pedestrian Bridge over RR tracks	One touch down portion would be located within general vicinity of Oak to Ninth project with other touch down on northern side of RR tracks

¹⁰ Other than listed, the Port owns all remaining properties in the Inner Harbor Area.

¹¹ Other than listed, the Port or the City owns all of the remaining property in the Outer Harbor Area. Chapter 664, Statutes of 2005 authorized an exchange of City and Port interests.

Attachment 2: Chronology of Key Events/Meetings Relating to Identification of Trust Exchange Parcel

Date	Event
2001	
March 15	Request for Developer Qualifications (RFQ) process for Oak Street to 9th Avenue property ("Site") commenced
April 4	Public information session on the RFQ
May 28	Two proposals received—Oakland Harbor Partners, LLC ("OHP") and Shorenstein Co.
September 18	Board of Port Commissioners selects OHP as the developer to enter into Exclusive Negotiating Agreement
2003	
September 2	Board of Port Commissioners authorizes execution of Option Agreement for project in open session public meeting
October	Community Representative contacts SLC and requests and is provided documents regarding Oakland Army Base Exchange
November	The Port of Oakland ("Port") and OHP execute Option Agreement for potential sale and ground leasing of various Port-owned properties in the Oak Street to 9 th Avenue area
2004	
February 2	Community Representatives contact Port staff and express public interest in project amenities
May 24	Community Representatives express interest to Port staff in proposed legislation ("SB 1622"), in particular, the property to be acquired as the exchange property
June	Community Representative withdraws opposition to SB 1622 and certain amendments to SB 1622 incorporated into text of proposed legislation
August 24	SLC meets with members of public in Bay Area to discuss trust responsibilities
September 4	SB 1622 adopted by State Legislature authorizing a Public Trust Exchange on the property, subject to compliance with conditions contained in legislation

Date	Event
2005	
June 20	Port begins search for trust exchange parcel with letter to senior managers requesting input on location of potential parcels
July 21	Port staff internal discussion about possible trust exchange parcels
August 2	Port staff internal discussions about possible trust exchange parcel
August 3	Port staff internal discussions about possible trust exchange parcels
August	Port retains commercial broker, NAI-BT Commercial ("Broker") to identify available parcels in the Priority 1 and Priority 2 areas
August 12	Broker submits list of available parcels in the Priority 1 and Priority 2 areas to Port staff
August 18	Port-SLC-OHP discussions regarding exchange
September 6	SLC advises trust exchange parcel required when exchange agreement submitted to Commission
September 13	Port-SLC discussions including input from concerned citizens and Community Representative
September 26	Phone discussion with Community Representative regarding possible exchange parcel
September 27	Discussions between Port staff and City staff regarding Measure DD properties
September 28	Port, SLC, Community Representative discussions about potential exchange parcels
October 5	Port-SLC discussions including investigation for exchange parcel
October 6	Discussions between Port staff and City staff regarding Measure DD properties
October 19	Port – Community Representative discussions on exchange parcels
November 9	Port receives updated information on available parcels in Priority 1 and Priority 2 areas from Broker
November 10	Discussions between Port staff and City staff regarding Measure DD properties
November 14	Port-SLC tour of properties along Estuary and various Port project sites

