

Oakland Oversight Board

Memorandum

TO: Oakland Oversight Board
SUBJECT: Fox Theater Reaffirmations

FROM: Gregory Hunter
DATE: May 22, 2014
ITEM: #5

EXECUTIVE SUMMARY

On October 31, 2006 the Redevelopment Agency of the City of Oakland (“Agency”) and City approved resolutions authorizing amendments to the DDA between the Agency and Fox Oakland Theater Inc. (“FOT”). The amendments modified and/or added the following guarantees and indemnities by the Agency: 1) Loan Repayment Guarantee for a Conventional Loan not to Exceed \$6,500,000; 2) Completion and Historic Tax Credits Compliance Guarantee; 3) HTC and NMTCs Recapture Guarantee; and 4) Environmental Indemnification.

Per Assembly Bills 1x26 and 1484, the Oakland Redevelopment Successor Agency (“ORSA”) is the successor to all rights and obligations of the Agency pursuant to the provisions of Health and Safety Code Section 34173, including ORSA's obligations under the DDA and under various guaranties entered into in connection with the financing and the tax credits used to fund the development. But the holders of the various guarantees and indemnities, primarily Banc of America Community Development Corporation (“BoA CDC”) as the main investor in the tax credits, have requested that ORSA reaffirm these guarantees.

OUTCOME

The Agency provided various guarantees and indemnities to the Historic Tax Credit (HTC) and New Markets Tax Credit (NMTC) investor(s) for the Fox Theater Project (“Project”). This legislation will authorize ORSA to assume the Agency’s obligations by providing the investor(s), and related entities with three Assumption, Reaffirmation and Ratification of Indemnity documents for the 2006 and 2009 HTC and NMTC transactions for the Project.

BACKGROUND/LEGISLATIVE HISTORY

The Fox renovation is one of the most unique rehabilitation projects ever undertaken by the Agency. Because it combined new building technology with historic preservation, the challenges to this project were: (1) to preserve the building and modernize it at the same time; (2) to ensure that the City’s requirements have been met to make the building systems fully compliant with current codes, (3) to balance the need for seismic safety with historic building integrity; (4) to preserve architectural detail and still accommodate all new mechanical, electrical and plumbing requirements; and (5) to ensure compliance with HTC regulations while meeting the needs of the theater’s operators and users. The fact that the building stood vacant for over forty years compounded these renovation challenges.

The substantial development costs necessary to manage these complexities required the Agency to enter into a series of ownership and financial structures, and various agreements to ensure that the Project would receive HTCs and NMTCs needed to finance the Project. These are summed up as follows:

On July 19, 2005, the Agency and City Council ("City") approved resolutions authorizing a Disposition and Development Agreement (DDA) between the Agency and Oakland Renaissance NMTC, Inc. ("ORNMTC"), a non-profit corporation, that was required to apply for and accept HTCs- Agency Resolution No. 2006-0046 C.M.S. and City Resolution No 79382 C.M.S.

On July 18, 2006, the Agency and City approved resolutions authorizing an Amended and Restated DDA between the Agency and ORNMTC, which was later assigned to a newly created non-profit corporation called Fox Oakland Theater Inc. ("FOT"). FOT replaced ORNMTC and was established specifically as the entity to control the Project via a ground lease and DDA, and to own and manage the other financial entities created to capture the HTCs-Agency Resolution No. 2006-0057 C.M.S. and City Resolution No. 80057 C.M.S.

On July 15, 2008 the Agency approved Resolutions No. 2008-0075 C.M.S. through 2008-0080 C.M.S. authorizing the Agency Administrator to: (1) amend the DDA to provide for a Bridge Loan to FOT for \$7,450,000 to pay for increased project costs; (2) to enter into a Tenant Improvement Grant Agreement with GASS Entertainment Inc., the selected theater operator, for \$2,000,000 to pay for theater tenant improvements; (3) to enter into a loan agreement with Fox Theater Master Tenant, LLC ("FTMT"), which is controlled by FOT via the ground lease and DDA, for \$2,700,000 to pay for additional theater tenant improvements and restaurant tenant improvements; (4) to enter into a loan agreement with the Oakland School for the Arts (OSA) for \$2,300,000 to fund the school tenant improvements; (5) to apply for, accept and appropriate grant funds from: (a) California Cultural And Historical Endowment Grant for \$1,400,000; (b) Department Of Housing And Community Development Infill Infrastructure Grant for \$10,000,000; and (c) a Federal Housing And Urban Development Grant for \$3,000,000; and (6) to accept and appropriate \$68,750 in historic mitigation funds from Signature At Broadway Grand LLC.

