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DEC 12 2006

OFFICE OF THE CITY CLERK
CITY OF BERKELEY

TO BE DELIVERED AGENDA MATERIAL

Meeting Date: December 12, 2006
Item Number: 23
Item Description: Oxford Plaza and Brower Center

DEC 12 2006

ESTOPPEL CERTIFICATE

(Disposition and Development Agreement - Oxford Street Development)

OFFICE OF THE CITY CLERK
CITY OF BERKELEY

This Estoppel Certificate (the "Certificate") is delivered by the City of Berkeley, a charter city (the "City") as of December __, 2006 (the "Effective Date"), to BROWER NMTC INVESTOR, LLC, a Delaware limited liability company (the "Investor"), USBCDE SUB-CDE III, LLC, a Delaware limited liability company, LCD New Markets Fund II, LLC, a Delaware limited liability company, and Clearinghouse NMTC Sub II, LLC, a California limited liability company (collectively, the "CDEs") in connection with that certain Disposition and Development Agreement dated as of July 3, 2006 (the "DDA"), by and between the City and Oxford Street Development, LLC, a Delaware limited liability company (the "Developer"). Capitalized terms, used but not defined, in this Certificate shall have the meaning set forth in the DDA.

The City acknowledges that the Investor intends to make certain equity investments in the CDEs as "qualified equity investments" in accordance with the New Markets Tax Credit Program. The City further acknowledges that the CDEs intend to enter into a construction loan agreement to provide a loan to the Developer for the development of the David Brower Center Development, the Parking Development, and the Retail Component in accordance with the New Markets Tax Credit Program (the "NMTC Program Closing"). In order to provide a summary of the Developer's performance with respect to the conditions precedent to the conveyance of the Property, as set forth in the DDA, the City hereby represents to the Investor and the CDEs, as of the Effective Date, the following:

1. DDA. A complete copy of the DDA is attached hereto as Exhibit A. As of the Effective Date, the DDA has not been amended; provided, however, the City and the Developer intend to amend the DDA to eliminate all references to the Parking Development Lease from the DDA and to provide, instead, that the Parking Development shall be conveyed to the City by the Developer immediately following satisfactory completion of construction of the Parking Development. The ordinance approving this amendment is scheduled for first reading at the City Council on January 16, 2007. The City and the Developer intend to execute this amendment on or before the date of conveyance of the Property to the Developer.

2. No Default. No Developer Event of Default has been declared by the City. Other than the Developer's failure to comply with the requirements of the DDA described in Paragraph 3 below, to the City's knowledge, no default exists as to the performance of any of the other terms or conditions of the DDA, nor is there any uncured default or event which with the passage of time would constitute a default under the DDA. As of the date of the Effective Date, the City does not intend to declare a default under the DDA for developer's failure, as of the Effective Date, to meet the requirements of the Development Schedule set forth in Exhibit E to the DDA, but the City reserves its rights to declare a default if Developer continues to fail to comply with the Development Schedule.

3. DDA Predisposition Requirements. Article Three of the DDA sets forth the conditions precedent to the City's obligation to convey the Property to the Developer. Article Four of the DDA sets forth the review and approval process for the design of the Development. The status of each such condition precedent to conveyance is described below in this Paragraph 3.

(a) Developer Deposit (DDA Section 3.2). The City has received the Developer Deposit from the Developer.

(b) Financing Plans (DDA Section 3.3). The Developer has not submitted complete financing plans for any of the components of the Development, nor has the City approved any of the Financing Plans. The City shall approve the Financing Plans for the Development: (i) upon the Developer submitting Financing Plans that meet the requirements set forth in Section 3.3 of the DDA; and (ii) if the City makes a reasonable determination that Developer has sufficient funds committed, closed, and available to construct the entire Development for the cost identified in all final executed City-Approved Construction Contracts (defined below), including reasonable contingency amounts. In order to make this determination by any given date, the City must have approved the proposed Construction Contracts, as set forth in subsection 3(d) below, and, within two (2) weeks of such approval, the Developer must submit completed Financing Plans that show complete financing for the total amounts contained in the City-Approved Construction Contracts. Within two (2) weeks of receipt of the Financing Plans, the City shall either approve or disapprove the Financing Plans. For example, for the City to approve the Financing Plans by March 31, 2007, the Developer must have obtained City approval of the proposed Construction Contracts no later than March 2, 2007 and submitted the complete Financing Plans to the City supporting the City-Approved Construction Contracts no later than March 16, 2007. The City will not withhold approval of the Financing Plans because Resources for Community Development or the Apartment Partnership does not have an executed AHAP with the Berkeley Housing Authority. The City will not approve the Financing Plans if it does not include a personal guarantee from Mr. Peter Buckley to pay all cost overruns associated with the David Brower Center, and the David Brower Center's agreed share of the Parking Development cost overruns. The City will not approve the Financing Plan if the terms and conditions of the 108 loan are not consistent with the terms set forth in Exhibit B to this Certificate. The City will not approve the Financing Plans if they include additional funds from the City or Berkeley Redevelopment Agency beyond the funds approved by the City Council or the Redevelopment Agency Board as of December 12, 2006. **[[Note to parties: this assumes City Council approves additional \$2,065,543 Housing Trust Fund loan on Dec. 12]].** For purposes of this Certificate, the Financing Plans, as approved by the City, shall be referred to as the "City-Approved Financing Plans".

