



Office of the City Manager

ACTION CALENDAR

November 14, 2006

To: Honorable Mayor and
Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Stephen Barton, Director, Housing Department

Subject: Oxford Plaza and David Brower Center Project Status

RECOMMENDATION

Review the status of the Oxford Plaza and David Brower Center Project and provide direction to staff regarding HUD Section 108 loan terms and cost overrun issues.

INTRODUCTION

The Oxford Plaza and David Brower Center project has reached a significant point at which the staff needs to report to Council on the status of the project's overall financing; the Development's proposed closing date and transfer of the property; the status of local entitlements; possible modifications to the Disposition and Development Agreement (DDA) which might be needed; potential cost overrun estimates that may result in additional financial demands on the City; and the status of the City's negotiations concerning the HUD Section 108 program loan. In order to move forward, staff needs direction from the Council as to the level of risk that the Council considers acceptable regarding the HUD 108 program loan and possible cost overruns. According to the DDA it was originally anticipated that the Developer would close escrow by April 2007 and the Developer now proposes to close in December 2006. In order to close in December, significant changes to the Disposition and Development Agreement (DDA), approved by Council, will have to be made within a much-compressed time frame. Staff's goal is to obtain an accurate projection of potential and real risks and costs related to the project and report back to Council by December 12, 2006 so that Council can make a final decision with the maximum possible information available at that time.

CURRENT SITUATION AND ITS EFFECTS

The project has various uncertainties that could, under a worst case scenario, result in the need for up to \$6,500,000 in additional City subsidy, mostly to the housing but including up to \$2,100,000 in General Funds, as described below.

The project financing depends on receiving a \$4,000,000 loan through the HUD 108 program, with repayment backed by the City's CDBG allocation. The use of this 108 loan is a requirement for the project to receive a \$1.7 million Brownfields Economic Development Initiative (BEDI) grant that has been awarded to the City for use in this project. The developer has proposed a set of conditions regarding this loan that would require the City to accept certain risks, which will be described in more detail below. Among the reasons for the risks involved is that repayment of \$3,000,000 of the \$4,000,000 HUD 108 loan will come from the first floor retail space in the housing building, with repayment of \$1,000,000 guaranteed by the DBC. The Developer previously provided the City with a letter of interest from Patagonia, a major clothing chain, to lease the retail first floor retail space in the housing building as a store location. In September 2006, the Developer indicated that the Patagonia was no longer interested in leasing space in the development. Analysis of a worst-case scenario for rental of the retail space, which is currently without a tenant, indicates that in the eighth year after construction is complete the owner of the retail space may only be able to refinance \$2,000,000 of the \$3,000,000 loan obligation so that City could be at risk for as much as \$1,000,000 in loan repayment in year eight.

In addition, City staff has created a "worst case" model of cost overruns that assumes that the ultimate costs of the project will be 24% more than currently budgeted. Over the next few months the City will spend approximately an additional \$100,000 in General Funds for consulting advice (peer review of waterproofing and construction costs; and continued financial consultant and legal services) to better understand the project's risks of predevelopment and construction overruns, which in a worst case scenario could reach as much as \$7,000,000. The David Brower Center would cover approximately \$2,900,000 of this amount, but approximately \$4,100,000 could require additional support from the City of Berkeley during construction and to complete the project. Once the initial construction bids are available on November 13th, staff should have a better idea of the actual risk level, and will report verbally to Council on November 14th. The estimates will still be rough, as there will be a process of "value engineering" to revise the plans to lower cost overruns, possible revisions that will need to be incorporated as a result of the plan check process, and the inevitable change orders that will arise during the construction process.

Finally, the project is planning on obtaining a \$1,500,000 loan against rents from units with Project-Based Section 8 Vouchers. If the project is unable to obtain the commitment of vouchers in a timely way, the developer would need this amount in additional subsidy for the housing.

DDA Transfer of Land

The DDA sets forth the specific sequencing for 24 actions items related to Oxford Plaza and David Brower Center from predevelopment, financing, through construction, and project completion. These action items are outlined in the DDA Exhibit E - Development Schedule (see Attachment 1). Twenty-one of these actions are required to be satisfied before the land is transferred. The DDA contemplated transfer of the City's property by April 2007.

