City of FRESNO

| ITEM NO. |
| --- |
| MEETING: March 17, 2009 |
| APPROVED BY |
| (Executive Director) |

**REPORT TO THE REDEVELOPMENT AGENCY**

**DATE:** March 17, 2009

**FROM:** Marlene Murphey, Executive Director

**SUBJECT:** Consider approval of a Memorandum of Understanding (MOU) for the development of real property in the Chinatown Expanded Project Area.

**RECOMMENDATIONS**

Approve a Memorandum of Understanding (MOU) for the development of real property in the Chinatown Expanded Project Area.

**EXECUTIVE SUMMARY & BACKGROUND**

Fresno Historic Chinatown, LLC (the Developer) has been performing due diligence for the development of mixed use projects in the Chinatown Expanded Redevelopment Project Area (Project Area). Their due diligence has identified properties suitable for multi-phased affordable housing and retail mixed use projects.

The Developer approached Agency Staff regarding the development of a three phase mixed use project consisting of 200 +/- affordable housing units, 9,000 +/- square feet of ground floor commercial/retail space, and subterranean parking on 1.5 +/- acres of property (Assessor Parcel Numbers 467-073-06, 467-073-07, 467-073-16T, and 467-081-16T) on Mono Street between F and G Streets in December 2008.

The Developer's financing plan for the project includes leveraging the State of California Housing and Community Development Department's Proposition 1-C Infill Infrastructure Grant (IIG) program and the California Tax Credit Allocation Committee's Low Income Housing Tax Credits (LIHTC).

In preparation for application to the IIG and LIHTC programs an MOU is proposed to facilitate the negotiation of a Disposition and Development Agreement (DDA) for the property. The MOU is the appropriate instrument to demonstrate negotiation rights for the property and satisfy the site control threshold requirements for both funding programs. The developer will submit a Conditional Use Permit (CUP) application to the City's Planning Development in March 2009, an IIG application in April, 2009, and a LIHTC application in 2009.

This project will assist the Agency's implementation of the Project Area Plan, satisfy the Agency's statutory requirements to produce inclusionary housing under Section 33334.2, 33334.3, and 33334.5 of the California Community Redevelopment Law (CRL), and assist the City in its implementation of the Housing Element, specifically Goal 2 – New Construction of Affordable Housing, Policy 2.1 – New Construction.

Under the MOU the Agency agrees to donate the property to the project as financial assistance should certain conditions be met including 1) An award of a Proposition 1-C Infill Infrastructure Grant (IIG) in the 2008-2009 Funding Round; 2) Approval of discretionary land use approvals and conditions from the City of Fresno; 3) An allocation LIHTC from the California Tax Credit Allocation Committee (CTCAC) in 2009; and 4) Agreement, approval of and execution of a DDA between the Agency and Developer in 2009.

The Agency shall not be relied upon for further financial considerations beyond the value of the land as substantiated by an appraisal performed by an MAI certified Appraiser. Agency Staff has ordered an appraisal for the property. Furthermore, the Developer is required to complete the necessary environmental review per the California Environmental Quality Act (CEQA) in order to receive building permits at Developers sole expense.

The MOU helps support the applications for the IIG and LIHTC allocation and the potential development of a mixed use project in Chinatown.

On February 25th the Developer presented the project to representatives of the Chinatown Revitalization Inc. (CRI) Board and Chinatown business owners. The representatives voiced consensus of support for the project.

On March 11, 2009, the Housing and Community Development Commission, at a regularly scheduled meeting, with presentation by staff, unanimously recommended that the Agency Board approve the Agency negotiate and execute this MOU. Representatives of the Chinatown Revitalization Inc. (CRI) Board and Chinatown business owners were also present at the meeting and voiced consensus of support for the project.

