



CITY OF COMMERCE AGENDA REPORT

TO: Honorable Successor Agency to the Commerce
Community Development Commission and the
Honorable City Council for the City of Commerce

FROM: Eduardo Olivo, City Attorney and Legal Counsel for the
Successor Agency

SUBJECT: UPDATE REGARDING LITIGATION ENTITLED *MAYANS
DEVELOPMENT, INC., ET AL. V. SUCCESSOR AGENCY TO THE
COMMERCE COMMUNITY DEVELOPMENT COMMISSION, ET AL.*

MEETING DATE: August 15, 2017

RECOMMENDATION:

Approve settlement agreement.

BACKGROUND:

The origins of the litigation go back to 2001, when the Commerce Community Development Commission ("Commission") entered into an Owner Participation Agreement ("OPA") with Mayans Development, Inc. ("Mayans"). The purpose of the OPA was for Mayans to develop affordable housing within the City. To achieve that purpose, the Commission agreed to sell approximately 3.7 acres to Mayans at a greatly reduced price.

Unbeknownst to the Commission, Mayans created a company called Los Jardines, a Nevada LLC, and attempted to surreptitiously transfer the OPA-properties to that entity, which constituted a breach of the OPA. The Commission did not know about that breach until the litigation began. By that time, the Commission was succeeded by the Successor Agency to the Commerce Community Development Commission ("Successor Agency").

The dispute between the parties started when the Department of Toxic Substances Control ("DTSC") discovered contaminants on properties located at the northeast corner of S. Eastern Ave. and Triggs St. ("Eastern-Triggs Site"), which was part of the OPA and formerly occupied by the Specific Plating electroplating operation. The DTSC notified Mayans/Los Jardines of the contamination; Mayans/Los Jardines then demanded that the Successor Agency clean up the property and pay them substantial sums for the costs they had incurred relating to that property.

Upon receiving this demand from Mayans/Los Jardines, the Successor Agency began investigating how Los Jardines became involved in the properties. It was not clear how a

company named Los Jardines had standing to make any demands to the Successor Agency relating to the Eastern-Triggs Site. In its investigation, the Successor Agency determined that Mayans never properly assigned its rights in the OPA to Los Jardines. It also discovered that Mayans failed to meet several of its obligations under the OPA, including the obligation to use restricted grant deeds which preserve the rights of the Commission/Successor Agency with regard to the properties, as well as the failure to build a sufficient amount of affordable housing. The Successor Agency therefore rejected the demand of Mayans/Los Jardines.

However, the Successor Agency always wanted the property to be remediated. It therefore negotiated with Mayans/Los Jardines to see how to best accomplish that goal. After several meetings and presentations from consultants on both sides, the Successor Agency made a generous offer to Mayans/Los Jardines: it would take back the Eastern-Triggs Site and handle the remediation process, and would pay Mayans/Los Jardines approximately \$350,000. The offer would have allowed Mayans/Los Jardines to keep all other properties under the OPA, including the undeveloped Eastern-Triggs Sites. Ismael Mayans (the owner of both companies) ultimately rejected that offer and sued the Successor Agency on April 11, 2013. The Successor Agency filed a cross-complaint alleging several breaches of the OPA.

One of Mayans/Los Jardines' causes of action was for declaratory relief. They sought to have the court rule as follows:

- That the Successor Agency (as the successor-in-interest to the Commission) had a duty to defend and indemnify Mayans/Los Jardines against all environmental hazards, investigations, and remediations;
- That the Successor Agency had to pay all of the costs of Mayans/Los Jardines incurred to date, including attorney fees and costs associated with owning the contaminated property (this allegedly would have amounted to over a million dollars);
- That the Successor Agency had to either take back the Eastern-Triggs Site or clean it up with Los Jardines "maintaining" ownership; and
- That the OPA be partially rescinded as to the Eastern-Triggs Site.

The parties went to trial on October 2 and 3 of 2014. After almost a year of post-trial briefing and hearings, the Court issued a Statement of Decision on September 10, 2015, **ruling in favor of the Successor Agency in every important aspect of the case.** The most important portions of the Court's ruling are as follows:

- "Mayans' purported 'transfer' of its interests in the Sites or the OPA was 'contrary to the provisions of section 603'" and that Mayans alleged assignment constituted a breach of the OPA;
- Mayans did not assign its rights and obligations in the OPA to Los Jardines.

- “Los Jardines has no rights under the OPA. It is not a ‘Participant’ under the OPA, and cannot exercise any rights under the OPA, including the remedy of rescission”;
- “Plaintiffs are not entitled to partial recession under the OPA” ;
- Mayans does not own, and has never owned, the subject properties. Rather, “the Sites were grant deeded to a non-existent entity, ‘Los Jardines, LLC, a California corporation,’ without Mayans ever having held title at all”;
- “Los Jardines does not currently own the ‘Sites,’ or any one of the ‘Sites’ and, therefore also has no property to return”; and
- “Mayans breached the OPA by failing to comply with the requirements of sec. 603 of the OPA.”

After receiving this highly favorable ruling, the Successor Agency amended its cross-complaint to seek quiet title to all undeveloped properties under the OPA, including the sites located north of E. Gave Ave. and south of Watcher St. (“Gage-Watcher Site”), given that the Court ruled that neither Mayans nor Los Jardines owned the properties and that Los Jardines had no rights under the OPA. If successful, this cause of action would allow the City or Successor Agency to obtain valuable uncontaminated properties, which it could then use to serve public purposes. Mayans/Los Jardines filed amended complaints, but counsel for the Successor Agency essentially eliminated those pleadings through the demurrer process. Mayans/Los Jardines demurred to our amended cross-complaint but counsel defeated those motions in their entirety.