However, although the land does not need to transfer until as late as April 2007 under the DDA, the developer must have a clear commitment by the City that it will move ahead with the project and that financing for the project can be in place by December 21, 2006, otherwise funding that is essential to the project will instead be transferred to other projects. It is clear that these constraints include at minimum that the City agree to the terms of the project financing, especially the HUD 108 loan, so that financing can close by December 21, and that terms of the 108 loan be agreed upon by November 14, 2006 so that processing can be done by the December 21, 2006 date. Since December 12, 2006 is the final Council meeting before this deadline, staff anticipates bringing the most current information regarding expected project costs and potential financial risks to the Council on December 12, 2006 for a final decision on whether to proceed with the project along with all necessary approvals and amendments to the DDA.

The City's attorneys have determined that it will not be necessary for the City to lease the parking structure during the initial eight years after construction, as previously believed. Instead, the City will be able to take immediate ownership once construction is completed. This will eliminate any possible property tax liability. This change will also require a DDA modification.

In order to move forward, and meet this deadline, the City must decide on whether it is willing to accept a certain level of risk in making the \$4,000,000 HUD 108 program loan, whose repayment to HUD is guaranteed by the City's CDBG allocation. The nature and extent of this risk is discussed below. If the Council wishes to proceed on this basis, then it should direct the City Manager to return as soon as possible before December 12, 2006 with a Resolution formally accepting the HUD Section 108 loan. Council has previously requested that 108 loan terms be reviewed by the Housing Advisory Commission (HAC). Under the proposed timeline it is unlikely that the full HAC will be able to make a recommendation, although staff will consult with the Housing Trust Fund Subcommittee of the HAC and report back with their comments.

Risks Related to Construction Cost Overruns

The total project includes four (4) major components (1) the housing parcel (floors 2-6 of the housing building; (2) the retail/residential parking parcel (first floor of the housing building), (3) the David Brower Center building parcel; and (4) the public parking garage parcel. The DDA envisions these four components as one project, not four separate components. The Developer's most recent projection of total hard and soft costs to complete the total project is approximately \$68,000,000.

The Developer has structured the project to separately apportion the cost liability of the project's components to Resources for Community Development (RCD) and the David Brower Center (DBC). As originally proposed per City Council direction, it appeared that

the City did not want to be liable for any cost overruns from the project other than what is attributed to the Housing component of the project. Unfortunately, as a nonprofit affordable housing developer, RCD does not have the corporate resources to guarantee any significant portion of the cost overruns beyond the contingency amounts they have budgeted. As a result, RCD's portion could ultimately fall back to the City for payment. DBC will be 100% responsible for cost overruns related to its building predevelopment and construction cost overruns; RCD for its housing and retail/residential components; and the public parking garage predevelopment and construction cost overruns are proposed to be divided to provide for RCD being 2/3's responsible and DBC being 1/3 responsible for each \$1 expended within the first million in cost overruns and, should cost overruns go into a second million, a split of 1/2 RCD and 1/2 DBC. (The "worst case scenario" projects potential overruns of just under \$1,000,000 for the parking garage.)

Since the City could be asked to fund major cost overruns that are RCD's responsibility, the City needs to understand the risks involved in RCD's potential liability from this project. The City estimates that the current potential liability for both predevelopment and construction cost overruns based on a worst case scenario of up to 24% cost increases over the Developer's latest budget, is approximately \$7,000,000 after applying approximately \$3,600,000 in budgeted contingencies. RCD's share of this liability would be approximately \$4,100,000, which the organization has little ability to pay. As a result, City could be requested to provide additional financial support to RCD in the event of major cost overruns. This \$4,100,000 of increased funding to the project would be in addition to previous City commitments. Approximately \$3,000,000 of the potential cost overrun could come from the City's Housing Trust Funds, such as future HOME allocations, but \$1,100,000 of this potential cost overrun would have to come from City General Funds, since the parking structure and retail space are not eligible uses for HOME and other HTF funding. The developers have stated that they agree that this is the likely worst case scenario for cost overruns related to the underground parking structure, which their contractor estimates at an additional \$500,000 if a higher than expected water table results in a need to upgrade waterproofing and an additional \$500,000 if toxics are discovered under the ground. The developer proposes to purchase insurance which may cover potential toxics removal. Other possible costs increases could result from a need for dewatering, a need for additional shoring, working out issues with the neighboring property owners, or the discovery of archeological resources during excavation.

