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AGENDA REPORT

TITLE: Approval of an Amendment to the Agreement for Purchase and Sale and Ground Lease of Real Property in the Oak to Ninth District

AMOUNT: N/A, other than an Increase in the Buyers Deposit of up to \$1 million

PARTIES INVOLVED:

Corporate Name/Principal	Location
Oakland Harbor Partners, LLC Michael Ghielmetti Dana G. Parry	Pleasanton, California
Signature Harbor Partners, LLC Michael Ghielmetti	Oakland, California
R&B Harbor Venture, LLC Dana G. Parry	Concord, California

TYPE OF ACTION: Ordinance

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

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 sum, the Original Option Agreement granted the Developer an option to both purchase fee title and ground lease the entire approximately 64 acre Property for \$18,000,000. 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, requires 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 requires that the Developer remediate the Property in accordance with a Response Plan approved by the California Environmental Protection Agency, Department of Toxic Substances Control ("DTSC"), and expend at least \$16,000,000 on this remediation, among other obligations.

In 2006 the City of Oakland approved a series of land use entitlements for the Property which enable the development of approximately 3,000 residential units, approximately 200,000 square feet of commercial space, 32 acres of improved public access and open space, and two renovated marinas. In recent months the Developer has also submitted a proposal in response to the Lawrence Berkeley National Laboratory ("LBNL") Request for Proposals to develop a new campus in the Bay Area. The Oak to Ninth site was selected

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as one of six finalists for further evaluation by LBNL. A final decision regarding a preferred site for the new LBNL campus is anticipated in the upcoming weeks, which will apparently be followed by the execution of an Exclusive Negotiating Agreement between the LBNL and the winning proposer team to enable time to seek necessary land use entitlements and regulatory approvals for the campus project. The Developer has indicated that the LBNL proposal represents an intriguing alternative to the current project approved for the Property if the residential development market remains weak.

Over the past few years, the Original Option Agreement was subsequently amended on several occasions by the Port and the Developer and numerous public agency approvals for the development project were obtained. Notably, in April of 2010 the State Department of Toxics and Substance Control approved the Project Remediation Action Plan; in August of 2010 the Tidelands Trust Exchange Agreement with the State Lands Commission was executed by the Governor and subsequently validated by the Superior Court in January 2011; and in February 2011 the Bay Conservation and Development Commission approved the Developer's permit for the project. In September of 2011 the Developer exercised the Option and both parties (Port and Developer) have now executed the Purchase and Sale Agreement. Pursuant to the terms of the Purchase and Sale Agreement, the Developer and Port have established a close of escrow date of January 31, 2012.

On November 16, 2011 the Port received a letter from the Developer requesting a one-year extension to the close of escrow date. A copy of the letter is attached for reference as Exhibit A to this report. The Developer cites the continuing recessionary economy and constriction of the financial and real estate markets as key factors in requesting an extension, among other reasons. If the Developer's request is granted by the Board, the new close of escrow date would be no later than January 31, 2013.

ANALYSIS

Since receipt of the Developer's extension request in November, staff has analyzed the request and discussed other potential amendments to the terms of the Purchase and Sale Agreement with the Developer that the Port believes are appropriate companion amendments with the requested extension. A summary of the key proposed changes to the Purchase and Sale Agreement include the following:

1. Close of Escrow Date Change: The outside date for close of escrow will be moved from January 31, 2012 to no later than January 31, 2013, but with an earlier closing allowed and encouraged subject to certain notice requirements from the Developer to the Port and selection of a mutually agreeable date among all parties to escrow.
2. Increased Deposit Amount: Staff is proposing that the deposit amount be increased from the current amount of \$421,666 to \$1 million, with the additional \$578,334 paid to the Port in equal quarterly payments beginning on February 1, 2012. This represents a substantial increase in the Developer's deposit but also serves to incentivize the Developer to close early if at all possible with the incremental payment approach. Consistent with the existing Agreement terms, if close of escrow does not occur by January 31, 2013 as a result of the Developer's failure to close,

