



AGENDA REPORT

PROPOSED ACTION: Ordinance: Approve and Authorize the Executive Director to: Execute a Fifth Amendment to the Agreement for Purchase and Sale and Ground Lease of Real Property and Escrow Instructions with Zarsion-OHP I, LLC to Disburse Certain Cost Cap Funds Currently Held in Escrow for the Brooklyn Basin Project and Execute Amended and Restated Agreements with Zarsion-OHP I, LLC Regarding the Cost Cap Insurance Escrow Account and Replacement Letter of Credit for Various Project Phases (Brooklyn Basin), and Finding that the Proposed Action is Exempt Under the California Environmental Quality Act. **(CRE)**

Submitted By: Jonathan Veach, Chief Real Estate Officer; Danny Wan, Executive Director

Parties Involved: Zarsion-OHP I, LLC, a California limited liability company, Oakland, California

Amount: \$0

EXECUTIVE SUMMARY: In 2003, the Port of Oakland (Port) executed an Agreement for Purchase and Sale and Ground Lease of Real Property and Escrow Instructions (Purchase and Sale Agreement) for the Oak to Ninth District Property (Brooklyn Basin) with Zarsion-OHP I, LLC (ZOHP or Developer). The requested Fifth Amendment to the Purchase and Sale Agreement (1) acknowledges that the developer has substantially completed the environmental remediation of Phase I of the Brooklyn Basin Project and authorizes the release of certain cost cap funds related to such property, (2) authorizes the amendment and restatement of the current Cost Cap Agreement related to Phase I and Phase IA of the project, (3) authorizes the execution of a Phase II Cost Cap Agreement, and (4) approves a form of the Cost Cap Agreement to be utilized for future phases of the project.

BACKGROUND & ANALYSIS

Overview of Brooklyn Basin Project

In 2003, the Port executed a Purchase and Sale Agreement for the Oak to Ninth District Property with ZOHP, an affiliate of signature Development Group (Developer). The Brooklyn Basin includes approximately 60 acres of land and two marina locations, bounded generally by 9th Avenue to the east, the privately owned Portobello condominium site to the west, Embarcadero Road to the north, and the Estuary to the south.

In May 2013, the Port closed escrow on an approximately 30-acre land sale, an approximately 30-acre Open Space Ground Lease, and a Marina Lease of adjacent water. The subject site was originally approved for the development of 3,100 residential units (465 affordable units and 2,635 market rate units), approximately 200,000 sq. ft. of commercial/retail space, a marina containing approximately 200 berths and approximately 30 acres of parks and open space (Project).

The City of Oakland (City) recently approved certain amendments to the project approvals which add an additional 600 market rate residential units to the project in return for additional community benefits, including the payment of in excess of \$26,750,000 to fund additional affordable housing in the City, which amount is paid via \$9,000,000 in direct payments from Developer and the balance through affordable housing impact fees imposed on the 600 new units.

The Project is now under construction with:

- a) 465 affordable housing residential units completed;
- b) 1,231 market rate residential units completed;
- c) The first phase of the parks/open space [Phase 1 of Township Commons], which includes the rehabilitation of the 9th Avenue Shed Building, completed and open to the public;
- d) The first phase of project infrastructure and circulation are completed and have been accepted by the City;
- e) The second phase of project infrastructure and circulation are substantially complete; and
- f) Active remediation of hazardous materials on approximately 28 acres completed.

Environmental Remediation

As with many of the Port's more complicated real estate transactions, the Purchase and Sale Agreement has certain ongoing requirements and obligations imposed on Developer that survive the close of escrow. These surviving requirements include, without limitation, certain liability and implementation measures related to Developer's obligation to remediate hazardous materials at the project site. These obligations include the obligation to (a) expend a minimum of \$16,000,000 in Actual Remediation Costs, (b) indemnify the Port against certain hazardous materials claims related to the Project site (as more particularly set forth in the Purchase and Sale Agreement and supplemental transaction documents), (c) provide a Completion Guaranty for the remediation of the Final Public Trust Parcels (Upland), (d) obtain a Pollution Legal Liability Insurance Policy (PLL Policy) benefitting the Port, Developer and other third parties in the amount of \$10,000,000 and providing coverage for two consecutive 10 year terms, and (e) provide remediation "cost cap" protection for any remediation efforts actually commenced by Developer at the project site in the form of an insurance policy or escrowed funds, currently on a "per-Phase" basis.

