COMMISSION ON COMMUNITY INVESTMENT AND INFRASTRUCTURE

RESOLUTION NO. 80-2014

**Continued to a future meeting**

CONDITIONALLY APPROVING A VARIATION TO THE TRANSBAY REDEVELOPMENT PLAN’S ON-SITE AFFORDABLE HOUSING REQUIREMENT AS IT APPLIES TO THE MIXED-USE PROJECT AT 181 FREMONT STREET, SUBJECT TO APPROVAL BY THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO IN ITS CAPACITY AS LEGISLATIVE BODY FOR THE SUCCESSOR AGENCY TO THE SAN FRANCISCO REDEVELOPMENT AGENCY, AND AUTHORIZING THE ACCEPTANCE OF A FUTURE PAYMENT OF $13.85 MILLION TO THE SUCCESSOR AGENCY FOR USE IN FULFILLING ITS AFFORDABLE HOUSING OBLIGATIONS IN THE PROJECT AREA; TRANSBAY REDEVELOPMENT PROJECT AREA

WHEREAS, The California Legislature in 2003 enacted Assembly Bill 812 (“AB 812”) authorizing the demolition of the historic Transbay Terminal building and the construction of the new Transbay Transit Center (the “TTC”) (Stat. 2003, Chapter 99, codified at § 5027.1 of the Cal. Public Resources Code). AB 812 also mandated that 25 percent of the residential units developed in the area around the TTC “shall be available to” low income households, and an additional 10 percent “shall be available to” moderate income households if the City and County of San Francisco (“City”) adopted a redevelopment plan providing for the financing of the TTC (the “Transbay Affordable Housing Obligation”); and,

WHEREAS, The Board of Supervisors of the City and County of San Francisco (“Board of Supervisors”) approved a Redevelopment Plan for the Transbay Redevelopment Project Area (“Project Area”) by Ordinance No. 124-05, adopted on June 21, 2005 and by Ordinance No. 99-06, adopted on May 9, 2006 (“Redevelopment Plan”). The Redevelopment Plan established a program for the Redevelopment Agency of the City and County of San Francisco (“Former Agency”) to redevelop and revitalize the blighted Project Area; it also provided for the financing of the TTC and thus triggered the Transbay Affordable Housing Obligation; and

WHEREAS, The 2005 Report to the Board of Supervisors on the Redevelopment Plan (“Report”) estimated that the Transbay Affordable Housing Obligation would require the development of 1200 affordable units. Report at p. VI-14 (Jan. 2005). The Report also stated: “The affordable housing in the Project Area will include approximately 388 inclusionary units, or units built within market-rate housing projects… The affordable housing will also include approximately 795 units in stand-alone, 100 percent affordable projects.” Report at page VIII-7; and

WHEREAS, The Project Area is 40 acres in size and there are a limited number of publicly-owned properties (“Blocks”) remaining on which to build affordable
housing to meet the Transbay Affordable Housing Requirement. All of the remaining Blocks are already programmed for stand-alone, 100 percent affordable housing (e.g., Blocks 2 and 12), for commercial office space (e.g., Block 5 and Parcel F), or for a combination of market-rate and affordable housing, with specific land value goals that the Transbay Joint Powers Authority (“TJPA”) has used in its funding plan for the TTC. Nonetheless, with an additional public subsidy, units may be added to proposed stand-alone affordable housing developments on one or more of the Blocks; and,

WHEREAS, The Redevelopment Plan established, under Cal. Health and Safety Code § 33333, the land use controls for the Project Area, required development to conform to those land use controls, and divided the Project Area into two land use zones: Zone One and Zone Two. The Redevelopment Plan required the Former Agency to exercise land use authority in Zone One and authorized it to delegate to the San Francisco Planning Department (“Planning Department”) the land use controls of the San Francisco Planning Code (“Planning Code”), as amended from time to time, in Zone Two; and

WHEREAS, On May 3, 2005, the Former Agency and the Planning Department entered into a Delegation Agreement whereby the Planning Department assumed land use authority in Zone Two of the Project Area subject to certain conditions and procedures, including the requirement that the Planning Department’s approval of projects shall be consistent with the Redevelopment Plan (“Delegation Agreement”); and,

