

AGENDA REPORT

Ordinance: Approve a Fourth Amendment to the Agreement for Purchase and Sale and Ground Lease of Real Property and Escrow Instructions to Establish a Standard Form Assignment and Assumption Agreement for the Transfer of Privately Owned Parcels Located within the Oak to Ninth District Project site. **(CRE)**

MEETING DATE: 9/26/2019

AMOUNT: \$ Choose an item.

PARTIES INVOLVED: Zarsion-OHP 1, LLC
Michael Ghielmetti, Principal

SUBMITTED BY: Pamela Kershaw, Director of Commercial Real Estate

APPROVED BY: Danny Wan, Acting Executive Director

ACTION TYPE: Ordinance

EXECUTIVE SUMMARY

The requested Fourth Amendment to the Agreement for Purchase and Sale and Ground Lease of Real Property and Escrow Instructions establishes a new Standard Form of Assignment and Assumption applicable to the transfer of privately owned parcels to third parties, which captures all applicable surviving obligations benefitting the Port, and can be utilized for future private land transfers without requiring Board consent. Any proposed sale or transfer that does not utilize the proposed Standard Form of Assignment and Assumption will require Board consent, consistent with the current requirement. The proposed Fourth Amendment is intended to help reduce future Port staff time and effort to review such future private party transfers yet provide the same level of risk protection for the Port.

BACKGROUND

In 2003 the 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 with Zarsion-OHP 1, LLC, successors in interest to Oakland Harbor Partners, LLC ("Developer"). The subject site 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. The Port subsequently closed escrow on an approximately 30-acre land sale, an approximately 30-acre Open Space Ground Lease, and a Marina Lease of adjacent water area in May of 2013. The project is now under construction with the first residential building completed, a second one under construction, and a third planned for commencement of

construction soon. The first phase of the public parks/open space development is also substantially completed, along with the internal site infrastructure and circulation network, and the required environmental remediation obligations imposed on the project by the Port.

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 the Developer that survive the close of escrow. These surviving obligations relate to ongoing indemnity and releases benefitting the Port regarding the "as-is" condition of the property at the time of sale, certain ongoing environmental remediation covenants and releases for the Port, requirements for compliance with the Port's Prevailing Wage and Non-Discrimination Small Local Business Utilization Policies, and other general obligations related to indemnity/release for the Port with respect to future potential claims. In order to ensure that future owners are aware of and agree to comply with these surviving obligations, Section 13.10 of the Purchase and Sale Agreement requires Port consent the subsequent transfer of these privately-owned parcels if these surviving obligations are intended to be transferred to a new third-party owner.

ANALYSIS

In July of this year, the Developer approached the Port to request Port approval of the right to sell one of the privately-owned parcels within the site to a third party, Anton Brooklyn, LLC, an affiliate of Anton DevCo, Inc, along with a transfer of these surviving obligations. In discussing this request, it became apparent to Port staff that while the assignment language of Section 13.10 of the Purchase and Sale Agreement is certainly well intended as a means to ensure that the Port is protected from future claims by private parties relating to site conditions, the implementation of this assignment clause could be quite onerous for the Port over time. Since the Developer intends to create multiple different building parcels within their 30 acres of privately owned land, and each one of those parcels could be sold to separate private parties in the future, and then re-sold over and over again an unlimited number of times, the Port would be required to consider and consent to each such future transfer of these privately-owned lands. Thus, staff has proposed an alternative solution which accomplishes the same goal of ensuring that all existing surviving obligations that protect the Port are assumed by future owners via the creation and adoption of a Standard Form of Assignment and Assumption agreement, that would allow for the transfer of parcels between private buyers in the future without prior Port consent, so long as they adhered to the Standard Form of Assignment and Assumption. Any proposed transfer of these obligations that did not utilize a Standard Form of Assignment and Assumption would still require Port consent. This Standard Form of Assignment and Assumption incorporates by reference all applicable surviving obligations contained within the existing Purchase and Sale Agreement in order to ensure that the same level of protection accrues to the Port upon each future transfer.

Staff believes that the proposed Fourth Amendment to the Purchase and Sale Agreement to allow for the creation of and use of this new Standard Form of Assignment and Assumption will result in the same level of risk protection and benefit for the Port but will reduce future Port staff time and effort required by these private party transfers. Based on the analysis contained above, staff recommends approval of the requested Fourth Amendment to the Purchase and Sale Agreement.

BUDGET & STAFFING

There are no impacts to budget or staffing from the proposed action, although approval of the requested amendment to the Purchase and Sale Agreement should reduce the amount of future staff time and effort necessary to process such future private transfer requests.

MARITIME AVIATION PROJECT LABOR AGREEMENT (MAPLA)

The work performed under this contract is not within the scope of the Port of Oakland Maritime and Aviation Project Labor Agreement (MAPLA) and the provisions of the MAPLA do not apply to this work.

STRATEGIC PLAN

The action described herein would help the Port achieve the following goals and objectives in the Port's Strategic Business Plan (2018-2022).

<https://www.portofoakland.com/wp-content/uploads/Port-of-Oakland-Strategic-Plan.pdf>

- Goal: Improve Customer Service

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.

SUSTAINABILITY

Port staff have reviewed the Port's 2000 Sustainability Policy and did not complete the Sustainability Opportunities Assessment Form. There are no sustainability opportunities related to this proposed action because it does not involve a development project, purchasing of equipment, or operations that presents sustainability opportunities.

ENVIRONMENTAL

This action was reviewed in accordance with the requirements of the California Environmental Quality Act (CEQA). The CEQA Guidelines, Section 15061(b)(3) ("the general rule") states that CEQA applies only to projects that have the potential for causing a significant effect on the environment. Adding an amendment to an agreement will not have a significant effect on

the environment and therefore is not a project under CEQA. No further environmental review is required.

GENERAL PLAN

This action does not change the use of any existing facility, make alterations to an existing facility, or create a new facility; therefore, a General Plan conformity determination pursuant to Section 727 of the City of Oakland Charter is not required.

OWNER-CONTROLLED INSURANCE PROGRAM (OCIP)

This action is not subject to the Port's Owner Controlled Insurance Program (OCIP) as it is not a capital improvement construction project.

OPTIONS

- Approve a Fourth Amendment to the Agreement for Purchase and Sale and Ground Lease of Real Property and Escrow Instructions to establish a standard form Assignment and Assumption Agreement for the transfer of privately owned parcels located within the Oak to Ninth District Project site. This is the recommended action.
- Do not approve a Fourth Amendment to the Agreement for Purchase and Sale and Ground Lease of Real Property and Escrow Instructions to establish a standard form Assignment and Assumption Agreement for the transfer of privately owned parcels located within the Oak to Ninth District Project site, which will result in each future such assignment request for the transfer of these private properties to be considered by the Board.

RECOMMENDATION

Adopt an ordinance approving a Fourth Amendment to the Agreement for Purchase and Sale and Ground Lease of Real Property and Escrow Instructions to establish a standard form Assignment and Assumption Agreement for the transfer of privately owned parcels located within the Oak to Ninth District Project site, subject to the approval as to form and legality by the Port Attorney's Office. If the subject Fourth Amendment is not fully executed within 30 days of Board approval of this matter, this authorization shall be null and void unless extended by the Executive Director in his sole and absolute discretion.

Attachment: Site Map