

File No. 150423

Committee Item No. 3

Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: Government Audit and Oversight Date May 21, 2015

Board of Supervisors Meeting Date _____

Cmte Board

- Motion
- Resolution
- Ordinance
- Legislative Digest
- Budget and Legislative Analyst Report
- Youth Commission Report
- Introduction Form
- Department/Agency Cover Letter and/or Report
- MOU
- Grant Information Form
- Grant Budget
- Subcontract Budget
- Contract/Agreement
- Form 126 – Ethics Commission
- Award Letter
- Application
- Public Correspondence

OTHER (Use back side if additional space is needed)

- Draft Settlement Agmt - 4/21/2015
- _____
- _____
- _____
- _____
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- _____
- _____
- _____
- _____
- _____

Completed by: Erica Major Date May 14, 2015

Completed by: _____ Date _____

1 [Settlement of Unlitigated Claim - Association of Bay Area Governments and ABAG Financing
2 Authority for Nonprofit Corporations - City to Receive \$1,296,340.66 Plus Interest and Other
3 Costs]

4 **Resolution approving the settlement of the unlitigated claim in favor of the City against**
5 **the Association of Bay Area Governments (ABAG) and the ABAG Financing Authority**
6 **for Nonprofit Corporations for \$1,296,340.66 plus interest and other costs; the City's**
7 **claim sought recovery following the embezzlement of certain Rincon Hill Community**
8 **Facility District bond funds under the jurisdiction of the Mayor's Office of Housing and**
9 **Community Development.**

10
11 WHEREAS, On June 8, 2006, the Association of Bay Area Governments ("ABAG"),
12 though its ABAG Finance Authority for Nonprofit Corporations, a joint exercise of powers
13 authority organized and existing under and by virtue of the laws of the State of California
14 ("FAN"), caused to be issued \$5,825,000 of Community Facilities District No. 2006-1 (San
15 Francisco Rincon Hill) Special Tax Bonds, Series 2006A (the "Bonds") to finance the
16 acquisition and construction of certain infrastructure improvements within the Rincon Hill
17 Communities Facilities District (the "District"); and

18 WHEREAS, The Bonds were issued pursuant to the terms of Indenture, dated as of
19 June 1, 2006 (the "Original Indenture"), between FAN and Union Bank of California, as trustee
20 (the "Trustee"), and a portion of the proceeds of the Bonds were deposited into Rincon Hill
21 Community Improvements Account and the SOMA Community Stabilization Account
22 (collectively, the "City Accounts"), as established under the terms of that Original Indenture,
23 for the benefit of the City and administered by the Mayor's Office of Housing and Community
24 Development ("MOHCD"); and

1 WHEREAS, Under the terms of the Original Indenture, all funds withdrawn from the
2 City Accounts required the approval of the then Mayor's Office of Public Finance or other
3 appropriate City official; and

4 WHEREAS, In July 2014, FAN, without the City's knowledge or approval, entered into
5 a First Supplemental Indenture of Trust (the "First Supplemental Indenture"), dated as of July
6 1, 2014, by and between FAN and the Trustee, to eliminate City approval of any withdrawal of
7 funds from the City Accounts as set forth under the Original Indenture; and

8 WHEREAS, On the basis of the First Supplemental Indenture and a memorandum
9 authored by then FAN Secretary Clark Howatt ("Howatt"), the Executive Committee of FAN,
10 on July 14, 2014, adopted Resolution No. 14-15 authorizing the transfer, without City approval
11 or notice, of the remaining funds in the City Accounts; and

12 WHEREAS, On or about August 12, 2014, Howatt and Herbert Pike, an ABAG
13 employee and Chief Financial Officer of FAN, delivered instructions to the Trustee to wire
14 \$1,296,340.66 into a Citibank Account in La Jolla, California for an entity denoted "Urban
15 West for Rincon Developers, LLC"; and

16 WHEREAS, Urban West for Rincon Developers, LLC was not an entity entitled to the
17 funds, and it now understood that the transfer was the result of an embezzlement scheme
18 orchestrated by Howatt; and

19 WHEREAS, On March 17, 2015, the ABAG Administrative Board and the Executive
20 Committee of FAN approved the payment of restitution, together with other costs, to the City;
21 and

