



Executive Director's

Report to the

Board of Harbor Commissioners

DATE: MARCH 20, 2013

FROM: REAL ESTATE DIVISION

SUBJECT: ORDER NO. _____ - (1) SITE PREPARATION AND ACCESS AGREEMENT AND (2) PERMIT NO. 901 WITH BNSF RAILWAY COMPANY FOR THE CONSTRUCTION, OPERATION, AND MAINTENANCE OF AN INTERMODAL NEAR-DOCK RAIL FACILITY TO BE KNOWN AS THE SOUTHERN CALIFORNIA INTERNATIONAL GATEWAY FACILITY

SUMMARY:

Staff recommends approval of the proposed Site Preparation and Access Agreement (SPAA) and proposed Permit No. 901 between the City of Los Angeles Harbor Department (Harbor Department) and BNSF Railway Company (BNSF), a Delaware corporation. The SPAA grants rights to BNSF to use and occupancy of approximately 102.75 acres of land to perform necessary site preparation work and to construct a proposed intermodal near-dock rail facility to be known as the Southern California International Gateway (SCIG). Permit No. 901, which is intended to become effective upon performance of the SPAA's obligations, grants BNSF the use and occupancy rights necessary to operate and maintain the rail yard facility.

The term of the SPAA is five years and subject to two separate one-year options and may be tolled such that the maximum time the SPAA could be in effect is 12 years. The term of the Permit No. 901 will allow BNSF to occupy the premises for a term not to exceed an aggregate total of 50 years.

The proposed compensation during the term of the SPAA is approximately \$6,266,106 annually. The proposed compensation during the first five years of the Permit No. 901 is \$7,832,633 annually. Both amounts are consistent with the rate of return policy approved by the Board of Harbor Commissioners (Board).

These matters are being considered by the Board in relation to the previously certified Final Environmental Impact Report (FEIR), dated March 7, 2013, and the approved SCIG Project (Project) that BNSF proposes to build on the subject property.

RECOMMENDATION:

It is recommended that the Board of Harbor Commissioners:

1. Approve proposed Site Preparation and Access Agreement and proposed Permit No. 901 with BNSF Railway Company;

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2. Direct the Board Secretary to transmit the Site Preparation and Access Agreement and Permit No. 901 with BNSF Railway Company to the City Council for approval pursuant to Charter Section 607 of the City Charter;
3. Authorize the Executive Director to execute and the Board Secretary to attest to Site Preparation and Access Agreement and proposed Permit No. 901 effective upon approval by City Council; and
4. Adopt Order No. _____.

DISCUSSION:

Background and Context – The Project is a new near-dock intermodal rail facility proposed by BNSF (Transmittal 1). The Project is intended to manage the anticipated demands of current and future growth in containerized cargo at the San Pedro Bay ports by providing sufficient near-dock intermodal rail facilities, thus reducing the distance of truck trips associated with increases in containerized cargo. SCIG operations would re-route container trucks from the current primary local truck routes between San Pedro Bay port facilities and BNSF's Hobart Rail Yard in the City of Commerce to local truck routes between San Pedro Bay port facilities and SCIG. Among other things, the Project is intended to minimize emissions, both by diverting cargo from truck to rail transport, and by utilizing clean technologies that will reduce the emission of particulate matter into the air.

Proposed SPAA Summary – Assembling the necessary lands, preparing those lands for construction, and then constructing the Project is anticipated to take five years. It is recognized that a potential for unknown events may require additional time. Therefore, the development allows for two, one-year conditional extensions if the need arises.

Premises: 102.75 acres (Exhibit B of the Permit). The SPAA includes a provision that allows lands necessary for the development of the SCIG to be added to the premises following their acquisition, which will occur after the SPAA's effective date and includes the existing ACTA maintenance yard site.

Term: Five years plus two, one-year conditional options to extend the SPAA (Transmittal 2) for a maximum of seven years, subject to the ability to toll the running of the SPAA term such that the maximum amount of time the SPAA could be in effect is 12 years

1. License Fee: Estimated at \$6,266,106 annually, which, in a land rent context, would result in the Harbor Department receiving a 10 percent annual rate of return on 102.75 acres (actual area to be determined upon completion of Engineering Division's final survey and official drawings). This rate also applies if the SPAA extension options are exercised (see Note below). In addition, compensation will be adjusted annually based upon the Consumer Price Index (CPI-U).

