

THIS PRINT COVERS CALENDAR ITEM NO.: 7.2
FOR THE MEETING OF: April 19, 2007

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Resolution regarding hazardous waste identification, clean up, liability and indemnification required by the California Transportation Commission (“the Commission”) as a condition of grant funding applied toward the purchase of 200 Main Street.

BACKGROUND:

The TJPA plans to acquire 200 Main Street (Block 3739, Lot 002) (“the property”) from Union Pacific Railroad Company for the Program. The property will be used for the Temporary Terminal.

The Commission approved inclusion of \$3.391 Million for right of way acquisition for the Transbay Transit Center Program in the 2006 State Transportation Improvement Program (STIP). The TJPA has requested allocation of \$3.391 Million in Regional Transportation Improvement Program (RTIP) funds, which will be applied toward the purchase of the property. Caltrans and the Commission staff have informed the TJPA that its allocation request will be presented to the Commission at the Commission’s April 2007 meeting.

In 1991, the Commission adopted Resolution #G-91-2, which requires a public agency applying for an RTIP grant (“the applicant”) to adopt a resolution regarding hazardous waste identification, clean up, liability and indemnification as a condition of grant funding. The Commission resolution is attached. In particular, Commission Resolution #G-91-2 requires the applicant to make the following commitments and agreements:

- The applicant will complete all reasonable steps to assure due diligence in examining a property for the presence or absence of hazardous waste prior to acquisition of the property.
- Should the applicant discover that the property contains hazardous waste, then the property will be cleaned up to applicable federal, state, and/or local standards.
- The applicant will hold the State harmless from any present or future liability or damage relating to clean up of the property.
- The applicant will not seek state funding for clean up, damage, or liability relating to any hazardous waste.
- The purchase agreement between the applicant and the seller of the property will include one of the following: (1) the property has been investigated and has been found clean; or (2) the seller will clean up the property prior to the applicant’s acquisition of the property; or (3) the subsurface rights and liability on the

property, and the full responsibility to pay for and remove any hazardous waste on the property will remain with the seller; or (4) if time is of the essence for the applicant's acquisition of the property, then the applicant will enter an enforceable agreement requiring the responsible parties to clean up the property.

- If the applicant enters an agreement requiring responsible parties to clean up the property, but the responsible parties fail to clean up the property, then the applicant will make full restitution to the State for the cost of the State's participation in any clean up.
- The seller of the property will retain liability for clean up of any hazardous waste discovered after the applicant acquires the property.
- The seller of the property will indemnify the applicant for any claims relating to the remediation of any hazardous waste resulting from the seller's failure to clean up the property.

These commitments and requirements in Commission Resolution #G-91-2 apply only to properties that the TJPA will purchase with RTIP funds. At this time, the TJPA has applied for Commission RTIP funding only for 200 Main Street.

ENCLOSURES:

1. California Transportation Commission Resolution #G-91-2.
2. TJPA Resolution.

RECOMMENDATION:

Adopt the resolution.

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, On February 21, 1991, the California Transportation Commission ("Commission") adopted Resolution #G-91-2, Hazardous Waste Identification and Clean-up Policy, which requires public agencies applying for Regional Transportation Improvement Program (RTIP) grant funds from the Commission ("RTIP Grant") to:

- Exercise due diligence to identify any hazardous materials on parcels being acquired with a RTIP Grant;
- Provide clean up or remediation of any hazardous materials on such parcels;
- Agree that no state funds will be sought for any clean up, damages, or liability costs associated with any hazardous materials on such parcels; and
- Indemnify the State of California ("State") from current and future liabilities associated with any hazardous waste on such parcels; and

WHEREAS, The Transbay Joint Powers Authority ("TJPA") plans to acquire 200 Main Street, San Francisco (Assessor's Parcel Number Block 3739, Lot 002) ("the Property"), from Union Pacific Railroad Company ("Seller") for the Transbay Transit Center Program ("the Program"); and

WHEREAS, The Commission approved inclusion of \$3.391 Million for right of way acquisition for the Transbay Transit Center Program in the 2006 State Transportation Improvement Program; and

WHEREAS, TJPA has requested the allocation of \$3.391 Million in RTIP funds, which will be applied toward the purchase of the Property for the Program, and Caltrans and Commission staff has informed the TJPA that its allocation request will be presented to the Commission at the Commission's April 2007 meeting; now, therefore, be it

RESOLVED, That TJPA will complete all reasonable steps to assure due diligence in examining the Property for the presence or absence of hazardous waste prior to acquisition of the Property; and