Following the Court’s holdings to date, the parties agreed to mediate to possibly reach a settlement prior to litigating the remaining causes of action.

CURRENT STATUS AND SETTLEMENT:

As previously reported, we attended a mediation on Monday, June 19th. After a full day of deliberation, in exchange for all Gage-Watcher properties (including the private site purchased by Los Jardines subsequent to the OPA), as well as judgment entered in favor of the Successor Agency, the City offered \$375,000 to Mayans/Los Jardines and \$50,000 to the title insurance company. **Mayans/Los Jardines ultimately accepted that offer**, meaning that the City will be receiving ownership of the Gage-Watcher Site, so long as the agreement is approved by the Successor Agency, Oversight Board, and the Department of Finance. The settlement also requires that Mayans/Los Jardines satisfy all outstanding loans from Banco Popular so as to remove the deed of trust from portions of the Gage-Watcher Site. Finally, the Successor Agency will be taking the Eastern-Triggs Site, which the Successor Agency sought to remediate anyway, and already had an obligation to remediate because it is in the chain of title. Once remediated, the Successor Agency can then sell the property or use it for another purpose. The attached settlement agreement details all aspects of the settlement, including a stipulated judgement to quiet title in favor of the Successor Agency and for the Successor Agency to transfer the Gage-Watcher Site to the City.

CLEAN-UP PROCESS:

Throughout the litigation, the DTSC has sought to have the Eastern-Triggs Site remediated. It issued a Stipulation and Order against Los Jardines in October 2013. However, Los Jardines refused to clean it up because it claimed Successor Agency had that obligation under the OPA. Successor Agency denied those allegations. However, it also claimed ownership of the Site based on the allegation that any alleged transfer to Los Jardines was invalid. Due to the dispute regarding the parties' respective obligations, the parties entered into a joint agreement to conduct \$50,000 in preliminary investigation work while the litigation moved forward.

Before an investigation took place under the joint agreement, the Court issued its ruling that would ultimately aid the Successor Agency's quest to quiet title to all undeveloped OPA properties. Because the Court ruling made clear that the Successor Agency would ultimately obtain quiet title, Mayans/Los Jardines refused to perform under the joint agreement, and the Successor Agency stepped up its efforts to have the site cleaned up. However, AB 26 and AB 1484 require that the Successor Agency seek approval from the DOF prior to spending funds formerly held by the dissolved redevelopment agency.

The Successor Agency approved an agreement with Amec Foster Wheeler to begin investigating the scope and extent of contamination on the Eastern-Triggs Site. This contract also had to be approved by the Oversight Board and DOF. The DOF initially rejected both requests, claiming that the remediation was not an enforceable obligation. The Successor Agency disagreed, as the Commission is the only party validly in the chain of title since 2002. Despite the denial, the Successor Agency continued to receive pressure from the DTSC and Assembly Member Cristina Garcia for the remediation to move forward; however, remediation could not occur without DOF approvals.

We thereafter informed the DOF why we believed disapprovals to be improper. The Successor Agency also requested that Assembly Member Garcia help lobby the DOF to approve the requests for funds and resubmitted its request for funding. On September 24, 2015, the DOF finally approved the Successor Agency's request for \$115,000. It also later approved the Successor Agency's amended request for \$240,663 based on the estimate from its consultant and the DTSC to cover expenses for the expanded investigation, comprehensive reporting, and remediation planning. Though she was not involved in the litigation or settlement, Assembly Member Garcia was helpful in getting the Successor Agency's funding requests approved by the DOF.

The original scope of work confirmed the presence of contaminants on the Eastern-Triggs Site, including volatile organic compounds. As a result of the preliminary sampling, the DTSC required additional off-site sampling to determine the extent of the contaminant plume. A proposal for offsite soil gas sampling locations within the public right-of-way was submitted to the DTSC on February 21, 2017 and approved soon thereafter. Subsequently, the Successor Agency submitted a funding request to the DOF for \$38,000. The DOF approved the additional funding beginning July 1, 2017. The Successor Agency's consultants are in the process of obtaining permits from the City and scheduling the

additional sampling. Depending on the results of this sampling, the DTSC may require expanded sampling.

Once testing is complete, the Successor Agency's consultants will propose an action plan for remediation. Upon receiving estimates of the cost of any proposed remediation, the Successor Agency will submit another request for funds to the DOF, and may seek the help of Assembly Member Garcia to facilitate an approval in Sacramento.

As a separate matter, we recommend that the Successor Agency and City Council approve the attached settlement so that the Successor Agency and the City can take possession of the Eastern-Triggs and Gage-Watcher sites, respectively.

ALTERNATIVES:

1. Approve the settlement agreement;
2. Reject the settlement agreement;
3. Provide Staff with further direction.

FISCAL IMPACT:

The fiscal impact to approving the agreement will be \$425,000, which the City would undertake (\$375,000 to Mayans/Los Jardines and \$50,000 to the title insurance company). The Successor Agency will not be making any payment under the agreement and therefore will not be impacted fiscally.

Recommended by:	Eduardo Olivo, Successor Agency Counsel
Reviewed by:	Matthew Rodriguez, Interim Executive Director and Vilko Domic
Approved as to form by:	Eduardo Olivo, Successor Agency Counsel