**Attachments:**

"A". Draft MOU
"B". Parcel Map

## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (the "MOU"), is entered between the Redevelopment Agency of the City of Fresno ("Owner") and Fresno Historic Chinatown, LLC, ("Developer"), regarding the development of real property in the Chinatown Expanded Redevelopment Project Area (the "Project Area") for a multi-phase mixed use affordable housing and retail project at the Property (defined herein) at Mono and G Streets in Chinatown ("Site").

### Recitals

A. The Agency owns four (4) separate parcels; three (3) contiguous and one (1) non-contiguous. The property consists of those parcels with the assessor parcel numbers (APN) 467-073-06, 467-073-07, and 467-073-16T and 467-081-16T (see attached map). The Agency has sole ownership and control of the Property. The Agency owns and has present rights in the Property and intends to negotiate a Disposition and Development Agreement (DDA) with the Developer should certain conditions be met within allotted time as stated in Section 7, "Milestones", of this MOU.

B. The Agency desires housing and mixed use projects in the Project Area to implement the Project Area Plan and stimulate residual redevelopment of the Project Area.

C. The Developer proposes to work with the Agency in developing a three phase mixed use project consisting of 200 +/- housing units and 9,000 +/- square feet of retail space on the Property, which would be financed, in substantial part, through low-income housing tax credits (LIHTC) and other sources of public financing. The first phase of this project is planned for 68 +/- units of affordable housing and 3,000 square feet of retail; the second phase is planned for 68 +/- units of affordable housing and 3,000 square feet of retail; and the third phase is planned for 61 +/- units of affordable housing and 3,000 square feet of retail.

D. The Agency and the Developer desire to take certain steps towards developing a mixed use housing and retail project in Chinatown and intend to pursue certain milestones to carry out such a project.

E. This MOU is solely to negotiate the DDA and the subsequent development of the Property should certain conditions be met within allotted time as stated in Section 7, Milestones, of this MOU.

### Understanding

1. **Limited Purpose MOU.** This MOU does not commit any party to further action other than those stated in Section 7 of this MOU. This MOU sets forth the parties' obligations relating only to engaging in those activities.

2. **Term.** This MOU should be effective as of the date that the Agency executes it, after the Developer's execution, and the Agency Board approves it. It should remain in effect no longer than December 31, 2009, or until the date that Agency determines to terminate this MOU and/or any further negotiations, whichever is earlier. This MOU will automatically terminate should the developer fail to receive any of the following approvals or allocations; 1) An award of a Proposition 1-C Infill Infrastructure Grant (IIG) in the 2008-2009 Funding Round; 2) Approval of discretionary land use approvals and conditions from the City of Fresno; 3) An allocation LIHTC from the California Tax Credit Allocation Committee (CTCAC) in 2009; and 4) Agreement, approval of and execution of a DDA between the Agency and Developer in 2009.

3. **Developer Project Team Members and Affiliates.** The Developer has assembled a project team (the "Project Team"), the members of which are as follows:

   **Developer(s):** *Fresno Historic Chinatown, LLC comprised of the Penstar Group*

4. **Agency and Developer Responsibilities.** During the term of this MOU, the Agency and Developer should negotiate exclusively in good faith to reach ultimate terms the DDA. During the term of this MOU, the Developer should work diligently to achieve the milestones per Section 7 of this MOU.

5. **Proposed Assistance Terms.** The Agency agrees to donate the property to the project as financial assistance to the project should certain conditions be met within allotted time as stated in Section 7 of this MOU. The Agency shall not be relied upon for further financial considerations beyond the value of the land as substantiated by an appraisal performed by an MAI certified Appraiser. Terms, conditions, and schedules of the land transfer shall be agreed upon in the DDA.

6. **Developer's Financial and Other Capacity**. During the term hereof, Developer will demonstrate to the Agency's reasonable satisfaction that the Developer and all associated affiliates has sufficient financial strength and the business experience in planning, financing, development, ownership, and operation of similar projects to complete the Project, or portion thereof, competently.

