

Approving the Economic Development Conveyance Memorandum of Agreement for the conveyance of former Naval Station Treasure Island to the Treasure Island Development Authority and adopting findings under the California Environmental Quality Act.

SUMMARY OF PROPOSED ACTION

The proposed resolution would authorize the Treasure Island Director to execute and perform the Economic Development Conveyance Memorandum of Agreement (“EDC MOA”) between the Treasure Island Development Authority (“TIDA”) and the Navy.

BACKGROUND

On April 21, 2011, in a joint session with the San Francisco Planning Commission, the Treasure Island Development Authority (“TIDA”) Board of Directors adopted a series of resolutions to approve numerous entitlement and transaction documents relating to the Treasure Island/Yerba Buena Island Development Project (collectively, the “Transaction and Entitlement Documents”), including a Development Agreement (“DA”) and a Disposition and Development Agreement (“DDA”) with Treasure Island Community Development (“TICD”), adopting environmental findings pursuant to the California Environmental Quality Act (“CEQA”), and by Resolution No. 11-19-04/21, approving a draft form of an EDC Memorandum of Agreement (the “Draft EDC MOA”). On June 7, 2011, the Board of Supervisors approved these same Transaction and Entitlement Documents.

In 2011, The Draft EDC MOA was not finalized, partly due to the lack of a utilities agreement, in part as a result of a CEQA challenge, and other reasons. Over the intervening years, and more intensely over the past several months, TIDA Staff, supported by the City Attorney’s office, has negotiated with the Navy to finalize the terms of the EDC MOA.

The EDC MOA establishes the terms, conditions and schedule governing the transfer of title of the former Naval Station Treasure Island property excluding property to be retained by the U.S. Coast Guard and the U.S. Jobs Corp (the “Base”) to TIDA. The EDC MOA is a critical enabling document allowing the transfer and redevelopment of the former base, and, in conjunction with the DA and DDA, create a clear path to title to TICD.

DISCUSSION

In 1993, the former Naval Station Treasure Island was selected for closure and disposition by the Base Realignment and Closure Commission (“BRAC”), and in 1997, the Base closed and the TIDA was created to serve as a single entity responsible for the reuse and development of the Base.

TIDA submitted to the Navy an EDC Application and Business Plan for Naval Station Treasure Island dated June 19, 2000 (the “EDC Application”), for an economic development conveyance

("EDC") of the Base and has from time to time amended the EDC Application based on revisions to the Development Plan for Treasure Island.

In the Spring of 2010, TIDA presented to the Treasure Island Citizens Advisory Board ("CAB"), the TIDA Board, and the Board of Supervisors a term sheet, *Terms of Economic Development Conveyance Memorandum of Agreement for Transfer of Property with United States Navy* ("EDC MOA Terms"), which was endorsed by each of those bodies. In August 2010, Mayor Gavin Newsom, House Speaker Nancy Pelosi, and U.S. Secretary of the Navy Ray Mabus also endorsed the terms for the conveyance of the property from the Navy to the City.

Key Terms As Set forth in the 2011 Draft EDC MOA

These endorsed terms were then incorporated into the Draft EDC MOA, which was approved by the TIDA Board and Board of Supervisors in April and June, respectively, of 2011. The Draft EDC MOA outlined the key economic and other terms associated with transferring the property from the Navy to the Authority. Key terms of the Draft EDC MOA included:

- The Navy will receive guaranteed initial consideration of \$55 million, paid in 10 annual \$5.5 million payments, to be paid by TICD per the DDA.
- The Navy will commit to a schedule for transferring property and, if certain benchmarks are not achieved, adjustments would be made to the payment schedule.
- The Authority will provide the Navy security for the initial consideration – in the event TICD does not make payments on the Authority's behalf – by pledging assignment of its existing rent revenues (existing housing and commercial uses) and certain Infrastructure Financing District (IFD) tax increment financing. This pledge to the Navy, however, is subordinate to bondholders, the San Francisco County Transportation Authority (for specified services relating to the Bay Bridge ramps project) and to TICD under the DDA. In all cases, the General Fund will not be required to make purchase price payments and the Navy will not be able to seek payment from the General Fund.
- TICD will pay to the Navy a profit participation, as follows: (1) up to an additional \$50 million from available net revenues if and when private capital achieves an unleveraged 18% return, and (2) 35% of any available net revenues from the project from and after private capital achieves an unleveraged 22.5% return, for a period terminating 25 years after the initial closing.
- The Navy will convey to TIDA the real property consisting of (i) approximately 1,000 acres of upland and submerged lands on Treasure Island and Yerba Buena Island, (ii) all buildings, facilities, roadways and infrastructure, (iii) all utility infrastructure on and off the island (not including utility lines on the property of other state or federal entities), and (iv) identified personal property owned by the Navy and used at the Base.
- TIDA will be required to accept title to the property tendered by the Navy as long as all closing conditions described in the EDC MOA have been satisfied. If the closing conditions have not been satisfied, TIDA may waive the closing condition or extend the closing for the parcel for a reasonable period of time, but will not be required to accept the property.

The above provisions have not been modified in the EDC MOA being presented for approval by the Board of Supervisors.

Following the approval of the 2011 Transaction and Entitlement Documents, including the Draft EDC MOA, the parties did not execute the EDC MOA as some of the provisions were not yet finalized, most importantly certain provisions regarding the transfer of the utility infrastructure. Due to a number of factors, including a CEQA challenge filed in San Francisco Superior Court, the parties did not prioritize finalization of the EDC MOA.

Over the past year, the parties have negotiated and finalized the EDC MOA as the Navy nears the point where it can fulfill the closing conditions for the proposed initial property transfer. TICD has indicated a desire to begin development soon in response to existing market conditions, although they are entitled to CEQA Delay under the DDA and therefore are not required to begin until the CEQA Delay period has elapsed. The final EDC MOA is attached to the proposed resolution.

Changes Incorporated Into the Final EDC MOA

The financial and other terms of the agreement described above remain unchanged, but key provisions that were absent from the 2011 Draft EDC MOA have been negotiated and each of the forty-seven exhibits have been reviewed and updated/revised as appropriate. The primary changes relate to (i) property that is “radiologically impacted”, (ii) the schedule for transfers of land, (iii) the operation and maintenance of utilities and transfer of utility infrastructure, and (iv) the deletion of the pre-closing parcel. A memorandum summarizing the primary changes between the 2011 Draft EDC MOA and the current EDC MOA was prepared by George Schlossberg & Hilary Jackler of Kutak Rock, LLP, outside counsel to TIDA. The Kutak Rock memorandum is on File with the Clerk of the Board of Supervisors.

Radiologically Impacted Property

Due to recent discoveries and additional information regarding potentially radiologically impacted property, TIDA negotiated additional closing conditions and tolling provisions relating to radiological contamination into the body of the EDC MOA. Staff has advised the TIDA Board and residents regarding these radiological issues, and will continue to keep the TIDA Board and residents advised of all new information as it becomes available.

New closing conditions in the EDC MOA require that State regulators concur with the Navy’s Finding of Suitability to Transfer (“FOST”) and that properties identified as “radiologically impacted” (i.e., subject to further radiological investigation) be released for unrestricted use relative to radiological matters or have a license exemption. The purpose of these closing conditions is to ensure that property transferred to the City be suitable for development consistent with the Development Plan and not be subject after transfer to regulation under the California Radiation Control Law. The parties also agreed to toll purchase price payments if there are delays in the transfer of specified development parcels due to the Navy’s radiological investigation or remediation activities.

The Navy's guiding document for radiological programs on the Base is the Historical Radiological Assessment ("HRA") prepared in 2006. In late June/July, the Navy is expected to release a Supplemental Technical Memorandum to the HRA (the "HRA STM") updating the assessment to reflect new information gained through field surveys and additional historical record investigations. This HRA STM will identify a number of areas as radiologically impacted, but none of these areas are proposed to be part of the initial land transfer ("Initial Closing Parcel"). Before these parcels could be transferred to TIDA, the Navy would need to have achieved the closing conditions described above.

