



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: September 1, 2020
TO: Christine Daniel, City Manager
FROM: Charles S. Bryant, Community Development Director
SUBJECT: Emeryville Art Center Project

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 4060 Hollis, LLC And Related Ground Lease For The Development And Operation Of An Art Center At 4060 Hollis Street, Emeryville, California (APN 049-0618-004) 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 15301 and 15332)

Resolution Of The City Council Of The City Of Emeryville Authorizing The City Manager To Execute A Professional Services Contract With Macks Craic DBA Mack5 For Construction Monitoring Of The Emeryville Art Center Project In An Amount Not To Exceed \$144,000

RECOMMENDATION

Staff 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 agreements with 4060 Hollis, LLC (“Developer”), a single purpose entity formed by Orton Development Inc. (“ODI”), for the design, development and operation of the Emeryville Art Center on the City-owned property located at 4060 Hollis Street. Staff also recommends that the City Council adopt the attached resolution authorizing the City Manager to execute a Professional Services Contract with Macks Craic DBA Mack5 (“Mack5”) to provide construction monitoring services for the construction of the Emeryville Art Center, in an amount not to exceed \$144,000.

BACKGROUND

In March 2006, the Emeryville Redevelopment Agency (“Agency”) purchased the former United Stamping Company building at 4060 Hollis Street for the purpose of establishing an arts and cultural facility. The 30,000 square foot building and associated property (the “Site”) was purchased for \$3.6 million. It contains a one-story brick warehouse located on the northeast corner of 40th and Hollis Streets, directly adjacent to City Hall. The Site is located in the heart of the Park Avenue District and has been designated in the *Park Avenue District Plan* as an ideal location for arts and cultural uses.

The Agency purchased the Site for adaptive reuse to provide space for the annual Emeryville Celebration of the Arts Exhibition as well as year-round exhibit and performing arts uses. Various plans were contemplated for the facility over the following five years. In December 2010, the Agency entered into an Exclusive Right to Negotiate Agreement (“ERN”) with Emeryville Center for the Arts (“ECA”), a non-profit entity created to operate the Art Center, and on September 22, 2011, the Planning Commission approved a Conditional Use Permit and Design Review application for adaptive reuse of the Site.

In 2012, the State of California dissolved all redevelopment agencies statewide. This, in addition to an identified capital project funding gap of \$7.6 million, led to a temporary postponement of the Art Center project implementation until adequate funds could be identified. Shortly after the Agency was dissolved, ECA was dissolved as an entity. The City was ultimately able to retain the Site and the property was legally transferred to the City on September 5, 2017 in accordance with the *Long Range Property Management Plan* prepared by the Successor Agency to the Emeryville Redevelopment Agency. In addition to the Site, the City has approximately \$11 million available for the project in the City’s current Capital Improvement Program (CIP# CF-08, Project Number 06466107).

On January 16, 2018, the City Council held a study session regarding implementation options to re-start the Art Center project. The Council directed staff to pursue a public-private partnership approach and approved a draft Request for Qualifications/Proposals (“RFQP”) to solicit developer interest in partnering with the City. The RFQP was arranged as a two-phase selection process, with the first phase consisting of qualifications review, and the second phase consisting of qualified respondents’ submittals of conceptual proposals for the project.

The RFQP was released on February 12, 2018, and the City received nine responses to the RFQP by the April 13, 2018 deadline. A selection panel comprised of staff members from various departments reviewed the Phase I qualifications submittals and held follow-up interviews with the teams, resulting in a determination that three teams were the most qualified and should be invited to move forward to the second phase of the RFQP process.

The short-listed teams included ODI, Community Arts Stabilization Trust and Crew, and MSL & Company/Artspace/I.D.E.A. Partners. These teams submitted conceptual proposals pursuant to the RFQP on June 29, 2018. The RFQP included scoring of the second phase submittals by two separate panels: the staff panel that had determined the short list, and a panel of community members who were subject area experts (the “Blue Ribbon Panel”). The results of both panels’ scoring was then reported to the City Council at their regular meeting of September 17, 2018. The Council received presentations from staff and all three finalists, and then adopted a resolution authorizing staff to negotiate an ERN with ODI for the construction and operation of an Art Center on the Site.

