

DATE ISSUED: April 7, 2010

ATTENTION: Honorable Chair and Members of the Redevelopment Agency
Docket of April 13, 2010

ORIGINATING DEPT.: Centre City Development Corporation

SUBJECT: Former Atmosphere Project Site (partial block bounded by Ash
and Beech streets, Fourth and Fifth avenues) – Acquisition and
Exclusive Negotiation Agreement with Wakeland Housing and
Development – Cortez Redevelopment District of the Expansion
Sub Area of the Centre City Redevelopment Project

COUNCIL DISTRICT: 2

REFERENCE: None

STAFF CONTACT: Jeff Graham, Vice President-Redevelopment, 619-533-7181

REQUESTED ACTION: That the Redevelopment Agency of the City of San Diego
("Agency"):

- Authorizes staff to proceed with the acquisition of the former Atmosphere project site, subject to the conditions cited in this report including deviation from the standard and broad indemnification language typically preferred in an agreement for the purchase of property by the Agency, located in the Cortez Redevelopment District; and
- Approves an Exclusive Negotiation Agreement (ENA) between the Agency and Wakeland Housing and Development Corporation ("Developer").

STAFF RECOMMENDATION: That the Agency authorizes staff to proceed with the acquisition of the former Atmosphere project site, subject to the conditions cited in this report including deviation from the standard and broad indemnification language typically preferred in an agreement for the purchase of property by the Agency, located in the Cortez Redevelopment District and approves an ENA between the Agency and Developer.

SUMMARY: The former Atmosphere project site is a 22,500-square-foot site located in the lower Cortez neighborhood directly east of the proposed St. Joseph's park site (Attachment A). The Atmosphere project, which was permitted for 74 condominium units over street-level retail in a 5- to 9- story building, was abandoned during site excavation (a depth of up to 22 feet in certain portions). The site has been in an abandoned state for several years and has been

foreclosed upon by the lender, D&A Semi-Annual Mortgage Fund III, L.P. ("Seller"). The Developer, with expertise in affordable housing development, has secured site control through a purchase and sale agreement with the Seller.

Staff has conducted significant due diligence related to the site and has concluded that, with certain conditions placed on Developer precedent to Agency acquisition, that the site complies with the Corporation's Affordable Housing Guidelines and would be an ideal location for a future affordable housing development. Therefore, Corporation staff is seeking authorization to negotiate a purchase and sale agreement with the Developer, on behalf of the Agency, and a companion ENA to allow for a period of reasonable time within which to negotiate the terms of a future affordable housing project.

The Developer is opposed to the standard indemnification typically sought from the seller of a property proposed for purchase by the Agency primarily because of the concurrent escrows and the Developer's *de minimis* period of ownership. Staff seeks recommendation for approval of deviation from the standard and broad indemnification language to a more narrow scope of "gross negligence or willful misconduct of" Seller. Agency Counsel has evaluated the actions and duties to be performed by the Seller in advance of the Agency's acquisition of the subject site and has determined that such actions and duties by the Seller substantially reduce the Agency's risks and liabilities associated with the site's present condition. Additionally, Agency Counsel has evaluated staff's recommendation to modify the Agency's standard indemnification in the purchase and sale agreement and replace it with the more narrow language included in the staff report attachment. Agency Counsel has advised that this is fundamentally a policy decision for the Agency Board but that given the actions and duties to be performed by the Seller in advance of the Agency's acquisition of the subject site and the Developer's negligible period of site control, staff has taken substantial steps to protect the Agency.

FISCAL CONSIDERATIONS: Staff proposes the Agency acquire the site at its appraised value of \$4,950,000 and pay its share of reasonable closing costs. Funds are available within the Redevelopment Agency's Fiscal Year 2010 Low and Moderate Income Housing Budget. At the conclusion of future development negotiations pursuant to the ENA with the Developer, staff will return this item to the Committee and Corporation Board with the proposed terms and additional Agency subsidy required for the development of the site with an affordable housing project.

These project expenditures were included in the Fiscal Year 2010 budget, were taken into account when determining this project area's ability to fund its estimated portion of the State's ERAF Take, and will not impact the Agency's ability to make the FY 2010 ERAF Payment at such time it becomes legally obligated to do so.

CENTRE CITY DEVELOPMENT CORPORATION RECOMMENDATION: On March 10, 2010, the Centre City Development Corporation Board (“Corporation”) voted 3-0 (with one abstention) to support the staff recommendation.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: On February 17, 2010, the Centre City Advisory Committee and the Project Area Committee voted to support the staff recommendation.