7. **Milestones – Target Dates.** Target dates for events contemplated by this MOU are as follows:

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| Execution of this Agreement by Developer | March 2009 |
| Submittal of Discretionary Land Use Approval Applications | March 2009 |
| Submittal of IIG Application (for Phases I-III) | April 1, 2009 |
| Submittal of Second Round LIHTC Application (for Phase I) | July 1, 2009 |
| Notification of Award of Proposition 1-C IIG | June 1, 2009 |

| | |
|---|---|
| Approval of Discretionary Land Use Approvals and Conditions | August 1, 2009 |
| Notification of LIHTC Award | September 1, 2009 |
| Submit DDA to Agency Board for Approval | September 15, 2009 |
| Execution of DDA | September 15, 2009 |

**8. Limitations and Contingencies.**

8.1. **Agency rights in the Property.** Developer understands that the Agency owns the site and has the right to exercise control over the Property. This MOU is merely an understanding regarding the predevelopment activities of the project and a concurrent period of negotiations for of DDA described herein.

8.2. **Assignment Prohibited.** The Developer may not assign or otherwise transfer any of its rights or obligations under this Agreement without the express written consent of the Agency. The Agency may give or deny consent in its sole and absolute discretion.

8.3. **The Agency is committing to a continuing course of action.** By executing this MOU the Agency is agreeing to negotiate the DDA for transfer of the Property to the Developer if all milestones are achieved per Section 7 of this MOU within the term of this MOU. Any further negotiations following receipt of the items under Section 7 are within the sole discretion and direction of the Council and Agency Board.

8.4. **DDA and Compliance with Laws.** If the negotiations result in a proposed DDA, Agency Board approval thereof may occur only after compliance with all applicable laws and ordinances including, without limitation, the CRL and CEQA, as applicable. Any DDA shall become effective only if and after the DDA has been considered and along with appropriate findings and determinations approved by the Agency Board at a public hearing called for such purpose.

8.5. **Property control**. Any development on the Property by any person or entity is fully contingent upon control of the Property.

8.6. **City and Agency discretion is absolute.** Except as expressly provided herein, neither City nor Agency should have obligations or duties hereunder and no liability whatever if any negotiations end for any reason.

a. The Agency has no agreement to provide financial assistance toward the development of a mixed use project at the Site. The Agency's financial and other involvement in developing a mixed use project at the Site, if any, should be established by future written agreements. The Agency Board has sole and absolute discretion to determine any Agency

financial participation. In exercising its discretion, the Council and the Agency Board may consider such factors as market conditions, development density, costs, risks associated with development, estimated or actual revenues and profit, public purposes, the degree to which a project fits in with the existing character of the Chinatown area and the downtown, the financial requirements of the developer, the direct and indirect financial benefit to the Agency, or any other matters it may deem appropriate.

b. The Agency is not committed to or in agreement to undertake any acts or activities requiring the subsequent independent exercise of discretion by the Agency or any Commission or official thereof. The parties recognize that any negotiations or further actions may end after reaching the milestones in Section 7 of this MOU, or by the Council's exercise of discretion.

This MOU is merely an agreement to negotiate disposition of the property should certain conditions be met within allotted time as stated in Section 7, "Milestones", of this MOU.

9. **Indemnity.** Developer shall indemnify, defend with counsel reasonably acceptable to Agency, and hold Agency harmless from all claims, demands, liabilities, losses, damages, costs, fees, and expenses, including Agency's reasonable attorney fees, costs, and expenses, arising from the acts or activities of Developer or Developer's representatives in, on, or about the Property during or arising in connection with this Agreement. Developer shall pay for all consultants Agency must retain in relation to this MOU or the DDA, whether the DDA is approved by the Agency or not. Prior to retention of any consultant by Agency, Developer and Agency shall meet and confer as to the scope and nature of services to be rendered and the cost thereof. The Agency may require Developer to provide a deposit to cover any anticipated costs.

10. **Miscellaneous Provisions.**

**10.1 Further Assurances.** Each party will sign and deliver further documents, or take any further actions required to undertake the actions of this MOU.