On November 13, 2018, the City Council authorized the City Manager to execute the ERN with ODI. Since then, ODI has completed its due diligence of the Site and completed

design of the Art Center. On February 28, 2019, the Planning Commission held a study session to review the proposed conceptual design and provided comment. A second Planning Commission study session was held on May 28, 2020. On August 27, 2020, the Planning Commission is scheduled to hold a public hearing and consider approval of the Conditional Use Permit and Design Review application for the project (UPDR18-006) as well as a General Plan Conformity Report.

Simultaneously, an LDDA has been negotiated with and agreed to by ODI, included as Exhibit A to the attached ordinance.

DISCUSSION

LDDA and Ground Lease

The LDDA sets forth the terms and conditions for the funding, construction and preconditions of the City's leasing of the Site to the Developer. The Ground Lease (Exhibit E to the LDDA) contains the terms relating to the ongoing operations of the Art Center. The key terms of the LDDA and Ground Lease are summarized below:

Project Description:

The project consists of adaptive reuse of the existing 30,000 square foot building located on the Site, improved in accordance with the Scope of Development (Exhibit C to the LDDA) and consistent with the Conditional Use Permit and Design Review permit. The project includes approximately 13,000 square feet of flexible gallery/multipurpose space suitable for visual and performing arts uses, 17 artist studios comprising approximately 10,000 square feet total, approximately 4,500 square feet of office/co-working space, and a 2,400 square foot café space. The improvements outlined in the LDDA include new structural components; building facades; roof demolition, repair, replacement and alteration; and building systems (electrical, mechanical, plumbing). All spaces will be finished to a tenant improvements condition, except the café space, which will be finished to a "cold shell" condition pending identification of a tenant and associated tenant improvements.

Duration (Term) of Agreement:

The term of the LDDA commences upon execution and ends one year from the date the final Certificate of Occupancy is issued for the improvements. Interim milestones for advancement of the project are established in the Development Schedule (Exhibit B to the LDDA). The Ground Lease term commences upon execution, subject to satisfaction of the LDDA Conditions Precedent to Lease Close (discussed further, below), and consists of an initial term of 34 years with three ten-year options, for a total of 64 years. Pursuant to Government Code Section 37380, cities may lease properties for terms between 55 and 99 years if the lease is authorized pursuant to an ordinance adopted by the legislative body. For this reason, staff is recommending the City Council approve the execution of the lease by ordinance (see attached Proposed Ordinance).

Conditions Precedent to Lease Close:

Developer is required to satisfy several Conditions Precedent to Lease Close prior to execution of the Ground Lease and start of construction. These include:

Obtain Discretionary Approvals

Developer must have obtained all discretionary City approvals. As noted above, an application for Conditional Use Permit and Design Review is scheduled to be considered for approval by the Planning Commission on August 27, 2020. Accordingly, Section 2.2 of the LDDA includes an acknowledgement that this condition will have been satisfied prior to the effective date of the LDDA.

Submit Financing Plan and Operations Pro-Forma

Developer must submit a Financing Plan for the project that shows adequate funding to complete the improvements, and the total cost may not exceed \$12,900,000. Developer is not permitted to utilize debt financing in the Financing Plan and must use a combination of City funds and developer equity to fund the project. Additionally, Developer must submit an Operations Pro-Forma that depicts operations revenues and expenses over a ten-year period, which does not require any operating support from the City beyond that identified in the Operations Fund (see “Project Funding”, below).

Establish Gallery Operator and Submit Associated Agreements

Developer is required to form a non-profit entity to serve as the “Gallery Operator”. The Gallery Operator will be responsible for managing and programming the flexible gallery/multipurpose space, as well as day-to-day management of the overall operations of the Art Center. Developer is also required to submit any agreements, including subleases or operating agreements, that govern the Gallery Operator’s relationship with Developer and the project.

