Oakland Oversight Board Memorandum

TO: Oakland Oversight Board

FROM: Fred Blackwell

SUBJECT: 1100 Broadway Project OPA

DATE: February 25, 2013

Amendment

ITEM: #3

EXECUTIVE SUMMARY

On February 4, 2013, staff of the Oakland Redevelopment Successor Agency (ORSA) requested approval from the Oakland Oversight Board of ORSA board action taken on December 18, 2012, approving an amendment to an Amended and Restated Owner Participation Agreement (OPA) between ORSA and SKS Broadway, LLC (SKS) to extend certain deadlines for the development of a mixed-use project at 1100 Broadway in order to avoid a default by SKS.

At the meeting, the Oversight Board's legal counsel questioned the authority of the Oversight Board to approve the proposed amendment to the OPA. Specifically, legal counsel cited Health and Safety Code Section 34181(e), which gives an oversight board the authority to renegotiate or amend an existing agreement if the renegotiation increases net revenues to the taxing entities, and expressed concern that the OPA amendment as proposed does not generate any additional revenues to the taxing entities and is therefore not in compliance with the dissolution statute.

At this time, Successor Agency staff and SKS have modified the terms of the OPA amendment to require the developer to pay ORSA a \$25,000 extension fee for an initial two-year extension, as well as another \$25,000 fee payable by SKS after two years in return for an optional second two-year extension. SKS would still be required to pay ORSA the \$440,000 in liquidated damages if they fail to meet the performance schedule as extended. The \$25,000 fee was determined on the basis of a cost-of-funds analysis.

The proposed amendment, as modified, will increase net revenues to the taxing entities by \$25,000 to \$50,000 on top of the possible liquidated damages payment, and so would be within the legal approval authority of the Board per Section 34181(e). The amendment would be in the best interests of the taxing entities because of the payment of the fee, available for distribution to the taxing entities, but more importantly because of the general fiscal benefits to the taxing entities from keeping the developer in the deal and improving the chances that a tax-generating project will actually get built.

At this time, staff requests Oversight Board approval of new legislation to be submitted for ORSA board consideration authorizing an amendment to the OPA that will (1) extend the deadlines for SKS to complete a number of pre-construction activities by two years, (2) extend the date on which SKS must start project construction by two years, to June 25, 2015, and the date by which it must complete project construction by two years, to April 27, 2017, for a fee of

\$25,000, and (3) give SKS an option to extend the new construction commencement and completion dates by an additional 24 months for second payment of \$25,000.

The following analysis will also address the OPA Extension Option that was discussed by the board's legal counsel raised at the February 4, 2013 Oversight Board meeting.

ANALYSIS

Health and Safety Code Section 34181(e), gives an oversight board the authority to renegotiate or amend an existing agreement if the renegotiation increases net revenues to the taxing entities, and if the amendment is found to be in the best interests of the taxing entities.

The Extension Fee

In response to the concerns raised by the Oversight Board's legal counsel regarding the authority of the Oversight Board to approve the proposed amendment to the OPA, Successor Agency staff and SKS have modified the terms of the amendment to require SKS to pay ORSA a \$25,000 fee for an initial two-year extension, as well as an additional fee of \$25,000, should the developer exercise its option for a second two-year extension. The developer would still be required to pay ORSA the \$440,000 in liquidated damages if they fail to meet the performance schedule as extended.

The \$25,000 fee was set at an amount greater than the cost to the taxing entities of delaying receipt of the liquidated damages. In setting the fee staff considered the cost of borrowing short-term funds for cities and the Consumer Price Index ("CPI"). The average interest rate for Tax and Revenue Anticipation Notes ("TRANs", which are financing vehicles used by cities to meet short-term cash flow needs) over the last five years was 2.2 percent. Thus far during Fiscal Year 2012-13, this rate has been even lower at 1.0 percent, but higher over the last ten years at approximately 3.4 percent. The CPI shows a similar pattern. For last year the CPI was 1.7 percent, for the last five years the index averaged 1.8 percent, and for the last ten years it has averaged 2.4 percent. On the basis of these indices, staff set the extension fee at \$25,000 for each 2-year period. This amount equals a return of slightly more than 2.8 percent on the liquidated damages per year payable to the taxing entities, which is a higher rate than the TRAN and the CPI.

