Supplemental Material

For

City of Sacramento

City Council
Financing Authority
Housing Authority
Redevelopment Agency

Agenda Packet

Submitted:

For the Meeting of: January 18, 2011

☐ Additional Material

X Revised Material

TITLE: TRACK RELOCATION PROJECT – TRACK RELOCATION AND FINANCING, REMEDIATION SERVICES AND PRIVATE UTILITIES SERVICES AGREEMENTS

Contact Information: Fran Halbakken, 808-7194

Consent Calendar (Continued)

10. **Track Relocation Project - Track Relocation and Financing, ~~Remediation Services and Private Utilities Service~~ Agreements ~~[2/3 Votes Required]~~ [To Be Delivered]**
Report ID #: 2011-00104
Location: Downtown near Sacramento Valley Station (District 1)

Recommendation: Adopt a **Resolution** ~~1) repealing the Track Relocation and Financing Agreement (Agreement No. 2006-1406) and the Private Utilities Service Agreement (Agreement No. 2009-1053) with S. Thomas Enterprises of Sacramento, LLC ("Thomas") effective as of October 22, 2010; 2) suspending competitive bidding for the Track Relocation Project remediation work and approving the Track Relocation Remediation Services Agreement with Thomas; and~~ 3) approving the Track Relocation and Financing Agreement ~~and the Private Utilities Service Agreement~~ the IA Sacramento Holdings, L.L.C.

Contact: Fran Halbakken, Operations Manager, (916) 808-7194, Department of Transportation.

11. **(Pass for Publication) Ordinance Amendment: Fire Cost Recovery [To Be Delivered]**
Location: (Citywide)

Recommendation: 1) Review an Ordinance adopting City Code Chapter 8.128 related to Fire Cost Recovery; 2) pass for publication the Ordinance title as required by Sacramento City Charter 32c to be adopted on January 25, 2011.

Contact: Lloyd Ogan, Deputy Chief Operations, (916) 808-1300, Fire Department.

Public Hearings (Item 12)

Public hearings may be reordered by the Mayor at the discretion of the legislative bodies.

12. **Estimated Time: 5 minutes**
Pell Circle Billboard Relocation (P10-065) (Noticed on 1-7-11)
Report ID #-2011-00029
Location: (District 2)

Recommendation: Withdrawn for Re-Noticing.

Contact: Antonio Ablog, Associate Planner, (916) 808-7702, Community Development Department.

City of Sacramento
City Council

915 I Street, Sacramento, CA, 95814
www.CityofSacramento.org

Meeting Date: **1/18/2011** **Report Type:** Consent

Title: Agreements: Track Relocation Project - Track Relocation Project Escrow

Report ID: 2011-00104

Location: District 1

Recommendation: Adopt a Resolution: ~~1) Repealing the Track Relocation and Financing Agreement (Agreement No. 2006-1406) with S. Thomas Enterprises of Sacramento, LLC ("Thomas") and;~~
2) approving the Track Relocation Escrow Agreement with IA Sacramento Holdings, L.L.C.

Contact: Fran Halbakken, Operations Manager, (916) 808-7194, Department of Transportation

Presenter: None

Department: Transportation Department
Division: Planning & Policy
Dept ID: 15001041

Attachments:

1-Description/Analysis
2-Background
3-Location Map
4-Resolution
5-Exhibit A Track Relocation Project Escrow Agreement

City Attorney Review
Approved as to Form
Sheryl N. Patterson
1/14/2011 1:55:52 PM

City Treasurer Review
Prior Council Financial Policy Approval or
Outside City Treasurer Scope
John Colville
1/14/2011 10:04:30 AM

Approvals/Acknowledgements

Department Director or Designee: Jerry Way - 1/14/2011 1:23:18 PM

Assistant City Manager: John Dangberg - 1/14/2011 1:50:31 PM

Attachment 1

Background Information:

The Track Relocation Project (T15029005) relocates and reconfigures the current Union Pacific Railroad (UPRR) mainline and passenger tracks and the passenger platforms to the north, between the I Street bridge and 7th Street. This will improve the mainline heavy rail capacity and reliability, for both freight service and passenger rail service. In addition, separating the freight tracks from the passenger platforms and limiting access to the platforms by means of the new passenger and service tunnels will improve safety. Relocation of the existing UPRR tracks will also allow extension of 5th and 6th Streets to open the Railyards area for development and connect the area to downtown Sacramento.