**10.2 Notices.** All notices and other communications required or permitted under this Agreement shall be in writing and duly given on the date of service, if (a) served personally on the person to receive the notice, (b) delivered by depositing the notice or communication in the U. S. mail, postage prepaid, and addressed to the relevant party at the address set forth below, or (c) by facsimile that provides a transmission confirmation showing the date and time transmitted.

**To Developer:**
Fresno Historic Chinatown, LLC
Attention: Brian Glover
855 M Street, Suite 1110
Fresno, CA 93721
Fax N. (559) 268-6030

**To Agency:**
Redevelopment Agency of the City of Fresno
Attention: Executive Director
2344 Tulare Street, Suite 200
Fresno, CA 93721
Fax No.: (559) 498-1870

**10.3** **Entire Agreement.** Each Exhibit referred to in this Agreement is by that reference incorporated into and made a part of this Agreement. This Agreement is the entire agreement between the parties regarding the Property, and supersedes all prior discussions, negotiations, commitments or understanding, written or oral.

**10.4** **Amendment.** Developer and Agency may amend this Agreement only by mutual written consent of the parties, unless otherwise expressly provided herein.

**10.5** **Successors and Assigns.** This Agreement is binding upon and shall inure to the benefit of each party, and each party's heirs, successors, assigns, transferees, agents, employees or representatives.

**10.6** **Time of the Essence.** Time is of the essence of each term in this Agreement.

**10.7** **Attorneys' Fees**. If any party to this Agreement begins any action, proceeding, or arbitration arising out of this Agreement, then as between Agency and Developer, the prevailing party shall be entitled to receive from the other party, besides any other relief that may be granted, its reasonable attorneys' fees, costs, and expenses incurred in the action, proceeding, or arbitration.

**10.8** **Governing Law.** This Agreement and the legal relations between the parties shall be governed by and construed according to California law. Venue for the filing of any action to enforce or interpret this Agreement or any rights and duties hereunder shall be in Fresno, California.

**10.9** **Headings.** The section headings in this Agreement are for convenience only. The headings are not part of this Agreement and shall not be used to construe it.

**10.10** **Waiver**. If Agency or Developer waives a breach of any provision herein, the waiver will not be a continuing waiver. The waiver will not constitute a waiver of any subsequent breach, or a waiver of a breach of any other provision hereof.

**10.11** **Severability.** The provisions of this Agreement are severable. The invalidity or unenforceability of any provision in this Agreement will not affect the other provisions.

**10.12** **Interpretation.** This Agreement is the result of the combined efforts of the parties. If any provision of this Agreement is found ambiguous, the ambiguity will not be resolved by construing this Agreement in favor or against any party, but by construing the terms according to their generally accepted meaning.

**10.13** **Precedence of documents.** If any conflict exists between the body of this Agreement and any Exhibit or Attachment to it, the provisions of the body of this Agreement will control and take precedence over the Exhibit or Attachment.

**10.14** **Counterparts.** This Agreement may be executed in counterparts, each of which when executed and delivered will be deemed an original, and all of which together will constitute one instrument.

**Each Party acknowledges that this Agreement has been executed by its duly authorized representative(s) on the date.**

**AGENCY:**

REDEVELOPMENT AGENCY OF THE CITY OF FRESNO
A public body, corporate and politic

By: _____
Title: _____

Dated: _____, 2009

**DEVELOPER:**

Fresno Historic Chinatown, LLC
A California Limited Liability Company

By: _____
Title: _____

Dated: _____, 2009

ATTEST:
REBECCA KLISCH

City Clerk and Ex Officio Clerk of the Agency

By: _____
Deputy

APPROVED AS TO FORM:
JAMES C. SANCHEZ

City Attorney and Ex Officio Attorney

By: _____
Deputy/Assistant/
Special Counsel

Attachments:
Parcel Map

LAA:cg; 48256cg/agt

# SUBJECT PARCELS