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**Title:** CONSIDER APPROVAL OF SETTLEMENT AND RELEASE AGREEMENT WITH CARSON MARKETPLACE LLC

THIS IS A JOINT AGENDA ITEM WITH THE SUCCESSOR AGENCY ITEM NO. 8 AND RECLAMATION JOINT POWERS AUTHORITY ITEM NO. 2

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**Report to Mayor and City Council**

Tuesday, April 21, 2015

New Business Discussion

**SUBJECT:**

**CONSIDER APPROVAL OF SETTLEMENT AND RELEASE AGREEMENT WITH CARSON MARKETPLACE LLC**

**THIS IS A JOINT AGENDA ITEM WITH THE SUCCESSOR AGENCY ITEM NO. 8 AND RECLAMATION JOINT POWERS AUTHORITY ITEM NO. 2**

**I. SUMMARY**

I. An Owner Participation Agreement (“OPA”) between the former Carson Redevelopment Agency (RDA) and Carson Marketplace LLC (“CM”) provided for the mixed-use development of the 157-acre former land fill site located in Carson’s Marketplace Specific Plan (“the Site”). The OPA contemplated a mixed use project called the Boulevards at South Bay. However, due in part to the Great Recession, the project has not been completed and progress on the development is delinquent under the timeframes set by the OPA, although a portion of the remediation has been performed. Moreover, CM has indicated that it does not intend to develop the project and CM owes the City money under

the OPA.

Under the OPA, an innovative approach was taken to divide the property into two parcels, a Surface Lot and a Subsurface Lot. The purpose was to separate the remediation obligations of the users of the Subsurface Lot from the users of the Surface Lot.

The former RDA (now Successor Agency) also has obligations outstanding under the OPA. The RDA/Successor Agency was obligated to provide a total of \$120 million in financial assistance for Site remediation work and development of certain public improvements. To date, the Agency paid \$69.5 million, leaving an outstanding funding obligation of \$50.5 million payable by the Agency toward Site remediation.

The Site presents the largest undeveloped tract of land remaining in Carson and, if developed, could generate substantial property tax increment and sales tax revenues for the benefit of the City and other local taxing entities. However, completion of Site remediation is needed before the Successor Agency, JPA, City, and other taxing entities can capture the benefits of development.

**CM has been marketing the property and has been willing to sell it for minimal value provided it was indemnified and held harmless from any environmental liability. Thus, to the end of facilitating and expediting the availability of the Site for development opportunities, a “Settlement, Release and Indemnification Agreement” (the “Settlement”) between CM and the Successor Agency, Carson Remediation Authority (“JPA”), and City is proposed to unencumber the Site of the OPA dispute and provide an alternative method of financing the Site’s remediation and public infrastructure. The Settlement essentially replaces the prior obligations imposed by the OPA and sets forth a new “Method of Finance” for the outstanding \$50.5 million, making such funding available for the JPA to complete Site remediation and public infrastructure. In consideration of the concessions and various releases made in the Settlement, CM has agreed to transfer the Site to the JPA, which in turn will transfer the surface lot to the City.**

## **II. RECOMMENDATION**

TAKE the following actions:

- A.** Approve Settlement and Release Agreement in a form approved by City Attorney.
- B.** Authorize the City Attorney, City Manager and the Mayor to execute such additional documents and take such additional actions as may be necessary to implement the Settlement and Release Agreement, the transfer of the property to the Carson Reclamation Authority including escrow agreements, transfer agreements, title documents, and other

documents and approvals.

### III. **ALTERNATIVES**

A. Do not approve the “Settlement, Release and Indemnification Agreement” and/or consider Settlement terms alternative to those presented in Exhibit A. CM would then not sell for nominal value and may default on its obligations.

### IV. **BACKGROUND**

The Site is located on a former landfill. Clean-up of the landfill and implementation of remediation systems are subject to oversight by the Department of Toxic Substance Control (“DTSC”) through a lawsuit originally filed in 1995, which resulted in various consent decrees entered into with ARCO and others between December 1996 and March 2001 (the “Consent Decree”). There was also a subsequent Remedial Action Plan approved on October 25, 1995.

The OPA for “The Boulevards” mixed-use project was executed between the former RDA and CM on July 25, 2006, and amended in 2008 and 2009. Under the OPA, the former RDA (now Successor Agency) has the obligation to provide a total of \$120 million in financial assistance to remediation work on the Site and the development of certain on and off-site public improvements. To date, the RDA/Agency made payments totaling \$69.5 million, leaving an outstanding funding obligation of \$50.5 million payable by the Agency toward Site remediation. More specifically, the Successor Agency is obligated to issue additional bonds and/or provide other assistance totaling the remaining \$50.5 million for remediation and infrastructure.