Date	Event
November 15	Discussions between Port staff and City staff regarding Measure DD properties
November 16	Port – Community Representative discussions re exchange parcel
December 19	Port-SLC-OHP discussions including investigation for exchange parcel
2006	
January 9	Port-SLC-OHP discussions including investigation for exchange parcel
January 31	Discussions between Port staff and City staff regarding Measure DD properties
February 1	Port – Community Representative discussions re potential exchange parcel
February 6	Port – Community Representative discussions re potential exchange parcel (email)
February 17	Port-SLC-OHP discussions including investigation for exchange parcel
March 3	Broker submits list of available parcels in the Priority 1 and Priority 2 areas
June/July 2006	Oak to 9th Project entitlements approved by the Oakland City Council after over 20 public meetings on project hosted by City
June 27	Broker submits updated list of available parcels in the Priority 1 and Priority 2 areas
September 14	Port-SLC-OHP discussions including investigation for exchange parcel
September 22	BTC submits updated list of available parcels in the Priority 1 and Priority 2 areas
October 5	Port-SLC-OHP discussions including investigation for exchange parcel
October 13	Port contacts Broker re: availability of suggested parcel from Community Representatives (4909 Tidewater)
October 18	Broker advises suggested parcel (4909 Tidewater) unavailable
October 26	Broker advises suggested parcel (DeSilva Tidewater Parcel) also unavailable
November 5	Port-SLC-OHP discussions including investigation

Date	Event
	for exchange parcel
December 8	Port-SLC-OHP discussions including investigation for exchange parcel
2007	
January 23	Broker submits updated list of available parcels in the Priority 1 and Priority 2 areas
January 31	Port-SLC-OHP discussions including investigation for exchange parcel
February 27	Port-SLC-OHP discussions including investigation for exchange parcel
March ??	SLC staff hosts public presentation workshops on Public Trust Doctrine in San Francisco
April 17	Port-SLC-OHP discussions including investigation for exchange parcel
April 27	Broker submits updated list of available parcels in the Priority 1 and Priority 2 areas
May 15	Port-SLC-OHP discussions including investigation for exchange parcel
June 12	Port-SLC-OHP discussions including investigation for exchange parcel
July 16	Port-SLC-OHP discussions including investigation for exchange parcel
July 31	Port-SLC-OHP discussions including investigation for exchange parcel
August 29	Port-SLC-OHP discussions including investigation for exchange parcel
September 5	Broker submits updated list of available parcels in the Priority 1 and Priority 2 areas
October 4	City-Port Liaison Committee ¹² discussion on status of Oak to Ninth Project with comments from Community Representatives and Port staff on the exchange parcel process and possible Trust Exchange Parcels
October 9	Port-SLC-OHP discussions including investigation for exchange parcel

¹² A public Committee made up of representatives from the Oakland City Council and the Board of Port Commissioners.

Date	Event
October 24	Port-SLC-OHP discussions including investigation for exchange parcel
October 29	Port staff advised by Community Representative of two potential Trust Exchange Parcels
November 5	Port staff contacts Community Representative regarding results of investigation of suggested possible Trust Exchange Parcel
November 28	Port staff meet with several members of public, SLC staff and community representatives to discuss potential exchange parcel suggestion on Tidewater
December 13	Port-SLC-OHP discussions including investigation for exchange parcel
2008	
January 22	Port-SLC-OHP discussions including investigation for exchange parcel
March 6	City Port Liaison Committee meeting ¹³ discussion on Tidelands Trust regulations report given by Port staff
March 10	Port-SLC-OHP discussions including investigation for exchange parcel
April 1	Port-SLC-OHP discussions including investigation for exchange parcel
April 2	Port Commercial Real Estate Committee ¹⁴ meeting, during which a scheduled open session agenda item is consideration of various amendments to the Option Agreement between the Port and OHP
April 17	Port-SLC-OHP discussions including investigation for exchange parcel
May 5	Community Representatives submit letter to State Lands Commission during public meeting of SLC