DEVELOPMENT TEAM

ROLE	FIRM/CONTACT	OWNERSHIP
Developer	Wakeland Housing and Development Corporation Barry Getzel Ken Sauder	a California, nonprofit 501(c)(3) corporation

BACKGROUND:

This proposed project advances the Visions and Goals of the Downtown Community Plan and the Objectives of the Centre City Redevelopment Project by:

- Continuing to promote the production of affordable housing in all of downtown’s neighborhoods and districts;
- Ensuring supplies of housing for downtown employees commensurate with their means to reduce automobile trips and achieve related air quality benefits;
- Expanding the supply of living units (small studio apartments) affordable to very low-income persons;
- Eliminating blight through the development of underutilized properties;
- Assisting in the development of affordable, permanent supportive housing projects in the downtown and surrounding neighborhoods; and
- Emphasizing development of Cortez as a primarily residential neighborhood with a center of mixed-use activity, and dual character emerging between Cortez Hill and Lower Cortez.

The site is also consistent with the Corporation’s Affordable Housing Guidelines (“Guidelines”) which promote geographic diversity of new affordable housing units throughout downtown.

In 1999-2000, the Corporation approved the Lofts on Fourth and Lofts on Fifth projects on adjacent sites located on the block bound by Ash and Beech streets and Fourth and Fifth avenues. The projects were later joined together as the Atmosphere project. The project commenced construction in late 2004 but construction halted during excavation to accommodate

the three-level underground parking garage. The owner(s) tried for several years to recommence construction but were unsuccessful and the building permits for the project expired. The project contained 74 condominium units over street-level retail, with a five-story building facing Fifth Avenue and a nine-story building facing Fourth Avenue.

DISCUSSION:

The L-shaped site consists of 22,500 square feet, with 150 feet of frontage on Fourth Avenue and 75 feet of frontage along Fifth Avenue. The site lies in the lower Cortez neighborhood, directly to the east of the proposed St. Joseph's park site. The neighborhood is currently characterized by a variety of low-rise commercial and residential buildings.

The site is located within the Residential Emphasis land use district, which requires that any project contain at least 80 percent residential uses. Given the future development of St. Joseph's park across Fourth Avenue, the opportunity exists for a ground-floor restaurant or café overlooking the park site, although no commercial uses are required for the site. The Centre City Planned District Ordinance (PDO) establishes a base maximum Floor Area Ratio (FAR) of 8.0 for the site, with the opportunity to increase the FAR to 10.0 through the FAR Bonus Program or Transfer of Development Rights (TDRs). An affordable housing project on the site could further increase the FAR up to 12.8, although the associated parking for such a dense development would be problematic on this relatively small and odd-shaped site.

Staff estimates development of the site could provide between 90 and 115 affordable housing units in one or two buildings with ground-floor retail; the constraint being the amount of parking that can be accommodated on the site. The Developer has agreed to comply with the Corporation's Affordable Housing Guidelines ("Guidelines") adopted in June 2009, including the inclusion of at least 15 percent supportive housing units. The site is included on the "reserved list" of Mental Health Services Act (MHSA) funds for the supportive units but will require a formal application by the Developer once a project has been defined. The site is also included on staff's list of affordable housing priority sites for potential Agency participation.

In recognition of the current lack of viable federal and state affordable housing funding sources with which to leverage Agency funds, staff recommends acquiring the site and entering into negotiations with the Developer for the project's future design and development. At a future date when sufficient additional funding sources have been identified, staff will return to the Committee and the Corporation with the proposed terms of a Disposition and Development Agreement (DDA) between the Agency and Developer for consideration. Staff considers a negotiation period of up to two years in length necessary to allow sufficient time for federal and state funding sources to be appropriated and execution of a DDA.

Site Condition

During the course of the past several months, staff has retained specialized consultants to assess the physical condition of the site, the status of permits, bonds and tie-back agreements, possible legal risks and site restoration. The firm of Flores Lund Consultants was retained to review the in-place temporary shoring system. While the shoring was found to be in better condition than expected, significant deterioration of several soldier beams and lagging boards was detected. While the tie-backs were not physically evaluated, based on the deflection survey the consultant deduced the tie-backs are in reasonable condition. Recognizing that future redevelopment of the site may not commence for a period of up to three or more years, the consultant recommended the site be backfilled and capped with asphalt. The amount of required fill was estimated to be 22,000 cubic yards. This method ensures the stability of the site without the costs of conducting destructive testing and analyzing the current effectiveness of the shoring and installation of additional tie-backs. The pedestrian traffic control is also in disrepair and requires improvement if the site were to remain excavated.

Agency Special Counsel considered the existing site conditions and also expressed concern of risks and liability to the Agency in acquiring an abandoned excavated site with compromised shoring. Therefore, staff informed the Seller, and the Seller has agreed, to backfill and deliver the site in a condition satisfactory to the Agency prior to acquisition.