(c) Evidence of Availability of Funds (DDA Section 3.4). The Developer has not submitted evidence of availability of funds as required pursuant to DDA Section 3.4 (i.e. all loans or equity contributions are closed and conditions to funding removed). The City agrees that it will find this condition precedent to be satisfied if the Developer submits evidence of the availability of all funds identified in the

City-Approved Financing Plans as necessary to complete construction of the entire Development, subject to the same exceptions and requirements set forth in subsection (b) above. The City anticipates it can review and approve or disapprove such evidence of availability of funds within one (1) week of the City's receipt of a complete submission from the Developer.

(d) Construction Contracts (DDA Section 3.5). The Developer has not obtained the City's approval of the Construction Contracts in accordance with Section 3.5 of the DDA. The City shall approve the Construction Contracts if (i) the City reasonably determines, in consultation with the City's Construction Manager and other consultants, that the Construction Contracts adequately reflect the anticipated cost to construct the entire Development, including adequate contingency amounts; and (ii) the Construction Contracts include the RDA Grant Document requirements, Housing Trust Fund Loan Document requirements, 108 and BEDI Loan Document requirements, and DDA requirements described below, as well as any requirements recommended by the City's construction manager. In order for the City to make this determination on any given date, the City must receive submissions from the Developer of complete Construction Contracts (including all exhibits and addenda, and all blanks completed with applicable information) at least two (2) weeks prior to that date. Regarding the requirements of subsection 3(d)(i) above, the City hereby discloses to the CDEs and the Investor that it has retained Swinerton Construction to analyze the proposed construction contracts and Swinerton Construction has issued a preliminary report to the City recommending that the construction contingency in the construction contracts be increased from five percent (5%) to twelve percent (12%), which would require an approximately Three Million Two Hundred Thousand Dollar (\$3,200,000)-increase in the total combined construction budget for the two Construction Contracts, which recommendation may be revised by Swinerton Construction, following meetings and discussions between the City, Swinerton Construction, and the Developer. Regarding the requirements of subsection 3(d)(ii) above, the City hereby discloses that the requirements of the RDA Grant Documents, the 108 and BEDI Loan Documents, the Housing Trust Fund Loan Documents, and the DDA include, but are not limited to, the requirement that the City to be named as a third party beneficiary to each construction contract, that the City's construction manager be provided an on-site office with fully-functional and operational utilities, that the contracts include a fully-cost loaded schedule for the construction of the Development, that City approval be obtained for certain change orders, and that the City's construction manager review all construction draws and participate in all draw meetings. For purposes of subsection 3(b) of this Certificate, the construction contracts, as approved by the City pursuant to this subsection 3(d), shall be referred to as the "City-Approved Construction Contracts".

(e) Construction Bonds (DDA Section 3.6). The Developer has not obtained the City's approval of the construction bonds in accordance with Section 3.6 of the DDA. The City shall approve the construction bonds upon the Developer submitting construction bonds that meet the requirements of Section 3.6 of the DDA.

(f) City and Other Governmental Approvals (DDA Section 3.7). One proposed modification to the use permit for the Development, related to the conference

space at the David Brower Center was approved by the City Zoning Appeals Board on December 14, 2006, and the appeal period for this approval will expire on December 28, 2006 [**this assumes 12/14 /07 ZAB approval**].

(g) Building Permit (DDA Section 3.8). The Developer has not obtained the building permit in accordance with Section 3.8 of the DDA. The City agrees that issuance by the City of a permit for the excavation of the Property for the Development shall be sufficient to meet the requirements of Section 3.8 of the DDA.