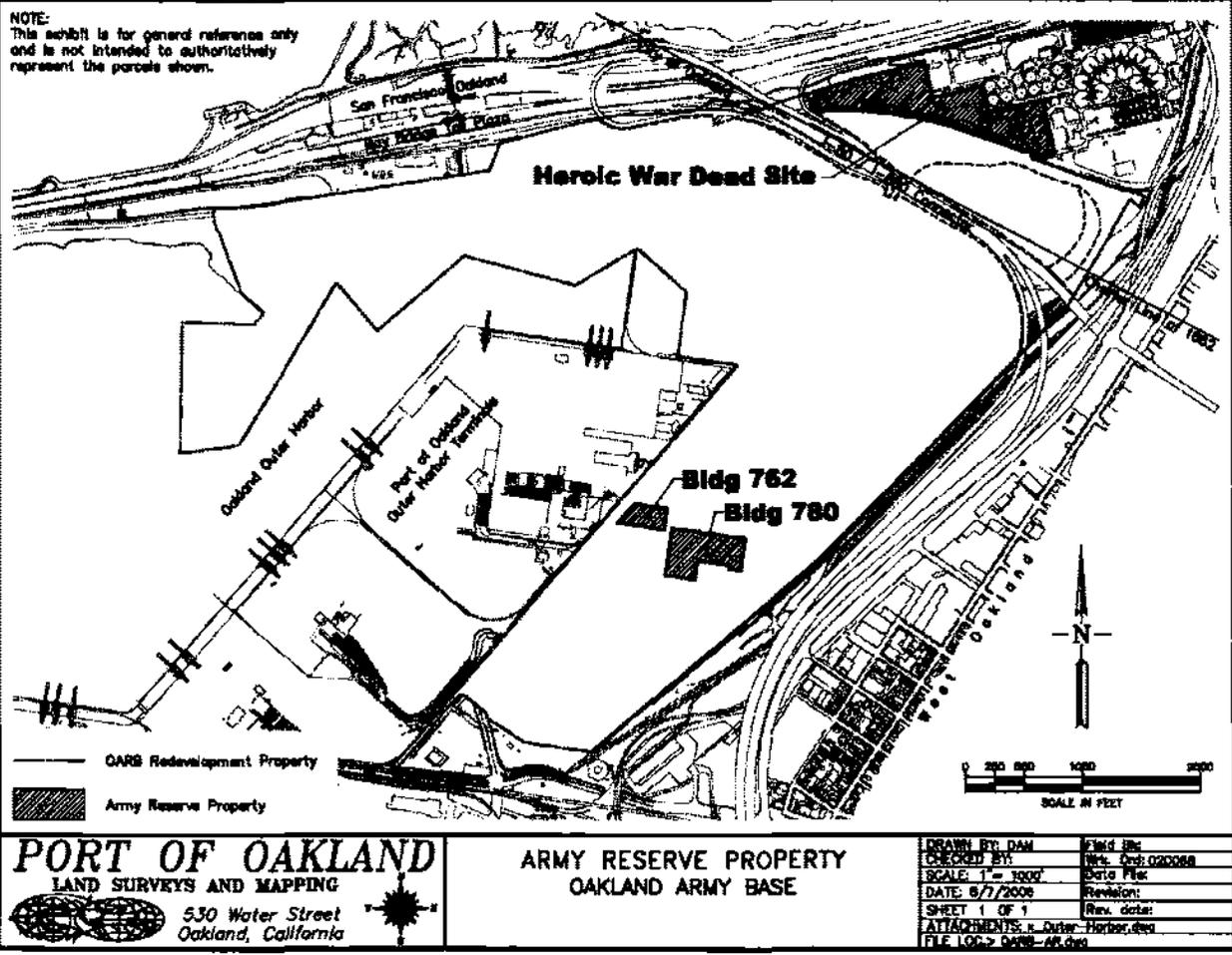
¹³ The City Port Liaison Committee is an official public body which posts an agenda 10 days prior to the meeting and allows for public testimony on any matter listed on the agenda as well as during Open Forum if a member of the public wishes to discuss non-agendized matters.

¹⁴ The Port Commercial Real Estate Committee is an official public body made up of members of the Board of Port Commissioners which posts an agenda 10 days prior to the meeting and allows for public testimony on any matter listed on the agenda as well as during Open Forum if a member of the public wishes to discuss non-agendized matters.