Prior commitments to this project are approximately \$4,044,000 of City loans and grants to the housing portion of the project and in addition, \$1,000,000 in General Fund reserves, which were set aside for construction cost overruns related to this and two other affordable housing projects currently under construction. That \$1,000,000 in General Funds will be used in large part to cover the cost of paying for construction oversight by Swinerton Management Company and for the Public Works Department to oversee the construction, which will last approximately 20 to 24 months as well as for peer review on design issues and ongoing financial and legal advice. This construction management contract is also on tonight's Council agenda. Staff believes that it is essential to provide careful construction

oversight and monitor change orders and construction cost overruns in order to keep such overruns to a minimum and to ensure that such costs are allocated to the appropriate parts of the project.

The actual construction costs for this project will become clearer after November 13, when the construction bids and schedule of values is completed by the project's General Contractor. The Developer and Developer's representative have agreed to submit the bids and schedule of values for the staff to review. These costs will then be analyzed by the City's peer review consultant. These costs will be further refined as a result of the Developer conducting value engineering and after the building permit and plan check review changes are known and calculated, these new costs will be added to the construction costs via of amending the Developer's contract with the General Contractor for the project. This process will not be entirely completed by December 12, 2006 when Council must make its final decision. Of the estimated \$4,000,000 in potential City liability for cost overruns, roughly \$3,000,000 could be in the housing component and approximately \$1,100,000 in the underground parking garage and in the retail and ground level parking under the housing. If the City is asked to assist further, these costs could be covered by a combination of fiscal year 2007 and 2008 HOME funds and General funds.

In addition, the City may need to commit another \$1,500,000 to the housing if RCD is unable to obtain a Section 8 Project-Based Voucher contract necessary to support a loan in that amount from a private lender. HUD conditionally approved the Berkeley Housing Authority (BHA) allocation of project-based Section 8 to the Oxford Plaza after review, however the Housing Authority must still first obtain approval of three waivers from HUD and an approval from HUD of the subsidy layering review report and a Project- Based Section 8 contract, prior to the lender agreeing to advance the funds. If staff or HUD cannot complete these actions, then the City would have to commit up to an additional \$1,500,000 of financing in order to fill the housing gap prior to the project starting construction. Also, if the housing component starts construction prior to HUD's approval of the subsidy layering review report, then the Berkeley Housing Authority cannot enter into an agreement to provide the Oxford Plaza housing component with Section 8 Project Based certificates.

Risks Related to the HUD Section 108 Program Loan

On January 25, 2006 the Council approved a Resolution to submit a HUD 108 application to HUD for a \$4,000,000 Section 108 loan for the commercial portions of the Oxford Plaza and David Brower Center development. The commercial portions of the project include the retail and residential parking on the first floor of the Oxford Plaza housing building, the David Brower Center building and the underground parking garage. During 2005, the City was awarded a Brownsfields Economic Development Initiative (BEDI) grant in the amount of \$1,767,000 to be used in conjunction with a HUD 108 loan in the amount of \$4,000,000.

When reviewing the HUD 108 application, HUD-San Francisco staff was concerned about the collateral risk during the first seven to eight years of the project. Under a financing structure that allows the Developer to obtain significant funding from the Federal New

Markets Tax Credits Program, the City is unable to have a direct secured interest in the property as collateral for the HUD 108 loan. Unless other adequate collateral is provided to secure the City's risks, the HUD San Francisco staff recommended to HUD-Washington that HUD require that the City lien other City owned property to secure the HUD 108 loan, following normal HUD lending requirements and practices. Our loan consultant has advised that HUD is legally allowed to approve the loan without placing this requirement on the City, however HUD requirements cannot be known with certainty until they begin consideration of the application. HUD will not begin consideration until Council determines the loan terms that it will accept.

The staff, with the financial and legal assistance of the National Development Council and Seifel Consulting have conducted negotiations concerning the terms and conditions of the Section 108 loan and BEDI award; both of which will be loaned to finance the development of the commercial portion of the project. These negotiations have been completed with the Developer presenting the loan terms in Attachment 1 as their best offer.

