

# Supplemental Material

For

## City of Sacramento

City Council  
Financing Authority  
Housing Authority  
Redevelopment Agency

## Agenda Packet

ITEM NO. 17

Submitted: Hinda Chandler

### For the Meeting of:

- Additional Material
- Revised Material

TITLE: 6<sup>TH</sup> STREET OVERCROSSING ROADWAY PROJECT

### Contact Information:

Please include this supplemental material in your agenda packet. This material will also be published to the City's Internet. For additional information, contact the City Clerk Department at Historic City Hall, 915 I Street, First Floor, Sacramento, CA 95814-2604, (916) 808-7200.

## 6<sup>TH</sup> STREET ROADWAY PROJECT ESCROW AGREEMENT

THIS ESCROW AGREEMENT (this "Escrow Agreement") is made this \_\_\_\_ day of December, 2010, by and among IA SACRAMENTO DEVELOPMENT, L.L.C., a Delaware limited liability company (the "Owner"), the City of Sacramento, a municipal corporation (the "City"), and STEWART TITLE OF CALIFORNIA (the "Escrowee").

### RECITALS:

A. Owner is the fee owner of that certain real property located in the City and County of Sacramento, commonly referred to as the Sacramento Railyards (the "Property"). Owner became fee owner of the Property on October 22, 2010 through its foreclosure on a loan to the prior owner S. Thomas Enterprises of Sacramento, LLC, for which the Property was the security interest. It is necessary for the Owner at this time to ensure the completion of certain infrastructure work on the Property that was planned and funded in part prior to the foreclosure to protect the value of the security interest. To accomplish that, Owner is entering into this Escrow Agreement.

B. On September 22, 2010, the City was awarded a Highway Railroad Crossing Safety Account Program Grant (the "Grant") in the amount of Seven Million Eight Hundred Sixty Five Thousand Dollars (\$7,865,000) (the "Grant Funds") from the California Transportation Commission (the "CTC") for the purpose of completing construction of the 6th Street roadway on a portion of the Property, more particularly extending the roadway from H Street north to the future Stevens Street (alternatively referred to herein as the "6th Street Roadway Project" or the "Project"). The City previously commenced construction of two bridges required for the 6<sup>th</sup> Street Roadway Project and the remaining work needed to complete the 6<sup>th</sup> Street Roadway Project is to construct the connecting street extensions between these bridges and H Street on the south and the future alignment of Stevens Street on the north.

C. In connection with the disbursement of the Grant, the City will enter into a Highway Railroad Crossing Safety Account Project Baseline Agreement (the "Baseline Agreement") with the CTC and the California Department of Transportation ("Caltrans"), which commits the City to complete the 6<sup>th</sup> Street Roadway Project. Thereafter, the City and Caltrans will enter into that certain Funding Agreement (the "Funding Agreement") whereby CTC will approve release of the Grant Funds under the terms of the Funding Agreement (the "Funding Agreement"), and the contract for construction of the 6<sup>th</sup> Street Roadway Project must be awarded within six (6) months from the date that the CTC approves the construction authorization.

D. The Baseline Agreement requires the City to secure additional funding for the completion of construction of the 6th Street Roadway Project in an amount not less than the Grant Funds. In furtherance of the foregoing, Owner has agreed to contribute an amount equal to the Grant Funds (the "Match Funds") to pay half of the estimated costs necessary to complete the 6th Street Roadway Project, subject to the limitations set forth herein. ~~If the 6th Street Roadway Project costs exceed the Grant Funds and Match Funds, Owner nevertheless must cover the additional costs in accordance with its obligation to construct this street as part of the~~

