



# City of Emeryville

CALIFORNIA

## MEMORANDUM

**DATE:** July 19, 2022  
**TO:** Christine Daniel, City Manager  
**FROM:** Charles S. Bryant, Community Development Director  
**SUBJECT:** **4300 and 4310 San Pablo Avenue Intergenerational Affordable Housing Project:**

**Resolution Of The City Council Of The City Of Emeryville Declaring The Properties At 4300 And 4310 San Pablo Avenue, Emeryville, California (APN 049-1079-014-01 And 049-1079-017-01) As Exempt Surplus Land Pursuant To Government Code Section 54221(f)(1)(A)**

**An Ordinance Of The City Council Of The City Of Emeryville Approving And Authorizing The City Manager To Enter Into And Execute A Lease Disposition And Development Agreement Between The City Of Emeryville And EAH, Inc. And Related Ground Lease For The Development And Operation Of An Intergenerational Affordable Housing Project At 4300 And 4310 San Pablo Avenue, Emeryville, California (APN 049-1079-014-01 And 049-1079-017-01) And Authorizing The City Manager To Take Action To Effectuate The Lease Disposition and Development Agreement And Related Ground Lease (CEQA Status: Exempt Pursuant To State CEQA Guidelines Sections 15194 and 15332)**

### RECOMMENDATION

Staff recommends that the City Council adopt the above-entitled resolution declaring the property at 4300 and 4310 San Pablo Avenue as "Exempt Surplus Land" pursuant to Government Code Section 54221(f)(1)(A). Staff also recommends that the City Council adopt the first reading of the above-referenced ordinance approving and authorizing the City Manager to execute a Lease Disposition and Development Agreement ("LDDA") and associated Ground Lease with EAH, Inc. for the development and operation of an Intergenerational Affordable Housing Project on the City-owned property at 4300 and 4310 San Pablo Avenue.

### BACKGROUND

On September 17, 2019, the City Council adopted Resolution No. 19-137 authorizing staff to release a Request for Qualifications/Proposals (RFQ/P) for the design and development of an affordable senior or intergenerational rental housing development at 4300 and 4310 San Pablo Avenue (the "Site").

As articulated in the Request for Qualifications/Proposals (“RFQ/P”) for the selection of the developer, the City’s key objectives for the redevelopment of the Site included:

- 1) Implementing an affordable housing project that effectively serves extremely low, very low-, and low-income senior households and/or youth in an intergenerational housing model, including youth transitioning from the foster care system.
- 2) Implementing a project that adheres to all appropriate Design Considerations including the City of Emeryville’s Planning Regulations, Design Guidelines, Green Design requirements and the San Pablo Avenue Urban Design Plan.
- 3) Meeting the goals and objectives of the City of Emeryville’s 2015–2023 Housing Element of the City’s General Plan.
- 4) Minimizing to the greatest extent possible the City’s financial assistance by using outside resources such as private, state, and federal programs.
- 5) Ensuring the financial sustainability of the project by selecting a developer able to demonstrate its capacity to sustain both its own financial health as well as that of the development project.

On July 21, 2020, the City Council adopted Resolution No. 20-85 selecting EAH, Inc. (“EAH”) as the first-choice developer for the design and development of the Site and authorized the City Manager to execute an Exclusive Right to Negotiate Agreement (“ERN”) with EAH for the purpose of negotiating the LDDA. During the City Council meeting on July 21, 2020, City Council requested that the developer explore options to incorporate as many two-bedroom units as possible into the design.

The ERN was executed on October 29, 2020, and included an initial negotiation period of 180 days (until April 28, 2021), with the City Manager authorized to extend the period an additional 180 days (until October 28, 2021). On October 19, 2021, the City Council authorized the execution of an amendment to the ERN to extend the negotiation period an additional 90 days (until January 20, 2022), with the City Manager authorized to extend the period an additional 180 days (until July 19, 2022).