The following are the underwriting and lending concerns that staff has with regards to the proposed the loan terms:

- a. **Apportionment of Loan Amount:** The allocation of \$3,000,000 of the HUD 108 loan to the retail and surface-parking component (the first floor of the Oxford Plaza building with the housing) creates a significant risk to the City. This risk level is limited for the first eight years, in which the developer makes only interest payments at a cost of about \$190,000 annually on the \$3,000,000. However, after eight years, if there is difficulty leasing the space and if there is difficulty refinancing the 108 loan, then the owner could have difficulty paying the loan off. At that point the 108 loan would convert from interest only to a fully amortizing loan for another twelve years, with estimated payments of \$380,000 in principle and interest annually. City staff estimate that as much as \$1,000,000 of the loan could be at risk at that point, or put another way, that unless the market for this retail space is strong after the eight years, the owner may be able to cover only about 2/3 of the payments due, so that the City could need to either provide annual subsidy of approximately \$130,000 or repay \$1,000,000 of the loan to reduce the payments to a more manageable level.

The developer is pursuing an alternative that would reduce the amount of the 108 loan on the retail and parking to \$2,000,000 by securing a \$1,000,000 second mortgage loan against the retail. City staff will work with the developer and lenders to secure the additional financing necessary to reduce the 108 loan on the retail to \$2,000,000. If that can be accomplished the DBC has agreed to accept the additional \$1,000,000 in 108 loan and reduce other financing, so that the DBC would have \$2,000,000 of the 108 loan. According to the City's loan consultant, this will provide loan to value ratios of 48% on the retail and 40% on the DBC,

and ensure that HUD would not ask for additional collateral security from the City, such as a lien on City-owned property.

- b. **Interest Rate and Term:** The City and the Developer are in agreement on this point.
- c. **HUD 108 Completion Guaranty:** The completion guarantee is subject to the proposed agreement on cost overruns below. To the extent that the completion guarantee is provided by RCD, any required costs could likely fall on the City of Berkeley.
- d. **Funding of Cost Overruns:** For costs beyond already budgeted contingency amounts the DBC must cover cost overruns attributed to the DBC. RCD would cover the cost overruns attributed to the housing and retail/parking parcels. RCD would be responsible for 2/3 of the first \$1,000,000 in cost overruns on the underground parking structure and DBC for 1/3. Cost overruns in excess of \$1,000,000 but less than \$2,000,000 would be split 50% from each if cost overruns reached that level. As discussed earlier in the staff report, it is likely that RCD would turn to the City to assist RCD in meeting its additional financial commitments here, since there is no readily available source of funding that RCD can draw on beyond the already budgeted contingency amount. Based on staff's worst-case estimate of \$7,000,000 in total project cost overruns in excess of budgeted contingencies, RCD's share would be \$4,100,000 based on these terms.
- e. **Section 108 Repayment Guarantee:** Under HUD's Section 108 Program, the City must guarantee repayment of the Section 108 loan to HUD and pledge its CDBG funds as collateral for any repayment due to HUD. RCD is unable to provide a repayment guarantee for the \$3,000,000 amount allocated to the retail and surface-parking component.
- f. **Reserves for Debt Service and Repayment:** RCD will dedicate 80% of the net cash flow from the retail/residential parking parcel operations for operating deficits and future repayment of the section 108 loan. RCD will budget for a debt service reserve equal to 22 months of debt service and if necessary will request a use permit modification to allow RCD to occupy the space as its own offices in order to dedicate their own rental payments to debt service. This creates the risk that the space would either remain vacant or be rented to a low-end retail use that cannot fully cover the debt service or be shifted to an office use (RCD) that is not what the City wants for this space.
- g. **Collateral Security for the HUD 108 Debt:** The \$4,000,000 Section 108 loan will have a first priority security interest, on an equal basis with the Rudolph Steiner Foundation (RSF) financing, during the first eight years which constitute the New Markets Tax Credit (NMTC) period. After that the loan would be split

between the DBC (\$1,000,000) and the Retail space (\$3,000,000) and the DBC would be released from any obligation after repayment of its \$1,000,000 share. To the extent that the Retail obligation is \$3,000,000 rather than \$2,000,000, this leaves a repayment risk for the City as described above.

HUD 108 Lease Up: In the initial project proposals, with one building rather than two, the DBC had responsibility for the entire ground floor, including all retail spaces. When the project separated into two buildings, the majority of the retail was in the RCD building, with the expectation that Patagonia would provide a major credit tenant. In September 2006 the developer informed us that Patagonia has withdrawn its interest in leasing this space. The developer now proposes that if the Retail space is not leased within 16 months, RCD will request a Use Permit modification that would allow RCD to occupy a portion of the retail space and pay rent to cover the debt service during the initial eight year period. The developer also proposes that DBC will provide a Debt Service Guarantee until such time as 75% of the office space at DBC is leased. In theory this could result in leaving a substantial amount of DBC space vacant, with payments made through other organizational resources.

