MEMORANDUM

TO: Community Investment and Infrastructure Commissioners

FROM: Tiffany Bohee
Executive Director

SUBJECT: 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

EXECUTIVE SUMMARY

Assembly Bill 812 requires that a total of 35% of the residential units in the Transbay Redevelopment Project Area (“Project Area”) be available to low- and moderate-income households. The Redevelopment Plan for the Project Area (“Redevelopment Plan”) and several enforceable obligations would fulfill this requirement through the combination of stand-alone and inclusionary housing in the Project Area. Both the Redevelopment Plan and the Planning Code require that all housing developments within the Project Area contain a minimum of 15% on-site affordable housing. Approval of projects on designated development blocks located in Zone One of the Project Area are under the purview of OCII; approval of projects in Zone Two are under the purview of the Planning Department, pursuant to the San Francisco Planning Code.

181 Fremont is a mixed-use, high-rise development project (the “Project”) located in Zone Two of the Project Area that is being developed by Jay Paul Company (the “Developer”). The Project, which is currently under construction, was approved by the Planning Commission on December 6, 2012. The Project is unique in that: (1) it is the only approved or proposed mixed-use office and housing development within the Project Area; (2) it has the smallest number of residential units of any high rise development in the Project Area; and (3) its residential units are located on the upper 15 floors of the 52-story tower, which is approximately 700 feet in height. The Developer maintains that given these unique characteristics, the requirement to include the affordable units on-site will create practical difficulties for maintaining the affordability of the units because the homeowners association fees, already high in such developments, will likely increase over time such that the original residents would not be able to afford the payments and thus create an undue hardship for both the Developer and the future owners of the affordable units. The Developer estimates that the homeowner association fees will likely exceed $2000 per month.
The Developer has therefore asked the Office of Community Investment and Infrastructure ("OCII"), as the successor agency to the San Francisco Redevelopment Agency, to grant a variation from the Redevelopment Plan requirement for on-site affordable housing that would allow the Planning Commission to consider the conversion of the 11 on-site affordable units to market-rate units, on the condition that the Developer contributes $13.85 million toward the development of affordable housing in the Project Area.

The Redevelopment Plan gives the Commission the ability to grant a variation from this requirement if: (1) enforcement otherwise result in practical difficulties for development creating undue hardship for the property owner; (2) enforcement would constitute an unreasonable limitation beyond the intent of the Plan, the Design for Development or the Development Controls and Design Guidelines; and (3) there are unique physical constraints or other extraordinary circumstances applicable to the property. The Redevelopment Plan also gives the Commission the authority to condition its approval of a variation as necessary to secure the goals of the Redevelopment Plan and related documents.

Staff has analyzed the Developer's request, and made findings as required by the Redevelopment Plan that: (1) enforcement of the on-site housing requirement creates practical difficulties for maintaining the affordability of the units, thereby creating undue hardship for the Developer, the future homeowners, and the Mayor's of Housing Community Development; (2) this hardship 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; and (3) extraordinary circumstances, in particular the small number of for-sale units at the top of the high-rise tower, apply to the Project. Additionally, the $13.85 million affordable housing fee, which was determined based on a market analysis by a real estate economics firm retained by OCII, can be used to subsidize the equivalent of up to 55 stand-alone affordable housing units on publicly-owned parcels in the Project Area and thus significantly assist OCII in fulfilling the 35% affordable housing requirement.

As required by Board of Supervisors Ordinance No. 215-12, the Commission’s approval of the Variation Request would be subject to approval by the Board of Supervisors of the City and County of San Francisco ("Board of Supervisors"), in its capacity as legislative body for OCII, because it constitutes a material change to OCII's affordable housing program. Additionally, because the Project is located in Zone Two of the Project Area, the Planning Commission and Board of Supervisors will consider approving a development agreement with the Developer that is consistent with this action.

Staff recommends conditionally approving a variation to the 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 in its capacity as legislative body for OCII, and authorizing the acceptance of a future payment of $13.85 million to OCII for use in fulfilling its affordable housing obligations in the Project Area.
BACKGROUND

Transbay Affordable Housing Obligation

Assembly Bill 812, enacted by the California Legislature in 2003 and codified at California Public Resources Code §5027.1, mandates that a total of 25% of the residential units in the Project Area be available to low income households, and an additional 10% be available to moderate income households (the “Transbay Affordable Housing Obligation”), for a total of 35% affordable housing units. This Transbay Affordable Housing Obligation is expected to generate approximately 1,200 affordable units through a combination of units within market rate buildings, or inclusionary units, and stand-alone 100% affordable projects to be built on publicly owned properties.