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- the Port retains the entire deposit amount. If close of escrow occurs on or before January 31, 2013 then the deposit amount is credited towards the purchase price.
3. Environmental Obligations Deducted from Deposit: If the Port receives a directive to investigate or remediate any part of the Property from a regulatory agency prior to the close of escrow, the costs of the Port's response to that directive shall be deducted from the Developer's deposit amount held by the Port. Thus, only the amount of deposit actually held by the Port at close of escrow would be credited against the Developer's purchase price payment owed to the Port. Likewise, these directive response costs would also be credited against the Buyers obligation to spend at least \$16 million in remediation costs on the Property, consistent with the limitations of the existing Purchase and Sale Agreement related to qualifying costs.
 4. Waiver of Buyers Closing Conditions: Certain buyer closing conditions shall be waived or affirmatively acknowledged as completed by the Port (such as Tenant and/or Landlord Estoppel obligations, Master Indenture Covenant, stormdrain maintenance manual preparation, etc.) in order to minimize future closing efforts and limit the potential for any future disputes that could result in further delay.
 5. Elimination of Port Liquidated Damages Payment: The \$500,000 liquidated damages payable by the Port as a result of an inability to close escrow due to the Port's Master Indenture Covenant shall be eliminated to minimize the risk for the Port related to other potential transactions occurring during the same twelve month period as the new proposed close of escrow date on this transaction.
 6. Leasing Flexibility: The Port would be granted the right to enter into property rental agreements with tenants for use of the Property, utilizing our standard form of agreements, for a term length of up to January 2013 or longer, with a copy of the executed agreement provided to the Developer, but with no tenant or landlord estoppel required.
 7. Performance Milestones and Regulatory Permit Costs: The Developer shall have the right to submit invoices to the Port for reimbursement for certain third party costs associated with the obtainment of outstanding regulatory agency permits and approvals required for the project such as the Regional Water Quality Control Board and Army Corps of Engineers each quarter, up to a maximum amount of \$72,292 each quarter, which equates to ½ of the quarterly deposit increase payment. At close of escrow, only the amount of deposit actually held by the Port at close of escrow shall be credited against the purchase price, with the remaining balance of the purchase price payable by the Developer at closing. This provision is intended to both somewhat offset the cash flow impact of the significant increase in the Developer's deposit being collected by the Port, and also incentivize the Developer to continue to pursue readying the site for development during the upcoming year such that project financing is more readily obtainable.

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

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with additional time to secure project financing and investment interest in an effort to continue to move this important project forward to fruition. Based on the analysis above, staff recommends approval of the proposed amendments to the Purchase and Sale Agreement.

STRATEGIC PLAN

The proposed amendments to the Purchase and Sale Agreement for the Oak to Ninth District Project are consistent with the following goals and objectives of the Strategic Plan:

Strategic Priority Areas	Goal	Objective	How the requested action will implement the subject goal/objective
Sustainable Economic and Business Development	Goal A: Create sustainable economic growth for the Port and beyond.	Objective 1: Maximize the use of existing assets.	The proposed amendments enable the redevelopment of a currently underutilized property by private investment for more intensive uses. In addition, the proposed amendments enable the Port to continue leasing efforts on the Property during the interim period prior to close of escrow .
		Objective 2: Affirm Port identity as a public enterprise.	The project transaction represents a public-private partnership for the Port, with private investment dollars being utilized for the purchase, lease, development and maintenance of the subject property, including Property remediation.
	Goal D: Improve the Port's financial position.	Objective 1: Improve cash position and debt service coverage ratio.	The proposed amendments will avoid the potential termination of the existing transaction documents, which generate a significant cash payment to the Port both at the initial close of escrow by January 2013 as well as on the second Promissory Note payoff in June 2015, with interim payments made to the Port during this timeframe as well. The existing transaction agreement terms are financially favorable to the Port in light of current real estate market trends and remediation and improvement costs for the Property.
		Objective 2: Minimize expenditures and focus on core services.	The project transaction enables the Port to dispose of an underutilized property and generate significant cash from the transaction as well as remediate and improve the Property, all funded by private investment.
Stewardship and Accountability	Goal G: Sustain healthy communities through	Objective 2: Partner to share risk, accountability,	The project transaction requires that the Developer fund the site