The Seller has also provided staff with agreement letters for the tie-backs under a majority of the adjacent properties. Agency legal review of the letters deemed them expired and insufficient, therefore, new tie-back agreements, in a form acceptable to the Agency, will be required prior to closing. A standard form of tie-back agreement has been included as an attachment to the purchase and sale agreement between the Agency and the Developer.

Terms of Developer's Agreement

The Developer entered into a Purchase and Sale Agreement with the Seller ("Developer's Agreement") in April 2009 and expired in December 2009. Subsequently, the Developer and Seller have continued negotiations for new terms which address the risk and liability concerns of the Agency acquiring the site in its current condition. An Amended and Restated Developer's Agreement has been drafted and is expected to be fully executed by both parties by the Committee's February 2010 meeting date. The amended agreement provides for a property purchase price of \$4,950,000 including non-refundable deposits totaling \$200,000, which the Developer has paid and are applicable toward to the purchase price. The balance is due at escrow closing.

Pursuant to the amended Developer's Agreement, the Seller and Developer shall share the costs to obtain all required permits, implement all procedures recommended by the Agency's consultant including removal of all existing protruding rebar and shoring beams, proper fill and

compaction of the abandoned site, installation of appropriate erosion control, removal of the pedestrian traffic barricades and installation of security fencing. The Seller may elect, if timing can be coordinated, to fill the abandoned site with clean soil removed from the nearby Cedar Gateway affordable housing site which is scheduled to commence excavation soon. This approach may result in a cost savings to the Seller and Developer. Prior to escrow closing, the Seller shall also have delivered to the Developer and the Corporation executed tie-back agreements with all adjacent property owners to allow existing anchoring systems to remain in place.

Terms of Agency Agreement

A concurrent escrow is contemplated for the Agency's acquisition of the site from the Developer and the Developer's acquisition from the Seller. The proposed terms of the Purchase and Sale Agreement between the Agency and the Developer ("Agency Agreement") include a purchase price of \$4,950,000 (commensurate with the market value determined by the Agency's appraisers, Anderson and Brabant, Inc., dated December 7, 2009) and numerous conditions to be satisfied precedent to escrow closing. Such conditions include, but may not be limited to, the following:

- Delivery to the Corporation fully executed tie-back agreements with all adjacent property owners to allow existing anchoring systems to remain in place through a date sufficient to complete a future affordable housing project. Such agreements must be deemed acceptable to the Corporation and Agency;
- Delivery to the Corporation a survey of the before and after horizontal and vertical level data of the adjacent lands;
- The site shall be filled consistent with the recommended methods contained with the Flores Lund assessment report;
- Certification that the fill soil is uncontaminated;
- Delivery to the Corporation monitoring results of the at-level grade of all adjacent properties before and after the filling and compacting;
- Evidence that the property is free of all mechanics' liens;
- Proper drainage and erosion control measures, as deemed necessary by the City, have been implemented;
- Delivery to the Agency of all reports prepared by Seller's and Developer's consultants retained for the restoration of the site and work performed to the Agency's satisfaction; and
- Seller and Developer shall use best efforts to complete the required work and satisfy all conditions precedent to closing escrow as soon as possible but no later than October 31, 2010.

Subsequent to escrow closing, the Agency shall be responsible for installing proper sidewalks, curbs, gutters, driveways, and security fencing. Or, at the Agency's option, the Agency may

install asphalt, striping and lighting for temporary surface parking until commencement of construction of the affordable housing project. The Flores Lund report recommended the site be capped with an asphalt surface to prevent further deterioration of the shoring system, therefore if temporary parking is not installed, drainage measures and/or capping of the site may be necessary. Cost estimates for the Agency to improve the site for parking operations shall be obtained by staff and returned to the Board for approval prior to escrow closing.

The site's previous developer placed with the City a cash bond in the amount of \$70,000 for the tie-back encroachments in the public right-of-way. Upon the tie-backs' removal or de-stressing, the bond may be eligible for release by the City to the bond holder. According to City staff, the cash bond is not applicable toward the costs of filling the excavated site. The release, if approved by the City after the filling of the site, would only be upon satisfactory removal and de-stressing of the shoring systems presumably in connection with future excavation.

Liability Associated with the Site

Staff, together with Agency Special Counsel and Agency Counsel, has closely examined the liability issues associated with Agency purchase of the site. There are four particular areas of concern that have been identified: (i) claims for damages during excavation, (ii) claims for improper/outdated shoring system, (iii) claims for tie-back encroachments, and (iv) claims for improper filling of excavation site.

