



EXECUTIVE DECISION DOCUMENT

GENERAL MANAGER APPROVAL: <i>3 JAN 2019</i> <i>Ruth M. Perna</i>		GENERAL MANAGER ACTION REQ'D:		
DATE: 12/21/2018		BOARD INITIATED ITEM: No		
Originator/Prepared by: Abigail Thorne-Lyman Dept: Systems Development <i>Abigail Thorne-Lyman</i> Signature/Date: <i>Dec. 21, 2018</i>	General Counsel <i>[Signature]</i> <i>1/2/2019</i> []	Controller/Treasurer <i>[Signature]</i> <i>1/2/19</i> []	District Secretary []	BARC <i>[Signature]</i> <i>1/2/2019</i> []

Fruitvale Transit Village Phase IIB: Modifications to Recorded Agreements

PURPOSE:

To obtain Board authorization to modify currently existing recorded agreements with the City of Oakland for Fruitvale Transit Village Phase IIB.

DISCUSSION:

The Fruitvale Transit Village was built in partnership with the Spanish Speaking Unity Council ("Unity Council") following negotiations that commenced in 1994 and culminated with the completion of Phase I and the BART parking garage in 2003 and 2004, respectively. The Transit Village Master Plan originally envisioned that the completed garage would accommodate all BART patron parking at the station, and that the remainder of the property south of 35th Avenue would be developed with a second phase of mixed income condominium and rental residential units, located on 3.4 acres of property bounded by 35th and 37th Avenues to the North and South, and East 12th Street and the BART tracks to the east and west.

In 2010, as a result of the Great Recession, it became clear that the second phase of the development was not feasible. At that time, the Unity Council and the Oakland Redevelopment Agency requested modifications to the deal terms to ensure the long-term feasibility of the overall plan. BART agreed to sell the 3.4-acre property to the Oakland Redevelopment Agency for \$6 million (fair market value in 2010) and a series of covenants and other agreements were recorded. Upon the dissolution of the Redevelopment Agency in 2012, the property was transferred to the City of Oakland. The City currently owns the

property and until recent construction, the Unity Council managed a private paid surface parking lot on the site.

The City has subdivided the 3.4-acre property into two separate projects, the first led by a partnership of the East Bay Asian Local Development Corporation (EBALDC) and the Unity Council, and the second led by a partnership of BRIDGE Housing and the Unity Council (hereinafter the “developer team”). In 2017 the BART Board approved modifications to these agreements for the first phase of development on 1.25 acres of the 3.4-acre property, also known as Fruitvale Transit Village Phase IIA, or *Casa Arabella*. That project, which includes 92 units of affordable housing and 2 market rate units, is currently under construction.

Phase IIB has recently been fully approved by the City of Oakland and includes a four-story affordable housing project with 179 rental units affordable to households earning between 20% and 80% of the Area Median Income, two managers units, 6,000 square foot ground floor commercial space to be leased by Communities United for Restorative Youth Justice, and approximately 100 total parking spaces. The developer team is currently seeking its final funding for the project and will be applying for an Affordable Housing and Sustainable Communities grant this cycle, as is noted in a separate item at the January 10, 2019 Board meeting.

This station is identified as an “Urban Neighborhood/City Center” in BART’s TOD Guidelines, which articulates a desire for seven-story buildings and no more than 0.5 car spaces per unit. As some of the parking will be designated for the commercial use, the project meets BART’s 0.5 car spaces per unit guideline but does not meet BART’s seven-story guideline. BART staff urged the developer team and City to consider a taller building but were informed that such a change would trigger undue delays in a long-awaited development, due to existing site entitlements and funding allocations.

I. Recorded Agreements between BART and the City of Oakland

At the time of the sale of the property to the City of Oakland Redevelopment Agency (now the Successor Agency) three agreements were recorded: (1) a Construction Covenant; (2) a Developer Transit Benefit Fee Agreement; and (3) a Unit Owner Transit Benefit Fee Agreement. All three agreements include terms adopted by the BART Board in 2010:

1. The **Construction Covenant** includes a **Conditional Purchase Option**, which provides that the City may, at its discretion, provide BART an option to repurchase all, or a portion of, the property if it includes an affordable rental housing project. The City of Oakland staff have advised BART that the City does not intend to approve BART's execution of an option to purchase the property.

2. The **Developer Transit Benefit Fee Agreement** includes:

- A **Transit Benefit Fee**, which is a provision included in all of BART's TOD agreements with for-sale developments, requires the property owner or owners to pay BART a 1.5% transfer fee when each unit is sold to allow BART to participate in the future increase in property value due to its proximity to quality transit service. The Transit Benefit Fee only applies to condominiums sold and would not apply to the proposed project.
- A **Covered Property Transfer Fee**, requiring a 1.5% transfer fee to BART if the Developer transfers all or any portion of the property. Because the land is owned by the City of Oakland and will be leased to the developer, this provision would not apply to this proposed project.
- A **Delayed Transfer Fee** provision where the developer is expected to pay BART 1.5% of the appraised value of the property every 5 years so long as the property has not been constructed as or converted to for-sale condominiums. This Delayed Transfer Fee was waived in 2015 because there was no proposed development at the time and the City was still the property owner. The Delayed Transfer fee will be contractually required again in 2020.
- A **Contingent Revenue Fee**, provides that BART would receive 25% of the surplus revenue from the development if the project achieves the greater of (i) a twenty-five percent internal rate of return on invested capital or (ii) a twenty percent net margin on revenue. Language in this section applies only to condominium units, and the proposed project is 100% affordable rental housing, therefore this section would not apply.