Public Benefit of the Project for the City and its Downtown

The Oxford Plaza development, or the housing portion of the development, will accomplish a number of local goals and policy priorities. The housing component will increase the number of affordable units for very low, low and moderate-income households and families. The rental units will occupy the second through sixth floors of the Oxford Plaza. The retail space and tenant parking will be on the first floor of the building. Income requirements on the project that the City and State are assisting in funding jointly mandate the housing remain 100% affordable for a minimum period of 55 years. Twenty-four of the units will be Project-Based Section 8, making them very affordable to low, very low, and extremely low-income households. All of the units will be accessible to the disabled so that they are not limited to particular areas of the building. Because it is designed to accommodate families, over 50% of the units will be two and three-bedroom units and the roof top courtyard will also feature a tot lot to provide a protected play area for smaller children. In the worst case scenario, with the allocated \$5,044,000 and approximately \$4,000,000 in cost overruns allocated for both the first floor retail and residential housing portion of the project, the high-end per unit cost to the City would reach approximately \$93,000 per unit. If the City has to step in to repay part of the HUD 108 program loan (up to \$1,000,000) and if the project-based Section 8 is not approved in time (\$1,500,000), then the City's costs per unit would reach \$119,000 per unit. This assigns all City costs to the housing, which is the main reason for City involvement in the project.

The David Brower Center and the retail component of the project will probably bring up to an estimated 200 jobs to the site. Of these, it is estimated up to approximately 120 could be new jobs. It is anticipated that several of the new jobs to be created by the

development will be available to target area residents. All commercial tenants at the project will enter into First Source Employment agreements with City. By the nature of both the retail and non-profit office tenants the project will likely help attract additional businesses that will support the project's environmental mission and strengthen the downtown retail core. The new income in the downtown from the new jobs and events to be held at the Center will have economic multiplier effects on the downtown and surrounding residential areas. In addition, the presence of a David Brower Center in downtown Berkeley will strengthen the City's green knowledge base and resources and thus support its green business development strategy. Finally, this project is one of the largest NMTC project in northern California. The commercial side of the project leverages approximately \$1 of public funds for each \$5 of private funds expended. A project like this, which provides an anchor development on the City's downtown edge, will also act as an impetus to other lenders considering participating with the City in making future investments affordable housing and economic development projects in downtown and in the City of Berkeley.

POSSIBLE FUTURE ACTION

The City Manager will provide regular reports to the Council at important stages of the project. DDA revisions will be needed and these changes must be approved by City Council, at least in concept at its meeting of December 12, 2006. The DDA authorizes the City Manager to waive or modify terms of the agreement. This provision was inserted only to allow for minor changes such as developing the exact language for changes approved by Council. To put to rest any concerns about the manner in which I will exercise my powers, I have advised Oxford Street Development LLC in June 2006, that I do not intend to exercise my discretion to waive or modify any terms of the DDA other than minor changes in the timing of the events called for by the Development Schedule, and that that significant issues including policy, legal or financial ones must go before the City Council for resolution.

After HUD-Washington completes its review of the HUD 108 application, the HUD contract must return to Council for final review and approval.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

One way to help protect the City from paying excess amounts due to construction cost overruns and change orders is by providing a strong construction management oversight contract with the tools and techniques required to best analyze and monitor the construction process. The City is also currently conducting construction cost and waterproofing peer reviews to be used by the City and the construction management company. The contract for full-time construction management services as included in the DDA will cost approximately \$500,000.

CONTACT PERSON

Stephen Barton, Director, Housing Department, (510) 981-5400

Attachments

1. DDA Exhibit E – Development Schedule
2. Developer's Proposed Section 108 Loan Terms dated November 3, 2006
3. Potential cost over-runs

EXHIBIT E

DEVELOPMENT SCHEDULE

This Development Schedule summarizes the schedule for various activities under the Disposition and Development Agreement (the "Agreement" or the "DDA") to which this exhibit is attached. The description of items in this Development Schedule is meant to be descriptive only, and shall not be deemed to modify in any way the provisions of the DDA to which such items relate. Section references herein to the DDA are intended merely as an aid in relating this Development Schedule to other provisions of the DDA and shall not be deemed to have any substantive effect.