During the term of the ERN, staff and EAH negotiated the terms of the LDDA with periodic updates provided to the City Council in closed session. During this time, Senate Bill (“SB”) 591 was introduced, which would permit the development of fully integrated intergenerational housing developments. Prior to SB 591, an intergenerational housing project would effectively require the populations be served in two separate but adjoining developments. On September 28, 2021, the Governor signed SB 591, which allowed the Project to proceed with an intergenerational housing model.

The LDDA, included as Exhibit A to the attached ordinance, and accompanying Ground Lease (Exhibit G to the LDDA) has been negotiated with and agreed to by EAH. The following sections of this staff report discuss the applicability of the Surplus Lands Act to the Site, and provide an overview of the major provisions of the LDDA and Ground Lease.

## **DISCUSSION**

### **Surplus Lands Act**

Assembly Bill (“AB”) 1486 and AB 1255, signed into law in 2019, made changes to the Surplus Lands Act (Government Code Title 5, Division 2, Part 1, Chapter 5, Article 8, “Surplus Land”, or “SLA”). As a result, the SLA now includes provisions requiring local agencies to notify the State Housing and Community Development Department (“HCD”) of the inventory of lands that it has declared as “surplus” or “exempt surplus”, and includes requirements for notifying HCD, and for negotiating with interested housing sponsors prior to disposal of surplus lands.

In April 2021, HCD released the Final Surplus Land Act Guidelines (the “Guidelines”), which implement, interpret, and make specific the text of the SLA. Section 103 of the Guidelines describes the types of properties that are exempt from the Guidelines’ provisions relating to required notification and negotiation periods, and requirements for certain covenants to be placed on the property at the time of sale. Specifically, Section 103(b)(3)(A) of the Guidelines, which mirrors Government Code Section 54221(f)(1)(A), provides the following exemption:

“County or City Surplus Land Transferred for the Development of Affordable Housing with restrictions as described in Government Code Section 25539.4 or 37364.”

Government Code Section 37364 authorizes a City to dispose of real property to provide affordable housing to persons and families of low or moderate income provided the following conditions are met:

- a) Not less than 80 percent of the area of the parcel will be used for the development of housing; and
- b) Not less than 40 percent of the total number of those housing units developed on the parcel shall be affordable to households whose incomes are equal to, or less than, 75 percent of the maximum income of lower income households, and at least half of which shall be affordable to very low income households; and
- c) Dwelling units produced for persons or families of low and moderate income under Government Code Section 37364 shall be restricted by regulatory agreement to remain continually affordable to those persons and families for the longest feasible time, but not less than 30 years, with such regulatory agreement recorded in the office of the county recorder in which the housing development is located.

According to the Guidelines, the City Council may declare the Site to be Exempt Surplus Land if this declaration is made at a regular public meeting and is supported by written findings demonstrating that the land meets the above description.

As applied to the Site, staff believes the exemption at Government Code Section 54221(f)(1)(A) and Guidelines Section 103(b)(3)(A) is appropriate because the City intends to lease the Site pursuant to an LDDA that defines the scope of development as a project that utilizes the entirety of the Site for housing that is affordable to households

earning between 20 percent and 60 percent of AMI, with not less than 51 percent of the units affordable to households earning up to 30 percent of AMI. Additionally, the Ground Lease includes an Affordability Agreement (Exhibit B to the Ground Lease), which will have a term of 75 years and be recorded in the Alameda County Recorder's Office.

The attached Draft Resolution declares the Site as Exempt Surplus Land under the provisions outlined above.

### **LDDA and Ground Lease**

#### *Agreement Structure*

As noted above, the agreement with EAH is arranged as an LDDA with the form of Ground Lease as an exhibit to the LDDA, similar to the structure of the agreement for the 3706 San Pablo Avenue Affordable Housing Project (Estrella Vista). The LDDA establishes the scope of development, the conditions precedent to the conveyance of the leasehold interest in the property, and a schedule for performance of certain milestones, while the Ground Lease addresses the construction and operation of the development. The term of the Ground Lease is 75 years.