In order to comply with the Transbay Affordable Housing Obligation, the Redevelopment Plan, at Section 4.9.3, and the San Francisco Planning Code, at Section 249.28(b)(6), require that all housing developments within the Project Area contain a minimum of 15% on-site affordable housing (the “On-Site Requirement”). Neither the Redevelopment Plan nor the Planning Code authorizes off-site affordable housing construction or an “in-lieu” fee payment as an alternative to the On-Site Requirement in the Project Area.

Variation Requirements

The Redevelopment Plan provides a procedure and standards by which certain of its requirements, including the On-Site Requirement, may be waived or modified. Section 3.5.5 of the Redevelopment Plan gives the Commission the ability to grant a variation from the Redevelopment 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. Section 3.5.5 also states that variations can only be granted by the Commission because of unique physical constraints or other extraordinary circumstances applicable to the property, and that the Commission shall condition the variation as necessary to secure the goals of the Redevelopment Plan, the Design for Development and the Development Controls and Design Guidelines.

181 Fremont Mixed-Use Project

On December 6, 2012, the Planning Commission issued approvals for the Project at 181 Fremont Street in Zone 2 of the Project Area. The Project is a 52-story (approximately 700 feet tall), containing approximately 404,000 square feet of office uses, approximately 74 for-sale units on the highest 15 floors of the tower, approximately 2,000 square feet of retail space, and approximately 68,000 square feet of subterranean area with off-street parking. In compliance with the On-Site Requirement of the Redevelopment Plan and Planning Code, the Project approvals require that 11 of the 74 units be available to moderate income households earning 100% of area median income. The Project’s developer estimates that the homeowners association fees for the residential units will exceed $2,000 per month.
DISCUSSION

Variation Request

The Developer of the Project has requested a variation from the On-Site Requirement that would allow for the conversion of the 11 on-site affordable units to market-rate units (see Exhibit A, the "Variation Request"). In the Variation Request, the Developer explained that the Project was unique in that (1) it is the only approved or proposed mixed-use office and housing development within the Project Area, (2) it has the smallest number of residential units of any high rise development in the Project Area, and (3) its 74 residential units are located on the upper 15 floors of an approximately 52-story tower. 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." Finally, the Variation Request proposes that OCII grant a variation on the condition that the Developer contributes $13.85 million toward the development of affordable housing in the Project Area, in order to ensure that the conversion of the 11 inclusionary units to market-rate units does not adversely affect OCII's compliance with the Transbay Affordable Housing Obligation.

Analysis of the Variation Request

As noted above, the Commission can authorize a variation from the On-Site Requirement if the following findings can be made: (1) enforcement of the Off-Site Requirement would result in practical difficulties for development creating undue hardship for the property owner; (2) enforcement of the Off-Site Requirement would constitute an unreasonable limitation beyond the intent of the Plan, the Design for Development or the Development Controls and Design Guidelines; and (3) there are unique physical constraints or other extraordinary circumstances applicable to the property.

Practical Difficulties/Undue Hardship

Given the unique nature of the Project, in particular the affordable units at the top of a high-rise tower, the On-Site Requirement creates practical difficulties for the Project, as well as undue hardships for the future owners of the inclusionary below-market-rate units ("BMR Owners") and the Mayor's Office of Housing and Community Development ("MOHCD"), as the housing successor responsible for enforcing the long-term affordability restrictions on the units, as follows:

1) HOA fees pay for the costs of operating and maintaining the common areas and facilities of a condominium project and, per state law, 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 as other owners;
2) OCII’s Limited Equity Homeownership Program ("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 OCII nor MOHCD has a program, however, for assisting owners in BMR units when increases in regular monthly HOA fees occur;

3) HOA members 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% of the regular assessment may occur without a vote of the HOA; increases exceeding 20% require a majority vote of members in favor. (Cal. Civil Code § 1366 (b)) To date, 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; and

4) 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. 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 OCII and/or MOHCD. If a 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. In either case, the high HOA dues will have caused an additional hardship.

Unreasonable Limitation

The hardship imposed by the On-Site Requirement, as described above, 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).

Extraordinary Circumstances

There are several extraordinary circumstances applicable to the Project. 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 previously noted, the construction of affordable housing units at the top of a high-rise creates practical difficulties for maintaining the affordability of the units.