Whenever this Development Schedule requires the submission of plans or other documents at a specific time, such plans or other documents, as submitted, shall be complete and adequate for review by the City or other applicable governmental entity within the time set forth herein. Prior to the time set forth for each particular submission, the Developer shall consult with City staff informally as necessary concerning such submission in order to assure that such submission will be complete and in a proper form within the time for submission set forth herein.

<u>Action</u>	<u>Date</u>
1. <u>City and Other Governmental Approvals</u> . The Developer shall apply for and obtain the City Approvals and all other governmental approvals necessary for the development and operation of the Development. [DDA § 3.7]	Completed as of the Effective Date.
2. <u>Schematic Design Drawings</u> . The Developer shall submit the Schematic Design Drawings to the City. [DDA § 4.3(a)].	Completed as of the Effective Date.
3. <u>Design Development Drawings</u> . The Developer shall submit the Design Development Drawings to the City. [DDA § 4.3(b)]	Submitted as of the Effective Date.
4. <u>Developer Deposit</u> . The Developer shall deposit the Developer Deposit in the amount of \$10,000. [DDA § 3.2]	No later than the Effective Date of DDA.
5. <u>Temporary Right of Entry; Approval of Property</u> . The City shall grant the Developer the Temporary Right of Entry to enter the Property and the Developer shall approve or disapprove of the condition of the Property. [DDA § 11.20]	City grants the Temporary Right of Entry as of the Effective Date. Developer approval of the condition of the Property no later than 90 days following the Effective Date.
6. <u>City Approval of Design Development Drawings</u> . The City shall approve or disapprove the Design Development Drawings.	No later than thirty (30) days after Agency receipt, provided such drawings are consistent with Article 4.

<u>Action</u>	<u>Date</u>
[DDA § 4.4]	
7. <u>Financing Plans</u> . The Developer shall submit the initial financing plan for the Apartment Development, the David Brower Center Development, the Retail Development and the Parking Development for the City's review and approval. [DDA § 3.3]	No later than 60 days following the Effective Date.
8. <u>City Approval of Financing Plans</u> . The City shall review and either approve or disapprove of the Apartment Development Financing Plan, the David Brower Financing Plan, and the Parking Development Financing Plan. [DDA 3.3]	Within 30 days following receipt of each initial Financing Plan. Each Financing Plan must be approved by the City no later than 90 days following the date of the initial Financing Plan. All Financing Plans must be approved no later than February 28, 2007; provided, however the City has no obligation to approve any Financing Plan if such Financing Plan does not meet the requirements set forth in Section 3.3.
9. <u>Final Construction Drawings</u> . The Developer shall submit the Final Construction Drawings to the City. [DDA § 3.9 and 4.3(c)]	No later than December 31, 2006.
10. <u>City Approval of Final Construction Drawings</u> . The City shall either approve or disapprove the Final Construction Drawings. [DDA § 4.4]	No later than thirty (30) days after Agency's receipt, provided such drawings are consistent with Article 4.
11. <u>Reciprocal Easement Agreement</u> . The Developer shall submit for the City's review and approval the final Reciprocal Easement Agreement. [DDA § 3.10]	No later than March 1, 2007.
12. <u>Parking Development Lease</u> . The Developer shall deliver the Parking Development Lease for the City's review and approval. [DDA § 3.13]	No later than March 1, 2007.
13. <u>City Approval of Parking Development Lease</u> . The City shall review and approve the Parking Development Lease (provided the Developer has made any changes reasonably requested by the City). [DDA § 3.13]	Within 30 days following the City's receipt; provided that the City shall have no obligation to approve the Parking Development Lease unless the Developer has made such changes reasonably requested by the City.

