

## **FOR CONSIDERATION**

June 15, 2010

TO: The Directors

FROM: Dennis M. Mullen

SUBJECT: New York City (Kings County) – Brooklyn Bridge Park Civic and Land Use Improvement Project (the “Project”)

REQUEST FOR: Affirmation of the Modified General Project Plan as Modified; and Authorization to Take Related Actions

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## **BACKGROUND**

The existing Modified General Project Plan (“GPP”) for the Brooklyn Bridge Park Civic and Land Use Improvement Project (the “Project”) consists of the GPP and related findings adopted in July, 2005, affirmed as modified in January, 2006, and affirmed as further modified in April, 2007 to permit Brooklyn Bridge Park Development Corporation (“BBPDC”), a subsidiary of New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) to fund, plan, construct, operate, and maintain the Project, including the Brooklyn Bridge Park (the “Park”), and to develop certain parcels (the “Development Parcels”) within the Project site in order to produce revenue for the Park. At their March 26, 2010 meeting the Directors (and, on March 10, 2010, the BBPDC Board of Directors) adopted a proposed modification to the GPP. Now, the Directors are being asked to affirm the GPP as modified by the revised modification (the “Modification”) attached as Exhibit 1 to these materials in order for BBPDC to transfer to Brooklyn Bridge Park Corporation (“BBPC”), a not-for-profit entity that the City of New York (the “City”) established and controls, financial and operational responsibility for and control of the funding, planning, development, construction, operation, and maintenance of the Project and to authorize BBPDC to enter into leases and subleases and other arrangements in furtherance of such transfer. The Modification was affirmed by the BBPDC Board on June 9<sup>th</sup> subject to affirmation by the ESDC Directors.

## **MODIFICATION OF THE GPP**

In order to expedite the completion of the Project with new funding and local control of the Project, BBPDC proposes to enter into leases, subleases and other arrangements with BBPC for the Park parcels and the Development Parcels owned by BBPDC and for other parcels within the Project owned by the City, BBPC, or others. In order to continue the construction of the Park, the City will provide \$55 million (“the New Funding”) to BBPC for such construction and related expenses, provided that the Project produces the revenue necessary in order for BBPC to fund the costs of the operation and maintenance of the portions of the Park to be constructed with the New Funding. BBPC, the City, and BBPDC intend to cooperate with respect to those parcels

included in the Project that are owned by the City or BBPC (the “City Properties”) or owned by persons other than the City, BBPC, or BBPDC (the “Other Properties”) in order to create a seamless Park experience for Park visitors and, with respect to City Properties and the Other Properties that are identified in the GPP as Development Parcels, new sources of revenue for the construction, operation and maintenance of the Park.

BBPDC will assign or transfer to BBPC all contracts and funding agreements, or enter such other agreements with BBPC as necessary, and take all actions necessary, in order to ensure that all planning, construction, operations, maintenance, and funding agreements currently in place with respect to the Project continue in effect and that all funds currently held by or for BBPDC and all Project-related equipment and personal property owned by BBPDC are transferred to and controlled by BBPC. BBPC will receive from BBPDC an assignment of all BBPDC revenues from the Park and Development Parcels.

These changes do not alter the fundamental benefits and utility to be derived from the Project or the uses and requirements for the Park and the Development Parcels as set forth in the GPP. The changes are intended to enhance the benefits to be derived from the Project, as set forth in the GPP, by obtaining additional funding for planning, construction, operation, and maintenance of the Project and increasing local control of the Project and to thereby expedite completion of the Project in accordance with the GPP as modified by the Modification.

#### ESSENTIAL TERMS OF THE TRANSACTION DOCUMENTATION

The Modification will allow for the transfer to BBPC from BBPDC of operational and financial responsibility and control of the Project so that BBPC will fund, plan, construct, operate, and maintain the Project pursuant to and in accordance and compliance with the GPP as modified by the Modification. In order to implement this transfer with respect to all properties comprising the Project:

- (i) BBPDC will enter into a lease or leases with BBPC pursuant to which BBPDC will lease to BBPC all properties that BBPDC owns, except, possibly, in the case of the property known as the 360 Furman Street (the “360 Furman Street Parcel”) as described below, and BBPC will assume full financial and operational responsibility and control of those properties and receive all revenues from those properties;
- (ii) with respect to the 360 Furman Street Parcel, BBPDC may enter into an administration agreement (the “Administration Agreement”) with BBPC pursuant to which BBPC will assume full financial and operational responsibility for and control of the of that parcel and retain and use all revenues from that parcel;
- (iii) BBPDC will enter into a lease or leases with the City or BBPC, as the case may be, to lease from the City or from BBPC City Properties and Other Properties within the Project that the City or BBPC owns or may acquire from

others, and immediately upon BBPDC leasing each such City Property and Other Property, BBPDC will sublease the same to BBPC, and BBPC will assume full financial and operational responsibility and control of those properties and receive all revenues from those properties. In some cases, BBPDC may acquire from the City or BBPC the City Property, or from the City, BBPC or others an Other Property, and immediately upon BBPDC acquiring such City Property or Other Property, BBPDC will lease or sublease the same to BBPC, and BBPC will assume full financial and operational responsibility and control of those properties and receive all revenues from those properties.

The leases and subleases will be for terms of ninety-nine years. It is anticipated that the Administration Agreement will have a term approximately equal to the term of the existing and any replacement ground lease for the 360 Furman Street Parcel.

All rents pursuant to the leases and subleases or consideration for the transfer of any real or personal property shall be for a nominal amount (*e.g.*, \$1.00 *per annum* rent or \$10 for transfer of title), provided, however, that consideration for transfers to BBPDC of Other Properties from persons or entities other than the City or BBPC may be for greater amounts provided that the City or BBPC actually pays all of BBPDC's costs and expenses in connection with or related to such transfers, including, the purchase price, applicable taxes, fees, assessments, and recording costs, if any, and reasonable fees and expenses of legal counsel, if any.

All leases, subleases, and other documentation shall include reasonably satisfactory indemnification and insurance undertakings as appropriate that indemnify and insure BBPDC and ESDC.

Pursuant to the leases, subleases and other agreements for the Park parcels, the Development Parcels, the City Properties, and Other Properties, BBPC will be required to comply in all respects with the GPP as modified by the Modification. The Park parcels owned by BBPDC shall be subject to a restrictive declaration running with the land comprising those parcels that restricts such parcels to public park and public recreational uses.

The leases, subleases, and other agreements will provide that if either BBPC or the City fails to act in accordance with the GPP, the Letters Patent (regarding the Empire Fulton Ferry site), and the Letter of Resolution (regarding the Project) or is in material breach of the leases, subleases, or other agreements regarding the Project to which BBPDC is a party, and such breach remains uncured pursuant to the applicable cure provisions of the relevant lease, sublease, or agreement, BBPDC will be entitled to exercise appropriate remedies that may include, among other remedies, money damages, specific performance, and transfer of title to its owned properties to the City or BBPDC.

With respect to properties owned by BBPDC, upon termination of the leases and the administration agreement between BBPDC and BBPC, title to those properties shall pass

to BBPC, or its successors and assigns, including, as the case may be, the City, and BBPCD will have no further obligations or responsibilities with respect to those properties.

## COST, FUNDING, AND CONSIDERATION

BBPC, in connection with entering into the ground leases, will (i) commit to complete, in accordance with the GPP as modified by the Modification, construction of the Park and the development of the Project, and (ii) use the New Funding in order to fund capital construction of the Project and costs and expenses related to such construction. The City commitment to provide to BBPC the New Funding will be contingent upon the Project producing sufficient revenue to support the operation and maintenance of those portions of the Park to be constructed by BBPC with the New Funding. The New Funding shall be in addition to the funding previously committed to the Project by the State and City, which neither will reduce. Upon completion of the transfer to BBPC from BBPDC of financial and operational responsibility for the Project and transfer to BBPC from BBPDC of all Project funding agreements, funds, revenue rights, and personal property, BBPDC will have no further financial or operational responsibility for the Project except as may be expressly set forth in a written agreement between BBPDC and BBPC and between BBPDC and the City. BBPC will pay BBPDC's and ESDC's reasonable out-of-pocket costs and expenses, including costs and expenses of legal counsel, in connection with actions that may be necessary for BBPDC or ESDC to take in connection with the GPP and the ownership by BBPDC of properties and leaseholds within the Project. BBPC will indemnify and hold BBPDC and ESDC harmless with respect to liability arising from BBPDC's ownership of the property and leaseholds within the project either pursuant to a contract with the City or by procuring insurance as provided in the leases, sublease, and other agreements.