Prior Track Relocation Agreements

The scope of the Track Relocation Project was initially set out in an agreement between UPRR, the National Railroad Passenger Corporation (Amtrak), the Capitol Corridor Joint Powers Authority (CCJPA), the California Department of Parks and Recreation on behalf of the California State Railroad Museum (CSRM) and S. Thomas Enterprises of Sacramento, LLC (Thomas) dated July 13, 2006. The UPRR tracks would move northward, a new passenger tunnel would be built to provide access to the relocated platforms, and a new crossing and spur track would be built for CSRM to provide continued access for movement of their historic rail cars between their Old Sacramento Museum and their maintenance facility in the Central Shops.

On December 13, 2006 the City and Thomas entered into the Track Relocation and Financing Agreement (City Agreement No. 2006-1406) to allocate responsibilities for funding and construction of the Track Relocation Project. The City agreed to fund the first $40 million of project costs and the parties would split costs above $40 million. At that time, the project was estimated to cost $45 million and Thomas was to be responsible for the construction of the project. Since Thomas lost ownership of the Railyards through Inland's foreclosure proceeding and Thomas' LLC entity has no other assets~~, the prior TRFA is no longer enforceable~~. Also, the City will undertake the construction work with grant funds.

Project Scope Changes

The scope of the construction project has changed to add the West Tunnel (pedestrian access underneath UPRR tracks between Old Sacramento and the Central Shops) to implement the Railyards project entitlements, and to install utility casings underneath and adjacent to the new tracks to allow for future utility improvements to serve the Railyards project.

UPRR requires all tunnels underneath its new mainline tracks to be constructed at the same time as the Track Relocation Project. A portion of the West Tunnel design costs were funded by allocating $300,000 in park funds from Market Plaza, as approved by Thomas and the City Council on February 3, 2009 (City Agreement No. 2008-0409-1).

RESOLUTION NO.

Adopted by the Sacramento City Council

~~REPEALING PRIOR TRACK RELOCATION PROJECT AGREEMENT WITH S. THOMAS ENTERPRISES OF SACRAMENTO, LLC (THOMAS), AND~~ APPROVING TRACK RELOCATION PROJECT ESCROW AGREEMENT WITH IA SACRAMENTO HOLDINGS, L.L.C.

BACKGROUND

A. The City of Sacramento has completed environmental studies and engineering design plans for the Track Relocation Project, which is the first phase of the Sacramento Intermodal Transportation Facility Project.

B. The Track Relocation Project involves relocating the Union Pacific Railroad Company's (UPRR) freight tracks and building new passenger tracks and platforms to the north to allow for expansion of the existing Sacramento Valley Station, provide rail safety improvements and enhance the comfort and convenience for rail and intercity bus passengers.

C. The City previously entered into the Track Relocation and Financing Agreement (Agreement No. 2006-1406) with S. Thomas Enterprises of Sacramento, LLC ("Thomas"). On October 22, 2010, Thomas lost ownership of the Railyards property through a foreclosure proceeding~~ and can no longer perform its obligations under that agreement~~.

D. IA Sacramento Holdings, L.L.C. ("Inland"), as the new owner of the Railyards, has agreed to fund the cost for the grant match for the West Tunnel and the utility improvements to serve the Railyards development which the City will construct under the Track Relocation Project contract under the terms of a new Track Relocation Project Escrow Agreement.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

~~Section 1. The City Manager or his designee is authorized to repeal the Track Relocation and Financing Agreement (Agreement No. 2006-1406) with S. Thomas Enterprises of Sacramento, LLC.~~

Section 2. The City Manager or his designee is authorized to execute the Track Relocation Project Escrow Agreement with IA Sacramento Holdings, L.L.C. in the form set out in Exhibit A.

Table of Contents:

TRACK RELOCATION PROJECT ESCROW AGREEMENT

THIS ESCROW AGREEMENT (this "**Escrow Agreement**") is made this _____ day of January, 2011, by and among IA SACRAMENTO HOLDINGS, L.L.C., a Delaware limited liability company (the "**Owner**"), the CITY OF SACRAMENTO, a municipal corporation (the "**City**"), and CHICAGO TITLE INSURANCE COMPANY (the "**Escrowee**"). The Owner, City and Escrowee are collectively referred to herein as the "**Parties**" or individually as a "**Party**."