BE IT FURTHER RESOLVED, That should the TJPA discover that the Property contains hazardous waste which exceeds federal or state standards and notwithstanding the presence of hazardous waste the TJPA wishes to acquire the Property, then the Property will be cleaned up to the satisfaction of responsible local, state and/or federal regulatory agencies ("Clean," "Cleaned" or "Clean Up"), as appropriate, and the appropriate regulatory agency(ies) shall certify to the TJPA that any such required Clean Up has been completed; and

BE IT FURTHER RESOLVED, That the TJPA holds the State harmless from any liability or damage, both present and future, relating to any Clean Up of the Property; and

BE IT FURTHER RESOLVED, That the TJPA will not seek state funding for Clean Up, damage, or liability cost associated with any hazardous waste on or below the Property's surface; and

BE IT FURTHER RESOLVED, That the purchase agreement between the TJPA and the Seller of the Property ("Purchase Agreement") shall include one of the following: (1) the Property has been investigated and has been found Clean; or (2) the Seller will Clean Up the Property prior to the TJPA's acquisition of the Property; or (3) the subsurface rights and liability on the Property, and the full responsibility to pay for and remove any hazardous waste on the Property remains with the Seller, in conformance with applicable state and federal law; or (4) time is of the essence for TJPA's acquisition of the Property, and therefore the TJPA will enter an enforceable agreement requiring the responsible party(ies) to Clean Up the Property by a date certain; and

BE IT FURTHER RESOLVED, That if the Purchase Agreement provides for item number 4 in the previous recital and in the event of failure to Clean Up the Property by the date determined, the TJPA will make full restitution to the State for the cost of the State's participation in any Clean Up, and the TJPA may request re-allocation not to exceed the refunded amount after the Property has been Cleaned; and

BE IT FURTHER RESOLVED, That the Purchase Agreement shall require the Seller to retain liability for Clean Up of any hazardous waste discovered in, on, or under the Property subsequent to the transfer of title to the Property from the Seller to the TJPA; and

BE IT FURTHER RESOLVED, That the Purchase Agreement shall require the Seller to indemnify the TJPA for any claims relating to the remediation of any hazardous waste resulting from the Seller's failure to Clean Up the Property.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of April 19, 2007.

Secretary, Transbay Joint Powers Authority

CTC RESOLUTION G-91-2
Passed by the CTC on February 21, 1991

**CALIFORNIA TRANSPORTATION COMMISSION
RESOLUTION G-91-2
Commission Policy Resolution for Hazardous Waste Identification
and Cleanup for Rail Right-of-Way**

WHEREAS, the Commission has programmed funding for rail right-of-way acquisition in the 1990 State Transportation Improvement Program and may allocate funds for rail right-of-way acquisition from the Clean Air and Transportation Improvement Act; and

WHEREAS, hazardous wastes, based upon federal and state statutes and regulations, include but are not limited to such categories as heavy metals, (e.g., lead), inorganic (e.g., excessive mineral levels) and organic compounds (e.g., petroleum products), and can occur on a property's surface and subsurface; and

WHEREAS, rail properties often have hazardous wastes exceeding State of California and federal hazardous waste standards; and

WHEREAS, such properties contaminated with hazardous wastes require mitigation prior to using them for rail purposes; and

WHEREAS, hazardous wastes discovered on rail property may significantly impact property value, project scheduling and future liability for the grant applicant; and

WHEREAS, the Commission must be assured that acquisition of rail properties have been fully reviewed by the grant applicant, and if warranted, the grant applicant has tested for hazardous wastes; and

WHEREAS, if hazardous wastes exist, the Commission must be assured that the hazardous wastes identified has either been cleaned up, or financial responsibility for the cleanup has been determined prior to title transfer to the grant applicant, or easement has been secured in lieu of purchasing the property, and the subsurface rights and liability for hazardous wastes remain with the property seller; and

WHEREAS, hazardous wastes identified subsequent to title transfer to the grant applicant will be cleaned up by the seller or a mechanism to recover clean-up-costs is established and executed as a condition prior to title transfer; and

WHEREAS, full due diligence is necessary in discovering hazardous waste and is an essential element in acquiring rail right-of-way properties by the grant applicant; and

NOW THEREFORE BE IT RESOLVED, that acquisition of all rail right-of-way properties will be fully investigated by the grant applicant to determine the absence/presence of hazardous wastes. Investigations shall be conducted in accordance to the standards and practices of the local, state and/or federal regulatory agencies having jurisdiction and by personnel adequately trained in hazardous waste investigation; and

BE IT FURTHER RESOLVED, that all properties, discovered with hazardous wastes which exceed the federal/state standards, will be cleaned up to the satisfaction of the responsible local, state and/or federal regulatory agency. The appropriate regulatory agency shall certify to grant applicant that the cleanup has been completed; and