Schedule for Transfers

Exhibit R to the EDC MOA, establishing the schedule by which the Navy shall transfer the property, has been updated to reflect the Navy's current schedule for environmental work on the Base and reviewed with TICD for conformance with the planned schedule for development. Per the current schedule in Exhibit R, the Navy will offer Initial Closing Parcel by October 31, 2014 in the condition required by the EDC MOA, and TIDA would have 60 days (i.e., by the end of December) to accept the transfer. Achieving subsequent transfer dates will require that the Navy meet its target schedules for required remediation activities and fulfill its other closing condition obligations. The last parcel to be transferred is expected to be offered at the end of 2021.

Utilities Maintenance and Utility Infrastructure Transfers

Additional provisions relating to operation, permitting and transfer of the existing utilities were negotiated, the most significant of these being embodied in the Utilities Agreement, Exhibit E to the EDC MOA, but including other exhibits and provisions of the EDC MOA.

TIDA will continue to assume all responsibility for utilities as set forth in the Cooperative Agreement so long as the Cooperative Agreement remains in effect. The Navy will transfer to TIDA ownership of utility infrastructure within individual parcels at the same time as the Navy transfers the land that contains the infrastructure. But the Navy will continue to own certain "key infrastructure" that the Navy needs to provide utility service to its retained property until the Developer builds new infrastructure and that infrastructure is duly accepted by a utility provider, such as the SFPUC. Each party will be responsible for any damage that it causes to utility lines serving the other party. The Cooperative Agreement remains terminable by TIDA on 30 days notice, but this termination is very unlikely and may be difficult to rely upon as a practical matter. The Navy has no responsibility to provide utilities.

The utilities agreement also includes specific provisions regarding the transfer of permitting responsibility for each of the utility services. In short, TIDA will assume responsibility for permitting the utilities on the land that it acquires at the time of acquisition. The parties agreed to delay the transfer of permitting responsibility for the existing wastewater treatment facility until the end of 2020. TIDA pushed for this late date to provide a greater window of time in which a new wastewater treatment facility could be constructed and to avoid or defer as long as possible being the entity listed on the regulatory permit for this old and difficult to maintain plant. TIDA now must work with the SFPUC on the timing and financing of the replacement

facility. While TIDA and SFPUC staff have started discussions on this capital project, no agreement has been reached at this time.

Under the EDC MOA, TIDA's utility obligations are subject to appropriation, and TIDA staff agrees that it will seek annual appropriations and required approvals to continue to operate and maintain the utility systems generally consistent with past practices so long as the Cooperative Agreement remains in effect. TIDA also agrees that it will spend all utility revenues it collects on utility-related costs. TIDA will investigate and respond to any utility notices of violation from a regulatory agency. But, if TIDA traces a violation or discharge to a Navy contaminant or responsibility, then the Navy will be required to prospectively assume responsibility for the violation or discharge.

Deletion of the Pre-Closing Parcel

Finally, the original EDC MOA anticipated a "pre-closing transfer" of property required to support the I-80/YBI Westbound Ramps Project before the Initial Closing, but that transfer has already been accomplished. Due to the availability of federal funding and the schedule for completion of the Ramps Project, the Federal Highway Administration transferred the Property to TIDA in 2013 and therefore the parties deleted all references to this pre-closing parcel in the EDC MOA.

Environmental Review

When the Board of Supervisors approved the Transaction and Entitlement Documents for the Project on June 7, 2011, one of the actions was to affirm the Planning Commission's certification of the Final Environmental Impact Report ("FEIR") and adopt CEQA findings of the FEIR, including adopting a mitigation monitoring and reporting program and the statement of overriding considerations.