RECITALS

A. S. Thomas Enterprises of Sacramento, LLC ("**Thomas**") was a prior owner of certain real property located in the City and County of Sacramento and commonly referred to as the Sacramento Railyards (the "**Property**"). On July 13, 2006, Thomas and the Union Pacific Railroad Company ("**UPRR**"), together with the National Railroad Passenger Corporation ("**Amtrak**"), the Capitol Corridor Joint Powers Authority, ("**CCJPA**"), and the State of California Department of Parks and Recreation ("**CSRM**") entered into that certain Track Relocation Agreement (the "**TRA**"). The City and UPRR entered into that certain Construction Operation and Maintenance Agreement dated November 23, 2009 (the "**COMA**") pursuant to which the City assumed certain of Thomas' obligations under the TRA, as more particularly set forth in the COMA. The TRA and the COMA provided for, among other things, the right ~~for Thomas~~ to relocate UPRR's freight and passenger tracks and facilities and the performance of certain other obligations by the City and UPRR with respect to such tracks and facilities (the "**Track Relocation Project**" or "**Project**").

B. On December 28, 2006, the City acquired the existing Sacramento Valley Station located at 401 I Street in Sacramento, which is commonly known among the Parties as Parcel A. The City has or will contract with Owner to purchase an adjacent parcel of land, and known as Parcel B. Collectively Parcels A and B are referred to herein as the "**Intermodal Property**."

C. As part of the Track Relocation Project, UPRR's freight and passenger tracks and facilities, currently located within UPRR's existing easement within Parcel A ("**Railroad Easement I**"), will be reconstructed to a location within Parcel B ("**Railroad Easement II**"), both as defined in the TRA. Amtrak, CCJPA and CSRM all operate passenger or freight rail services over UPRR's freight and passenger tracks and facilities. As such, various City and UPRR agreements, which allow for construction of the Track Relocation Project, require Amtrak, CCJPA and CSRM approval of the plans and specifications for the Project.

D. Pursuant to the Track Relocation and Financing Agreement ("**TRFA**") between City and Thomas dated December 28, 2006, and the City thereafter assuming the responsibility for delivery of the Track Relocation Project, the scope of which is as defined in the TRFA and the COMA, the City has prepared plans and specifications and cost estimates for the Project, in which UPRR, Amtrak, CCJPA and CSRM have participated.

E. On October 22, 2010, the Owner became the current fee owner of the Property through its foreclosure on a loan to Thomas, for which the Property was the security interest. It is necessary for the Owner at this time to facilitate the completion of certain infrastructure work

on and adjacent to the Property that was planned and funded by the City and Thomas in part prior to the foreclosure to protect the value of the Property. To that end and to assist the City in its assumption of the Track Relocation Project, Owner is entering into this Escrow Agreement.

PROJECT BACKGROUND

A. The City has obtained federal, state and Amtrak grants and local transportation funds (collectively the "**Track Relocation Project Grants**") to pay for the Project. The City further has modified the original Project scope to reduce the construction costs so that it is anticipated that additional financing beyond the Track Relocation Project Grants will not be required.

B. The City will undertake the design and construction of the Track Relocation Project within Railroad Easements I and II pursuant to the COMA and other agreements with UPRR, and within the Property pursuant to the existing temporary construction easement granted to the City by Thomas, which easement may be reissued by the Owner and is subject to City's subsequent approval. Upon completion of the Project, UPRR will abandon Railroad Easement I, which encumbers both Parcel A and a portion of the Property. The Track Relocation Project will allow for improved access to the Property, including without limitation the extensions of 5th and 6th Streets.

C. The Track Relocation Project construction scope of work for bidding purposes will include additional improvements that were not included in the TRA or TRFA, but which are required for future development of the Property. The costs for these additional improvements are not eligible costs under the Track Relocation Project Grants. UPRR requires that all improvements to be located under or adjacent to its relocated tracks within Railroad Easement II be constructed concurrently with the Track Relocation Project, and UPRR imposes a license fee (the "**UPRR License Fee**") for each crossing or encroachment within its easement area. These scope of work additives, which are described and identified in the list of drawings attached as **Exhibit B** and incorporated by reference, include the West Tunnel, which will provide for pedestrian access underneath the relocated UPRR main line tracks to connect Old Sacramento to the Central Shops located within the Property (the "**West Tunnel Project**") and other infrastructure and utility facilities (the "**Railyards Improvements**"), which are required to be funded by the owner of the Property to allow for its development pursuant the terms of the Railyards Tentative Map (Resolution No. 2007-912) and the Railyards Specific Plan (Resolution No. 2007-908). The Owner is responsible for payment of these costs which benefit the Property and which will further increase the value of the Property.