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	leading edge environmental stewardship.	benefits and improve environmental and safety compliance.	remediation and provide environmental insurance to benefit the Port, as part of the risk sharing structure of the current and proposed deal terms.
		Objective 4: Continue to provide quality public access and open space at a financially sustainable level.	Once close of escrow occurs, the ultimate development planned for the Property will result in significant new amounts of open space and public access, all developed and maintained without the use of Port funds.

The close of escrow for the Oak to Ninth transaction is identified as one of the Port's nineteen key strategic initiatives for the current fiscal year. While the requested extension of the close of escrow date will shift completion of this initiative to the upcoming fiscal year, the package of proposed amendments to the Purchase and Sale Agreement are intended to continue to move this initiative forward toward close of escrow and ultimate development of the Property to a future date in lieu of potentially terminating the existing contract. Thus, while the timeframe for completion of this initiative is shifted, the intention and outcome of this initiative with respect to the development and improvement of the Property and the creation of jobs from the project development is retained.

BUDGET & FINANCIAL IMPACT

Related to the Oak to Ninth Property and the terms of the existing Purchase and Sale Agreement, Port staff included the following in its Fiscal Year (FY) 2012 budget:

- Operating revenue: \$825,000 of revenue – based on close of escrow on 1/1/12
- Non-operating income: one-time net book gain of \$12.7 million - sale of the Property
- Cash receipt: \$4.5 million less deposit

A delay in the closing of escrow allows the Port to retain the existing Property revenue for an additional calendar year. Therefore, operating revenue from the Property in FY 2012 is expected to be \$900,000 instead of \$825,000. However, the proposed amendments to the Purchase and Sale Agreement will delay the recognition of the one-time gain and receipt of the initial closing cash payment to FY 2013.

Retention of rental revenue from the Property will increase operating revenue relative to the current fiscal year (FY 2012) budget by approximately \$75,000. Deferral of the initial closing payment reduces the Port's projected cash balance in FY 2012. Overall, however, the deferral of the one-time gain and initial closing payment to January 2013 are not anticipated to pose a significant challenge to the Port in the current fiscal year. If approved, Port staff will incorporate the proposed amendments to the Purchase and Sale Agreement in the upcoming FY 2013 budgeting process.

STAFFING IMPACT

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There will be no impact to Port staffing as a result of the proposed action, existing staff within the Commercial Real Estate Division will continue to manage the Property and Agreement terms as is currently being done.

SUSTAINABILITY

The Developer's approved project for the site provides many economic, environmental and social equity benefits for the City and the region, and will support many sustainability concepts. The 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.

Furthermore the project will also provide new venues for public access to the waterfront with the approximately 32 acres of public access and open space planned for the Property, much of which is presently not available to the public. 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 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. The City Council approved the project entitlements and certified the project EIR in July of 2006. 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

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CEQA and adequately addressed the deficiencies it had identified. The court therefore vacated its prior order suspending the Project approvals. In May of 2011, the California Court of Appeal affirmed the August 2009 ruling of the Superior Court and dismissed the appeal.

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 Board of Port Commissioners approved various Agreement amendments in October of 2010 and made the necessary and appropriate findings as a Responsible Agency at that time. The Port's actions in consummating the amended 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. The proposed amendments to the Purchase and Sale Agreement involve the timing of close of escrow and the details of other payments related to implementing the real estate transaction for the project, but they do not alter the scale, nature or impacts of the project in any material way.

MARITIME AND AVIATION PROJECT LABOR AGREEMENT (MAPLA)

MAPLA does not apply to Commercial Real Estate Division 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.