<u>Action</u>	<u>Date</u>
14. <u>City Approval of Reciprocal Easement Agreement.</u> The City shall review and approve the Reciprocal Easement Agreement (provided the Developer has made any changes reasonably requested by the City). [DDA § 3.10]	Within 30 days following the City's receipt; provided that the City shall have no obligation to approve the Reciprocal Easement Agreement unless the Developer has made such changes reasonably requested by the City.
15. <u>Building Permits.</u> The Developer shall obtain the Building Permits for construction of the Development. [DDA § 3.8]	No later than April 15, 2007.
16. <u>Construction Contract.</u> The Developer shall submit for the City's approval the construction contract for the construction of the Improvements. [DDA § 3.5]	No later than April 15, 2007.
17. <u>Construction Bonds.</u> The Developer shall submit payment and performance bonds for the Improvements. [DDA § 3.6]	No later than April 15, 2007.
18. <u>Final Subdivision Map.</u> The Developer shall apply for and obtain the City's approval of the Final Subdivision Map. [DDA § 3.11]	No later than April 25, 2007.
19. <u>Completion Guaranty Agreement.</u> The Developer shall deliver the Completion Guaranty Agreement to the City. [DDA § 3.12]	No later than April 25, 2007.
20. <u>Insurance.</u> The Developer shall submit evidence of insurance to the City. [DDA § 3.16]	No later than April 25, 2007.
21. <u>Evidence of Availability of Funds.</u> The Developer shall submit evidence to the City of the availability of funds to purchase the Property and construct the Improvements. [DDA § 3.4]	No later than April 30, 2007.
22. <u>Close of Escrow.</u> The Developer shall purchase the Property from the Agency. [DDA § 5.4]	No later than April 30, 2007, provided that the Developer has satisfied the pre-disposition requirements set forth in Items #1 through #21, as reasonably determined by the City.
23. <u>Commencement of Construction.</u> The Developer shall commence construction of the Improvements. [DDA § 6.1]	No later than May 31, 2007.

<u>Action</u>	<u>Date</u>
24. <u>Completion of Construction.</u> The Developer shall complete construction of the Improvements. [DDA § 6.5]	No later than May 31, 2009.

Oxford Plaza and David Brower Center

Proposed Section 108 Loan Terms

November 3, 2006

	Proposed Terms
Loan Amount	<p>\$4 million</p> <ul style="list-style-type: none"> • \$3 million allocated to Retail/Parking • \$1 million allocated to Brower. <p>The Brower Center will accept up to \$2 million of the Section 108 loan provided (1) that the RSF loan is reduced accordingly so that the overall amount of debt service on the Brower Center remains constant and (2) additional sources are secured to cover the reduced financing on the Retail.</p> <p>Oxford has been pursuing alternate financing for the Retail in the form of a \$1 million second mortgage secured by the Retail. If this financing is available upon acceptable terms and secured solely by the Retail portion of the project, then the amount of the Section 108 loan allocated to Retail may be reduced to \$2 million.</p>
Interest Rate and Term	Interest only for 8 years based on the HUD 108 rate to the City, plus 50 basis points and a 1% fee payable at funding.
Completion Guaranty	Completion guaranty will be provided by Oxford and its members, DBC and RCD, for completion of the commercial components of the project (Retail, Brower and Parking) subject to Cost Overruns conditions below and City agreement to stand behind RCD's obligations under the Completion Guaranty. RCD to provide separate completion guaranty on Housing. Similar terms shall apply to the Completion Guaranty in the DDA if this guaranty is still required.
Cost Overruns	<p>The first \$1 million in cost overruns associated with the parking and site development shall be allocated 1/3 DBC and 2/3 RCD.</p> <p>Parking and site cost overruns in excess of \$1 million but less than \$2 million will be funded 50/50 by DBC and RCD provided that the City of Berkeley provides a guaranty to fund RCD's share of these additional cost overruns in the event RCD fails to provide these funds.</p> <p>Parking and site cost overruns in excess of \$2 million will be funded 1/3 DBC and 2/3 RCD.</p> <p>DBC will guarantee cost overruns for Brower. DBC will establish a reserve secured by cash or a letter of credit in the amount of \$1 million as collateral for its share of the Completion Guaranty and Cost Overrun obligations.</p> <p>RCD will guarantee cost overruns for Housing and Retail. The City will stand behind RCD's obligations for Cost Overruns.</p>