D. On April 10, 2008, City was awarded a Trade Corridors Improvement Fund ("**TCIF**") Program Grant under Proposition 1B (the "**Grant**") in the amount of Five Million Two Hundred Sixty Six Thousand Dollars ($5,266,000) (the "**Grant Funds**") from the California Transportation Commission (the "**CTC**") for the purpose of the funding half of the costs to construct the West Tunnel Project. The City applied for the Grant based on the commitment of Thomas, the prior owner of the Property, to pay the required Grant Funds match.

E. Thereafter, on August 13, 2009, the CTC approved the allocation of the Grant Funds for disbursement to the City for construction of the West Tunnel Project. The City has

entered into a TCIF Baseline Agreement (the "**Baseline Agreement**") and a TCIF Funding Agreement (the "**Funding Agreement**") with the CTC and the California Department of Transportation ("**Caltrans**"), which commit the City to undertake construction of the West Tunnel Project in consideration for release of the Grant Funds. Thereafter, the CTC approved revising the milestone dates to allow for extension of the award for construction contract for the West Tunnel Project to March 31, 2011.

F. The Baseline Agreement and Funding Agreement requires the City to secure matching funds for the West Tunnel Project in an amount not less than the amount of Grant Funds to be expended on the construction costs (the "**Net Grant Funds**"). The construction cost for the West Tunnel Project is estimated to be much less than $10.532 million (i.e., the Grant Funds plus the match) because it will be constructed with the Track Relocation Project and the scope has been modified to reduce costs by eliminating the tunnel ramps. The ramps are located outside of Railroad Easement II and therefore are not required by UPRR to be constructed at this time. In addition, the Central Shops have not yet been rehabilitated to allow for public access. The West Tunnel Project construction cost is estimated at $4.5 million (the "**West Tunnel Construction Costs**"). This estimate does not include any costs for encountering contaminated soil or groundwater during excavation, which is anticipated to occur, or other unusual site conditions.

~~G. The CTC and Caltrans will allow as Grant Funds match the costs for: (i) prior remediation of the contaminated soil and groundwater within the West Tunnel Project boundaries if the costs were incurred after April 10, 2008, (ii) the $27,000 UPRR License Fee, and (iii) the City's expenditure of its park funds in the amount of $300,000 for the West Tunnel Project design costs (collectively the "**Grant Soft Match**"). Prior to the date hereof, Thomas has provided the necessary documentation of the remediation costs for the West Tunnel Project, which amount is claimed to be $3.97 million; however, the City has not yet received sufficient documentation to verify the eligibility and amount of such costs.~~

~~H~~G. The City has advanced $124,300 for preparation of design plans (the "**Railyards Improvements Design Costs**"), plus $160,000 for the UPRR License Fees for the Railyards Improvements. The construction costs for the Railyards Improvements is estimated at $1,010,440 (the "**Railyards Improvements Construction Costs**").

~~I~~H. In furtherance of the foregoing, the Owner shall deposit with Escrowee the funds in the amount of One Million Seven Hundred Thousand Dollars ($1,700,000) (the "**Escrow Funds**"). The City will have access to the Escrow Funds to pay costs incurred in connection with the design and construction of the West Tunnel Project and the Railyards Improvements, and for the Track Relocation Project Cost Overruns on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and for other good and valuable consideration, the Owner, City and Escrowee agree as follows:

AGREEMENT:

1. **Escrow Account; Transfer of Escrow Funds**.

(a) Deposit of Escrow Funds. Simultaneously with the execution of this Escrow Agreement, the Owner shall deposit with Escrowee the Escrow Funds. The Escrow Funds shall, as hereinafter provided, be invested by the Escrowee at the direction of the Owner in a money market account or other interest bearing account, government securities or other investment designated by the Owner, and all investment income and appreciation shall accrue to the benefit of the Owner.

(b) Transfer of Excess 6th Street Roadway Project Escrow Funds. The City, Owner and Escrowee have entered into that certain 6th Street Roadway Project Escrow Agreement dated December ~~—,~~31, 2010 (the "**6th Street Escrow Agreement**"), whereby the Owner has deposited Seven Million Eight Hundred Sixty Five Thousand Dollars ($7,865,000) (the "**6th Street Escrow Funds**") to pay half of the costs for the design and construction of the extension of 6th Street, as defined therein. If the amount of the 6th Street Escrow Funds required to be held under the terms of the 6th Street Escrow Agreement is reduced, the amount of the reduction in the 6th Street Escrow Funds shall be deposited by Escrowee into the Escrow Funds under this Escrow Agreement, notwithstanding the requirement under the 6th Street Escrow Agreement to return said funds to the Owner.

