Sedgwick LLP

Memorandum

TO: Oakland Oversight Board

FROM: Laurie N. Gustafson OFFICE: San Francisco

DATE: June 24, 2016

RE: I. Proposed Assignment of an Amended and Restated Owner Participation Agreement ("OPA") with SKS Broadway, LLC for Development ("SKS") at 1100 Broadway from Oakland Redevelopment Successor Agency ("ORSA") to the City of Oakland ("City");

II. Department of Finance ("DOF") Disapproved and Returned the Oversight Board Resolution 2016-02 for Reconsideration, which Resolution Approved the Assignment to the City of the ORSA's Rights and Obligations under the City Center Disposition and Development Agreement with Oakland T12 LLC for Development of the Property Located at 601 12th Street (the "T12 Site")

I. Proposed Assignment of an Amended and Restated OPA with SKS Broadway, LLC for Development at 1100 Broadway from ORSA to the City.

As stated in ORSA's staff memorandum dated June 27, 2016, the Oversight Board previously approved the Amendment of the OPA between the former RDA and SKS (Oversight Board Resolution 2013-5) to extend the construction start dates under the OPA. The DOF, however, disapproved Resolution 2013-5 because the First Amendment to the OPA recorded on June 9, 2010 allowed for the extension of deadlines for one year only. DOF cited HSC Section 34163(c), which provides that an agency shall not have the authority to amend or modify existing agreements with any entity for any purpose, and the DOF therefore approved the extension for one year, but not for two years. As a result, according to the ORSA staff memorandum, the OPA has remained suspended.

Now, ORSA is proposing an Assignment of the OPA to the City, and then the City would make the Amendment to extend the construction schedule. Presumably this is to in part avoid a violation of HSC Section 34163(c) (the Successor Agency is prohibited from amending or modifying existing agreements). Also, ORSA is proposing that the extension fees be paid to ORSA (with the benefit accruing to the taxing entities), not to the City. Presumably, this is to avoid a violation of HRC Section 34177(f) which provides that the Successor Agency is required to "Enforce all former redevelopment agency rights for the benefit of the taxing entities, including, but not limited to, continuing to collect loans, rents, and other revenues that were due to the redevelopment agency."

ORSA is now proposing a non-refundable extension fee of $75,000 to extend the construction commencement to June 24, 2017 and an option to extend the construction commencement to June 24, 2019 for an additional fee of $50,000, both payable to ORSA. As the ORSA Staff memorandum points out, the payments to ORSA proposed in 2013 were lower - $25,000 and $25,000 respectively. However, the fees now proposed - $75,000 plus $50,000 - are still lower than the fees that were provided for in the Purchase and Sale Agreement between the former RDA and SKS, and the First Amendment thereto, which provided for certain deposits tied to the construction commencement schedule under the OPA. As described in greater detail in Oversight Board Counsel's March 15, 2013 Memorandum to the Oversight Board (attached hereto), the former RDA and SKS have already negotiated and agreed in the OPA that a one year extension

to the construction schedule would cost SKS the release of $100,000 and the deposit of another $200,000. Now ORSA and SKS want to change the deal to only $125,000 for a total of four years of extensions. Although this is a better deal for ORSA (and the taxing entities) than the deal proposed in 2013 of just $50,000 total for the four years of extensions, it still falls short of the original deal struck in 2010. As I asked in 2013, how can a significant reduction in the already agreed upon "cost" to extend a contract be considered to be an increase in the net revenues to the taxing entities?

II. DOF Disapproved and Returned the Oversight Board Resolution 2016-02 for Reconsideration, which Resolution Approved the Assignment to the City of the ORSA's Rights and Obligations under the City Center Disposition and Development Agreement with Oakland T12 LLC for Development of the Property Located at the T12 Site.