As a result, the proposed extension payments will increase the net revenues to the taxing entities by \$25,000 to \$50,000 in addition to the possible liquidated damages payment. As a result, the amendment will be within the legal approval authority of the Board per Section 34181(e). The amendment would be in the best interests of the taxing entities because of the payment of the fee, available for distribution to the taxing entities, but more importantly because of the general fiscal benefits to the taxing entities from keeping the developer in the deal and improving the chances that a tax-generating project will actually get built.

The OPA Extension Option

At the Oversight Board meeting, the board's legal counsel also referred to an option in the current OPA that would allow SKS to receive a one-year extension for a payment of \$200,000 under a separate Purchase and Sales Agreement (PSA) between the City of Oakland and SKS for the acquisition of a City-owned 145-space garage located at 409 – 12th Street (the "UCOP Garage") inside the University of California Office of the President building at 1111 Franklin.

This option was presented to the ORSA board as an alternative to the four-year extension. The board rejected this alternative because a one-year extension would provide insufficient time for SKS to complete all predevelopment requirements necessary to start construction by June of 2014. SKS will need approximately 61 weeks to perform the following tasks after they have secured an anchor tenant (which they have been unable to do to date):

- A. Completion of Construction Documents: 24 weeks
- B. Negotiate/Finalize Project Financing: 32 weeks (concurrently with A above): 32 weeks
- C. Negotiate/Finalize Construction Contract (concurrently with A & B above): 32 weeks
- D. Permitting: 12 weeks
- E. Construction of OPA Pre-commencement activities¹: 17 weeks

In light of the fact that the developer will initiate this work only after they signed up an anchor tenant for the Project, extending the commencement date to June 26, 2014 (or by another 68 weeks beginning in March) will simply not be enough time for SKS to complete these tasks. As a result, the ORSA board decided to grant SKS a longer extension given the developer's good faith attempts to pursue the project in spite of adverse economic conditions and given the need to give the developer more time to market the project, obtain financing and permits, and reach the point where they're ready to start construction.

The Oversights Board's legal counsel also argued that the payment of an additional \$200,000 deposit to extend the construction commencement date until June 26th of 2014 would constitute a net benefit to the taxing entities and thus meet the intent of Health and Safety Code Section 34181(e). However, the funds referred to in the OPA are deposits held by the City, not ORSA, under the PSA for the UCOP Garage (since the City, not ORSA, holds title to the garage and will be selling the facility to SKS). So the forfeiture of the \$100,000 "Second Deposit" in exchange

- Owner's procurement of all approvals and permits necessary to commence construction.
- Owner's issuance of a notice to proceed to the Project contractor
- Grading of the entire Project site.
- Driving of all piles into the Project site.
- Installation of all forms necessary for the pouring of the Project foundation.
- Installation of all steel necessary for the pouring of the Project foundation.
- First pour of concrete for the Project foundation.

Completion of this work assumes that significant structural work in the KSB will be finished prior to driving piles and pouring foundation for the new tower.

According to the OPA, construction shall be deemed commenced upon completion of all of the following:

for the OPA extension would go exclusively to the City, with nothing accruing to the taxing entities. Nor would the taxing entities benefit at all from the \$200,000 "Third Deposit", which would also be deposited with the City and forfeited completely to the City if the extended OPA deadlines are not met. In this regard, the City, pursuant to Ordinance No. 13148 C.M.S., authorized (1) an extension of the date for closing the sale of the UCOP Garage by 24 months, from June 2013 to June 2015, while maintaining the current \$100,000 deposit in escrow, and (2) an extension of SKS's option to extend the new closing date by an additional 24 months to June 2017 upon making an additional deposit of \$200,000 into escrow by June 2015. It should also be noted that the UCOP garage is considered a government use property that will not be part of ORSA's long-range Property Management Plan. As a result, the UCOP Garage will not be returned to ORSA.