CM has made various improvements, including installations of dry and wet utilities and substantial portions of the landfill cap and landfill gas extraction and treatment systems. Pursuant to the OPA, the Developer previously issued a performance promissory note payable to the City at the order of the RDA, and a deed of trust and assignment of rents for the benefit of the RDA and the City that secures the obligations under the performance note on a substantial portion of the Site. More specifically, pursuant to the OPA, CM issued a performance promissory note dated March 9, 2009, payable to the City at the order of the RDA (the “Promissory Note”) to evidence CM’s obligations to make certain payments under the OPA if certain remediation and development thresholds and timelines were not met, including the obligation to pay an initial Sales Tax Threshold Shortfall Payment of \$3 million dollars pursuant to the OPA, as extended, which became due on November 30, 2015. There was also a Deed of Trust and Assignment of Rents dated February 17, 2009, for the benefit of the RDA and the City securing the obligations under the Performance Note (“City/Agency Deed of Trust”), on a substantial portion of the Site for the benefit of the RDA.

Notwithstanding the above-described security measures, due to the sluggish market over the past five years, the complexity of the remediation and phasing of the project, the development and remediation are proceeding much slower than expected. The lack of committed tenants has caused uncertainty as to the ultimate design of the building protection systems and landfill cap. The costs to CM and its developers are also

escalating, with CM's developers having already contributed some \$98 million to development of the Site. At this point, progress on the development is delinquent under the timeframes set by the OPA. Moreover, CM has indicated that it does not intend to develop the project and CM owes the City money under the OPA.

## **ANALYSIS**

### **Possible NFL Stadium and Other Development Opportunities.**

The Site presents the largest undeveloped tract of land remaining in Carson and, if developed, could generate substantial property tax increment and sales tax revenues for the benefit of the City and other local taxing entities. In the midst of the performance problems surrounding the OPA, other development opportunities for the Site have arisen. For example, a voter initiative has been launched to create a zoning overlay district enabling the Site to be developed as a 68,000-seat NFL football stadium. Two teams have publically stated that they would consider playing at the stadium if approved. An NFL team would play its home games at the stadium, including pre-season, regular season and post-season games for the term of certain leases for the stadium's use and occupancy. Under this development scenario, the Site would also be used for non-NFL events such as concerts, other sporting events and civic events.

On or about January 30, 2015, CM and Cardinal Cavalry LLC ("Cardinal") entered into a purchase sale agreement (the "Purchase Agreement") for the sale of the Site whereby, for a nominal amount, Cardinal was given the right to nominate an entity to take title to the Site, which entity would carry out the remediation program and indemnify and hold harmless CM for certain potential environmental liabilities. Pursuant to this, Cardinal has nominated and is seeking to transfer its right to take the Site's title to the JPA pursuant to a transfer agreement by and between Cardinal and the JPA (the "Transfer Agreement"), to facilitate the possible development of a NFL stadium.

Cardinal is unwilling to take title directly due to the liability issues, and is unwilling to indemnify CM. However, the recently formed Carson Remediation JPA which has been approved by DOF to carry out the remediation is an appropriate legal vehicle, and the City and its general funds are not liable for debts and liabilities of the JPA.

If the voter initiative fails to support the development of an NFL stadium, CM's developer has indicated that there is interest in other development deals for the Site. In the case of any development scenario, completion of Site remediation is needed before the Successor Agency, JPA, City, and other taxing entities can capture the benefits of development.

### **The Proposed Settlement; Role & Purpose of JPA.**

The proposed Settlement between CM and the Successor Agency, JPA, and the City aims to facilitate and expedite the Site's availability for the development opportunities described above. Key terms and acknowledgements in the Settlement include, without limitation, the following:

CM will cause the Site's title to be transferred to the JPA in lieu of foreclosure by City and Successor Agency.

Successor Agency, JPA and City to release and indemnify CM, its affiliates, partners, agents, prior Site owners, representatives, etc., from all claims-past or future-arising from the Site, regardless of whether such claims arise under contract, environmental liability, performance of remediation work, or bond/financial undertakings.

CM's transfer of the Site to the JPA is entirely AS-IS, and CM makes no warranties or guaranties with respect to the Site or its condition of title, environmental condition, or geologic condition.

CM is released from all rights and obligations for Site remediation, including remedial and legal orders imposed by DTSC.

Parties agree to a new "Method of Finance" (to be approved by the Oversight Board and the State Department of Finance) that replaces the financing structure in the OPA by providing that the remaining \$50.5 million in funding payable by the Successor Agency under the OPA will instead be made available to the JPA.

The City and Successor Agency shall deliver to CM a full and unconditional reconveyance of the City/Agency Deed of Trust in a form mutually acceptable to CM, City and Successor Agency, duly executed and acknowledged, and City and Successor Agency shall cancel and return the Promissory Note to CM.