WHEREAS, To fulfill the Transbay Affordable Housing Obligation, both the Redevelopment Plan and the Planning Code require that all housing developments within the Project Area contain a minimum of 15 percent on-site affordable housing. Redevelopment Plan, § 4.9.3; Planning Code, § 249.28 (b) (6) (the “On-Site Requirement”). Neither the Redevelopment Plan nor the Planning Code authorize off-site affordable housing construction or an “in-lieu” fee payment as an alternative to the On-Site Requirement in the Project Area; and,

WHEREAS The Redevelopment Plan provides a procedure and standards by which certain of its requirements and the provisions of the Planning Code may be waived or modified. Section 3.5.5 of the Redevelopment Plan states: “The Agency Commission, in its sole discretion, may grant a variation from the Plan, the Development Controls and Design Guidelines, or the Planning Code where enforcement would otherwise result in practical difficulties for development creating undue hardship for the property owner and constitute an unreasonable limitation beyond the intent of the Plan, the Design for Development or the Development Controls and Design Guidelines… Variations to the Plan or the Development Controls and Design Guidelines shall only be granted because of unique physical constraints or other extraordinary circumstances applicable to the property. The granting [of] a variation must be in harmony with the Plan, the Design for Development and the Development Controls and Design Guidelines
and shall not be materially detrimental to the public welfare or materially injurious to neighboring property or improvements in the vicinity… In granting any variation, the Agency Commission shall specify the character and extent thereof, and shall also prescribe any such conditions as are necessary to secure the goals of the Plan, the Design for Development and the Development Controls and Design Guidelines;” and,

WHEREAS, On February 1, 2012, the Former Agency was dissolved pursuant to the provisions of California State Assembly Bill No. 1X 26 (Chapter 5, Statutes of 2011-12, First Extraordinary Session) (“AB 26”) and the decision by the California Supreme Court in California Redevelopment Assoc. v. Matosantos, 53 Cal.4th 231 (2011). On June 27, 2012, AB 26 was amended in part by California State Assembly Bill No. 1484 (Chapter 26, Statutes of 2011-12) (“AB 1484”). (AB 26 and AB 1484 are codified in sections 33500 et seq. of the California Health and Safety Code, which sections, as amended from time to time, are referred to as the “Redevelopment Dissolution Law.”); and,

WHEREAS, Under the Redevelopment Dissolution Law, all of the Former Agency’s assets (other than certain housing assets) and obligations were transferred to the Successor Agency to the Former Agency, also known as the Office of Community Investment and Infrastructure (“Successor Agency” or “OCII”). Some of the Former Agency’s housing assets were transferred to the Mayor’s Office of Housing and Community Development (“MOHCD”), acting as the housing successor; and,

WHEREAS, To implement the Redevelopment Dissolution Law, the Board of Supervisors adopted Resolution No. 11-12 (Jan. 26, 2012) and Ordinance No. 215-12 (Oct. 4, 2012), which granted land use authority over the Former Agency’s Major Approved Development Projects, including the Transbay Redevelopment Project, to the Successor Agency and its Commission. The Delegation Agreement, however, remains in effect and the Planning Department continues to exercise land use authority over development in Zone Two; and,

WHEREAS, On April 15, 2013, the California Department of Finance (“DOF”) determined finally and conclusively that the Successor Agency has enforceable obligations under Redevelopment Dissolution Law to complete certain development in the Project Area, including the Transbay Affordable Housing Obligation; Letter, S. Szalay, DOF Local Government Consultant, to T. Bohee, Successor Agency Executive Director (April 15, 2012 [sic]); and

WHEREAS, On December 6, 2012, the Planning Commission approved Motions 18763, 18764, 18765 and the Zoning Administrator issued a variance decision (later revised on March 15, 2013) (collectively, the “Approvals”) for a project at 181 Fremont Street in Zone 2 of the Project Area. The Approvals authorized the demolition of an existing three-story building and an existing two-story building, and the construction of a 52-story building reaching a roof height of approximately 700 feet with a decorative screen reaching a maximum height of approximately 745
feet and a spire reaching a maximum height of approximately 800 feet, containing approximately 404,000 square feet of office uses, approximately 74 dwelling units, approximately 2,000 square feet of retail space, and approximately 68,000 square feet of subterranean area with off-street parking, loading, and mechanical space (the “Project”). The Project also includes a bridge to the future elevated City Park situated on top of the Transit Center; and

WHEREAS, To comply with the On-Site Requirement, the Approvals require the Project to include approximately 11 inclusionary below-market-rate units that are affordable to income-eligible households. All of the Project’s approximately 74 residential units are located on the highest 15 floors of the approximately 52-story building. The residential units will be for-sale units with home owners association (HOA) assessments that the Project’s developer estimates will exceed $2000 per month; and