BE IT FURTHER RESOLVED, that the grant applicant will certify by formal resolution to the Commission that all reasonable steps have been completed to assure full due diligence in the discovery of hazardous waste has been achieved during the acquisition of rail right-of-way and the state is held harmless from cleanup liability or damages, both present and future; and

BE IT FURTHER RESOLVED, that the grant applicant will certify by formal resolution that it will not seek further state funding, for cleanup, damages, or liability cost associated with hazardous wastes on or below acquired property's surface; and

BE IT FURTHER RESOLVED, that the grant applicant will certify to the Commission:

- that all rail right-of-way acquisition properties have been investigated and have been found clean;
- or that the cleanup of discovered hazardous waste has been completed prior to acquisition of the property;
- or that the grant applicant has obtained permanent easement and the subsurface rights and liability and full responsibility to pay for and remove such hazardous waste remains with the seller in conformance with applicable State and Federal law;
- or if hazardous wastes are known to exist prior to acquisition and if the applicant determines that time is of the essence for acquisition, then and in that event, an enforceable agreement will be entered into requiring the responsible party(ies) to clean all hazardous wastes by a date certain, with the option of funds sufficient for the clean-up costs deposited in escrow by the seller.

In the event of failure to clean up by the date determined, the recipient of the grant will make full restitution to the STATE for its participation. This resolve does not preclude the recipient from requesting re-allocation not to exceed the refunded amount after the hazardous waste(s) have been fully removed from the subject site; and

BE IT FURTHER RESOLVED, that the grant applicant will certify to the Commission that the seller from whom properties have been acquired retain liability for any hazardous waste investigation and/or cleanup, and damages discovered subsequent to the transfer of title; and

BE IT FURTHER RESOLVED, the Commission declares all future liability resulting from hazardous wastes remain with the seller or the grant applicant, not the state, and the grant applicant has been indemnified by the seller for any costs resulting from failure to eliminate hazardous wastes; and

BE IT FURTHER RESOLVED, no state funds will be made available for any future costs associated with cleanup; damages, or liability costs associated with hazardous wastes on or below the acquired property's surface.

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WHEREAS, if hazardous wastes exist, the Commission must be assured that the hazardous wastes identified has either been cleaned up, or financial responsibility for the cleanup has been determined prior to title transfer to the grant applicant, or easement has been secured in lieu of purchasing the property, and the subsurface rights and liability for hazardous wastes remain with the property seller; and

WHEREAS, hazardous wastes identified subsequent to title transfer to the grant applicant will be cleaned up by the seller or a mechanism to recover clean-up-costs is established and executed as a condition prior to title transfer; and

WHEREAS, full due diligence is necessary in discovering hazardous waste and is an essential element in acquiring rail right-of-way properties by the grant applicant; and

NOW THEREFORE BE IT RESOLVED, that acquisition of all rail right-of-way properties will be fully investigated by the grant applicant to determine the absence/presence of hazardous wastes. Investigations shall be conducted in accordance to the standards and practices of the local, state and/or federal regulatory agencies having jurisdiction and by personnel adequately trained in hazardous waste investigation; and

BE IT FURTHER RESOLVED, that all properties, discovered with hazardous wastes which exceed the federal/state standards, will be cleaned up to the satisfaction of the responsible local, state and/or federal regulatory agency. The appropriate regulatory agency shall certify to grant applicant that the cleanup has been completed; and

BE IT FURTHER RESOLVED, that the grant applicant will certify by formal resolution to the Commission that all reasonable steps have been completed to assure full due diligence in the discovery of hazardous waste has been achieved during the acquisition of rail right-of-way and the state is held harmless from cleanup liability or damages, both present and future; and

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BE IT FURTHER RESOLVED, that the grant applicant will certify to the Commission:

- that all rail right-of-way acquisition properties have been investigated and have been found clean;
- or that the cleanup of discovered hazardous waste has been completed prior to acquisition of the property;
- or that the grant applicant has obtained permanent easement and the subsurface rights and liability and full responsibility to pay for and remove such hazardous waste remains with the seller in conformance with applicable State and Federal law;
- or if hazardous wastes are known to exist prior to acquisition and if the applicant determines that time is of the essence for acquisition, then and in that event, an enforceable agreement will be entered into requiring the responsible party(ies) to clean all hazardous wastes by a date certain, with the option of funds sufficient for the clean-up costs deposited in escrow by the seller.

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BE IT FURTHER RESOLVED, the Commission declares all future liability resulting from hazardous wastes remain with the seller or the grant applicant, not the state, and the grant applicant has been indemnified by the seller for any costs resulting from failure to eliminate hazardous wastes; and

BE IT FURTHER RESOLVED, no state funds will be made available for any future costs associated with cleanup; damages, or liability costs associated with hazardous wastes on or below the acquired property's surface.