Date	Event
	expressing concerns with exchange process
May 6	Port-SLC-OHP discussions including investigation for exchange parcel
2008	
May 20	Board of Port Commissioners authorizes various amendments to the Option Agreement during open session of public meeting
June 9	Port-SLC-OHP discussions including investigation for exchange parcel
August 26	Port-SLC-OHP discussions including investigation for exchange parcel
November 3	Port-SLC-OHP discussions including investigation for exchange parcel
2009	
March 6	Port-SLC-OHP discussions including investigation for exchange parcel
March 15	Port-SLC-OHP discussions including investigation for exchange parcel
June 4	Port-SLC-OHP discussions including investigation for exchange parcel
June 9	SLC staff informs Port staff of new suggested potential exchange parcel raised by Community Representatives in Alameda, SLC staff and Port staff discuss site and agree that site does not qualify for exchange parcel due to location outside of all Priority Areas of legislation, SLC to pass this information on to Community Representatives at next scheduled telephone conference
June 23	Port-SLC-OHP discussions including investigation for exchange parcel
July 7	Port-SLC-OHP discussions including investigation for exchange parcel
July 28	Port-SLC-OHP discussions including investigation for exchange parcel
August 31	Broker submits updated list of available parcels in Priority 1 and Priority 2 areas
September 16	Port-SLC-OHP discussions including investigation for exchange parcel

Date	Event
October 1	Port-SLC-OHP discussions including investigation for exchange parcel
October 19	Port-SLC-OHP discussions including investigation for exchange parcel
November 10	Port staff contacts Community Representative (email) to solicit any further suggestions for potential exchange parcels and to provide an informal "heads up" that project may be scheduled for December 2 Commercial Real Estate Committee meeting

Attachment 3: Location of Army Reserve Parcels



**FINDINGS AND STATEMENT OF OVERRIDING
CONSIDERATIONS UNDER THE CALIFORNIA
ENVIRONMENTAL QUALITY ACT FOR AUTHORIZING
THE EXECUTIVE DIRECTOR OF THE PORT OF
OAKLAND TO EXECUTE AN AMENDMENT TO THE
AMENDED AND RESTATED OPTION TO PURCHASE
AND GROUND LEASE REAL PROPERTY, A TIDELANDS
TRUST EXCHANGE AGREEMENT, A PURCHASE AND
SALE AGREEMENT, AN OPEN SPACE GROUND LEASE,
A MARINA GROUND LEASE AND OTHER RELATED
DOCUMENTS FOR THE OAK TO NINTH AVENUE
PROJECT**

RECITALS

1. **WHEREAS** the City of Oakland (“City”) is the Lead Agency under the California Environmental Quality Act (“CEQA”) for the project described as the Oak to Ninth Avenue Project in the City’s Environmental Impact Report for the Project (“Project EIR”) (State Clearinghouse No. 2004062013), which includes the following documents: (a) the Draft EIR, published in August 2005; (b) the Final EIR, published in February 2006; (c) the Revisions to the EIR, published in September 2008; and (d) the Responses to Comments on the Revisions to the EIR, published in December 2008.

2. **WHEREAS** the City has certified the Project EIR and has adopted the findings required by CEQA. In particular, the City Council adopted Resolution No. 81769 in January 2009, which certified the Project EIR, adopted CEQA Findings and a Statement of Overriding Considerations, and adopted a Mitigation Monitoring and Reporting Program.

3. **WHEREAS**, the City, through its Resolution No. 81769 adopted in January 2009, certified revisions to the Project EIR in response to a judgment of the Alameda County Superior Court.

4. **WHEREAS**, in August 2009, the Alameda County Superior Court, in a detailed 55-page opinion, ruled that the Project EIR fully complies with CEQA and rejected all of the CEQA claims presented by the opponents of the Project.

5. **WHEREAS**, the City consulted with the Port of Oakland (“Port”) as a Responsible Agency in accordance with the requirements of CEQA. Port Staff received notices from the City and participated in meetings with City Staff on numerous occasions regarding each of the specific environmental documents referenced above in Paragraph 1.

