



# CITY OF EMERYVILLE

## MEMORANDUM

To: Mayor Dianne Martinez and City Council

From: Michael A. Guina, City Attorney

Date: October 18, 2016

Subject: **Resolution Of The City Council Of The City Of Emeryville Appropriating \$1,802,269.68 From Fund 298 (Housing Assets Fund) In Order To Make Timely Debt Service Payments Due November 8, 2016, Pursuant To Promissory Notes Held By The Charles A. And Elizabeth C. Leone Living Trust And The Miriam N. Flynn Trust One UAD 10/5/2001, As Well As Payment To The State Franchise Tax Board, Which Notes Are Secured By Deeds Of Trust Encumbering 5890 And 5900 Christie Avenue, Emeryville, California**

### BACKGROUND

On March 15, 2011, the Emeryville Redevelopment Agency (“Agency”) adopted Resolution No. RD18-11 authorizing a Purchase and Sale Agreement (the “Contract”) with the Charles and Elizabeth C. Leone Trust and the Miriam N. Flynn Trust (collectively, “Sellers”) for the acquisition of 5890 and 5900 Christie Avenue, Emeryville, California (collectively, the “Property”). Both parcels of the Property were (and are) improved with building improvements. The parties executed the Contract for the purchase of the Property on March 15, 2011.

The Contract provided a formula for the determination of the purchase price for the Property. Pursuant to this formula, the parties agreed to a price for the Property of \$159.94 per square foot of land and this base price represented the maximum price the Agency agreed to pay for the Property. However, since the Property was encumbered by a driveway easement, the Contract provided that the value of the portion of the Property that was (and is) subject to the easement (the “Easement Area”) would be discounted by 66% of the per square foot purchase price. Therefore, the Property needed to be surveyed to determine (1) the actual size of the Property to calculate the gross purchase price, and (2) the actual size of the Easement Area so that the easement discount could be determined.

Further, since the Contract purchase price was based on an assumed cleared site, the cost to demolish the existing building improvements on the Property needed to be determined in order to arrive at the actual net price to the Agency. Additionally, the base purchase price assumed that the environmental condition

of the Property was clean and did not require remediation. Therefore, the Agency needed to conduct its environmental due diligence investigations to confirm that the Property was in fact clean from an environmental standpoint; therefore, the Contract reserved the Agency's right to (1) investigate the environmental condition of the Property and (2) approve the environmental condition of the Property as a condition of its obligation to purchase the property from Sellers.

On November 14, 2011, the transaction closed and in conjunction with the closing, the parties executed Amendment No. 1 to the Purchase and Sale Agreement which memorialized: (1) the gross purchase price of \$10,356,892 based on the results of the survey of the Property and the Easement Area (which was agreed to and accepted by the parties on March 17, 2011); (2) the demolition bid deduction of \$219,550 (which was agreed to and accepted by the parties on April 21, 2011); (3) the environmental remediation deduction of \$500,000 (which was agreed to and accepted by the parties on September 21, 2011); and (4) the final net purchase price of \$9,637,342 ("Purchase Price").

At close of escrow the Agency made a payment of \$1,500,000 against the Purchase Price and executed two promissory notes in favor of the Charles and Elizabeth C. Leone Trust in the amount of \$4,227,300.26 ("Leone Note") and the other in favor of the Miriam N. Flynn Trust in the amount of \$3,910,041.74 ("Flynn Note"). The obligation to make payments due under the Leone Note and Flynn Note are secured by separate deeds of trust encumbering the property at 5890 and 5900 Christie Avenue. The remaining amounts due are spread over five payments due November 8 of each year in amount of \$936,268.27 to the Leone Note, and \$866,001.41 to the Flynn Note, for a total sum due of \$1,802,269.68. See the detailed discussion below.

### **IMPACT OF AGENCY DISSOLUTION**

With the dissolution of the Redevelopment Agency, the City as Successor Agency listed the obligations due under the Leone Note and Flynn Note as enforceable obligations. Nonetheless, the Department of Finance maintained that the obligations due under the Leone Note and Flynn Note are not enforceable obligations because, notwithstanding the fact that the Purchase and Sale Agreement was approved and executed as of March 15, 2011, the transaction did not close until November 14, 2011, nearly five (5) months after the June 26, 2011 effective date of AB 26.