Submit Arts Management Plan and Community Outreach Plan

Developer must submit an Arts Management Plan that establishes the marketing plan for the spaces in the project, establishes the procedures for implementation and monitoring of the use restrictions applicable to the project via the Ground Lease, designates the community foundation selected to manage the Operating Fund, outlines the terms of the agreement with the community foundation, and establishes the policies and procedures related to the management and use of the Operating Fund (for more detail on the Operating fund, see “Project Funding”, below).

Submit Design Development Plans and Final Construction Plans

Developer must submit plans at two completion stages: Design Development and Final Construction. This submittal is for the City’s proprietary review (i.e. acting as property owner, not as regulator) to ensure the project complies with the terms of the LDDA and Ground Lease.

Submit for Building Permit Plan Check

Developer must submit all materials necessary for all building permits required for the project. In addition to submitting for plan check, a building permit for interior demolition, brick repointing, temporary shoring and environmental abatement must be “issue ready” prior to lease close.

Submit Construction Contract and Bonds

Developer must submit its contract for construction of the improvements to the City for review. The contractor must be reputable, experienced, licensed, and sufficiently capitalized for the project. The contract must show a guaranteed maximum price consistent with the aforementioned Financing Plan and not exceeding \$12,900,000. The contract must include retention provisions and require the payment of prevailing wages. The contract must include a one-year warranty and name the City as a third-party beneficiary of the warranty. ODI is also required to submit a labor and materials bond and a performance bond, each for an amount not less than 125% of the costs of construction as indicated by the contract.

Submit Insurance Certificates

Developer must submit evidence of insurance meeting the requirements of the Ground Lease (Exhibit D to the Ground Lease).

Execute Assignment of Plans

Developer must execute an Assignment of Documents (Exhibit F to the LDDA) assigning all of its rights and obligations under the plans, specifications, documents and approvals to the City.

Execute Construction Staging License

Developer must execute a Construction Staging License, which will provide for the temporary use of a portion of the City's parking lot for construction activities and staging.

Receive All Government Approvals

Developer must have received any other government approvals necessary to commence construction but not specifically addressed in the LDDA.

Agree to Form of Parking and Access License

Developer must have agreed to the form of a Parking and Access License, which will provide for the Art Center tenant and patron use of the City's parking lot and City Hall property for purposes of ingress and egress from the Art Center.

Submit Letters of Intent to Lease Café and 30% of Studio Spaces

Developer must submit Letters of Intent from prospective tenants to lease the café space and at least 30% of the studio spaces.

Project Funding:

As noted above, construction will be funded by a combination of City funds and Developer equity. The City currently has \$10,978,105 available for the project in its CIP. Of this, \$9,800,000 will be made available for construction, and \$1,000,000 will be placed into an Operating Fund which will be managed by a community foundation to generate interest that supports the Gallery Operator's costs. The balance of funding for the project will be provided by Developer equity. Because the project costs are limited to \$12,900,000,

Developer equity is limited to \$3,100,000. Developer equity is subject to an 8% rate of return. City funds will be expended first, and the City will withhold 10% of costs invoiced with retention released upon issuance of a Certificate of Occupancy.

Developer Fee:

The LDDA specifies that a developer fee will be paid to the Developer with the amount dependent on final project costs. The developer fee provisions are structured to incentivize completion of the project under budget. If total costs are \$9,604,000 or less, the developer fee is \$196,000 plus 10% of the difference between \$9,604,000 and the total development costs. If total costs are more than \$9,604,000, the developer fee is \$196,000. If there are insufficient city funds remaining to pay the developer fee, the developer fee is paid through sublease revenues (see “Rent”, below).