To date, Developer has (i) expended in excess of \$16,000,000 in Actual Remediation Costs (+\$30,000,000), (ii) provided the required Completion Guaranty, (iii) obtained the required PLL Policies for the two consecutive 10 year terms, and (iv) escrowed

\$1,325,000 in “cost cap” funds for Phases I and IA of the project pursuant to the Agreement Regarding Cost Cap Insurance Escrow Account and Replacement Letter of Credit dated June 30, 2014 (the Phase 1/1A Escrow Agreement). Further, Developer has received DTSC approval for completion of active remediation of the entirety of Phase I and the majority of Phase II.

While the project is proceeding, Estuary Park (Phase 1A) is not yet ready for remediation as the City is developing renovation and design plans for the site and remediation work would make the site inaccessible to the public for some time.

Proposed Amendments

Developer has requested Port approval of (1) an amendment and restatement of the Phase I/IA Cost Cap Agreement that will now only deal with Phase IA, (2) approval of the disbursement of the Cost Cap Funds allocated to Phase I, (3) approval of the form of Agreement Regarding Cost Cap Insurance Escrow Account and Replacement Letter of Credit for Phase II and (4) approval of the form of Agreement Regarding Cost Cap Insurance Escrow Account and Replacement Letter of Credit for subsequent Development Phases.

The final revisions to the agreements accomplish a few things.

First, the amendment decouples Phases 1/1A, which were originally contemplated to be developed concurrently but now have different development timelines based on the City’s development schedule. In doing so, the funds held in escrow related to Phase 1 can be disbursed back to Developer as the entirety of construction of Phase 1 has been completed and approved for occupancy or has received DTSC’s approval to proceed with construction activities. DTSC has determined that no further active remediation is required for Phase I.

Separately, the amount of “cost cap” funds allocated to Phase IA has been increased based on current remediation estimates and include a provision to be increased by annual CPI adjustments going forward to account for any delay in proceeding with the redevelopment of Estuary Park. Doing so helps ensure that Estuary Park is remediated and built.

Finally, the proposed actions approve the form of Agreement Regarding Cost Cap Insurance Escrow Account and Replacement Letter of Credit for Phase II and also approve the form of Agreement Regarding Cost Cap Insurance Escrow Account and Replacement Letter of Credit for subsequent Development Phases. ZOHP has completed the active remediation for the majority of the Phase II site but has done so without a cost cap escrow agreement due to some with closing out the original Phase1/1A Agreement.

In summary, the proposed escrow instruction for the existing \$1,325,000 held in escrow as outlined in the Fifth Amendment to the Purchase and Sale Agreement are as follows:

- Of the \$1,325,000 original escrow funds, \$950,000 was associated with Phase I remediation and is no longer required to be held due to the completion of Phase I; \$375,000 was associated with Phase IA remediation.
- Going forward, \$125,000 of the \$950,000 shall be retained in the current escrow account along with the remaining \$375,000 funds originally deposited pursuant to the Phase I/IA Cost Cap Agreement for an increased total of \$500,000 as cost cap funds required by the Phase IA Cost Cap Agreement.
- An additional \$142,500 of the \$950,000 shall be deposited into a new escrow account opened pursuant to the Phase II Cost Cap Agreement to fund the cost cap funds required by the Phase II Cost Cap Agreement; and
- The balance of \$682,500, which is associated with the completed Phase 1 remediation shall be disbursed back to ZOHP.

Based on the analysis contained above, Port Staff believes Developer has performed in accordance with the original cost cap agreement and the proposed changes continue to provide risk protection to the Port while ensuring that Developer can access funds and continue remediation efforts for future phases. Furthermore, the original agreement term contemplated a maximum term of 5 years, which has now extended to more than 10 years.

Attachments: 1. Site Map, 2. Remediated Parcels, 3. DTSC Active Remediation Approvals

OTHER FINDINGS AND PROVISIONS

ENVIRONMENTAL REVIEW

The proposed action was analyzed under the California Environmental Quality Act (CEQA) and was found to be:

- Categorically exempt under the following CEQA Guidelines Section:
Choose an item.
- Not a "Project" under CEQA, as defined in Public Resources Code § 21065.
- "Common Sense" exemption under CEQA Guidelines Section 15061(b)(3).
- Other/Notes:

BUDGET

- Administrative (No Impact to Operating, Non-Operating, or Capital Budgets); OR
 - Operating
 - Non-Operating
 - Capital

Analysis: Proposed action has no impact to the Port's FY 2025 Board adopted budget.

STAFFING

- No Anticipated Staffing Impact.
- Anticipated Change to Budgeted Headcount.
Reason:
- Other Anticipated Staffing Impact (e.g., Temp Help).
Reason:

MARITIME AND AVIATION PROJECT LABOR AGREEMENT (MAPLA):

Applies? No (Not Aviation or Maritime CIP Project) – proposed action is not covered work on Port's Capital Improvement Program in Aviation or Maritime areas above the threshold cost.