#### *Scope of Development*

The LDDA establishes that the development will be a 5-story building with a courtyard at the second level and containing 68 residential units and approximately 7,000 square feet of amenity space serving the residential units. No fewer than eight of the residential units will be two-bedroom units. No fewer than 17, and no more than 34, parking spaces will be provided on the ground floor in the podium. The project will be built to either LEED Silver or obtain 100 'Green Point Rated' points and be an all-electric building. The developer will make every effort to include mass timber in the construction of the ground floor and, if found financially infeasible, will make best efforts to include low carbon concrete mixes, limiting carbon-intensive materials, and prioritizing lower carbon alternatives.

The development will serve both Transition Aged Youth ("TAY") and Senior populations, with a maximum of 13 units (i.e., 20%) set-aside for TAY, one unit for an on-site manager, and the remaining 54 units for seniors. The affordable units will serve households earning between 20% and 60% of Area Median Income ("AMI"), with no less than 35 units (51%) for households earning no more than 30% of AMI.

The development will include the installation of public art at a cost of at least 0.5% of the project development costs.

#### *Conditions Precedent to Disposition of Leasehold Interest*

The LDDA sets forth the following conditions precedent to conveyance of the leasehold interest to EAH. Prior to closing of the Ground Lease, EAH must submit and obtain City approval of the following items:

### Planning Entitlements

EAH is expected to submit an application for entitlement of the project under the process provided in SB 35 (Government Code Section 65913.4) which allows for streamlined, ministerial approval of certain housing projects. By using the SB 35 process, the project is expected to receive entitlements within 90 days of the effective date of the LDDA.

### Financing Plan

The LDDA includes an initial Financing Proposal (Exhibit E to the LDDA and described in more detail below) which is EAH's best estimate of the costs and funding sources that will be utilized for the development. A revised Financing Plan, including commitment letters from funders, is required to be submitted for City review 20 days prior to EAH's submittal of any application for Low-Income Housing Tax Credits ("Tax Credits") for the development.

### Construction Drawings and Building Permit

EAH is required to submit construction drawings both for the City's review for consistency with the LDDA, and separately, to obtain a Building Permit. Both of these submittals are required within 30 days of receipt of an award of Tax Credits from the Tax Credit Allocation Committee ("TCAC").

### Construction Contract

EAH must submit the proposed construction contract for the development within 60 days of submittal of construction drawings. The City's review of the construction contract is limited to determining that costs are consistent with the approved Financing Plan, the contractor is licensed and acceptable to the City, the terms of the construction contract are consistent with the LDDA and Ground Lease, and that prevailing wage, indemnification and insurance requirements are included.

### Bonds

The submittal of labor and materials bond and a performance bond is required within 60 days of submittal of construction drawings. The bonds must be for an amount equal to the cost of construction as indicated in the construction contract and naming the City as co-obligee.

### Insurance

EAH must submit evidence of insurance consistent with the requirements of the Ground Lease, prior to execution of the Ground Lease. The Ground Lease requires commercial general liability with excess liability, auto liability, worker's compensation, builder's risk, and property insurance.

### Residential Marketing Plan

EAH' submittal of a marketing plan, consistent with the Affordable Housing Agreement, is required within 60 days of the award of Tax Credits from TCAC. This is a standard requirement for all projects with affordable units and the Marketing Plan outlines the process by which EAH will market the units and conduct the lottery.

### Supportive Services Plan

Within 60 days of award of Tax Credits from TCAC, EAH must submit a Supportive Services Plan consistent with the LDDA and Affordable Housing Agreement. The Supportive Services Plan will outline shall include services tailored specifically to support the TAY and Senior households residing at the development and the LDDA calls for the Supportive Services Plan to purposefully integrate the TAY and Senior households as a cohesive community.

### Property Management Plan

EAH must submit a Property Management Plan within 60 days of the award of Tax Credits. The Property Management Plan must include a maintenance schedule and budget, provide for the semi-annual inspection of units, establishment of a maintenance fund, and requirements for annual reporting to the City on maintenance. The Property Maintenance Plan will also include a schedule for interior renovations and future capital needs assessments.