6. **WHEREAS**, the Port is considering the Project-related approvals that are described in the Agenda Report dated [REDACTED] and the attachments to the Agenda Report (Port Approvals).

FINDINGS

7. The Port Approvals do not substantially change the Project identified in the Project EIR that the City prepared and certified under CEQA. The Port Approvals constitute real estate transactions and tideland trust actions to implement the same Project that was before the City when the City certified the Project EIR and adopted findings under CEQA.

8. Since the City's certification of the Project EIR, no substantial changes have occurred with respect to the circumstances under which the Project is undertaken that would require major revisions of the Project EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.

9. Since the City's certification of the Project EIR, no new information, which was not known and could not have been known with the exercise of reasonable diligence at the time the City certified the Project EIR, shows any of the matters described in CEQA Guidelines § 15162(a)(3)(A)-(D).

10. Before granting the Port Approvals, the Port has considered the environmental effects of the Project as shown in the City's Project EIR.

11. In considering whether to adopt mitigation measures for the environmental effects of the Project, the Port finds that its authority over the Project is limited to the real estate transactions and tideland trust actions described in the Agenda Report dated [REDACTED]. The City, rather than the Port, is the agency with authority to regulate land use on the Project site. The City has adopted the feasible mitigation measures identified in the Project EIR to reduce the Project's significant effects. Based on the Project EIR, the City adopted an extensive Mitigation, Monitoring and Reporting Program for the Project. Accordingly, there is no need for the Port to duplicate the City's adoption of mitigation measures for the Project. The Port will take all reasonable steps to cooperate with the City in the City's implementation of the mitigation measures for the Project. The Port further finds that there are no other feasible mitigation measures within the Port's authority that have not already been adopted by the City, and that would substantially lessen or avoid any significant effect of the Project.

12. The Port adopts and incorporates by reference the City's January 2009 findings rejecting alternatives to the Project, as set forth in Exhibit A to Oakland City Council Resolution No. 81769. The Port further finds that there are no other feasible alternatives within the Port's authority that would accomplish the Project objectives while substantially lessening or avoiding any significant effect of the Project.

13. The Port adopts and incorporates by reference the City's January 2009 findings regarding the significant environmental effects of the Project as required by CEQA Guidelines section 15091, which findings are set forth in Exhibit A to Oakland City Council Resolution No. 81769.

Statement of Overriding Considerations

14. As described in Exhibit A to Oakland City Council Resolution No. 81769, the following impacts of the Project would remain significant following adoption and implementation of the mitigation measures identified in the Project EIR:

- Traffic, Circulation and Parking (Impacts B.1b, B.1c, B.1e, B.2a, B.2c, B.2d, B.2e, B.2h, B.2i, B.3a, B.3c, B.3d, B.3e, B.3h, B.3i, B.9)
- Air Quality and Meteorological Conditions (Impact C.7)
- Cultural Resources (Impacts E.3, E.4, E.5, E.8)
- Noise (Impacts G.1, G.4)

15. In accordance with CEQA Guidelines Section 15093, the Port has, in determining whether or not to confer approvals for the Project, balanced the economic, social, technological and other benefits of the Project against its unavoidable environmental risks, and has found that the benefits of the Project outweigh the significant adverse environmental effects that are not mitigated to less-than-significant levels, for the reasons set forth below. This statement of overriding considerations is based on the Port's review of the Project EIR and other information in the administrative record for the Project.

16. The Project presents an opportunity to redevelop an underutilized property that is no longer necessary for Port maritime or aviation purposes, and to provide housing units, commercial space, recreational marinas and public open space and parks to the residents of the City and the region.

17. The Project will provide affordable housing units, available to a range of income levels and families, and will generate new tax increment funds for the City Redevelopment Agency, which could be used for projects within the Central City East Redevelopment Area and the Central District Urban Renewal Plan Areas of Oakland. The Project will provide jobs for local residents during construction, as well as jobs in connection with the operation of the commercial businesses associated with the development, and in connection with the maintenance of the parks, open space and landscaping areas within the Project.