Eligible Costs listed above, and (b) construction management costs incurred pursuant to that certain consultant contract (the "Construction Management Contract") by and between the City and the selected firm for the 6th Street Roadway Project to be identified by City to Owner and Escrowee (the "Consultant"), (c) other costs incurred by Owner in connection with the completion of the 6th Street Roadway Project, including, without limitation, amounts paid or payable to Kimley-Horn, other consultants and contractors and incurred in connection with the preparation of the Plans and Specifications (collectively, the "Owner Costs"), as long as such costs do not exceed % of the Construction Contract cost, and (d) other costs incurred by the City in connection with the completion of the 6th Street Roadway Project which are not Eligible Costs as approved by Caltrans, which include, without limitation, City Project administration costs, City review of the Plans and Specifications and Engineer's Estimate, City inspection fees, and Project costs incurred by City for mitigation measures and fees owed to other agencies (collectively "City Costs"), if such costs are nonetheless approved by Owner, which approval shall not be unreasonably withheld, conditioned or delayed. The term "Eligible Payee" used herein shall individually or collectively refer to the City, Contractor, Consultant and any other party entitled to payment in connection with completion of the 6th Street Roadway Project as approved by City and Owner.

4. **Payment of Eligible Costs.** Following satisfaction of the Conditions Precedent (as defined in Paragraph 5 below), Escrowee shall make distributions to pay the Eligible Costs (each, a "**Disbursement**") in compliance with the provisions set forth in this Paragraph 4.

(a) **Disbursement Requests.** The City may, from time to time, deliver to Escrowee written instructions requesting a Disbursement in the form attached hereto as Exhibit A (each, a "**Disbursement Request**"). With each Disbursement Request, the City shall submit: (i) all invoices, statements and other documentation (collectively, the "**Payment Documentation**") evidencing the amount of the Disbursement and the payment of such Disbursement amount, and (ii) a written confirmation or certificate from the Eligible Payee with respect to the work performed to date that such work has been properly done (the "**Compliance Certificate**"). ~~For the final Disbursement Request, and the City shall also submit and~~ (iii) all applicable conditional and final lien waivers and releases (collectively, the "**Lien Waivers**") executed by the Eligible Payee's contractors and subcontractors with respect to the Work performed to date in a form as required by applicable law to the extent the Eligible Payee is entitled to assert a claim or file a lien against the Property. The Payment Documentation, the Compliance Certificate and the Lien Waivers submitted with each Disbursement Request shall collectively be referred to as the "**Supporting Documentation.**" Concurrently with delivering the Disbursement Request and the Supporting Documentation to Escrowee, the City shall deliver a copy of the same to the Owner for review and approval. Within three (3) business days after receipt of the Disbursement Request and Supporting Documentation, the Owner shall provide the City and Escrowee with written notice (the "**Owner's Notice**") stating either that the Owner agrees with the amount of the Disbursement requested in the Disbursement Request, and in such event the amount of the Disbursement requested in the Disbursement Request shall be immediately released to the City, or, if the Owner disputes any portion of the Disbursement requested in the Disbursement Request, or is not otherwise satisfied with the Supporting Documentation, the Owner's Notice shall set forth the same in detail, and in such event

(a) On or prior to June 30, 2012 (the "**Outside Date**"), (i) the City, Caltrans and CTC shall have executed the Baseline Agreement and provided a copy to Owner, (ii) the CTC shall have approved the construction authorization for the Project, and thereafter (iii) the City and Caltrans shall have executed the Funding Agreement and provided a copy to Owner, (iv) the City has received the CTC resolution or other documentation of CTC's approval disbursement of the Grant Funds to the City, copies of which shall be provided to Owner and Escrowee, and (v) City and Owner have approved a budget for the Project (the "**Project Budget**") based on the actual amounts incurred by Owner for the Plans and Specifications, the amount of the Construction Contract and the Construction Management Contract, and the actual and estimated City Costs;