Use of the Art Center:

The Ground Lease includes terms relating to the use of the Art Center. Two-thirds of the rentable square footage are reserved for “Arts Uses” as defined by the Ground Lease. As part of this reservation, the Ground Lease requires that at least 10,000 square feet be made available to the Celebration of the Arts for a period of at least seven weeks per year, free of charge. Additionally, the City has a right to use space for up to ten calendar days per year, with four of these being weekend days, at no cost except for costs relating to catering, audio/visual equipment rentals, and any extraordinary set-up or staffing costs.

Spaces that are rented on a daily or hourly basis are considered to meet the requirement for reservation for an Arts Use if they are occupied by an Arts Use for at least 50% of the days they are occupied. The Ground Lease also requires actively marketing available spaces to arts users.

Rent:

The Ground Lease sets forth a “waterfall” for the sequential uses of revenues generated by the Art Center. Rent will be received from subtenants including users of the office/coworking spaces, studio tenants, the café tenant and, in certain circumstances, the Gallery Operator. After the payment of operating costs of the Art Center, the net revenue from rent generated by the project is applied as follows:

- First, to any outstanding developer fee
- Second, to pay the return on Developer equity invested in the project and outstanding. As noted above, Developer equity is subject to an 8% rate of return.
- Third, to return Developer equity outstanding
- Fourth, to cover any operating losses of the Gallery Operator. This component is applied only if the Gallery Operator is unable to generate enough revenue (e.g. from facility rental, events, fundraising) to cover its costs after the application of Operating Fund support and abatement of any rent to be paid by the Gallery Operator. The City’s share of net revenue is applied to Gallery Operator losses first, then Developer’s share of net

revenue. If these sources, combined, are insufficient to cover Gallery Operator's losses, the Gallery Operator losses are funded first in the "waterfall" (i.e. before outstanding developer fee). This arrangement insulates the City from payment of operations costs of the Art Center.

- Fifth, and lastly, remaining revenues are split 50% to City and 50% to Developer.

The Gallery Operator's rent due to Developer is restricted under the terms of the Ground Lease. The Gallery Operator Rent cannot exceed \$6.00 per square foot per year, triple net, escalated annually by the Consumer Price Index ("CPI") for the area. This is a substantial discount from market rents for similar commercial spaces in the area. As noted above, the Gallery Operator is only required to pay this rent when it generates enough operating revenue, including support from the Operating Fund, to pay its operating costs.

Maintenance and Future Construction:

The Ground Lease requires that Developer maintain a capital reserve fund in the amount of \$1.20 per square foot of building space, deposited annually, and escalated annually by the CPI. In the event major maintenance is required that exceeds the amount in the capital reserve fund, the maintenance costs will be funded by Developer equity subject to a 4% return (in contrast to the 8% return on the initial investment). Any Developer equity outstanding and subject to the 4% return rate is repaid prior to Developer equity subject to the 8% return rate.

The Ground Lease sets forth the terms under which future capital improvements of the Art Center may be made by Developer. Any substantial alterations, remodeling, or construction of new spaces or any alteration with a cost exceeding \$25,000 are subject to the City's prior approval and must be completed without cost to the City. The City's review and approval rights and obligations for future improvements are similar to that required for the initial improvements, as outlined above.

Transfers:

Within the first five years of the Ground Lease term, transfer of the leasehold interest is only permitted in the case of death or incapacity of individuals at Developer, and for subleases of the individual spaces. After the fifth year of the Ground Lease term, transfer of the leasehold interest is subject to the City's review and approval of the proposed transferee. The proposed transferee must meet the criteria specified in the Ground Lease and the City must determine that the transferee has the reputation, financial strength, and management and operation expertise in the ownership and operation of art based developments necessary to fully perform and comply with all terms of the Ground Lease. If Developer equity remains outstanding as of the date of a proposed transfer to an approved transferee, Developer forfeits the return of that outstanding equity.

Construction Monitoring Contract

Staff is recommending engaging a construction management firm to provide oversight of the construction of the Art Center in an owner's representation role.