First, there would be no liability to the Agency until the Agency becomes fee owner. Therefore, with respect to claims for damages during excavation and claims for improper/outdated shoring system before the transfer of title to the Agency, the Agency simply would not be liable because it is neither an owner nor in any part related to the prior excavation and installation of the shoring system. Therefore, even in the event of such a claim prior to closing, the law would protect a non-owner against such a claim.

Second, with respect to claims for tie-back encroachments, it is a condition to closing of the Agency Agreement that perpetual tie-back easements be obtained from all affected third party property owners. The form of the perpetual tie-back easement is attached to the Agency Agreement and their procurement adequately ensures that Agency will come into ownership of the property without any unconsented or permitted encroachments caused by the tiebacks. Therefore, to the extent a claim is presented by a signatory to such an easement, it is likely not to be upheld because the signatory agreed to the easement for the tie-back.

Third, with respect to claims for improper filling in of the excavation site, there are multiple safeguards in place. The Agency identified and suggested technical criteria to be met with respect to the re-fill, fill, and compacting at the site before the Agency becomes obligated to close on the transaction. Additionally, the Agency is reserving for itself the ability to send

personnel to the site to monitor and evaluate work as it progresses, thereby providing itself with another layer of assurance as to the quality of the work being performed.

Finally, to the extent any claims arise despite the foregoing safeguards, the third parties, along with the Agency, may avail themselves to insurance coverage carried by the contractor (general liability) performing the work and the engineering professionals (professional liability - errors and omissions) for the opinions rendered in testing soils, administering the fill, etc.

While there is never any guarantee that the Agency will not be brought into litigation, staff believes the measures that are in place greatly reduce Agency risk exposure with respect to this transaction.

Indemnification

The Developer is opposed to the Agency's standard indemnification typically sought from the seller of a property proposed for purchase by the Agency primarily because of the concurrent escrows and the Developer's *de minimis* period of ownership. Staff is recommending to limit the standard and broad language from that which indemnified the Agency from "acts, occurrences, use, or matters that took place prior to the Close of Escrow" to a more narrow scope of "gross negligence or willful misconduct of" Seller. Section 17.1 Agency Agreement includes this substituted language and staff seeks recommendation for approval of deviation from the standard and broad indemnification. Agency Counsel has evaluated the actions and duties to be performed by the Seller in advance of the Agency's acquisition of the subject site and has determined that such actions and duties by the Seller substantially reduce the Agency's risks and liabilities associated with the site's present condition. Additionally, Agency Counsel has evaluated staff's recommendation to modify the Agency's standard indemnification in the purchase and sale agreement and replace it with the more narrow language included in the staff report attachment. Agency Counsel has advised that this is fundamentally a policy decision for the Agency Board but that given the actions and duties to be performed by the Seller in advance of the Agency's acquisition of the subject site and the Developer's negligible period of site control, staff has taken substantial steps to protect the Agency.

Terms of Exclusive Negotiation Agreement

Concurrent with the Agency's acquisition of the site, the Agency would enter into an ENA with the Developer for a period of one year, with an optional one-year extension. During that period, the Developer shall work with staff to prepare a conceptual design and program while the two parties negotiate in good faith for the development of an affordable housing project that satisfies the Corporation's Guidelines with the objective of executing a DDA.

PROJECT DESCRIPTION

The following is a summary of the site:

Site Area	22,500 sq. ft.
Land Use District	Residential Emphasis
Maximum FAR Permitted	8.0 (10.0 with FAR bonuses and/or TDRs)
Minimum FAR Required	5.0
Assessor's Parcel Nos.	533-451-02, -11, -16

Environmental Impact: This activity is categorically exempt from CEQA pursuant to State CEQA Guidelines Sections 15301(d), 15304(c) and 15332. The activity does fall within the classes of projects for which a categorical exemption may be applied. (Pub. Resources Code Section 21084.) Moreover, the activity triggers none of the exceptions to the application of a categorical exemption set forth in CEQA Guidelines Section 15300.2. Therefore, the application of the categorical exemptions set forth under CEQA Guidelines section 15301(d), 15304(c), and 15332 are appropriate for this activity.

CONCLUSION

Staff recommends that the Agency approve the Purchase and Sale Agreement and ENA between the Agency and the Developer inclusive of the conditions outlined in this report. The site is consistent with the Corporation's Affordable Housing Guidelines and provides the ability to expand the Agency's supply of affordable housing units and redevelop an abandoned excavated site.

Respectfully submitted,

Concurred by:



Jeff Graham
Vice President, Redevelopment



Frank J. Alessi
Executive Vice President & Chief Financial Officer

- Attachments: A – Site Map
 B – Purchase and Sale Agreement
 C – Exclusive Negotiation Agreement