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2. Conditions: The SPAA remains in effect until the Project is completed. The developer can elect to extend the SPAA for two one-year option periods if the project is not complete after five years, but the developer is diligently pursuing completion of the Project. The License Fee is \$14 per square foot for the first five years and \$14 per square foot for each option period, should the developer elect to exercise their option. Beyond the term of the second option, the License Fee is \$17.50 per square foot until completion of the Project or the reset period of five years, as required by City Charter, whichever occurs first.
3. Tolling. Though the term of the SPAA is for an initial period of five years, subject to two separate one-year options to extend, the running of such term may be tolled under specific circumstances, such that the maximum period of time the SPAA could remain in effect prior to completion of the SCIG is 12 years. The circumstances that could toll the SPAA are: (a) litigation of the FEIR; (b) City's remediation of the premises granted under the SPAA extends one year beyond the SPAA's effective date; (c) regulatory intervention (e.g., RWQCB) stops BNSF's site work; or (d) properties and rights necessary to develop SCIG are not obtained within 30 months following the SPAA's effective date.
4. BNSF Termination Rights: BNSF has a number of rights to terminate the SPAA during its term: (a) if litigation of the FEIR extends three years past the effective date of the SPAA; (b) if properties and rights necessary to develop SCIG are not obtained within 30 months following the SPAA's effective date; (c) if the City does not act in connection with the FEIR within nine months following any remand; (d) for any reason related to modifications of the FEIR for 15 months following the approval of any such modifications; (e) if BNSF does not acquire rights or entitlements necessary to construct the SCIG; and (f) for reasons that make the project not viable, in BNSF's discretion, for 36 months after the effective date of the SPAA.
5. City's Termination Rights: In the twelfth year of the SPAA's term, if BNSF's site work has not materially progressed to completion of the SCIG, the Board may terminate the SPAA.

Credit Against Obligation to Pay License Fee:

1. Up to \$12.6 million for clearing the site of encumbrances, pre-development costs, pre-construction site work, etc.
2. Dollar for dollar reimbursement for unanticipated BNSF expenditures on any environmental remediation that may be necessary to address underlying environmental conditions not addressed during the Harbor Department's initial remediation (see Item 1 below).

License Fee Abatement: Fees may be abated proportionately for any interference with BNSF's access to that portion of the site by the Harbor Department or by parties required by the Harbor Department to be allowed entry.

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Site Preparation and Access Period Activities:

1. The Harbor Department will determine acceptable environmental remediation levels for the site and will perform the initial remediation of identified contaminated areas prior to site development by BNSF.
2. The Harbor Department will notify current tenants of BNSF's control of the premises and their need to execute a right of access and use with BNSF upon completion of the term of their current agreement, as well as notify Right-of-Way (ROW) holders that will remain tenants of the Harbor Department (e.g. pipelines and utilities) of a need to relocate, pursuant to the terms of their existing permits.
3. BNSF will place any remaining tenants and ROW Holders under its Right of Entry Agreement, receive rents, and provide notice to vacate, pursuant to terms agreed upon by the parties.
4. BNSF will demolish existing improvements (including required abatement).
5. BNSF to begin development site work (i.e. grading, compacting, etc.) and construction a common ROW/easement facility.
6. The Harbor Department will work with BNSF to enforce requirement for ROW Holders to relocate into the common facility.
7. BNSF to perform any required remediation after tenant/ROW Holders are relocated. Costs associated with any contamination not remediated by tenant/ROW holder will be reimbursed by the Harbor Department, with the Harbor Department retaining the right to recover.
8. BNSF to complete all development, site preparation, and other Project construction activities.
9. The final site Term Environmental Baseline will be established by the Harbor Department upon completion of construction and will include the results of the remediation performed by the Harbor Department and any remediation that may have been performed by BNSF during site development.
10. The SPAA continues until completion of the Project. The developer may exercise rights of termination if litigation of the FEIR is ongoing on the third anniversary date of the SPAA; if real property listed on Attachment 4 may not be included in the premises; if the Board does not act on a response to any remand within nine months; for any reason arising from modifications to the first FEIR considered by the Board within a 15-month period after Board or City Council's approval of such modifications; and if developer may not acquire any other rights or entitlements necessary to develop and operate the SCIG.
11. The SPAA continues until completion of the Project. The Harbor Department may exercise its right to terminate the SPAA on the occurrence of a default by the developer and recover possession of the premises, as outlined Section 19.3 of the Permit.

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Note: If approval of the FEIR for the Project is appealed or otherwise challenged, and development and construction activities are held in abeyance, then payment of certain License Fees due under the SPAA may be deferred until such legal challenges are resolved. Upon such resolution, any deferred License Fees will be fully paid ratably over the remaining term of the Permit.

Proposed Permit Summary – After development activities under the SPAA are concluded, a Term Baseline for environmental conditions has been set, and the Project has been constructed, the Permit will become effective with no constraints or influences other than the business points addressed in Permit No. 901 (Transmittal 3).