22 WHEREAS, MOHCD, the Controller and the City Attorney's Office have recommended
23 settlement of such claim by payment by ABAG and/or FAN of \$1,296,340.66, plus interest,
24 and an amount of up to \$30,000 estimated to cover certain City costs, and the approval of the
25 Settlement and Release Agreement to be executed by and among ABAG, FAN and the City,

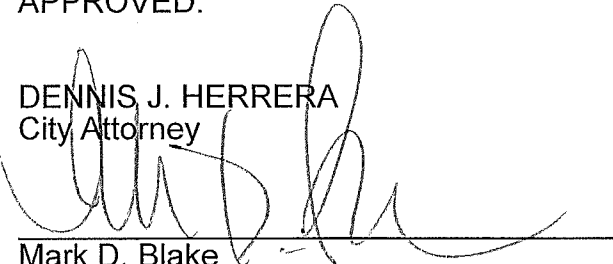
1 including rescission of the First Supplemental Indenture, all intended to restore the City to the
2 situation it was in before the unauthorized distribution of the bond funds; now, therefore, be it

3 RESOLVED, That pursuant to Administrative Code, Section 10.24, the Board of
4 Supervisors hereby authorizes the City Attorney to settle and compromise the claim by
5 payment of \$1,296,340.66, plus interest, and up to \$30,000 to cover certain City costs relating
6 to uncovering the embezzlement scheme and alerting ABAG and FAN; and, be it

7 FURTHER RESOLVED, That the form of Settlement Agreement and Release a copy of
8 which is on file with the Clerk of the Board of Supervisors in File No. 150423 proposed to be
9 executed by and among ABAG, FAN and the City is hereby approved with such final
10 modifications and clarifications therein as the Department and the City Attorney shall finally
11 approve consistent with this Resolution.

12
13 APPROVED:

14 DENNIS J. HERRERA
15 City Attorney

16 
17 Mark D. Blake
18 Deputy City Attorney

RECOMMENDED:

MAYOR'S OFFICE OF HOUSING AND
COMMUNITY DEVELOPMENT

19 
20 OLSON LEE
21 Director

RECOMMENDED:

22 OFFICE OF THE CONTROLLER

23 
24 BEN ROSENFELD
25 Controller

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SETTLEMENT AND RELEASE OF CLAIMS
AND ASSIGNMENT OF RIGHTS AGREEMENT

This SETTLEMENT AND RELEASE OF CLAIMS AND ASSIGNMENT OF RIGHTS AGREEMENT is dated for convenience as April __, 2015 (the "Agreement"), among the ABAG Finance Authority for Nonprofit Corporations, a joint exercise of powers authority organized and existing under and by virtue of the laws of the State of California ("FAN"), the Association of Bay Area Governments ("ABAG") and their respective members, boards and committees, officers and employees (collectively, FAN and ABAG are referred to herein as the "Releasees"), and the City and County of San Francisco, a charter city and county (the "City") for the sole consideration and payment of _____ (\$ _____) (the "Settlement Amount"), the agreements contained herein and the execution and delivery of certain documents (copies attached as Exhibits A-1 through A-X). Releasees and the City may be collectively referred to as the "Parties."

By this Agreement, Releasees and the City intend to resolve and settle any disputes, claims, and obligations they may have against one another arising out of the following circumstances (referred to in this Agreement as the "Occurrence"):

- FAN, without the City's knowledge or approval, entered into an First Supplemental Indenture of Trust (the "First Supplemental Indenture"), dated as of July 1, 2014, to eliminate City approval rights for the withdrawal of funds deposited in trust and for the benefit of the City (the "Bond Account") with MUFG Union Bank, N.A., the trustee (the "Trustee"). Jones Hall, A Professional Corporation ("Counsel") performed certain legal services for FAN with respect to the execution and delivery of the First Supplemental Indenture.
- On the basis of the First Supplemental Indenture and a memorandum authored by then Fan Secretary Clark Howatt ("Howatt"), the Executive Committee of FAN, on July 14, 2014 adopted resolution 14-15 authorizing the transfer of the remaining funds in the Bond Account to Rincon Developers, LLC (as more particularly described below).
- On August 11 and 12, 2014, Howatt and Herbert Pike, an ABAG employee and Chief Financial Officer of FAN executed and delivered instructions to the trustee of the Bond Account to wire \$1,296,340.66 into a Citibank Account in La Jolla, California for an entity denoted "Urban West for Rincon Developers, LLC." The Trustee transferred the funds to this account by wire on August 12, 2014.
- Urban West for Rincon Developers, LLC was not an entity entitled to the funds, and it now believed that the transfer was the result of an embezzlement scheme by Howatt.