Additional Notes:

LIVING WAGE (City Charter § 728):

Applies?

No (CRE) – proposed action entails tenancy outside of the Maritime or Aviation areas and therefore not subject to Living Wage requirements.

Additional Notes:

SUSTAINABLE OPPORTUNITIES:

Applies? **No.**

Reason: There are no sustainability opportunities related to this proposed action because it does not involve a development project, purchasing of equipment, or operations that present sustainability opportunities

GENERAL PLAN (City Charter § 727):

Conformity Determination:

CRE – proposed action is within City of Oakland's planning jurisdiction and appears to conform to the General Plan.

STRATEGIC PLAN. The proposed action would help the Port achieve the following goal(s) and objective(s) in the Port's Strategic Business Plan:

- | | |
|--|--|
| <input type="checkbox"/> Grow Net Revenues | <input type="checkbox"/> Modernize and Maintain Infrastructure |
| <input checked="" type="checkbox"/> Improve Customer Service | <input type="checkbox"/> Pursue Employee Excellence |
| <input type="checkbox"/> Strengthen Safety and Security | <input checked="" type="checkbox"/> Serve Our Community |
| <input checked="" type="checkbox"/> Care for Our Environment | |

Attachment 1
Site Map

[See attached.]

Attachment 2
Remediated Parcels

[See attached.]

Attachment 3
DTSC Active Remediation Approvals

1. Phase 1. All of the Phase I parcels have a DTSC-approved Active Remediation Completion report ("ARC"), as summarized below:

a. Development Parcels.

i. Parcel A (A1/A2): "[Active Remediation Completion Report for Parcels A1, A2, B and C](#)" (July 2015); approved by [DTSC on August 4, 2015](#).

ii. Parcel B: "[Active Remediation Completion Report for Parcels A1, A2, B and C](#)" (July 2015); approved by [DTSC on August 4, 2015](#).

iii. Parcel C: "[Active Remediation Completion Report for Parcels A1, A2, B and C](#)" (July 2015); approved by [DTSC on August 4, 2015](#).

iv. Parcel F: "[Active Remediation Completion Report for Parcels F, G1, G2, and T1](#)" (February 2016) approved by [DTSC on February 16, 2016](#).

v. Parcel G (G1/G2): "[Active Remediation Completion Report for Parcels F, G1, G2, and T1](#)" (February 2016) approved by [DTSC on February 16, 2016](#).

b. Open Space Parcels. Note: The ARC's for the open space parcels use a different nomenclature to identify various properties. Please see key map attached hereto as Schedule 3(a).

i. Township Commons Phase I - Parcel 1TW (formerly Parcels W1 and W2): "[Active Remediation Completion Report, Parcels A3, W1, and W2 of Phase I](#)" (September 2019); approved by [DTSC on October 18, 2019](#).

ii. Basin Parcels X2 and X3 (formerly Parcel A3): "[Active Remediation Completion Report, Parcels A3, W1, and W2 of Phase I](#)" (September 2019); approved by [DTSC on October 18, 2019](#).

c. Road Parcels. Note: The ARC's for the open space parcels use a different nomenclature to identify

various properties. Please see key map attached hereto as Schedule 3(a).

i. Parcels T2, T3, T4, TCWA: "[Final Active Remediation Completion Report for Parcels T and TCWA](#)" (July 2015); approved by [DTSC on July 27, 2015](#).

2. Phase II. With the exception of Gateway Park (Part of Open Space Parcel W), all of the Phase II parcels have a DTSC-approved ARC, as summarized below.

a. Development Parcels.

i. Parcels D, E, H (H1 and H2), and J are covered by the "[Active Remediation Completion Report for Phase II Development Parcels](#)" (July 2018); approved by [DTSC on August 1, 2018](#).

b. Open Space Parcels.

i. Parcels W3 and W4 (Portion - excluding Gateway Park): "[Active Remediation Completion Report - Phase II Open Space, Parcels W3 and W4](#)" (June 2022); approved by [DTSC on June 30, 2022](#).

ii. Parcel W4 (Portion - Gateway Park): DTSC approved the "[Implementation Plan for Gateway Park \(Part of Open Space Parcel W\)](#)" (July 2021) on [July 29, 2021](#). The remediation work needs to be completed pursuant to the Implementation Plan.

c. Road Parcels

i. Parcel T5: "[Active Remediation Completion Report for Phase II Development Parcels](#)" (July 2018); approved by [DTSC on August 1, 2018](#).