Effective Date: Commencing on expiration of the SPAA.

Term: A maximum of 45 years, reducible by up to two years (43 years).

Land Rent:

1. First Five year: Estimated at \$7,832, 633 annually (102.75 acres at 10 percent return). The proposed surface value rent is consistent with market rent for similar rail yards in the Wilmington area.
2. Rent to market every five years after the fifth year of the Permit through mutual agreement or through an appraisal process.
3. Annual compensation will be adjusted annually based upon the CPI-U.

Rent Abatement: Rent may be abated proportionately for any interference with BNSF's use of a portion of the site by the Harbor Department or by parties required by the Harbor Department to be allowed entry.

Per Container Rent:

1. Threshold Throughput equal to rolling three-year average of container Movements; beginning in the first month of the fourth permit year.
2. Per Container Rent equal to Land Rent divided by Threshold Throughput.
3. Per Container Rent due:
 - a. 100% - 125% of Threshold: each Movement pays full Per Container Rent with no discount. Estimated range to be \$22,908,081 - \$40,710,305.
 - b. 125% - 150% of Threshold: 20% discount. Estimated range to be \$0.00 - \$17,184,845.
 - c. 150% - 175% of Threshold: additional 15% discount (total of 35%)
 - d. Over 175% of Threshold: additional 15% discount (total of 50%). Estimated range to be \$0.00 - \$1,958,724.

Activities: Facility is placed into service and begins operations.

Right of First Refusal: The Harbor Department to have right of first refusal for other properties BNSF has acquired at the end of the Permit term.

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ENVIRONMENTAL ASSESSMENT:

The proposed action is for approval of a SPAA and Permit, for a combined term not to exceed 50 years, between the Harbor Department and BNSF for the construction, operation, and maintenance of the Project. The Project and proposed 50-year Permit was assessed in an EIR prepared in accordance with California Environmental Quality Act (CEQA), which was certified by action of the Board on March 7, 2013. No further review under CEQA is required for the approval of the proposed permit, and all feasible mitigation measures, lease measures, and Project conditions are incorporated into the proposed SPAA and Permit.

ECONOMIC BENEFITS:

The Project associated with this SPAA and Permit is anticipated to support approximately 1,400 temporary jobs per year over a three-year construction period and between 660 to 1,096 permanent jobs during the operations phase; the majority of jobs will be attributable to direct employment, with secondary jobs (indirect and induced) making a sizable contribution as well. In addition, the Project will contribute \$31.4 million in federal, state, and local taxes during the construction phase and \$47.7 million in tax revenue during the operations phase. It is not anticipated that any of the jobs associated with tenant companies displaced by this Project will be permanently lost.

FINANCIAL IMPACT:

Approval of proposed SPAA will add estimated fixed annual License Fee compensation to the Harbor Department in the amount of \$6,266,106.00 (minus rent credits not to exceed \$12,532,212.00) for the length of the development period (subject to annual CPI-U adjustment).

Approval of the proposed Permit will add estimated fixed annual rent to the Harbor Department in the amount of \$7,832,633.00 for the first five years of the Permit (subject to annual CPI-U adjustment), plus a significant additional amount of per-container rent for the final two years or the initial five-year period, and each year thereafter. The compensation terms of both the proposed SPAA and Permit conform to the Board's rate of return policy.

In addition to rent credits in an amount not to exceed approximately \$12.6 million, to be issued for development preparation and site work (but not improvements or acquisitions) on a reimbursement against expenditure basis, the Harbor Department has incurred approximately \$3.2 million in EIR expenses associated with the Project. The Harbor Department will also fund the relocation of the ACTA maintenance facility at an estimated cost of up to \$7.2 million. Additionally, the Harbor Department will conduct initial environmental remediation of the site at an estimated cost of \$6 million. The Harbor Department will not fund any Project improvements. The total amount of Harbor Department investment is estimated to be \$29 million. Subsequent to Project completion, all ongoing operating and maintenance costs associated with the premises and the Project will be fully borne by BNSF. The Harbor Department's expected rate of return for the SPAA and Permit ranges from 9.8 percent to 10.5 percent.

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CITY ATTORNEY:

The proposed Permit, Site Preparation and Access Agreement, and Order (Transmittal 4) have been approved as to form and legality by the Office of the City Attorney.

TRANSMITTALS:

1. Site Map
2. Site Preparation and Access Agreement
3. Permit
4. Order
5. Mitigation Monitoring and Reporting Program



JACK C. HEDGE
Director of Real Estate

FIS Approval: WP (initials)
CA Approval: SP (initials)



KATHRYN McDERMOTT
Deputy Executive Director

APPROVED:



for GERALDINE KNATZ, Ph.D.
Executive Director

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