In January 2019, the City issued a Request for Qualifications ("RFQ") for consulting services in various disciplines, including construction monitoring and project management services. The Art Center was specifically noted as an area of potential consulting services scope in the RFQ. Mack5 was the highest scoring construction monitoring and project management vendor based on the scoring criteria set forth in the RFQ. Mack5's submittal also demonstrated experience with adaptive reuse projects and performing arts facilities. Accordingly, Mack5 was selected to conduct construction estimating services for the City during the negotiation of the LDDA, including the review of estimates prepared by ODI and comparison of the estimates to the plans to determine accuracy and feasibility. The contract for construction estimating was executed in September 2019 for an amount not to exceed \$20,000.

In view of Mack5's qualifications demonstrated in the RFQ and this firm's familiarity with the Art Center project gained through the construction estimating scope of work, staff recommends engaging Mack5 to provide construction monitoring services for the project. The proposed contract (Exhibit A of the attached resolution) includes general construction monitoring/owner's representation tasks such as participation in weekly construction meetings, site visits to monitor progress, review of schedules, review of invoices for approval, negotiation of change orders, and generally representing the City's interest during construction. The proposed contract anticipates an 18-month construction period, consistent with ODI's current schedule. These services would be provided for a fee not to exceed \$144,000.

Environmental Review

Staff anticipates that the Planning Commission will determine that the project is exempt from environmental review under State CEQA Guidelines Section 15301, which applies to alterations to existing facilities, and Section 15332, which applies to infill development projects. The exemption at Section 15332 requires that:

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.

Staff has recommended that the Planning Commission find the project complies with these requirements. There has been no substantial change in the project, the circumstances under which the project will be taken or new information that warrants reconsideration of the application of the CEQA exemption.

FISCAL IMPACT

As noted above, \$10,978,105 is available for the Art Center project in the City's current Capital Improvement Program. The LDDA represents an expenditure of up to \$10,800,000 of this amount, with \$9,800,000 for construction and \$1,000,000 for the Operating Fund. The proposed construction monitoring contract with Mack5 is for \$144,000. Therefore, the total expenditures authorized under the LDDA and construction monitoring contract are \$10,944,000, within the amount budgeted in the CIP.

The structure of the LDDA and Ground Lease is arranged to insulate the City from operating costs of the Art Center. If the project performs as expected, the Ground Lease also creates the potential for the City to share in revenues in future years, once ODI equity has been repaid. Estimates of potential future revenues to the City are dependent on several variables and would be speculative at this time.

STAFF COMMUNICATION WITH THE PUBLIC

ODI held several community meetings during the first half of 2019 in various venues throughout the City to collect community input on the vision for the project. Additionally, staff met with the Besler Property Owners Association twice in early 2020 to discuss potential changes to the City Hall parking lot. As noted above, the Planning Commission reviewed the project at study sessions on February 28, 2019 and May 28, 2020, and is scheduled to hold a public hearing and consider approval of the project on August 27, 2020.

CONCLUSION

Staff recommends that the City Council adopt the first reading of the attached ordinance authorizing the City Manager to execute the LDDA with 4060 Hollis LLC, and the attached resolution authorizing the City Manager to execute a Professional Services Contract with Mack5 for the Art Center project.

If the Planning Commission approves the project's Conditional Use Permit and Design Review permit on August 27, 2020 and the City Council adopts the attached ordinance, the second reading of the ordinance will be scheduled for City Council action on September 15, 2020. If adopted at second reading, the ordinance will be effective 30 days thereafter, on October 15, 2020, and the LDDA will be executed. The Developer is expected to work toward satisfaction of the conditions precedent to lease close during the next two months, and once those conditions are satisfied, the Ground Lease may be executed, and construction can commence following issuance of the building permit. Construction is expected to take 18 months from building permit issuance to complete.

PREPARED BY: Chadrick Smalley, Economic Development and Housing Manager

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



Christine Daniel, City Manager

ATTACHMENTS:

- Proposed Ordinance, including Exhibit A, Lease Disposition and Development Agreement with 4060 Hollis, LLC
- Draft Resolution, including Exhibit A, Professional Services Contract with Macks Craic DBA Mack5