



## Oakland Measure DD Community Coalition

November 20, 2012

Board of Port Commissioners  
c/o John Betterton, Secretary of the Board  
Port of Oakland  
530 Water Street  
Oakland, CA 94607

Dear President Gonzales and Commission Members:

This letter serves as a request from the Measure DD Community Coalition that Port of Oakland impose certain conditions on any amendment to the purchase and sale agreement for the Oak to Ninth parcel that would delay the close of escrow beyond January 31, 2013.

### **Background**

The Measure DD Coalition was formed in 2003 and sanctioned by the Oakland City Council to provide public input concerning projects and expenditures designated in the 2002 Measure DD Bond. One of the key themes of the \$198M Bond was improved access to the shoreline including the Oakland Estuary, Lake Merritt, and the major creeks in Oakland. The scope of the bond included three parks and a public Bay Trail segment within the Oak to Ninth parcel lands.

In 2003, the Port of Oakland, trustee of the 64-acre Oak to Ninth parcel, executed an option to purchase agreement with Oakland Harbor Partners for the Oak to Ninth development parcel. This action moved Bay Trail and public access development for this parcel out of the public realm and out of the scope of Measure DD. The master plan for the project offered the promise of a rich mix of commercial, residential, and public access opportunities.

In 2006, the Port of Oakland, City of Oakland, and Oakland Harbor Partners submitted Permit Application 7-06 to BCDC. In 2011, BCDC issued a permit naming these three agencies in the authorization and requiring construction of an interim Bay Trail on an accelerated schedule. That permit will expire December 31, 2012.

In spring 2010, the purchase agreement for the Oak to Ninth Avenue property was revised to permit a delay: the Port of Oakland received 25% down with the understanding that construction would not begin before a final payment which could occur as late as 2015. The revisions also included an extension opportunity at 2015.

A pattern of delays and extensions ensued; by now, contractual deadlines for close of escrow have been May 2008, June 2010, January 2012, and January 2013.

To date, escrow has not closed. The current deadline for close of escrow for Oak to Ninth is January 31, 2013, and there is reason to expect that further extensions will be sought by the developer.

## Request

We request that there be no further delay without mitigation. We ask:

1. **That the Port make every effort to move the project forward under the current contractual timeframe**, retaining the January 31, 2013 deadline for close of escrow. While our focus is on the benefits associated with the Bay Trail, parks, and public amenities, the master plan offers potential commercial benefits for the area, including Jack London Square and other nearby parcels leased by the Port's Commercial Real Estate Division. If market conditions are such that the master plan is no longer viable, then the developer should not be allowed to tie-up the property through ongoing escrow deadline amendments at little cost. We urge the Commissioners to a) deny further delay, or b) make such delay brief, require a substantial deposit increase, and implement the mitigation introduced below

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

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

2. **That if the deadline for close of escrow is delayed again, the impacts of such delay be mitigated** by the permittees (Port of Oakland, City of Oakland, Oakland Harbor Partners) constructing the entire interim Bay Trail required by BCDC within 18 months of the amendment granting the delay. (Interim trail at the shoreline in the leased section of the parcel would be delayed until February 28, 2016, or 60 days after the expiration of the lease.)

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

We believe there is a strong commonality between commercial and public access concerns associated with this project, and we are seeking to advance it in a manner that brings benefits to all. A date certain for an interim Bay Trail is needed now to help mitigate the consequences of the repeated delays and uncertainty noted above.

We thank the Commission for considering this request.

Measure DD Community Coalition Interim Bay Trail Drafting Committee:

Naomi Schiff  
Sandra Threlfall  
James Vann

## Exhibit A

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

located at [http://www.portofoakland.com/pdf/boar\\_shee\\_120112.pdf](http://www.portofoakland.com/pdf/boar_shee_120112.pdf)

**BOARD MTG. DATE: 1/12/12**

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

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

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