3. The **Unit Owner Transit Benefit Fee Agreement** lays out the terms by which the Transit Benefit Fee would be paid for each resale of a unit. This would only apply if the project were condominiums and would therefore does not apply to the proposed rental project.

II. Request for Waiver of Delayed Transfer Fee

The development team for Phase IIB has requested that BART waive the Delayed Transfer Fee provision because the proposed project is 100% affordable housing. The development team and City are requesting this waiver because funding to pay BART the Delayed Transfer Fee could potentially render the proposed project financially infeasible. BART staff has worked with an outside economic consulting firm, Keyser Marston Associates (KMA), to review the pro forma analysis for the project to determine whether the Delayed Transfer Fee would render the development infeasible, and to estimate the potential revenue impacts to BART.

KMA has determined that the Delayed Transfer Fee would have a negative impact on the project's competitiveness for potential City, County, and State financing sources by diminishing the project's ability to generate any residual cash flow to the public agencies that would provide financing. Further, public agencies that have already allocated financing to the project, such as the City of Oakland, would receive a lower amount of return from the

project than anticipated at the time of award, which would diminish future subsidies for affordable housing from those sources.

Further, KMA has estimated that the Delayed Transfer Fee would generate a maximum of \$500,000 every five years to BART. This revenue to BART has not been incorporated into BART's budget forecasts, therefore if a full waiver of the Delayed Transfer Fee is approved, BART would forego roughly \$500,000 every five years (2020, 2025, etc.) for the period of the ground lease with the developer.

III. Request for Modifications to Other Agreements

The development team has also requested that BART modify the Construction Covenant, Developer Transit Benefit Fee Agreement, and Unit Owner Transit Benefit Fee Agreement to clarify that the other terms described above do not apply to the Phase IIB development as proposed. Changes to the project or affordability levels might result in the agreements being reinstated.

IV. Staff Recommendation to Waive Delayed Transfer Fee and Modify Agreements

Given the severity of the regional housing crisis, the potential ability of the developer to deliver 179 units of affordable housing in a short time frame, the impact of the Delayed Transfer Fee on both future affordable housing subsidies and the feasibility of this particular development, and the maximum fiscal impact of \$500,000 every five years, Staff recommend that the Board consider waiving the entire Delayed Transfer Fee so long as the project maintains its current proposed affordability levels, for the duration of the ground lease between the City and the Developer.

Staff also recommend modifying the Construction Covenant, Developer Transit Benefit Fee Agreement, and Unit Owner Transit Benefit Fee Agreement agreements to ensure that these terms do not apply to the Phase IIB development as proposed, but could potentially apply in the long term if the affordability or ownership status of the project is changed.

The Office of the General Counsel will review and approve as to form all modified agreements.

V. Pedestrian and Bicycle Path

The Board approved the waiver of the Delayed Transfer Fee and easements required on BART property for Fruitvale Transit Village Phase IIA with the condition that the developer build a two-way bicycle path to be shared with the emergency vehicle access and loading area that would run adjacent to BART's trackway.

As a condition of the waiver of the Delayed Transfer Fee, the developer team has agreed to design the portion of the two- way bicycle path that would run underneath the trackway on

BART's property parallel to the development, as well as an improved pedestrian path in the area north of 35th Avenue to the station entrance. The developer team has further agreed to work with BART to secure funding to build these improvements as part of the construction of the Phase IIB development, and will apply for funding for these improvements as part of the FY2017-2018 Affordable Housing & Sustainable Communities grant application. Lastly, the developer team has agreed to maintain the portion of the two-way bicycle path that is on BART Property underneath the tracks, via a maintenance agreement that would be executed with BART. The Unity Council is already required to maintain the pedestrian path between 35th Avenue and the fare gates as part of its existing ground lease with BART for Fruitvale Transit Village Phase I.

FISCAL IMPACT:

Independent economic analysis of the developer's pro forma indicates that the maximum Delayed Transfer Fee payment BART would receive in 2020 is \$500,000, translating to an estimated maximum of \$100,000 a year in initial Delayed Transfer Fee revenue that would be waived if the Board approves this request. The potential maximum foregone revenue to BART would be roughly \$9.5 million over 99 years, assuming a total of 19 payments.

The changes to the other Agreements are clarifications of the Agreements themselves rather than a change in the deal terms, thus, there is no fiscal impact.

Construction and maintenance of the cycletrack and pedestrian improvements may have some minor positive fiscal impact to BART, due to the reduced need for grounds maintenance under a portion of the trackway, and possible removal of existing trees adjacent to the station box, which have caused damage to the station drainage system requiring previous, and possible future repairs by BART.

ALTERNATIVES:

1. Do not waive the Direct Transfer Fee requirement. Project feasibility and competitiveness for funding would be affected.
2. Waive a portion of the Direct Transfer Fee requirement, reducing the amount from 1.5% to a smaller share of the appraised value of the covered property. A reduction would still have an impact on the feasibility of the development.
3. Do not modify other existing Agreements as described above to clarify that they are inapplicable to the proposed Phase IIB development, as requested by the developers and their lenders.

RECOMMENDATIONS:

Adopt the following Motion.

MOTION:

Authorize the General Manager or her designee to modify the existing recorded agreements between BART and the City of Oakland for Fruitvale Transit Village Phase IIB in order to waive the Delayed Transfer Fee requirement and acknowledge that the other major terms of the agreements do not apply to this development, so long as the development includes a minimum of 179 units of rental affordable housing for households earning less than 80% area median income. In lieu of the fee, the developer team and City of Oakland will design, build and maintain pedestrian and bicycle improvements connecting the station entrance to 37th Avenue.