JPA assumes all rights and obligations for Site remediation, including remedial and legal orders imposed by DTSC, and including rights to all inventories and equipment related to Site remediation.

CM shall cooperate with JPA in securing JPA as an additional insured on environmental liability insurance coverage.

CM assigns its rights to the remaining \$50 million payable by the Successor Agency under the OPA to the JPA.

JPA shall secure, prior to the transfer of the Site to the JPA, the consent of DTSC to the assignments made in the Settlement. Legal counsel has been in contact with council for DTSC and is optimistic that this consent will be secured in a timely fashion.

The agreement includes a provision that it will not be effective until all approvals including DTSC and DOF have been approved to the satisfaction of the City Attorney.

While the release and indemnity of CM and its affiliates under Item 2 listed above is very broad, there are certain protections for the City. The proposed Settlement acknowledges that:

[I]t is the intent of the City in forming the JPA to undertake remediation projects within the City, that the City intends to have a mechanism to further development of the City without subjecting its general funds which are necessary to fund law enforcement and other public services, to levy, in particular to the carrying out of the agreements herein.

To this end, on January 20, 2015, the governing Boards of the Housing Authority and Carson Community Facilities Districts Nos. 2012-1 and 2012-2 ("CFDs") approved each

Board's execution of an agreement for the formation of the JPA for the purpose of overseeing, and facilitating the remediation of contaminated properties in the City of Carson. As noted at the time of JPA formation, as a legally separate public agency, the JPA can sue or be sued, hire staff, obtain financing to build public facilities, and manage property. Joint powers agreements usually protect their member agencies from a JPA's debts or other liabilities. Thus, as noted in the above quote, by having the JPA assume the bulk of potential liabilities and environmental work under the terms of the Settlement, the funds of other entities such as the City may be afforded some protection. Moreover, the JPA is uniquely suited to assume the environmental remediation obligations set forth in the Settlement given that the JPA was specifically formed for the purpose of overseeing, and facilitating the remediation of contaminated properties in the City of Carson, such as the Site at issue.

### **RDA Dissolution Issues.**

Assembly Bill No. 1X 26 (AB 1X 26) adopted on June 29, 2011, and effective February 2012, dissolved redevelopment agencies, and established successor agencies and oversight boards to assist in the wind-down of the former redevelopment agencies. Prior to the dissolution the Carson RDA was a thriving redevelopment agency, with many projects in the works and many obligations outstanding at the time. The Successor Agency is the successor-in-interest by law to all assets and functions of the former RDA. All actions of the Successor Agency, particularly the execution of new contracts or other obligations, are subject to review and approval/ratification by the Carson Oversight Board and the State Department of Finance ("DOF").

The Successor Agency has already received a letter from the (DOF) dated March 5, 2015, indicating preliminarily that DOF has no objections to the transfer of the Site under the proposed Settlement, the release and indemnification by the Successor Agency of CM, the completion of the remediation work and public improvements as allowed under the OPA by the JPA, the issuance of bonds for the remaining financial assistance obligation of the Successor Agency, and the use of the remaining funding by the JPA to complete the remediation work, public improvements, carrying costs and other obligations assumed under the Settlement, irrespective of the vertical improvements ultimately constructed. The DOF is thus expected to approve the Settlement as well as its proposed, revised financial structure.

## **V. FISCAL IMPACT**

The Successor Agency's outstanding \$50.5 million funding obligation for Site remediation under the OPA would inure to the JPA. There may potentially be an increase in general and environmental liabilities assumed by the City, JPA and Successor Agency under the Settlement. Property tax residual payments are expected to increase if the stadium or other development project is completed. The Settlement is also different from the now-abandoned OPA as it does not require specific thresholds of new property taxes be generated from new construction to help fund the \$50.5 million. The potential initial impact of the \$60.765 million in Private Placement Series A bonds (the initial series of bonds described in the Method of Finance) on the impacted taxing entities is an immediate loss of existing RPTTF property tax residual due to the new debt service under the Dissolution Act. This is estimated at \$3 million in 2015/16 and \$6.9 million beginning in 2016/17 based

on the initial bond issue (or whatever annual amount is necessary to make the debt service payments to generate the \$50.5 Million of net proceeds promised under the settlement agreement) for an estimated total of \$99.24 million over the term of the Series A bonds. The refunding Series B bonds planned under the method of finance may reduce the debt service burden. Development of the Site may eliminate any negative impact on the impacted tax entities.

**VI. EXHIBITS**

**Exhibit A** - Proposed Settlement, Release and Indemnity Agreement (pgs. 7-42)

Prepared by: Sunny Soltani, City Attorney