Additionally, the Developer has offered to contribute $13.85 million toward the development of affordable housing in the Project Area, 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, which is approximately
$5.5 million. The amount of the affordable housing fee was determined based on a market analysis by a real estate economics firm retained by OCII, The Concord Group ("TCG"). TCG calculated the net additional revenue that would accrue to the Developer if the 11 on-site affordable housing units were converted to market-rate units and concluded that the Developer would accrue an additional $13.85 million (see Exhibit B). The analysis took into consideration the exact location of the 11 on-site affordable units within the Project in order to determine a value consistent with other comparable high-rise sales prices. Staff estimates that OCII could provide the local share of subsidy for approximately 55 stand-alone affordable housing units on publicly-owned parcels in the Project Area with the $13.85 million based on projected construction and subsidy costs.

**Compliance with the Transbay Affordable Housing Obligation**

As previously mentioned, the Transbay Affordable Housing Obligation is an enforceable obligation under Redevelopment Dissolution Law and requires that 35% (approximately 1,200 units) of the residential units in the Project Area shall be developed for low and moderate income households. OCII is on track to meet the Transbay Affordable Housing Obligation (which has been finally and conclusively determined to be an enforceable obligation by the State Department of Finance) through a combination of stand-alone and inclusionary housing on the OCII assisted parcels in Zone One of the Project Area as well as inclusionary units on privately developed projects in Zone Two. To date in Zone 1, OCII has completed 120 very-low income units on Block 11 and provided funding for 70 affordable units currently under construction on Block 6. OCII has provided predevelopment funding for 85 affordable units on Block 7, and construction will commence in 2015. Another 286 affordable units are currently in predevelopment in Blocks 8 and 9. Over the next several years, OCII will facilitate the development of approximately 600 additional units of affordable housing in Zone 1 on Blocks 1, 2, 4, and 12. In Zone 2, there are an additional 49 affordable inclusionary units currently approved in at 41 Tehama Street. Cumulatively, the affordable units in these projects total approximately 1,200 units, which will achieve the 35% Transbay Affordable Housing Obligation. Please see Exhibit C for a map of the Transbay Project Area for further reference.

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. OCII will use the payment to fulfill the Transbay Affordable Housing Obligation. Specifically, OCII will use the $13.85 million payment to not only fund the 11 units that would have otherwise been provided in the Project on an OCII assisted site, but also to fund an additional 44 units on future OCII assisted Transbay projects. Staff is currently programming the majority of the $13.85 million payment for Transbay Block 8, a mixed-income project that will include approximately 177 affordable units.

**NEXT STEPS**

As required by Board of Supervisors Ordinance No. 215-12, the Commission’s approval of the Variation Request would be subject to approval by the Board of Supervisors, in its capacity as legislative body for OCII, because it constitutes a material change to OCII's affordable housing program. Additionally, the Planning Commission and Board of Supervisors will consider approving a development agreement with the developer that would be consistent with this action,
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 OCII for its use in fulfilling the Transbay Affordable Housing Obligation.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

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.

Approval of the Variation Request will not result in a physical change to the Project that was approved by the Planning Commission on December 6, 2012. In approving the Project, the Planning Commission found that because the Project was consistent with the adopted zoning controls in the Transit Center District Plan and was encompassed within the analysis contained in the Transit Center District Plan Final EIR, it did not require further environmental review under Section 15183 of the CEQA Guidelines and Public Resources Code Section 21083.3.

Finally, the payment of $13.85 million as a condition of granting the Variation Request will be used by OCII to fund the 55 units that would have otherwise been in the Project Area and that were previously analyzed in the Environmental Impact Statement/Environmental Impact Report for the Transbay Terminal/Caltrain Downtown Extension/Redevelopment Project, which was certified in 2004. Any development project on the OCII assisted Transbay projects would require its own CEQA determination prior to project approval. Authorizing the future acceptance of $13.85 million for the Transbay Affordable Housing Obligation thus 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.

STAFF RECOMMENDATION

Staff recommends conditionally approving a variation to the Redevelopment Plan’s On-Site Requirement as it applies to the mixed-use project at 181 Fremont Street, subject to approval by the Board of Supervisors in its capacity as legislative body for OCII, and authorizing the acceptance of a future payment of $13.85 million to OCII for use in fulfilling the Transbay Affordable Housing Obligation.

(Originated by Christine Maher, Senior Development Specialist, and Courtney Pash, Acting Transbay Project Manager)

Tiffany Boheler
Executive Director
Exhibit A: Variation Request
Exhibit B: Market Analysis by The Concord Group
Exhibit C: Map of the Transbay Redevelopment Project Area