2. **Design Plans and Cost Estimate**. City ~~has provided~~shall promptly provide Owner with final plans and specifications for the construction of the West Tunnel Project and the Railyards Improvements (the "**Plans and Specifications**"), along with an engineer's estimate (the "**Engineer's Estimate**") of the West Tunnel Project and the Railyards Improvements Construction Costs. The Plans and Specifications and Engineer's Estimate shall be subject to Owner's approval, which approval shall not be unreasonably withheld, conditioned or delayed.

3. **Use of Escrow Funds**. The Escrow Funds shall be used to pay the following costs, which costs shall collectively be referred to as the "**Eligible Costs**," if such costs are approved by the Owner, which approval shall not be unreasonably withheld, conditioned or delayed:

(a) the Railyards Improvements Design Costs;

(b) the UPRR License Fees;

(c) actual construction costs incurred for the West Tunnel Project and the Railyards Improvements (collectively the "**Work**,") pursuant to that certain construction contract (the "**Construction Contract**"), by and between the City and the lowest responsible and responsive bidder for the Track Relocation Project to be identified by the City to the Owner and Escrowee (the "**Contractor**"), which Construction Contract is to include reimbursement of the costs for the Work as a stipulated sum as described in the Construction Contract;

(d) the construction management costs incurred to oversee the Work pursuant to that certain consultant contract (the "**Construction Management Contract**") by and between City and the selected firm for the Track Relocation Project to be identified by City to Owner and Escrowee (the "**Consultant**"), which costs shall not exceed 10% of the cost of the Work under the Construction Contract;

(e) change order costs paid to Contractor by City in connection with the completion of the Work, including, without limitation, incurred in connection with soil and groundwater contamination for the Work if such costs are not covered under the Remediation Funds, as defined in Paragraph 7 below;

(f) other costs incurred by City in connection with the construction of the Work, which include, without limitation, (i) a portion of the Track Relocation Project administration costs incurred during construction of the Work, which cost shall not exceed the same percentage of the Construction Costs for the Work as compared with the total amount of the Construction Contract, (ii) the costs incurred by City for mitigation measures related to the Work, and (iii) fees for undertaking the Work that are owed to other agencies, (collectively "**City Costs**"); and

(g) Track Relocation Project Cost Overruns, as defined in Paragraph 4(d) below, but only if (i) there is or will be funds remaining in the Escrow Fund after payment of all of the foregoing costs, and (ii) City has expended all of the funds under the Track Relocation Project Grants.

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**") to an Eligible Payee in compliance with the provisions set forth in this Paragraph 4. The term "**Eligible Payee**" used herein shall individually or collectively refer to the Owner, City, Contractor, Consultant and any other party entitled to payment in connection with completion of the Work and the Track Relocation Project construction as approved by the City and Owner.

(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, (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**"), 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 or the City or Owner 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**."

(b) 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 (i) 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 City, or, (ii) if the Owner disputes any portion of the Disbursement requested in the Disbursement Request, or is not otherwise satisfied with the Supporting Documentation, then the Owner's Notice shall set forth the same in detail, and only the non-disputed amount of the Disbursement shall be released to, or at the order of, City, and Escrowee shall retain the disputed amount until it has received notice of resolution of such dispute from the Owner. The Owner's approval of a Disbursement Request shall not be unreasonably withheld, conditioned or denied, and Owner may not disapprove any Eligible Costs as long as such costs are properly documented and are in conformance with the Project Budget (as hereinafter defined) setting forth the Eligible Costs as approved by the Owner and City pursuant to Paragraph 5.1(a) below. Absent receipt of an Owner's Notice by Escrowee within ten (10) business days after Escrowee's receipt of the Disbursement Request and Supporting Documentation from the City, the Owner shall be deemed to have disapproved the entire amount of the Disbursement requested in the Disbursement Request.