### Other

Additionally, prior to closing of the Ground Lease, EAH must not be in default and there must not be any litigation challenging the project; and EAH must remit \$250,000 to the City for the payment of the City's costs associated with construction monitoring.

### *Initial Financing Plan*

As noted above, the LLDA includes an initial Financing Plan as Exhibit E, which is EAH's best estimate of costs and funding sources for which the project will be competitive. The projected total development cost for the project is \$52.52 million, including the value of the land. The initial financing plan includes funds from the City in the form of a land donation valued at \$3.55 million, Alameda County A1 bond funding of \$2.52 million, State Multifamily Housing Program of \$17.55 million, Affordable Housing Program funds from the Federal Home Loan Bank of \$680,000, Tax Credits of \$19.75 million, Project-Based Section 8 Vouchers of \$4.38 million, and general partner equity and deferred developer fee of \$4.8 million.

### *Transfers*

The LDDA allows certain, specific types of transfers typical of affordable housing projects, including transfer of the leasehold interest and EAH's duties and obligations to a partnership, provided EAH remains the general partner and the partnership will be eligible for a property tax exemption, the admission of an investor as a limited partner for purposes of syndicating Tax Credits (subject to City's review and approval of the amended partnership agreement), transfer of the general partner's interest in the partnership if the general partner is removed by the investor for cause following default (subject to the City's review and approval of the replacement general partner), and transfer of EAH's leasehold interest from the partnership back to EAH, or a nonprofit affiliate of EAH, at the end of the 15-year compliance period for the Tax Credits.

All other transfers are subject to the City's sole discretion and require the submittal of information to the City sufficient for the City to determine the qualifications of the transferee.

### *Default*

The LDDA provides that, if the City, despite good faith and diligent efforts, is unable to convey the leasehold to EAH and EAH is otherwise entitled to the conveyance, or if any of the conditions precedent to conveyance of the leasehold proves to be impossible to meet, despite EAH's good faith and diligent efforts, and the City is otherwise ready to convey the leasehold, a "no-fault" termination may be initiated by either the City or EAH and neither party would have any rights against or liabilities to the other.

If EAH transfers its interest in a way that violates the terms of the LDDA, is declared bankrupt, or suspends or dissolves its business, a developer event of default is triggered and the City may issue a notice of default to EAH with a 60-day period to cure the default (or commence to cure if the default cannot be cured within 60 days). If EAH fails to cure within 60 days or longer, but in no case more than 120 days, the City's remedies include 1) bringing an action for specific performance; 2) bringing an action for damages; and/or 3) terminating the LDDA.

### *Schedule of Performance*

The LDDA requires EAH to obtain planning entitlements within 90 days of the LDDA's effective date, submittal of a financing plan to the City 20 days prior to application for Tax Credits, and submittal of an application for building permits within 30 days of award of Tax Credits. The outside date for closing of the Ground Lease is two years from the LDDA's effective date. This time period provides EAH with three opportunities to apply for Tax Credits.

### *Ground Lease Term*

The term of the Ground Lease is 75 years from the date of issuance of a Certificate of Completion, which is to be issued in conjunction with the Final Certificate of Occupancy for the building permit for the development.

### *Ground Lease Rent*

The base rent is \$100 per year, which will be prepaid by EAH for the entire 75-year term. EAH also must pay all taxes, license, permit fees and the costs of any utilities incurred at the Site.

### *Construction of Development*

The Ground Lease requires EAH to commence construction within 60 days of the date of recordation of the memorandum of Ground Lease in the Alameda County Recorder's Office (the "Commencement Date"), and to complete construction within three years. The Ground Lease reiterates the LDDA requirements for construction to comply with prevailing wage requirements, submit payment and performance bonds and maintain insurance. The Ground Lease also requires EAH to obtain the City's written approval prior to implementing any material changes from the approved construction plans.

### *Additional Construction*

For any future construction during the term of the Ground Lease, the City's prior approval is required. For construction that is a new building or outdoor structure, substantial

remodeling or alterations, additional spaces, or any construction with a cost of more than \$100,000 or that reduces the number of bedrooms within any unit, submittal of plans for the City's review and approval is required.