18. The Project will result in the environmental remediation and productive reuse of the Project site, which has long been used for industrial purposes and contains contaminants.

19. The Project will provide new venues for public access to the waterfront. The Project includes approximately 32 acres of open space, much of which is presently not available to the public. The Project will also include completion of a segment of the Bay Trail along the perimeter of the Project site.



February 16, 2010

Sent via email: board@portoakland.com

To the members of the Board of Port Commissioners:

I am asking that you defer action on the Tideland Trust exchange on the Oak to Ninth Project until the Central Estuary Specific Plan is completed and passed by Council.

Background. Today you will be asked to vote on a tidelands trust transfer from the Oak to Ninth Project to an area on the Oakland Army Base. The original sovereign Trust Lands were adjacent to the Estuary waterfront. The trade parcel is located on the Army Base and will be used for Port purposes. The removal of the Trust from the title would permit the developer to build housing on said land.

In 2004, SB1622 was passed to permit this exchange to take place. That legislation established the following land trade criteria, listed in order of priority:

- 1st – Land that lies within the area of the Estuary Plan
- 2nd – Land contiguous to the area of the Estuary Plan
- 3rd – Land that lies within or adjacent to the Middle Harbor
- 4th – land that lies within or adjacent to the Outer Harbor and land that supports the purposes or objectives of the port improvement plans to the extent that their purposes and objectives are consistent with the public trust and the legislative grants.

Rationale. I believe that the passage of the Specific Plan for the Central Estuary will open up opportunities for a higher priority land exchange than the 4th priority option now under consideration. New zoning will clarify land uses for the current industrial property owners located in the Estuary Plan area, some of whom may have been resistant to selling their lands in anticipation of a change in zoning to higher value "mixed use." If those lands are not up-zoned, then they may then become available for sale in a 1st or 2nd priority trade.

Request. As the final sale of this project is scheduled for 2011, there is no urgent need to complete the land exchange prior to that time. As the Specific Plan is scheduled to be completed prior to the final sale of the Oak to Ninth properties, I ask that you defer action on this part of item C1.

Thank you for your efforts to serve as Trustees of the Public Trust.

Sincerely,
Sandra Threlfall
 Sandra Threlfall
 Executive Director

OFFICE OF THE BOARD OF PORT COMMISSIONERS

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P... ..

George Duncan
 Robert Kidd
 Nate Miley
 Ann Richter
 Doug Siden
 Sandra Threlfall
 Richard Winnie



February 15, 2010

Victor Uno
Port of Oakland Commissioner

Dear Commissioner Uno,

Oakland Heritage Alliance urges you to delay action on the Oak to Ninth project agreement revisions proposed for February 16.

There is little urgency in making such major modifications of the terms of the agreement, since the construction of this project is unlikely to go forward immediately.

In fact, it appears that the current proposal delivers far less cash to the port, makes the time of completion indefinite, and does not commit the developer to commence the project nor to generate additional funds for the Port any time soon.

The possibility for a near-term reuse of the Ninth Avenue Terminal to begin generating some income long before the housing project moves ahead is worth your attention, given the economic situation. We hope that the Commission will look into the best way to achieve this reuse. It might benefit the goals of the OHP project by familiarizing people with the area, to create some visibility, identity and additional economic activity at this location, and to begin generating additional income from the site.

We wonder what the altered trusteeship of the Ninth Avenue Terminal means, in terms of its historic status and eventual reuse.

Please continue this item, and study the issues further before proceeding.

Sincerely,

A handwritten signature in cursive script that reads "Dea Bacchetti".

Dea Bacchetti
President
Oakland Heritage Alliance

DEPARTMENT OF PORT COMMISSIONERS
 COMMUNICATIONS SECTION
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