(b) On or prior to the date of award of the Construction Contract by the City, Owner has reviewed and approved the form and content of the (i) Construction Contract to be entered into by and between the City and the Contractor, (ii) the construction management contract to be entered into between City and its selected consultant, such consultant to be reasonably acceptable to Owner, and (iii) the Project Budget which sets forth all Eligible Costs. Owner shall provide written approval to the City and Escrowee of the foregoing items, and such approval by Owner shall not be unreasonably withheld, conditioned or delayed; provided, however, that the parties hereby agree and acknowledge that it shall not be unreasonable for Owner to withhold its consent if after City has approved the Plans and Specifications and the Engineer's Estimate, the Project Budget exceeds the total amount of the Grant Funds plus the Escrow Funds; and

(c) On or prior to the date of notice to proceed for the Construction Contract, the City and/or the Contractor has delivered to Owner, for Owner's approval, a schedule of values for construction of the 6th Street Roadway Project which sets out the anticipated schedule for payment of the costs, expenses, payments, fees and charges necessary to complete the Work, and such approval by Owner shall not be unreasonably withheld, conditioned or delayed.

5.2 The Conditions Precedent for a Disbursement which, in combination with the amount of the prior Disbursements, would exceed one half of the amount of the Construction Contract Project Budget for all Eligible Costs approved by City and Owner prior to the initial Disbursement to City, are is as follows:

(a) If the total costs, expenses, payments, fees and charges necessary to complete the 6th Street Roadway Project will exceed the amount of the Construction Contract is less than Fifteen Million Seven Hundred Thirty Thousand Dollars (\$15,730,000) (the "Original Project Cap"), which amount represents the amount of the Grant Funds plus the Escrow Funds, any Disbursements required for costs resulting from change orders or extra work orders issued after award of the Construction Contract by City must be approved by the City and Owner, and such approval by Owner shall not be unreasonably withheld, conditioned or delayed as set out in paragraph 5.4; and,

shall have the right and option to terminate this Escrow Agreement by giving written notice (the "Termination Notice") to City and Escrowee on or before January 30, 2011. In the event Owner delivers the Termination Notice to City and Escrowee, Escrowee shall immediately release all Escrow Funds to Owner. The City, by its execution and delivery of this Escrow Agreement, hereby authorizes Escrowee to release the Escrow Funds in accordance with this Paragraph 6 without further instruction from the City. The terms of this Paragraph 6 shall survive the termination of this Escrow Agreement.

**6.7. Escrowee.** Escrowee agrees to hold the Escrow Funds in accordance with the terms hereof and shall not release any portion thereof except as provided herein, and the following provisions shall control with respect to the right, duties and liabilities of Escrowee:

6.17.1 Escrowee acts hereunder as a depository only and is not responsible or liable in any manner whatsoever for the (i) sufficiency, correctness, genuineness or validity of any written instrument, notice or evidence of a party's receipt of any instruction or notice which is received by the Escrowee, or (ii) identity or authority of any person executing such instruction notice or evidence.

6.27.2 Escrowee shall have no responsibility hereunder except for the performance by it in good faith of the acts to be performed by it hereunder, and Escrowee shall have no liability except for its own willful misconduct or negligence.

6.37.3 Escrowee shall be reimbursed on an equal basis by the City and Owner for any reasonable expenses incurred by Escrowee arising from a dispute with respect to the Escrow Funds, including, the cost of any legal expenses and court costs incurred by Escrowee, should Escrowee deem it necessary to retain an attorney with respect to the disposition of any Escrow Funds.

6.47.4 By its execution and delivery of this Escrow Agreement, the Escrowee acknowledges receipt from the Owner of the Escrow Funds. Except for ~~Escrowee's cost~~ as set out in pParagraph 67.3 above, Owner shall be solely responsible to pay Escrowee's expenses to hold and administer the Escrow Funds.