In order to maintain ORSA control and a measure of certainty about the project scope and development schedule, and about the timing for receipt of taxes, staff requests Oversight Board approval of an amendment to the OPA to be submitted to ORSA that will (1) extend the deadlines for SKS to complete a number of pre-construction activities by two years, (2) extend the date on which SKS must start project construction by two years, to June 25, 2015, and the date by which it must complete project construction by two years, to April 27, 2017, for a fee of \$25,000, and (3) give SKS an option to extend the new construction commencement and completion dates by an additional 24 months for second payment of \$25,000.

For questions regarding this report, please contact Jens Hillmer, Urban Economic Coordinator at 238-3317.

Respectfully submitted,

/s/

FRED BLACKWELL Assistant City Administrator

Reviewed by: Gregory Hunter, Neighborhood Investment Officer Office of Neighborhood Investment

Prepared by:
Jens Hillmer
Urban Economic Coordinator
Office of Neighborhood Investment

OAKLAND OVERSIGHT BOARD

RE	SO	LU'	TION	No.	2013-	

A RESOLUTION APPROVING AN AMENDMENT TO AN OWNER PARTICIPATION AGREEMENT BETWEEN THE OAKLAND REDEVELOPMENT SUCCESSOR AGENCY AND SKS BROADWAY LLC TO EXTEND DEVELOPMENT DEADLINES FOR A MIXED-USE PROJECT AT 1100 BROADWAY

WHEREAS, on September 6, 2007, the former Redevelopment Agency of the City of Oakland (the "Redevelopment Agency") entered into an amended and restated owner participation agreement ("OPA") with SKS Broadway, LLC ("SKS"), pursuant to Redevelopment Agency Resolution No. 2006-0088 C.M.S., with regard to the development of a mixed-use office project ("Project") located at 1100 Broadway ("Property") in the Central District Redevelopment Project Area; and

WHEREAS, the OPA, as amended, establishes various parameters for the Project, provides the Redevelopment Agency certain approval rights regarding the 1100 Broadway Project, and requires SKS to accomplish a number of specific development milestones by specific deadline dates; and

WHEREAS, on June 1, 2010, pursuant to Resolution No. 2010-54 C.M.S., the OPA was amended to extend performance deadlines to their current dates; and

WHEREAS, SKS has made good faith efforts to reach those specific development milestones by the specified dates, but has been unable to do so because of lingering adverse economic conditions in Oakland's downtown office market that hinder SKS's efforts to obtain the required anchor tenants and debt financing for the Project; and

WHEREAS, SKS has to pay liquidated damages in the amount of \$440,000 to ORSA if it fails to meet the current development milestones and defaults on the OPA; and

WHEREAS, SKS has requested to extend the deadlines for Project construction commencement and completion as defined in the OPA; and

WHEREAS, the Redevelopment Agency dissolved on February 1, 2012, and the Oakland Redevelopment Successor Agency ("ORSA") has taken over the interests and obligations of the Redevelopment Agency with respect to the OPA and the Project; and

WHEREAS, on December 18, 2012, the ORSA board approved Resolution No. 2012-13 C.M.S., authorizing the ORSA Administrator, or her designee, to negotiate and execute an amendment to the OPA to (1) extend the date on which SKS must start Project construction by two years, from June 25, 2013, to June 25, 2015, and the date by which it must complete Project construction by two years, from April 27, 2015, to April 27, 2017 (the "First Extension"); (2) give SKS an option to extend the new construction commencement and completion dates by an additional 24 months (the "Second Extension") at no cost to SKS; and (3) extend the deadlines for submission of final construction plans, the construction contract, and the financing plan to ORSA until such dates as deemed appropriate and reasonable by the Administrator or her designee such that SKS is able to meet the commencement and completion deadlines above; and