To this end, the Parties hereby agree as follows:

Section 1. Release.

A. Upon payment of the Settlement Amount, the execution and delivery to the City of the documents referred to in Section 6 below, and the agreement by FAN and ABAG to retain the firms set forth in Section 3 below, the City hereby releases, acquits and forever discharges the Releasees, excepting only Clarke Howatt, from any and all claims, actions, causes of action, demands, , damages, costs, attorneys' fees, expenses and compensation whatsoever (the "Claims"), which the City now has or may hereafter accrue as a result of or arising out of the Occurrence. Notwithstanding the foregoing, nothing in this Agreement is intended to release, discharge or waive any Claim that the City may have against FAN or ABAG as a result of (i) any investigation by any regulatory or law enforcement agency initiated in connection with the Occurrence, or (ii) illegality or criminal acts (other than the Occurrence) revealed by the reports prepared under Section 3 below.

B. The CITY certifies that it has read Section 1542 of the California Civil Code, which provides: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." The City hereby waives application of Section 1542 of the Civil Code. The City understands and acknowledges that, as a consequence of this waiver of Section 1542, even if the City should eventually suffer additional or further loss, damages, or injury arising out of or in any way related to the Occurrence, City will not be permitted to make any further claims against Releasees to recover for such loss, damages or injury. The City acknowledges that it intends these consequences even as to claims that may exist as of the date of this Agreement and release but which City does not know exist, and which, if known, would materially affect the City's decision to execute this Settlement And Release Of Claims And Assignment of Rights Agreement, regardless of whether City's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

Section 2. Assignment of Claims. The City hereby assigns to FAN and ABAG, jointly and severally, any and all claims, actions, causes of action or demands based on or arising out of the Occurrence that the City may have or may in future have, against Howatt, Counsel or the Trustee.

Section 3. No Admission of Liability; Releasees Undertaking. It is understood and agreed that this settlement is the compromise of a disputed claim and that the consideration given by FAN and ABAG is not to be construed as an admission of liability on the part of any of the Releasees and they deny liability therefore and intend merely to avoid the time and expense of any protracted dispute, to preserve the good relationship of the parties and to restore the City to the status quo before the Occurrence. In furtherance thereof, Releasees hereby agree that within twelve (12) months from the Effective Date (as defined below) they will (i) retain the services of an independent audit firm and to cause such firm to examine the transactions of ABAG or FAN

involving the City occurring over the past 5 years over which Howatt had access or control to determine whether the disbursements from such funds and accounts were for lawful and appropriate purposes and to appropriate parties, and (ii) retain the services of a nationally recognized audit firm to critically examine whether FAN and ABAG have established and/or followed appropriate internal controls the purpose of which could have prevented the Occurrence, and to make recommendations to FAN and ABAG for improvements in such internal controls. The boards of both FAN and ABAG shall timely undertake a review of such reports, and adopt, after due deliberation, suitable recommendations for FAN and ABAG contained in such reports. A copy of said reports shall be made public and a copy provided to the Mayor, the Board of Supervisors of the City, the City Attorney and the City Controller.

Section 4. Board of Supervisor Approval. It is further understood and agreed that once the Releasees shall have approved, signed and delivered this Agreement to the City, the City shall timely submit this Agreement to the Board of Supervisors for approval by ordinance. Notwithstanding anything in this Agreement to the contrary, the Releasees understand and agree that no officer or employee of the City has authority to bind the City to this Agreement unless and until the Board of Supervisors shall have duly enacted an ordinance in its sole and absolute discretion approving this Agreement and such ordinance has further been approved by the City's Mayor in his sole and absolute discretion or otherwise becomes effective under the City's Charter without the Mayor's approval. Therefore, the any obligations of the parties under this Agreement is contingent upon such approvals, and this Agreement shall not be effective unless and until such approvals are obtained in accordance with the City's Charter. If a Board of Supervisors ordinance approving this Agreement becomes effective, then the effective date of this Agreement (the "Effective Date") shall be the same date that such ordinance becomes effective. Notwithstanding the foregoing, if the Board of Supervisors does not adopt an ordinance approving this Agreement by June 1, 2015 (or such later date as the parties may agree in writing), then the parties shall revert to whatever rights, remedies and obligations they have at law or in equity.