(h) Final Construction Drawings (DDA Section 3.9). The Developer has not obtained the City's approval of the Final Construction Drawings in accordance with Section 3.9 and Article 4 of the DDA. The City shall approve the Final Construction Drawings upon the Developer submitting Final Construction Drawings based on the City-approved Design Development Drawings pursuant to Article 4 of the DDA. In order to make this determination by March 31, 2007, the City must receive complete submissions of Final Construction Drawings from the Developer by March 1, 2007.

(i) Reciprocal Easement Agreement (DDA Section 3.10). The City has approved the form of the Reciprocal Easement Agreement which is attached to the DDA as Exhibit L. In connection with the amendment of the DDA to delete the references to the Parking Development Lease, the City intends to revise the form of the Reciprocal Easement Agreement to delete the references to the Parking Development Lease in the Reciprocal Easement Agreement. In addition, the City has been informed that the lender and tax credit investor for the Apartment Development will request minor changes to the form of the Reciprocal Easement Agreement. The City Manager, in consultation with the City Attorney, is authorized to approve such minor changes to the Reciprocal Easement Agreement.

(j) Final Subdivision Map (DDA Section 3.11). The Developer has submitted the Final Subdivision Map to the City for execution. However, the City has not approved the Final Subdivision Map and shall not execute the Final Subdivision Map until the map is revised to show that the "slab" on which the Retail Development and the David Brower Center Development will be constructed will not be located on, or within, the Parking Development.

(k) Completion Guaranty Agreement (DDA Section 3.12). The Developer has not submitted the executed Completion Guaranty Agreement. The City has agreed that the David Brower Center and Peter Buckley shall execute the Completion Guaranty Agreement for the David Brower Center Development, that Resources for Community Development shall execute the Completion Guaranty Agreement for the Apartment Development, and that Resources for Community Development, the David Brower Center, and Peter Buckley shall execute the Completion Guaranty for the Parking Development, and that completion obligations shall be shared by such entities and persons in the manner described in Exhibit C to this Certificate [**NOTE TO PARTIES: THIS ASSUMES THE CITY COUNCIL APPROVES THIS FORMULA AT THE DECEMBER 12 MEETING**].

(l) Insurance (DDA Section 3.15). The Developer has not submitted the evidence of insurance required by DDA Section 3.15 and DDA Section 7.6.

(m) City Ordinance Approving Conveyance (DDA Section 3.17). The City has adopted the ordinance pursuant to the City of Berkeley Charter Article VIII, Section 44(7), approving the conveyance of the Property to the Developer. The City anticipates considering an ordinance to amend the DDA, as described in Section 1 above, on January 16, 2007.

(n) Design Development Drawings (DDA Section 4.3). The Developer has not obtained the City's approval of the Design Development Drawings in accordance with Article 4 of the DDA. The City shall approve the Design Development Drawings upon the Developer submitting revised drawings incorporating the City's requested changes regarding an additional elevator serving the Parking Development. In order to make this determination by December 21, 2006, the City must receive submissions from the Developer by December 14, 2006 **[DATES TO BE VERIFIED, AND THIS CAN BE MODIFIED IF THIS REQUIREMENT IS MET PRIOR TO EXECUTION OF THE CERTIFICATE]**.

4. Other DDA Consents and Approvals. Through this Certificate, the City hereby approves an interim transfer of the Apartment Development parcel to Resources for Community Development, immediately prior to the transfer of such parcel to the Apartment Partnership, pursuant to the transfer requirements of Article 8 of the DDA.

CITY OF BERKELEY, a charter city

By: _____

Name: _____

Title: _____

EXHIBIT A

Copy of DDA

EXHIBIT B

108 Loan Terms and Conditions

EXHIBIT C

CONSTRUCTION COMPLETION GUARANTY SHARING OF COSTS

The first \$1 million in completion guaranty costs associated with the Parking parcel shall be allocated 1/3 DBC and 2/3 RCD.

Parking parcel cost completion guaranty costs in excess of \$1 million but less than \$2 million will be funded 50/50 by DBC and RCD.

Parking parcel completion guaranty costs in excess of \$2 million will be funded 1/3 DBC and 2/3 RCD.

DBC will establish a reserve secured by cash or a letter of credit in the amount of \$1 million as liquid collateral that may be used to satisfy its potential liability under the Completion Guaranty. In addition, DBC and Peter Buckley will guarantee payment of completion costs for Brower and the DBC share of Parking parcel costs not funded by this reserve.

RCD will guarantee completion for Housing and Retail.

All completion cost cost overruns are measured from project cost estimates provided in the Developer's pro formas dated 8/30/06 for the DBC and Retail/Residential Parking parcels and 8/29/06 for the Housing parcel.