LIVING WAGE

Living Wage requirements, in accordance with the Port's Rules and Regulations for the Implementation and Enforcement of the Port of Oakland Living Wage Requirements (the "Living Wage Regulations"), do not apply to this matter because tenancies outside of the Aviation and Maritime areas with entities that do not principally provide aviation or maritime services are excluded from the Living Wage Regulations.

OPTIONS

1. Approve the requested extension to the close of escrow date and other proposed amendments to the Purchase and Sale Agreement as described within this Agenda Report, which will allow the project to move forward toward a close of escrow on or before January of 2013;

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2. Do not approve the requested extension to the close of escrow date and other proposed amendments to the Purchase and Sale Agreement, which may result in the Developer being unable to close escrow on the transaction and the Agreement may terminate; or
3. Approve the requested extension to the close of escrow date but subject to other amendments to the Purchase and Sale Agreement than those described within this report, which depending on the nature of those amendments may require further negotiation with the Developer to determine the feasibility of those amendments with respect to the Developer's ability to close escrow on the transaction.

RECOMMENDATION

It is recommended that the Board approve the requested extension to the close of escrow date along with other proposed amendments to the Purchase and Sale Agreement as described within 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. It is further recommended that the subject approval be valid for no longer than 30 days from the date of Board authorization, and that if the subject Agreement amendments are not fully executed by that date such approval shall be null and void unless further extended at the sole and absolute discretion of the Executive Director or his designee.

Attachments:

- Exhibit A: Letter from Developer dated November 16, 2011
- Exhibit B: Site Plan of Proposed Approved Project

SIGNATURE
DEVELOPMENT
GROUP

November 16, 2011

Ms. Pamela Kershaw
Port of Oakland
530 Water Street
Oakland, CA 94607

Re: Oak to Ninth – Agreement for Purchase and Sale and ground Lease of Real Property and Escrow Instructions

Dear Pam:

The purpose of this letter is to follow up on our recent conversation and to formally request an amendment to Agreement for Purchase and Sale and Ground Lease of Real Property and Escrow Instructions, dated September 15, 2011 (the "Agreement"), for the Oak to Ninth property (the "Property") by and between the Port of Oakland ("Port") and Oakland Harbor Partners, LLC ("OHP") extending the scheduled closing date from January 31, 2012 to January 31, 2013.

As you know, OHP has been an enthusiastic partner with the Port for last 10 years regarding the redevelopment of the Property. Working with the Port and a myriad of local and regional stakeholder groups, OHP has obtained local land use approvals and permits from regional and State agencies for a project design that has been nationally acknowledged for its "smart growth" and environmental justice principles and incorporation of significant open space uses, all of which are projected to have a transformative effect on the City of Oakland's waterfront, nearby neighborhoods and the City's potential for additional revitalization.

This has not been accomplished without significant setbacks. OHP has continued to process permits and otherwise advance the project in the face of extended litigation and economic downturn in an effort to be prepared to close escrow on the Property on the currently scheduled closing date.

Unfortunately, due to continued global macroeconomic turmoil, a stubbornly high unemployment rate, socio-political issues ranging from national to local and a particular weakness in the finance and real estate markets, OHP finds it must request this extension to provide additional time for the real estate and capital market to stabilize in order to allow the project to proceed as planned.

EXHIBIT A


2201 Broadway, Suite 604 Oakland, California 94612

That said, OHP strongly believes in the long term viability of the project and the future of both the Port and the City of Oakland. As such, OHP will continue working aggressively with local, State and federal agencies to ensure the Property and the project are positioned as early as possible to move forward for a successful close of escrow. These efforts will include OHP continuing to advance the proposed project alternative that would bring the Lawrence Berkeley National Lab's second campus to the Property (while preserving the right to develop the current project should that be the more economically viable goal). Further, we are open to working with Port staff to continue to demonstrate our strong commitment to the Property.

The Port's continued cooperation and support is much appreciated. Please review the proposal and call me at your earliest convenience to discuss.

Sincerely,

Oakland Harbor Partners, LLC


Michael Ghielmetti
President of Manager

cc: Mr. Dana Parry