Repayment Guarantee	DBC will guarantee repayment of its share of the Section 108 loan provided that there is a release provision that releases DBC from any further obligation on the Section 108 loan once DBC's portion of the Section 108 loan is repaid. RCD cannot provide a repayment guarantee for the Section 108 loan for the reasons specified in its letter to the City dated October 27, 2006.
Repayment and Operating Deficit Reserve	RCD will dedicate 80% of the net cash flow from the Retail and Residential Parking to a reserve for operations and future repayment of the Section 108 loan. This reserve will accrue to the end of the NMTC period and will be net of operating losses, increased development costs, and a reserve for ongoing operations equal to one year's cost for debt service and operations.
Debt Service Reserve	The NMTC commitment letter requires that separate Debt Service Reserve Accounts be established for the Brower Center and Retail with a Debt Service Reserve Amount equal to one year's debt service until a DSC of 1.25 is achieved at which time the Debt Service Reserve will be reduced by 50%. RCD has agreed that the Retail budget will include a Debt Service Reserve equal to approximately 22 months of debt service on the Retail portion of the Section 108 loan. RCD further agrees that once this Debt Service Reserve has been reduced to 6 months of monthly debt service then RCD will fund the monthly debt service payments from other sources as required under the master lease agreement between Oxford and RCD. If RCD occupies the Retail space, the DSC requirement above will be reduced to 1.0.
Security	The Section 108 loan will have a first priority security interest (pari passu with RSF bank financing) in the NMTC Investment LLC. After the NMTC period, this security interest will be convertible to a First Deed of Trust on the Retail/Residential Parking in the amount of the Section 108 loan allocated to Retail and a First Deed of Trust on the Brower Center in the amount of the Section 108 loan allocated to the Brower Center. The Brower Center and Retail shall be released from their respective obligations under the Section 108 loan upon the repayment of their respective share of the Section 108 loan amount.
Pre-Leasing	<p>DBC will provide a Debt Service Guarantee until such time as 75% of the office space at the David Brower Center is leased.</p> <p>In the event that the Retail space is not leased within the first 16 months following completion of construction, RCD will request a Use Permit that would allow RCD to occupy a portion of the Retail space and pay rent which would cover substantially all of the Section 108 debt service.</p>

<p>Public Financial Participation Covenant</p>	<p>The City will receive a participation in sale proceeds of the DBC in excess of the total development cost at time of sale plus 10%. The amount of participation will be equal to the ratio of Section 108 financing allocated to DBC divided by the total cost of DBC.</p> <p>The City will receive a participation in sale proceeds of the Retail in excess of the total development cost at time of sale plus 10%.</p>
--	---

Attachment # 3

Berkeley Oxford Plaza/David Brower Center
Construction Costs - Potential Cost Overrun Impacts

PROJECT COMPONENT	HARD CONSTRUCTION COSTS (Per Cahill 5/18/06, plus utility hookups and onsite improvements)	Assumes 10% increase by Construction Start in Spring 2007 and additional 10% for Unforeseen Cost Overruns and 4% for potential and known pre-development Costs	Budgeted Construction Contingency	Contingency as % of 5/18/06 Hard Costs	Potential Cost Overruns (after applying contingency)	Potential City Liability	Assumptions
COMMERCIAL							
David Brower Center	\$13,851,905	\$3,324,457	-\$692,595	5.00%	\$2,631,862	\$	Assumes DBC & Peter Buckley Pay 100% of Overrun Liability
Retail & Resid. Parking	\$2,535,788	\$608,584	-\$126,788	5.00%	\$481,796	\$ 481,796	Assumes City Pays 100% of Potential Overrun Liability
Parking Garage	\$5,120,662	\$1,228,958	-\$258,033	5.00%	\$972,925	\$ 648,941	Assumes City Pays 66.7% of Potential Overrun Liability
Total	\$21,508,333	\$5,162,000	-\$1,075,418		\$4,086,584	\$ 1,130,736	
HOUSING							
Oxford Plaza	\$23,176,459	\$5,562,350	-\$2,579,405	11.13%	\$2,982,945	\$ 2,982,945	Assumes City Pays 100% of Potential Overrun Liability
Total Comm. & Housing	\$44,684,792	\$10,724,350	-\$3,654,821	8.18%	\$7,069,529	\$ 4,113,683	

*These 4% costs include known additional Shoring & Underpinning, Modifications to Cancun, Plan Check Review Charges, Elevator, Modifications to Use Permit, Architectural Review and other potential pre-development.

\$7,069,529
 \$ (2,631,862) DBC Cost Share of Brower Center
 \$ (323,984) DBC Cost Share of Parking Garage
 \$ 4,113,683 Remaining City Share If RCD Cannot Pay for Share

Note: Cost increases expected with a final construction bid are assumed within the 24% cost overrun allowance above.

Sources: City of Berkeley, ECB, RCD, Cahill Contractors, Seitel Consulting Inc.