The Report on Recent Communications with the DOF includes a letter from the DOF dated April 29, 2016 in which DOF disapproves of Oversight Board Resolution 2016-02 whereby the Oversight Board approved the Assignment of the former RDA's rights and obligations under the City Center Disposition and Development Agreement to the City. DOF disapproved of the proposed Assignment because the extension fees were proposed to be paid to the City rather than to ORSA. DOF stated "Pursuant to HSC Section 34177.3(c), the Agency is not authorized to transfer any powers or revenues to another party, private or public, except pursuant to an enforceable obligation. Additionally, HSC Section 34177(f) requires the Agency to enforce all former RDA rights for the benefit of the taxing entities, including continuing to collect revenues due to the RDA. Therefore, without collection of the remaining $700,000 extension fees by the Agency, the assignment of the DDA to the City would not be approved….DOF is returning your OB action to the Board for reconsideration."

Two important points are raised by this disapproval by the DOF:

A. When will ORSA bring the matter of Resolution 2016-02 before the Oversight Board for reconsideration? The proposed Assignment would benefit the taxing entities and should be pursued pursuant to the DOF ruling. I have made this inquiry with the ORSA staff and am awaiting a response.

B. As cited by the DOF, HSC Section 34177(f) requires the Agency to enforce all former RDA rights for the benefit of the taxing entities, including continuing to collect revenues due to the RDA. This statutory requirement also governs the proposed 1100 Broadway OPA Assignment before the Oversight Board at the June 27, 2016 meeting. Under the OPA and the related First Amendment to Purchase and Sale Agreement, the full extension fees of $100,000 plus another $200,000 are due to the RDA for the benefit of the taxing entities, not a newly negotiated lesser amount.

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MEMORANDUM

DATE: March 15, 2013

TO: Oakland Oversight Board

RE: Proposed Amendment to Owner Participation Agreement between the Oakland Redevelopment Successor Agency and SKS Broadway, LLC to Extend Development Deadlines for a Mixed Use Project - Item # 3

The Oakland Redevelopment Successor Agency ("ORSA") seeks Oversight Board approval of an amendment to the Amended and Restated Owner Participation Agreement ("OPA") between the former Oakland Redevelopment Agency ("RDA"), now ORSA, and SKS Broadway, LLC ("SKS") to extend certain deadlines for the development of a mixed use project at 1100 Broadway. The proposed OPA amendment would permit SKS to pay ORSA a $25,000 extension fee for an initial 2 year extension and another $25,000 extensive fee, payable in two years, for an optional second 2 year extension.

There are a number of legal and factual issues to consider:

- The OPA **is tied to** the Purchase and Sale Agreement (the "Original PSA") and the First Amendment to the PSA (the "First Amendment to PSA") (collectively, the "PSA") between the former RDA and SKS, whereby SKS would purchase the Parking Garage at 1111 Franklin from the former RDA for $4.35 million to provide needed parking for SKS's 1100 Broadway mixed use project. The First Amendment to the PSA states: "Among other things, the Agreement provided for certain deposits and specified a Closing Date for the close of the transaction as no later than October 23, 2009, which was tied to the commencement of construction deadlines as set forth in the Amended OPA." In other words, the rights ORSA has with regard to extensions under the OPA are tied to the Deposits held in Escrow under the PSA.

- Under the First Amendment to PSA, executed in early June 2010, the former RDA agreed to extend the Closing Date for one year, in exchange for a release to the RDA of $100,000 then held in Escrow, which release amount was not to be applied to the Purchase Price, and SKS agreed to make a Second Deposit into Escrow of $100,000. The RDA and SKS also agreed that if the SKS desired an additional one year extension of the Closing Date, the Second Deposit of $100,000 would be released to the RDA, also would not be applied to the Purchase

Price, and SKS would make a Third Deposit of $200,000 into Escrow, no later than June 26, 2013.

- As set forth in the First Amendment to PSA, the RDA and SKS, "concurrently" with the First Amendment to PSA, entered into the First Amendment to the OPA to extend certain milestone development deadlines (the "OPA Amendment"). The OPA Amendment cross-references the PSA, stating that the Closing Date under the PSA is "tied to" the commencement of construction under the OPA.