**7.8. Notices.** All notices, requests, demands or other communications to the respective parties hereto shall be deemed to have been duly given or made if addressed as follows:

If intended for Owner:

c/o The Inland Real Estate Group  
2901 Butterfield Road  
Oak Brook, Illinois 60523  
Attention: Dean Stermer  
Facsimile: (630) 954-5655  
[dean.stermer@inland-investments.com](mailto:dean.stermer@inland-investments.com)

with a copy to:

City of Sacramento  
Office of the City Attorney  
City Hall  
915 I Street, 4th Floor  
Sacramento, CA 95814-2604  
Attention: Sheryl N. Patterson  
Facsimile: (916) 808-7455  
[spatterson@cityofsacramento.org](mailto:spatterson@cityofsacramento.org)

If intended for Escrowee:

Stewart Title of California, Inc.  
525 N. Brand Bl.  
Glendale, CA 91203  
Attention: Larry McGuire  
Facsimile: (818) 241-9173  
[lmcguire@stewart.com](mailto:lmcguire@stewart.com)

or to such other address or such other person as either party may from time to time hereafter specify to the other in writing delivered in the manner provided herein. Any notice, request, demand or other communication to be given or made hereunder shall (except to the extent otherwise required by law) be given or made by registered or certified U.S. mail, return receipt requested with postage prepaid, or by personal service (including service by a reputable overnight courier service, such as Federal Express, UPS or other comparable courier). Unless otherwise expressly stipulated in this Agreement, notices shall be deemed to have been given or made upon delivery, or if delivery is refused, upon such refusal.

9. Effectiveness of this Escrow Agreement. This Escrow Agreement shall not be deemed effective and shall have no force or effect unless and until fully executed by and delivered to the parties hereto.

8.10. Interpleader. The parties hereto expressly agree that Escrowee, as escrow holder, has the absolute right at its election to file an action in interpleader requiring the parties to answer and litigate their several claims and rights among themselves and Escrowee is authorized to deposit with the clerk of the court all documents and funds held in this escrow, in the event such action is filed. The parties jointly and severally agree to pay Escrowee's cancellation charges and costs, expenses and reasonable attorneys' fees, which it is required to expend or incur in such interpleader action, the amount thereof to be fixed and judgment therefore to be rendered by the court. Upon the filing of such action, Escrowee will thereupon be fully released and discharged from all obligations to further perform any duties or obligations imposed by the terms of this Escrow Agreement.

9.11. Governing Law. This Escrow Agreement shall be governed by and construed and enforced in accordance with the laws of the State of California.

10.12. Counterparts. This Escrow Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

**EXHIBIT A**  
**DISBURSEMENT REQUEST FORM**

Date: \_\_\_\_\_  
Instruction No.: \_\_\_\_\_

**INSTRUCTIONS FOR DISBURSEMENT OF ESCROW FUNDS**

In accordance with that certain ESCROW AGREEMENT (the "**Agreement**"), dated as of December \_\_, 2010, by and among IA SACRAMENTO DEVELOPMENT, L.L.C., a Delaware limited liability company (the "**Owner**"), the City of Sacramento, a municipal corporation (the "**City**"), and STEWART TITLE OF CALIFORNIA (the "**Escrowee**"), the undersigned hereby instructs Escrowee as follows ("**Instruction**"):

(1) Attached is the Payment Documentation as required pursuant to Paragraph 4(a) of the Agreement.

(2) Attached is the Compliance Certificate as required pursuant to Paragraph 4(a) of the Agreement.

(3) Attached are the Lien Waivers as required pursuant to Paragraph 4(a) of the Agreement, for the final Disbursement Request.

(4) Pay the attached invoice or invoices set forth in the Payment Documentation in accordance with the terms therein no later than ten (10) business days after receipt, unless the Owner gives written notice of a dispute.

(5) In the event that Owner gives notice of a dispute, then pay the amount not in dispute and reserve the remainder in accordance with the provisions of Paragraph 4(a) of the Escrow Agreement.

REQUESTING PARTY:

City of Sacramento, a municipal corporation

By: \_\_\_\_\_  
Name: Jerry Way  
Title: Transportation Director