The San Francisco Planning Department has recently reviewed two issues which had been raised regarding the information presented in the FEIR and its conclusions. Environmental Planning staff with the Planning Department reviewed information from the California Department of Public Health regarding radiological materials discovered in the soil on Treasure Island and a United States Geological Survey ("USGS") study of potential tsunami effects (*The SAFRR Tsunami Scenario – Improving Resilience for California*, USGS Fact Sheet 2013-3081, August 2013).

In a memorandum to file dated April 29, 2014, Planning Department staff "concluded that no supplemental or subsequent EIR is required because there are no substantial changes in the project analyzed in the EIR, no changes in circumstances under which the project is being undertaken, and the information presented in the documents provided does not provide new information indicating that new significant impacts would occur or that impacts identified in the Final EIR as significant impacts would be substantially more severe." A copy of the Planning Department Memorandum is on File with the Clerk of the Board of Supervisors.

CEQA Challenge

After the Board of Supervisors affirmed the Planning Department Certification of the FEIR, a Petition for Writ of Mandate challenging the environmental review for the Project under the California Environmental Quality Act ("CEQA") was filed in San Francisco Superior Court on July 18, 2011. The challenge was ultimately dismissed in its entirety by the Court in an Order Denying the Petition for Writ of Mandate on December 14, 2012, but the ruling was appealed to the California Court of Appeal. Written briefs have been filed by the parties and oral argument before the Court is scheduled for May 22, 2014.

Nothing in the lower court ruling or pending appeal would prohibit land transfer and/or development from proceeding, and therefore the City can proceed with implementation of the Project. Because the case is still in litigation, there is some degree of uncertainty. The Court could, in theory, find that the EIR prepared for the Project is inadequate, and invalidate the approvals or fashion some other remedy, but that risk is perceived to be small based upon the Superior Court ruling, and TICD has indicated its intention to proceed in advance of a ruling on the appeal.

Next Steps

Upon Board of Supervisors approval of the EDC MOA and its execution, the Navy is expected to offer the Initial Closing Parcel on or near October 31, 2014, provided that they have met all of the required closing conditions. The principle outstanding condition is for the Navy to issue a FOST covering these parcels and secure State (acting through the Department of Toxic Substances Control or "DTSC") concurrence to the FOST. Before the State can concur with the FOST, the Navy must issue a Remedial Action Completion Report for Site 33 and the HRA STM, both of which should be issued in late June. The State must concur with both of these documents as they may influence the contents of the FOST.

When the Navy meets all of the closing conditions and offers the Initial Closing Parcel to TIDA, TIDA will have 60 days to accept the property. After taking title to the property, TIDA will need to make a land trust exchange with the State Lands Commission covering portions of Treasure Island planned for development that are subject to the Tidelands Trust.

In anticipation of the EDC MOA and the initial transfer of property from the Navy to TIDA, TICD has issued Requests for Proposals for consultants to assist in preparation of plans for the First Major Phase and Subphase of development under the DDA. TICD's development will not begin until after they have submitted to TIDA, and TIDA has approved, applications for the first Major Phase and/or Subphase, as set forth in the DDA. Upon TIDA's approval of the Phase and Subphase applications, the fulfillment by TICD of other closing obligations, and completion of the Tidelands Trust exchange, TIDA would transfer the applicable development parcels of the first Subphase area to TICD, and TICD could begin development. Based on their current schedule, TICD anticipates requesting TIDA approval of the first Subphase application in June 2015. As noted above, TICD is entitled to CEQA Delay and therefore this schedule could be pushed back as determined by TICD in accordance with financial or other constraints, but TICD

has indicated their intention to proceed with preparation of the application materials and, upon their approval, to begin development.

RECOMMENDED ACTION

The EDC MOA is the final fundamental agreement that must be executed to enable the transfer and development of the Base to proceed. The proposed agreement secures commitments from the Navy to complete its environmental remediation in a manner and on a schedule that conforms with the reuse plans for the Base. It is recommended that the Board of Supervisors adopt findings under CEQA, approve the EDC MOA, and authorize the Treasure Island Director to execute and perform the EDC MOA.

Prepared by:



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