- The OPA Amendment provides that SKS may extend the construction timelines in the OPA by one year, by depositing the Third Deposit (as defined in the First Amendment to PSA) into Escrow no later than June 26, 2013, and that if the commencement of construction did not begin "on or before June 25, 2014, the **Third Deposit and all interest accrued thereon shall be released to the Agency as provided for in the PSA**."

- The OPA and the PSA are expressly linked together, intertwined. As expressly set forth in the OPA, the RDA's rights and the consideration it is to receive for extensions of time granted to SKS under the OPA are the Deposits, as defined in the PSA. That the two agreements are tied together was not an issue when the RDA was both the Seller under the PSA and the "Agency" under the OPA.

- The situation became more complicated, however, when, on the eve of its dissolution, the former RDA transferred title to the 1111 Franklin Parking Garage to the City in exchange for $1.00. Currently, title to the Garage is held by the City, and as a result, the City argues that it owns the Deposits too, leaving the Successor Agency (in the shoes of the RDA) without the consideration for extensions it bargained for and that, as a result, were agreed upon between the RDA and SKS in the OPA.

- The State Controller's Office is currently reviewing the transfer of the 1111 Franklin Parking Garage, and for the reasons set forth in the Stein & Lubin's Memorandum on the Property Transfers dated March 14, 2013, it is very likely that the 1111 Franklin Parking Garage will be "clawed back" by the Controller, and the City ordered to return the title to property to the Successor Agency.

- Aside from a narrow exception in Health & Safety Code ("HSC") Section 34181(e), as described below, the Successor Agency is not permitted to "amend or modify existing agreements, obligations, or commitments with any entity, for any purpose." Section 34163 (c) (as to the RDA after June 27, 2011), and pursuant to Section 34173(b), this restriction applies to the Successor Agency as well. It may be recalled that DOF denied the RDA amendment concerning the Scotlan Convention Center, executed on June 28, 2011.

- In addition, Section 34177(f) states that the Successor Agency is required to "Enforce all former redevelopment agency rights for the benefit of the taxing entities, including, but not limited to, continuing to collect loans, rents, and other revenues that were due to the redevelopment agency." Payment of the Deposits is due to the RDA (now the Successor

Agency), and the Successor Agency is required to collect them for an extension, not give them away to the City, or negotiate them away in the proposed amendment to the OPA.

- The Successor Agency seeks to amend the OPA on the basis of Section 34181(e) which provides for a very narrow exception to the "no amendment" rule. Pursuant to 34181(e), the Oversight Board may direct the Successor Agency to determine if any contracts 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". Any such termination or amendment must be presented to the Oversight Board for approval. The Oversight Board may approve of the termination or amendment if the Board finds that the amendment or early termination would be in the best interests of the taxing entities.

- The Successor Agency has not explained how the proposed amendment would reduce liabilities (note the use of "and" rather than "or" in the statute). The Successor Agency argues that a two year extension for $25,000 and a second two year extension for another $25,000 would "increase net revenues to the taxing entities." The RDA and SKS have already negotiated and agreed in the OPA that another one year extension would cost SKS the release of $100,000 and the deposit of another $200,000. Now SKS and the Successor Agency want to change the deal to only $50,000 for a total of four years of extensions. How can a significant reduction in the "cost" to extend a contract be considered to be an increase in the net revenues to the taxing entities?

- The Successor Agency argues that one year is not enough time. If more time is needed, that could be negotiated, but it should be for a fee that is proportional to the extension fees that were already negotiated between the former RDA and SKS. Absent some compelling fact supporting a change in the cost of extensions, it would seem that extensions should continue to be available, if needed, at the price negotiated by the former RDA and SKS in arms-length negotiations in June of 2010.

- The Successor Agency reports that the Escrow Deposits were also transferred to the City, along with the PSA, on the eve of the RDA's dissolution. Indications are that title to the Garage, and therefore the related PSA and Escrow Deposits, will be clawed back by the Controller, perhaps very soon. If title to the Garage is clawed back by the Controller, the Deposits will be clawed back as well. Pending resolution of this issue, potential rights of the taxing entitles should not be compromised.

We welcome any comments or questions with regard to this matter.