~~(c) West Tunnel Project Grant Match Payments. The amount of each Disbursement Request submitted by the City for the West Tunnel Project construction costs shall be not more than one half of the total amount of the construction costs for that portion of the Work, so that both the Grant Funds and the Escrow Funds are contributed equally in making progress payments for construction of the West Tunnel Project. The City shall apply Soft Grant Match credits for the West Tunnel Project Grant to pay the construction costs as match against the Grant Funds, which credits shall be subject to CTC and Caltrans approval, before a Disbursement Request is made from the Escrow Funds.~~

(c) Track Relocation Project Costs. If during the construction of the Work the City determines that the costs related to construction of the Track Relocation Project will exceed the Track Relocation Project Grants (the "**Track Relocation Project Cost Overrun**"), after City has verified to the Owner's satisfaction and approval that (i) there are no additional federal and/or state grant funds available to pay such additional costs, (ii) the costs are not eligible for payment with Remediation Funds as defined in Paragraph 7 below, and (iii) there is sufficient funding to pay for the construction of the Work; the Owner shall allow the City to use the Escrow Funds to pay the Track Relocation Project Cost Overrun.

(d) Remaining Escrow Funds. Upon completion of construction of the Work and the Track Relocation Project, and payment of the final Disbursement Request, upon issuance by the City of written notice to Escrowee that the Work has been satisfactory completed and all invoices for the Work and all Eligible Costs have been paid, which notice shall be issued no later than one hundred eighty (180) days after the recording of the notice of completion for the Track Relocation Project, any remaining Escrow Funds shall be released to the Owner.

5. **Conditions Precedent to Disbursements**. Escrowee's obligation to make Disbursements in accordance with Paragraph 4 above shall be conditioned upon the satisfaction

of each of the conditions precedent (collectively, the "**Conditions Precedent**") set forth in this Paragraph 5. If the Conditions Precedent for the Initial Disbursement defined below are not satisfied (or waived in writing by the Owner), then the Owner shall have the right to terminate this Escrow Agreement by written notice to the City and Escrowee and, if the Owner so terminates the Escrow Agreement, then the Escrow Funds shall be returned to the Owner.

5.1 The Conditions Precedent for the initial Disbursement (the "**Initial Disbursement**") to the City are as follows:

(a) On or prior to March 31, 2011, or a later date if a time extension for the Track Relocation Project construction contract award is approved by the CTC and/or Caltrans and consented to by the Owner (the "**Outside Date**"), the City and Owner have approved a budget for the Work (the "**Project Budget**"), which sets forth all Eligible Costs, and the Owner has reviewed and approved the form and content of the Construction Contract and the Construction Management Contract. The Owner shall provide written approval to the City and Escrowee of the foregoing items, and such approval by the Owner shall not be unreasonably withheld, conditioned or delayed. The Project Budget may thereafter be revised from time to time to include the Track Relocation Project Cost Overruns as defined in Paragraph 4(d) above, subject to Owner's written approval and such approval shall not be unreasonably withheld, conditioned or delayed.

(b) On or prior to the date of notice to proceed for the Construction Contract, the City and/or the Contractor has delivered to Owner, and the Owner has approved, a schedule of values breaking down the stipulated sum for construction of the Work, and such approval by Owner shall not be unreasonably withheld, conditioned or delayed.

5.2 Upon the written request of both Owner and City, Escrowee shall release Escrow Funds to City for disbursement to the applicable Eligible Payee prior to satisfaction of the Conditions Precedent in Paragraph 5.1 hereof to pay for design costs and UPRR License Fees associated with the Work.

6. **Construction Obligations.**

6.1 Pursuant to the ~~City's assumption of Thomas' obligations~~ COMA, the City has assumed, among other things, the obligation to construct the Track Relocation Project pursuant to the ~~terms of the~~ TRFA and the COMA. As part of this assumption, the City covenants and agrees to ~~construct the~~ (a) perform its obligations under the COMA, including, without limitation, the construction of the Track Relocation Project in a timely manner~~,~~ and in accordance with approved schedules and ~~subject to the amount of the Construction Contract for the Project not exceeding the amount of~~(b) enforce, the ~~Track Relocation Project Grants, and~~the benefit of Owner and the City, the obligations of UPRR under the COMA. Furthermore, the City hereby grants the Owner the right to attend Project meetings (including without limitation those jointly held between the City and the Contractor) and review and approve those disbursement requests related to the Work and Track Relocation Project Cost Overruns ~~fudned~~funded under this ~~EscrowAgreement~~Escrow Agreement, and to

review and approve other documentation as herein provided. The City agrees to make the Owner an intended third party beneficiary of all rights and benefits of the Construction Contract with respect to the Work and the Track Relocation Project Cost Overruns funded under this Escrow Agreement. ~~The~~