WHEREAS, On June 5, 2014, OCII received a request from the developer of 181 Fremont Street (“Developer”) for a variation from the On-Site Requirement. The Developer proposed removing the affordability restrictions from the approximately 11 affordable units on-site and converting them to market rate units. Letter, J. Paul, 181 Fremont Street, LLC, to M. Grisso, OCII (June 5, 2014) (“Variation Request”), attached as Exhibit A to the Commission Memorandum related to this Resolution; and,

WHEREAS, In the Variation Request, the Developer explained that the Project was unique in that it is the only approved or proposed mixed-use office and housing development within the Project Area, it has the smallest number of residential units of any high rise development in the Project Area, its residential units are located on the upper 15 floors of an approximately 52-story tower, and its HOA dues will be in excess of $2000 per month. The Variation Request concludes that the application of the On-Site Requirement to the Project creates “practical difficulties for maintaining the affordability of the units because homeowners association (“HOA”) fees, already high in such developments, will likely increase such that the original residents would not be able to afford the payments” and thus “creates an undue hardship for both the Project Sponsor and the owners of the inclusionary housing units;” and

WHEREAS, The Variation Request proposes that the Successor Agency grant a variation on the condition that the Developer contribute $13.85 million toward the development of affordable housing in the Project Area. Payment of this fee would ensure that the conversion of the approximately 11 inclusionary units to market rate units does not adversely affect the Successor Agency’s compliance with the Transbay Affordable Housing Obligation; and

WHEREAS, The following facts support a finding that the On-Site Requirement imposes practical difficulties for the Project creating undue hardships for the owners of the inclusionary below-market-rate units (“BMR Owners”) and MOHCD, as the housing successor responsible for enforcing the long-term affordability restrictions on the units:
1) HOA fees pay for the costs of operating and maintaining the common areas and facilities of a condominium project and generally must be allocated equally among all of the units subject to the assessment, Cal. Code Reg., title 10, § 2792.16 (a). HOA fees may not be adjusted based on the below-market-rate (“BMR”) status of the unit or the income level of the homeowner. If HOA fees increase, BMR Owners will generally be required to pay the same amount of increases in regular assessments and of special assessments as other owners.

2) The Successor Agency’s Limited Equity Homeownership Program (May 2005) (“LEHP”) ensures that income-eligible households are able to afford, at initial occupancy, all of the housing costs, but does not cover increases in HOA dues that occur over time. Initially, the LEHP will decrease the cost of the BMR unit itself to ensure that income-eligible applicants are able to meet all of the monthly costs, including HOA fees. Neither the Successor Agency nor MOHCD (which ultimately assumes authority over the BMR unit as a transferred housing asset) has a program, however, for assisting owners in BMR units when increases in regular monthly HOA fees occur.

3) Members of homeowner associations may approve increases in HOA fees without the support of the BMR Owners because BMR Owners, particularly in a development with inclusionary units, typically constitute a small minority of the total HOA membership. Increases less than 20 percent of the regular assessment may occur without a vote of the HOA; increases exceeding 20 percent require a majority vote of members in favor. Cal. Civil Code § 1366 (b). In addition, a homeowner association may impose special assessments to cover the costs of capital expenditures for repairs and other purposes. Id.

4) State legislation to provide protections to low- and moderate-income households in inclusionary BMR units of a market-rate building when HOA fees increase has been unsuccessful to date, see e.g. Assembly Bill No. 952, vetoed by Governor, Sep. 27, 2008 (2007-08 Reg. Sess.).

5) When HOA fees increase or special assessments are imposed, BMR Owners whose incomes have not increased comparably may have difficulty making the higher monthly payments for HOA fees. See e.g. Carol Lloyd, Owners’ Dues Keep Going Up, S.F. Chronicle, Aug. 5, 2007, available at http://www.sfgate.com/default/article/Owners-dues-keep-going-up-2526988.php. The result is that housing costs may become unaffordable and some BMR Owners will face the hardship of having to sell their unit at the reduced prices required under the limited equity programs of the Successor Agency and MOHCD.