5890 and 5900 Christie Avenue was initially acquired with low and moderate income housing funds and thus was considered a housing asset. On April 10, 2012 these properties, along with all of the housing assets of the former Redevelopment Agency, were approved by the Emeryville Oversight Board for transfer to the City of Emeryville pursuant to Resolution No. OB 01-12. The

resolution of the Oversight Board and all attachments were transmitted to the State Department of Finance as well as to the State Controller and the Alameda County Auditor-Controller and none of these entities objected to the transfers of the housing assets to the City. Furthermore, on August 1, 2012, pursuant to Health and Safety Code Section 34176 (a), the City was obligated to submit a housing assets transfer form to the Department of Finance. Once again the City submitted the required form, which clearly showed 5890 and 5900 Christie Avenue as housing assets transferred to the City. On August 31, 2012 the Department of Finance advised that it was “not objecting” to the items on the form. The State Controller and Alameda County Auditor-controller were also copied on this letter approving the City’s housing assets transfer form. Thus the acquisition and subsequent transfer of 5890 and 5900 Christie Avenue to the City as a housing asset has been approved, but nevertheless the obligations under the Leone Note or Flynn Note are not.

Beginning in 2011, there are 5 annual payments due every November 8 under the Leone Note and Flynn Note. The current 2016 payment represents the last payment. The Economic Uncertainty Fund (Fund 275) and the General Fund have loaned \$1,802,269.68 to the Housing Assets Fund for payments one through four due each year on November 8, from 2012-2015 (Resolution Nos. 12-193 (General Fund), 13-153, 14-139, 15-127). In addition, the General Fund loaned \$1,500,000 to the Housing Assets Fund pursuant to Resolution No. 12-240 to repay the down payment made by the Agency when it initially acquired these properties as required by the Low and Moderate Income Housing Fund Due Diligence Review.

For each payment the City is obligated to make payment to the Leone Note in the amount of \$936,268.27, and the amount due under the Flynn Note is \$866,001.41 for a total sum due of \$1,802,269.68. Note that because Flynn did not reinvest the proceeds of the sale into a replacement property, three and one third percent (3.33%) of the payment due to her must be paid to the Franchise Tax Board. Thus of the \$866,001.41 due on the Flynn Note, \$837,134.70 will be paid to Miriam Flynn and \$28,866.71 to the State Franchise Tax Board.

At the time the aforementioned resolutions were adopted, each provided that the City’s General Fund and Economic Uncertainty Fund would be repaid from the Housing Assets Fund eventual receipt of the Supplemental ERAF obligation of \$9,033,600. The SERAF obligation is an enforceable obligation and as provided in Section 34191.4 (b)(2)(B), repayment of the SERAF obligation has priority over any other loan repayment.

To date, the SERAF has repaid the General Fund and the Economic Uncertainty Fund in the amount of \$8,341,766 with the balance to be paid from the 2017-2018 ROPS. However, it should be noted that the General Fund and Economic

Uncertainty Fund could also be repaid from the sales proceeds from the properties themselves, or additionally the loan or some portion thereof could be satisfied by retention of all or a portion of the property by the City for some other public use (e.g. park/open space). At present the only funds that have been used to acquire 5890 and 5900 Christie Avenue are unrestricted General Fund and Economic Uncertainty Fund monies. Accordingly, there is no legal obligation to provide affordable housing on those parcels.

### **RECOMMENDATION**

There are currently sufficient funds in the Housing Assets Fund to pay the last payment of \$1,802,269.68 under the Leone Note and the Flynn Note. Staff recommends the City Council approve an appropriation from the Housing Assets Fund (Fund 298) in order to make the fifth and final payment that is due November 8, 2016 in the amount of \$1,802,269.69.



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Michael A. Guina, City Attorney

Attachments:

1. City Council Resolution