6.2 Notwithstanding paragraph 6.1 above, City's obligation to undertake construction of the Track Relocation Project and the Work ~~as set out herein~~ is subject to the costs for ~~said~~the Track Relocation Project and the Work under the Construction Contract not exceeding the amount of the Grant Funds and the Escrow Funds.~~—~~ If the bids for the Track Relocation Project and the Work exceed the Grant Funds and Escrow Funds, then either Owner or the City may terminate this Agreement, in which event the Escrow Funds shall promptly be returned to Owner.

7. **Environmental Insurance**. There is an existing environmental insurance policy with AIG (the "**AIG Policy**"), which provides funding for certain costs to remediate the soil and groundwater contamination (the "**Remediation Funds**") within both the City's Intermodal Property and Owner's Property. The scope of work under the AIG policy includes coverage for environmental remediation costs for certain portions of the Track Relocation Project scope of work, and the AIG Policy may also cover some or all of the costs related to unforeseen environmental remediation costs for the Work and for the Track Relocation Project. In the event the cost for remediation of the environmental conditions on the Intermodal Property and/or Owner's Property are covered under the AIG Policy, Owner hereby agrees to use reasonable efforts to obtain payment of City's costs for environmental remediation for the Work and the Track Relocation Project. Owner's obligation hereunder for the environmental remediation costs excludes payment of the deductible that may be required before such claims are to be paid under the AIG Policy.

8. **Option to Terminate**.

a. Notwithstanding anything to the contrary set forth herein, the Owner shall have the right and option to terminate this Escrow Agreement by giving written notice (the "**Termination Notice**") to the City and Escrowee on or before ~~January 30~~February 2, 2011. In the event the Owner delivers the Termination Notice to the City and Escrowee, Escrowee shall immediately release all Escrow Funds to the 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 8 without further instruction from the City. The terms of this Paragraph 8 shall survive the termination of this Escrow Agreement.

b. In the event either party terminates this Agreement pursuant to either paragraph 6.2 or 8.1, then the 6th Street Escrow Agreement shall, without further action of the parties thereto, terminate and the Escrow Funds (as defined in the 6th Street Escrow Agreement) shall be returned to Owner. The parties agree to execute an amendment to the 6th Street Escrow Agreement to memorialize the foregoing agreements of the parties.

9. **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:

9.1 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.

9.2 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.

9.3 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.

9.4 By its execution and delivery of this Escrow Agreement, the Escrowee acknowledges receipt from the Owner of the Escrow Funds. Except as set out in Paragraph 9.3 above, the Owner shall be solely responsible to pay Escrowee's expenses to hold and administer the Escrow Funds.

10. **Indemnification**. To the fullest extent permitted by law, the City shall waive any right of contribution and shall indemnify and hold harmless the Owner and its members, partners, officers, directors, employees, agents, affiliates and their respective successors and assigns (each an "**Indemnitee**") from and against all claims, damages, losses, and expenses, including, but not limited to, attorneys' and experts' fees and expenses or economic damages, (collectively "**Claims**") to the extent arising out of or resulting from or in connection with the performance of the Track Relocation Project. Such indemnity obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity that would otherwise exist as to any party or person described in the Escrow Agreement. Notwithstanding contrary language in this Article 10, this indemnity agreement shall not require the City to indemnify an Indemnitee for Claims arising out of or resulting from or in connection with its own negligence.

11. **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 Telephone: (630) 586-6463 dean.stermer@inland-investments.com
With a copy to:	c/o The Inland Real Estate Group 2901 Butterfield Road Oak Brook, Illinois 60523 Attention: Michael Podboy Facsimile: (630) 954-5655 Telephone: 630-218-8000 Podboy@inlandgroup.com
With a copy to:	c/o The Inland Real Estate Group 2901 Butterfield Road Oak Brook, Illinois 60523 Attention: Lori Foust Facsimile: (630) 954-5655 Telephone: 630-218-8000 foust@inland-investments.com
With a copy to:	c/o The Inland Real Estate Group 2901 Butterfield Road Oak Brook, Illinois 60523 Attention: Scott W. Wilton Facsimile: (630) 954-5655 Telephone: 630-218-8000 swilton@inlandgroup.com
With a copy to:	DLA Piper LLP (US) 203 North LaSalle Street, Suite 1900 Chicago, Illinois 60601 Attention: James L. Beard Facsimile: (312) 630-7379 Telephone: (312) 368-2169 james.beard@dlapiper.com