6) If the BMR Owner is forced to sell the inclusionary unit because of the high HOA fees, the cost of the restricted affordable unit, which will now include the high HOA fees, will be assumed by either the subsequent income-eligible buyer or by MOHCD, as the housing successor required to comply with the affordability restrictions. In either case, the high HOA dues will have caused an additional hardship; and

WHEREAS, The hardship imposed by the On-Site Requirement constitutes an unreasonable limitation beyond the intent of the Redevelopment Plan to create affordable
housing for the longest feasible time, as required under the Community Redevelopment Law, Cal. Health & Safety Code § 33334.3 (f) (1); and

WHEREAS, The following facts support a finding that extraordinary circumstances apply to the Project:

1) The Project is unique in that it is a mixed-use, high-rise development with a very small number of for-sale, on-site inclusionary affordable housing units at the top of the tower. Of high-rise development recently approved or proposed in the Project Area, the Project is the only mixed-use development with commercial office and residential uses and has the smallest number of residential units. As noted above, the construction of affordable housing units at the top of a high-rise creates practical difficulties for maintaining the affordability of the units.

2) The Developer has offered to contribute toward the Transbay Inclusionary Housing Obligation $13.85 million, which constitutes approximately 2.5 times the amount of the affordable housing fee that would be permitted under the City’s Inclusionary Affordable Housing Program if this Project were located outside of the Project Area. See San Francisco Planning Code, §§ 415.1 et seq. The Successor Agency can use those funds to subsidize the equivalent of up to 55 stand-alone affordable housing units on publicly-owned parcels in the Project Area and thus significantly increase the number of affordable units that would be produced under the On-Site Requirement. The amount of the affordable housing fee was determined based on a market analysis by a real estate economics firm retained by the Successor Agency, The Concord Group (“TCG”). As shown in Exhibit B to the Commission Memorandum related to this Resolution, TCG calculated the net additional revenue that would accrue to the developer if 11 on-site affordable housing units were converted to market-rate units and concluded that the developer would accrue an additional $13.85 million.

WHEREAS, The payment of $13.85 million as a condition of granting the Variation Request ensures that the variation will not be materially detrimental to the public welfare and is necessary to secure the goals of the Redevelopment Plan to fulfill the Transbay Affordable Housing Obligation; and

WHEREAS Approval of the Variation Request would be subject to approval by the Board of Supervisors, in its capacity as legislative body for the Successor Agency, because it constitutes a material change to a Successor Agency affordable housing program, Ordinance No. 215-12, § 6 (a) (providing that “the Successor Agency Commission shall not modify the Major Approved Development Projects or the Retained Housing Obligations in any manner that would . . . materially change the obligations to provide affordable housing without obtaining the approval of the Board of Supervisors….”); and

WHEREAS, The San Francisco Planning Commission and Board of Supervisors will consider approving a development agreement with the Developer that would be consistent with this Resolution, would provide relief from the on-site affordable housing requirement in Section 249.28 of the Planning Code, and would require the Developer to pay an affordable housing fee of $13.85 million to the Successor
Agency for its use in fulfilling the Transbay Affordable Housing Obligation. The form of the proposed development agreement is attached to this resolution; and

WHEREAS, Approval of the Variation Request does not compel any changes in the Project that the Planning Commission previously approved. Rather, approval of the Variation Request merely authorizes the Planning Commission and Board of Supervisors to consider a future action that would remove the On-Site Requirement from the Project. Thus, OCII’s approval of the Variation Request is statutorily exempt from the California Environmental Quality Act (“CEQA”) as a feasibility and planning study under CEQA Guidelines Section 16262. Moreover, authorizing the future acceptance of $13.85 million for the Transbay Affordable Housing Obligation does not constitute a project under CEQA Guidelines Section 15378 (b)(4) because it merely creates a government funding mechanism that does not involve any commitment to a specific project; now, therefore, be it

RESOLVED, The Commission on Community Investment and Infrastructure, as Successor Agency, hereby approves a variation to the Redevelopment Plan’s On-Site Requirement at 181 Fremont Street consistent with the Variation Request, subject to approval by the Board of Supervisors, acting in its capacity as the legislative body for the Successor Agency, on the condition that the Developer pay $13.85 million to the Successor Agency for use in fulfilling the Transbay Affordable Housing Obligation; and, be it further

RESOLVED, The Commission on Community Investment and Infrastructure authorizes the Executive Director to take appropriate and necessary actions to effectuate the purpose of this resolution.

I hereby certify that the foregoing resolution was adopted by the Commission at its meeting of September 12, 2014.

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Commission Secretary