On October 31, 2006 the Agency and City approved resolutions authorizing amendments to the DDA between the Agency and FOT. The amendments modified and/or added the following guarantees and indemnities by the Agency:

- Modifying the Existing Loan Repayment Guarantee from the Agency to FOT for a Conventional Loan to FOT not to Exceed \$6,500,000, and the Existing Contingent Loan Not to Exceed \$3,530,000 for Costs Associated with Obtaining HTCs and NMTCs, to Include Operating Costs within the Scope of the Guarantees;
- A Guarantee by the Agency in Favor of the Tax Credit Investment Entities for (A) Completion of the Fox Theater Rehabilitation Work in Compliance with

Applicable Laws and the Historic Tax Credits Requirements, (B) Payment of Carrying Costs through Lease Up, and (C) that the Project Is Free of Liens Upon Completion of Rehabilitation;

- A Guarantee by Agency in Favor of the Tax Credit Investment Entities Relating to the HTCs and NMTCs in the Event the Tax Credits Are Not Awarded or Are Recaptured by the Internal Revenue Service (IRS) as a Result of Non-Compliance With IRS Tax Credit Requirements by FOT or Its Affiliated Entities;
- Environmental Indemnification for the Lenders and Tax Credit Investors to Protect Against Existing and Future, Known or Unknown Environmental Matters.

On May 19, 2009 the Agency approved a resolution authorizing an amendment to Resolution No. 2008-0077 C.M.S. to divide the \$2.7 million loan to FTMT into two loans, (1) a \$1.4 million loan to FTMT for restaurant tenant improvements, and (2) a \$1.3 million loan to Friends of the Oakland Fox (“FOOF”), Agency Resolution No. 2009-0061 C.M.S.

On January 5, 2010 the Agency approved a resolution authorizing an additional \$2.0 million loan to FOT to pay for: (1) sub-contractors for changes in the design, construction and installation of mechanical, electrical and plumbing systems due to changing code requirements, modified tenant program requirements and unforeseen conditions; (2) modifications to the wrap building and the future restaurant space required by the National Park Service (“NPS”) and the State Office of Historic Preservation (“SHPO”) in order to ensure historic tax credit status; (3) outstanding State and Federal taxes, Agency Resolution No. 2010-0010 C.M.S.

These resolutions allowed the Project to reach substantial completion. The OSA opened in January 2009, the Fox Theater and the Den opened in February 2009, and Rudy’s Can’t Fail Café opened June 1, 2011.

Per Assembly Bills 1x26 and 1484, ORSA is the successor to all rights and obligations of the Agency pursuant to the provisions of Health and Safety Code Section 34173, including ORSA's obligations under the DDA and under various guaranties entered into in connection with the financing and the tax credits used to fund the development.

ANALYSIS

The Fox Theater project just went through the process of retiring two NMTC-enhanced loans totaling \$31.0 million through Bank of America and the Charter School Development Corporation. ORSA had previously worked with the investors to include the various guaranties, indemnities and DDA obligations on each of the Recognized Obligation Payment Schedules (“ROPS”). These obligations have been approved by the State Department of Finance on each ROPS, although to date no payments have been required for any of the guaranties. As part of the unwinding of the two NMTC enhanced loans, the tax credit investor has requested that

ORSA formally assume and reaffirm its obligations under the guarantees. **The proposed Assumption and Reaffirmation does not increase or change the liability of ORSA under the agreements**, but rather just formalizes the fact that ORSA, as the successor to the Agency, is now obligated under these guarantees.

The guarantees protect the investor in the event that the tax credits are recaptured. Recapture events could occur if the project or FOT is not compliant with NMTC or HTC re regulations. The guarantees remain in place until expiration of the statute of limitations for an IRS audit of the NMTCs and the HTC's, which is generally three years after the expiration of the respective compliance periods for each tax credit, namely seven (7) years for the NMTCs and five (5) years for the HTC's. All of these recapture periods will be completed by December 31, 2018 at which time the guarantees will end.

Long Range Property Management Plan

The Fox Theater is included in the Long Range Property Management Plan. The Redevelopment Agency owned the property and transferred development rights to entities created for the project under a lease disposition and development agreement

COST SUMMARY/IMPLICATIONS

The legislation does not commit ORSA to any new obligations or costs. ORSA is just formally assuming, reaffirming and ratifying obligations that have been included on the ROPS for a couple of years, including the following obligations:

ROPS Line	Payee	Description/Project Scope	Outstanding Obligation
97	Fox Oakland Theater, Inc.	DDA obligation for investor buyout, management of entities create for the benefit of the Redevelopment Agency	\$3,530,000
98	Bank of America, NA	Loan Payment Guaranty for construction/permanent loan	\$5,379,526
99	Bank of America Community Development Corporation	New Markets Tax Credit Loan Guaranty	\$12,090,000
100	Bank of America Community Development Corporation	New Markets Tax Credit Loan Guaranty	\$1,950,000
101	National Trust Community Investment Fund III	New Markets Tax Credit and Historic Tax Credit investment Guaranty	\$15,997,284

Most of these obligations are contingent and would only require any payments should the tax credits be recaptured. It should be noted that item 97 is a real obligation that is expected to come due in the 2015-16A ROPS. The Fox Theater received almost \$26 million in tax credit equity for the renovation project, but in order to unwind the tax credit deals there are ORSA obligations to various entities that will need to be paid over the next couple years. When the project was approved it was anticipated that these obligations would be paid from future Redevelopment tax increment or tax allocation bonds. The obligation will now need to be paid from the Redevelopment Property Tax Trust Fund. The DDA requires that ORSA pay these amounts to the Fox Theater entities set up by the City and Agency to develop the Fox Theater and will be used to buy back control of the entities from the investor(s).