WHEREAS, California Health and Safety Code Section 34181(e) provides that the oversight board shall direct the successor agency to determine whether any contracts, agreements, or other arrangements between the dissolved redevelopment agency and any private parties should be terminated or renegotiated to reduce liabilities and increase net revenues to the taxing entities, and present proposed termination or amendment agreements to the oversight board for its approval, and that the board may approve any amendments to or early termination of those agreements if it finds that amendments or early termination would be in the best interests of the taxing entities; and

WHEREAS, the Property and development of the Project, in conjunction with the sale of a City-owned parking garage on an adjacent property will generate financial benefits in the form of property taxes and sales taxes, and such property and sales taxes will be distributed to specified taxing entities in Alameda County pursuant to state law; and

WHEREAS, it is estimated that the developed Project on the Property will produce \$1.6 million in property taxes per year for the taxing entities upon completion of construction; and

WHEREAS, it is estimated that the net present value over a 10-year period accruing to the taxing entities from property taxes generated by the completed Project is \$13.7 million:

WHEREAS, the proposal has been modified to require that SKS pay a fee of \$25,000 for the First Extension and that SKS pay an additional fee of \$25,000 for the optional Second Extension; and

WHEREAS, the extension amendment as modified will increase net revenues to the taxing entities in the form of the extension fees, as well as encourage the developer to stay with the Project resulting in the long-term fiscal benefits to the taxing entities from completion of Project development noted above; and

WHEREAS, termination of the OPA would leave the future of the Property and the Project uncertain; now, therefore:

Based on the foregoing recitals and the documentation presented to the Oakland Oversight Board at a public meeting, the Oakland Oversight Board does resolve as follows:

SECTION 1. The Oakland Oversight Board finds and determines that the proposed amendments to the OPA as approved by ORSA will be of benefit to the taxing entities that will reap substantial additional property taxes from the Property, that the amendments will increase net revenue to the taxing entities, and that the proposed amendments under such conditions and yielding such benefits will best maximize the value of the Property for the taxing entities.

SECTION 2. The Oakland Oversight Board hereby approves the action of the ORSA board authorizing the ORSA Administrator to negotiate and enter into an amendment to the OPA with SKS consistent with the terms of this Resolution, and consistent with all applicable laws, to

- (1) extend the date on which SKS must start Project construction by two years, from June 25, 2013, to June 25, 2015, and the date by which it must complete Project construction by two years, from April 27, 2015, to April 27, 2017, for a fee of \$25,000 payable to ORSA;
- (2) give SKS an option to extend the new construction commencement and completion dates by an additional 24 months for a fee of \$25,000 payable to ORSA; and
- (3) extend the deadlines for submission of final construction plans, the construction contract, and the financing plan to ORSA until such dates as deemed appropriate and reasonable by the ORSA Administrator or her designee such that SKS is able to meet the commencement and completion deadlines above.

This approval is contingent on the ORSA board approving the modified terms for the extension set forth in this Resolution.

SECTION 3. The Oakland Oversight Board requires that the amendment to the OPA, shall be reviewed and approved as to form and legality by ORSA and Oversight Board General Counsel prior to execution by ORSA, and shall be placed on file with the ORSA Secretary.

ADOPTED	, OAKLAND, CALIFORNIA,	, 2013						
PASSED BY THE FOLLOWING VOTE:								
AYES-	CARSON, GERHARD, LEVIN, ORTIZ, QUAN, SMITH, TUCKER							
NOES-								
ABSENT-	•							
ABSTENT	ION-							
		ATTEST:						
		,	SECRETARY, OAKLAND					
			OVERSIGHT BOARD					