With a copy to:	DLA Piper LLP (US) 2000 University Avenue East Palo Alto, California 94303 Attention: Angela L. Castro Facsimile: (650) 687-1110 Telephone: (650) 833-2352 angela.castro@dlapiper.com
If intended for City:	City of Sacramento Office of the City Manager City Hall 915 I Street, 5th Floor Sacramento, CA 95814-2604 Attention: John Dangberg Facsimile: (916) 808-7618 Telephone: (916) 808-5704 jdangberg@cityofsacramento.org
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 Telephone: (916) 808-7292 spatterson@cityofsacramento.org
If intended for Escrowee:	Chicago Title-Insurance Company Chicago Commercial Center 171 N Clark St, Chicago, IL 60601 Attention: -Nancy Castro Facsimile: (312) 223-3409 Telephone: (312) 223-2709 nancy.castro@ctt.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 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 Escrow Agreement, notices shall be deemed to have been given or made upon delivery, or if delivery is refused, upon such refusal.

12. **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.

13. **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.

14. **Governing Law**. The provisions of the Escrow Agreement pertaining to the Escrowee shall be governed by and construed and enforced in accordance with the laws of the State of Illinois. All other provisions of this Escrow Agreement shall be governed by and construed and enforced in accordance with the laws of the State of California.

15. **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.

16. **Modification**. This Escrow Agreement may be modified only by written instrument signed by each of the parties hereto.

17. **Attorneys' Fees**. In the event of a dispute relating to the interpretation or enforcement of this Escrow Agreement, the non-prevailing party in such proceeding shall pay all fees, costs, and expenses (including court costs and reasonable attorneys' fees) of the prevailing party.

18. **City Authority**. By execution of this Escrow Agreement, the City represents that it is duly authorized and has all power and authority to commence and complete the Track Relocation Project.

~~18.~~19. **Agreements**. This Escrow Agreement is not intended to supersede or modify the Construction Contract or any agreement between the City and Owner, but solely to implement same. Further, by execution of this Escrow Agreement the City understands and acknowledges that the Owner is not bound~~, except to the extent of depositing Escrow Funds,~~ to and has not assumed any duties, liabilities or obligations of Thomas pursuant to either the ~~Track Relocation Agreement~~TRA or the ~~Track Relocation Finance Agreement~~TRFA.

[signature page follows]

IN WITNESS WHEREOF, the parties have executed this Escrow Agreement as of the date first above written.

Owner: IA Sacramento Holdings, L.L.C., a Delaware limited liability company

By: IA Sacramento Development VP, L.L.C., a Delaware limited liability company, its sole member

By: Inland American Real Estate Trust, Inc., a Maryland corporation, its sole member

By: _____
Name: Scott W. Wilton
Title: Secretary

City: City of Sacramento, a municipal corporation

By: _____
Name: John Dangberg
Title: Assistant City Manager

Approved as to Legal Form

By: _____
Senior Deputy City Attorney

Attest:

By: _____
City Clerk

ESCROWEE: Chicago Title Insurance Company

By: _____
Name: Nancy R. Castro
Title: Resident Vice President & CCC Escrow Manager

EXHIBIT A
DISBURSEMENT REQUEST FORM

Date:_____
Instruction No.:_____

INSTRUCTIONS FOR DISBURSEMENT OF ESCROW FUNDS FOR THE TRACK RELOCATION PROJECT

In accordance with that certain ESCROW AGREEMENT (the "**Agreement**"), dated as of January __, 2011, by and among IA SACRAMENTO HOLDINGS, L.L.C., a Delaware limited liability company (the "**Owner**"), the CITY OF SACRAMENTO, a municipal corporation (the "**City**"), and CHICAGO TITLE INSURANCE COMPANY (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.

(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 upon Owner approval of the Disbursement Request in accordance with Paragraph 4(b) of the Agreement.

(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(b) of the Escrow Agreement.

REQUESTING PARTY:

City of Sacramento, a municipal corporation

By: _____
Name: Jerry Way
Title: Transportation Director

EXHIBIT B
LIST OF DRAWINGS FOR WEST TUNNEL PROJECT AND RAILYARD IMPROVEMENTS

Drawing	Date