#### *Maintenance*

The Ground Lease requires EAH to maintain all elements of the development (including exterior, interior, landscaping) at no expense to the City, including replacements or renewals when necessary and that replacements be at least equal in quality and class to the original improvements.

#### *Ownership of Improvements*

During the term of the Ground Lease, the improvements are the property of EAH. Upon termination of the Ground Lease, the improvements and all stoves, refrigerators and dishwashers installed in the residential units become the property of the City.

#### *Ground Lease Default/Termination*

Under the Ground Lease, EAH as tenant can cause a default by 1) not curing a monetary obligation for ten days after notice of a breach; 2) failing to maintain the required insurance; 3) abandoning the property; 4) entering bankruptcy; 5) failing to pay taxes and/or assessments; 6) transferring its leasehold interest in violation of the Ground Lease; or 7) defaulting under any other obligation of the Ground Lease. After notice of a default and opportunity to cure (including the opportunity for limited partners and/or mortgagees to cure), the City may terminate the Ground Lease and take possession of the property and all improvements. The City may also bring an action for specific performance, injunction, and/or damages, and the City may also have a receiver appointed to take possession and perform any other obligations required under the Ground Lease.

### **FISCAL IMPACT**

As outlined above, the LDDA includes an initial Financing Plan. The City proposes to provide the Site in the form of a 75-year leasehold interest pursuant to the Ground Lease and will receive prepaid rent of \$100 per year upon execution of the Ground Lease for a total of \$7,500 in rent. Additionally, as a condition precedent to execution of the Ground Lease, EAH will remit \$250,000 to the City to support the City's costs of implementing the project, including construction monitoring. As the timing of these revenues is unknown and pending successful application for Tax Credits, the revenues will be incorporated into the City's budget at a future date, once Tax Credits are secured. The LDDA does not provide any other City funds to support the development.

### **STAFF COMMUNICATION WITH THE PUBLIC**

The project has been the subject of several public meetings, including meetings with both the Commission on Aging and Housing Committee regarding updates on the project generally, and discussion of resident services. The Planning Commission held a study session regarding the project on March 24, 2022, and is scheduled to hold an additional study session and consider a General Plan Conformity determination for the project on July 28, 2022.



## **CONCLUSION**

Staff recommends that the City Council adopt the attached resolution declaring the Site Exempt Surplus Land pursuant to Government Code Section 54221(f)(1)(A), an exemption related to affordable housing projects. Staff also recommends that the City Council adopt the first reading of the attached ordinance authorizing the City Manager to execute the LDDA and Ground Lease with EAH, Inc. for the development of the project.

If the Planning Commission approves the General Plan Conformity report for the project on July 28, 2022, and the City Council adopts the attached ordinance, the second reading of the ordinance will be scheduled for City Council action on September 6, 2022. If adopted at second reading, the ordinance will be effective 30 days thereafter, on October 6, 2022, and the LDDA will be executed. The Developer is expected to work to secure funding from various competitive sources including Tax Credits. The LDDA is effective for two years, providing EAH with three opportunities to secure Tax Credits.

Once Tax Credits and all other necessary funding is secured, and once the other conditions precedent to conveyance of the leasehold interest are satisfied, the Ground Lease may be executed and construction must commence within 60 days. Construction is expected to require approximately 18 months and, pursuant to the Ground Lease, must be completed within three years of the commencement of the Ground Lease.

**PREPARED BY:** Chadrick Smalley, Economic Development and Housing Manager

## **APPROVED AND FORWARDED TO THE CITY COUNCIL OF THE CITY OF EMERYVILLE:**



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Christine Daniel, City Manager

## **ATTACHMENTS:**

- Draft Resolution declaring 4300 and 4310 San Pablo Avenue as Exempt Surplus Lands, including Exhibit A, Assessor's Parcel Map
- Proposed Ordinance, including Exhibit A, Lease Disposition and Development Agreement with EAH, Inc.