Section 5. Payment of Settlement Amount. It is further understood and agreed that on the Effective Date, the Releasees shall cause the sum of \$[Depends on when we close. See accrual from Nadia Sesay]_ (herein referred to as the Settlement Amount) to be wired in immediately available funds to:

Union Bank
[Wire Instructions to Come]

The Settlement Amount consists of the Bond funds improperly transferred, plus interest at the rate of _____, and reimbursement of City's costs in an amount not to exceed \$30,000 relating to matters that are the subject of this Agreement.

Section 6. Within 10 days of the Effective Date, Releasees shall execute and deliver to the City the documents attached to this Agreement as Exhibits A1 through AX. Releasees shall deliver such executed documents to:

NAME of person to whom delivered

Address of person to whom delivered

Section 7. Purpose and Effect. This Agreement is intended to, and the City warrants, that it will dispose of all liability of the Releasees to the City and any department thereof that might now or in the future have a claim against the Releasees as a result of the injuries claimed by the City solely involving the Occurrence, as set forth in Section 1 above. Should any further claim be made by any person or entity controlled by the City to which the Releasees might be liable, directly or indirectly, as a result of the injuries claimed by the City arising from the Occurrence, the City for itself and on behalf of the Releasors, agrees to and will hold harmless and indemnify Releasees of and from any and all liability for such claim, including all costs, expenses and attorneys' fees in defending such claim.

Section 8. Voluntary Agreement. The City further declares and represents that no promise, inducement or agreement not herein expressed has been made to it, and that this Agreement contains the entire agreement between the parties hereto, and that the terms of this Agreement are contractual and not a mere recital. The City and the Releasees each further acknowledge that they are entering into this Agreement freely, knowingly, voluntarily and with a full understanding of its terms. The City and the Releasees further acknowledge that they have consulted with counsel of their own choosing concerning this Agreement and that they were given reasonable time to review and consider the terms of this Agreement.

Section 9. Integrated Document. This is an integrated document. This Agreement constitutes and contains the entire agreement and understanding between the Parties and supersedes and replaces all prior negotiations and agreements proposed or otherwise, whether written or oral, concerning the subject matter of this Agreement.

Section 10. Authority to Bind. The signatories to this Agreement represent and warrant that they have the authority to execute this Agreement and to bind parties on whose behalf they execute this Agreement, that the Agreement does not require court approval, and that it does not conflict with or contravene the terms of any agreement, judgment or order binding or enforceable against the parties hereto.

Section 11. Amendment. It is further agreed that neither this Agreement nor any term or provisions hereof may be changed, waived, discharged or terminated, except by a written instrument signed by the parties hereto and approved by the San Francisco Board of Supervisors.

Section 12. Governing Law. It is further agreed by the parties that the interpretation and performance of this Settlement and Release Agreement shall be governed by the laws of the State of California. Venue for all litigation relative to the interpretation and performance of this Agreement shall be in the courts located in the City and County of San Francisco.

Section 13. Severability. If any provision or provisions of this Agreement shall be held invalid, illegal or unenforceable, the validity, legality and/or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

Section 13. Counterparts. This Agreement may be executed in counterparts, each of which will be considered an original, but all of which, when taken together, will constitute one and the same instrument.

IN WITNESS WHEREOF, the City, ABAG Finance Authority for Nonprofit Corporations, and the Association of Bay Area Governments, each being duly authorized to execute this Settlement and Release Agreement as of the dated date above.

ABAG FINANCE AUTHORITY FOR
NONPROFIT CORPORATIONS

By: _____
Chief Financial Officer

ASSOCIATION OF BAY AREA GOVERNMENTS

By: _____
Executive Director

CITY AND COUNTY OF SAN FRANCISCO

By: _____
Controller

APPROVED AS TO FORM:

Dennis J. Herrera, City Attorney

By: _____

APPROVED BY:

SAN FRANCISCO BOARD OF SUPERVISORS
ORDINANCE/RESOLUTION NO. _____
Final as of _____, 2015.

*[FOR YOUR PROTECTION CALIFORNIA LAW REQUIRES THE FOLLOWING TO APPEAR
ON THIS FORM:*

False or fraudulent claim; penalty. It is unlawful to:

(a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.

(b) Prepare, make or subscribed any writing with intent to present or use the same or to allow it to be presented or used in support of any such claim.

Every person who violates any provision of this section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both (Stats 1935, c.145, p.511 Sec 556).

Signature _____]