For questions regarding this report, please contact Patrick Lane, Development Manager at 238-7362.

Respectfully submitted,

/S/

GREGORY HUNTER
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Economic and Workforce Development Department

Prepared by:
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OAKLAND OVERSIGHT BOARD

RESOLUTION No. 2014-_____

A RESOLUTION RATIFYING THE OAKLAND REDEVELOPMENT SUCCESSOR AGENCY'S ASSUMPTION, REAFFIRMATION AND RATIFICATION OF GUARANTIES AND INDEMNITIES REQUIRED FOR TAX CREDIT FINANCING FOR THE FOX THEATER PROJECT

WHEREAS, on July 19, 2005, the Redevelopment Agency of the City of Oakland ("Redevelopment Agency") authorized the Agency Administrator to enter into a Disposition and Development Agreement ("DDA") with Oakland Renaissance NMTC, Inc. ("ORNMTC"), a California non-profit corporation, for the renovation for the Fox Theater Project (the "Project"); and

WHEREAS, on July 18, 2006, the Redevelopment Agency authorized the Agency Administrator to amend the DDA and permit the DDA to be assigned to Fox Oakland Theater, Inc. ("FOT") a California non-profit corporation; and

WHEREAS, the Redevelopment Agency evaluated the costs of renovating the Fox Theater and determined that in order to complete the project, it would need a variety of sources of financing, including: state and federal grants, private fund raising, New Market Tax Credits (NMTC), Historic Tax Credits (HTC), and financing from the Agency; and

WHEREAS, the Project was ultimately financed with a combination of sources of funds including NMTCs and HTCs; and

WHEREAS, as a condition to obtaining the NMTC and HTC investments in the Project, the Redevelopment Agency was required to provide certain guaranties and indemnities to the investors, including Banc of America Community Development Corporation and National Trust Community Investment Fund III, LLC; and

WHEREAS, on October 31, 2006, the Agency authorized the Agency Administrator to further amend the DDA and enter into agreements with tax credit financing entities to provide the following guaranties:

1. A guaranty that the Fox theater project will be completed in accordance with the requirements of the National Park Service certification for historic property status and for eligibility for HTCs;

2. A guaranty against loss of tax credits due to a breach by FOT entities of the applicable tax credit rules and regulations;
3. A guaranty that the Fox Theater Project has funds sufficient to provide the following:
 - (a) replacement reserves,
 - (b) recurring expenses,
 - (c) debt service payments,
 - (d) preferred return for tax credit financing, and
 - (e) reserve for tax credit buyout;
4. An indemnity for protecting the tax credit financiers, and the commercial lending entity from existing and future, known or unknown losses from environmental contamination; and

WHEREAS, the Redevelopment Agency, consistent with the approved Amended DDA, entered into certain guaranty agreements for the benefit of the NMTC and HTC investors; and

WHEREAS, the Oakland Redevelopment Successor Agency (“ORSA”) is the successor to all rights and obligations of the Redevelopment Agency pursuant to the provisions of Health and Safety Code Section 34173; and

WHEREAS, Banc of America Community Development Corporation has requested that ORSA enter into two Assumption, Reaffirmation and Ratification of Indemnity Agreements (“Reaffirmation Agreements”) for the 2006 and 2009 NMTC Transactions for the Fox Theater, reaffirming that ORSA is the successor to the Redevelopment Agency and is obligated under the guaranties previously provided by the Redevelopment Agency; and

WHEREAS, ORSA has already assumed the guaranty obligations and has listed the guaranty obligations on the Recognized Obligation Payment Schedules (“ROPS”); and

WHEREAS, since the Fox Project was completed over five years ago, and no changes to the physical project would be triggered by the this legislation, there will be no effect on the environment by this new action and it is therefore exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3), which states that “CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA”, and

WHEREAS, the Reaffirmation Agreements do not change or increase ORSA's obligations but rather ratify that ORSA is obligated under the guaranty agreements; 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 reaffirmations only acknowledge an existin obligations and do not add new obligations or increase the existing obligations of ORSA.

SECTION 2. The Oakland Oversight Board hereby approves the action of the ORSA board authorizing the ORSA Administrator to negotiate and enter into appropriate agreements with the tax credit financing entities providing tax credit financing to the Fox Theater Project, including the Reaffirmation Agreements for the 2006 and 2009 NMTC transactions.

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

ADOPTED, OAKLAND, CALIFORNIA, _____, 2014

PASSED BY THE FOLLOWING VOTE:

AYES- CARSON, GERHARD, MULVEY, ORTIZ, QUAN, TUCKER, YEE

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____
SECRETARY, OAKLAND
OVERSIGHT BOARD