BBPC, the transferee of the properties, is not-for-profit corporation established and controlled by the City of New York, and the terms and conditions of the transfers require that the beneficial ownership and use of the properties will remain with that entity or the City of New York. The purpose of the transfers is within the New York State Urban Development Corporation Act, the governing statute for BBPDC as an ESDC subsidiary. Jerome Haims Realty, Inc, an independent appraiser, prepared the appraisal of the real properties to be transferred. The real property dispositions will be made for nominal consideration (*e.g.*, \$1 *per annum* rent and \$10 for transfer of fee title) that is more than the negative forty-seven million seven hundred thousand dollar (-\$47.7 million) appraised fair market value for such properties as set forth in the appraisal. The personal property and equipment to be transferred to BBPC has been purchased by BBPDC in the last year, and based invoices and other purchase price documentation, has an aggregate purchase price value of less than \$110,000. The benefits to the public of the dispositions are (i) increased funding for continued construction of the park and (ii) local control of the Project. The value received to be received by BBPDC, ESDC and the State are (i)\$55 million in new funding to BBPC for completion of the public park and recreational facilities and (ii) termination of further BBPDC, ESDC and State financial and operational responsibility for the Project. The proposed dispositions of property described in these materials comply with Title 5-A of Article 9 of the Public Authorities Law.

## PUBLIC HEARING

Pursuant to the authorization granted by the ESDC Directors on March 25, 2010 and the BBPDC Board on March 10, 2010, the Corporation and BBPDC held a duly noticed public hearing on April 26, 2010 at which oral and written comments were received from the public with respect to the proposed Modification. Further written comments were accepted through May 26, 2010. A transcript of the hearing and a copy of all written comments received are enclosed with these materials.

A total of thirty (30) speakers appeared at the April 26, 2010 public hearing and provided oral and written testimony.

Twenty-eight (28) speakers testified regarding the Modification to the GPP. Of those speakers: sixteen (16) supported the Modification, stating general support for the Project and the transfer from BBPDC to BBPC; five (5) speakers testified in support of the transfer from BBPDC to BBPC that is the subject of and purpose for the Modification, generally favoring the benefits to be derived from additional local control of the Project, however two (2) of these speakers opposed any restoration of the Tobacco Warehouse structure beyond its current roofless, windowless, and open condition (any restoration of the Tobacco Warehouse is the subject of a restrictive covenant running with the land described in the Modification, and the Modification does not change the current GPP that provides "The restored exterior shell of the former Tobacco Warehouse may be used to house a walled garden, café, or space for arts groups"), and the other three (3) speakers (i) opposed private housing on the Development Parcels and the self-sustaining financial structure of the Project and requested that the Project become a publicly funded New York City public park (notwithstanding that housing on the Development Parcels and the self-sustaining financial structure of the Project have been expressly authorized pursuant to the GPP since 2006) and (ii) opposed the governance structure of BBPC (which is not subject to the control of ESDC or BBPDC); seven (7) speakers opposed the Modification, generally with the explanation that their opposition to the Project (as previously authorized pursuant to the GPP) leads them to oppose any modification thereto and citing issues including: opposition to housing within in the Project and their preference for making the Project site municipal parkland owned by the City, controlled by the City's Departments of Parks, and funded solely with public funds, opposition to the transfer of City property to the ownership or control of a public authority or a not-for-profit entity (notwithstanding that the City is entitled to effect such transfers) and the governance structure of BBPC (which is not subject to the control of ESDC or BBPDC). Two (2) speakers spoke on subjects related to the Project, but unrelated to the proposed Modification: one spoke in favor of the inclusion in the Project of a community boathouse and the other opposed the location for the installation of a carousel amenity and the governance structure of BBPC.

In addition to testimony given at the public meeting, twelve (12) written comments were received, however, two persons submitted two written comments each, and for purposes of addressing each of those sets of comments, each pair is consolidated as a single written comment. Seven (7) comments (including those of Community Board No. 2) were in support of the Modification and five (5) of these comments expressed concerns, including , permanent

preservation portions of the Project (including waterfront access) as public recreational space (prior to leasing to BBPC, BBPDC will subject its Park parcels to a restrictive declaration running with the land comprising those parcels that restricts such parcels to public park and public recreational uses), restoration of the Tobacco Warehouse structure beyond its current roofless, windowless, and open condition (addressed above); the process to be used by BBPC in selecting developers for the Development Parcels (which process is not subject to the control of BBPDC), studying alternatives to housing in order to fund the operation and maintenance of the Park (which is the subject of the memorandum of understanding referred to in the succeeding paragraph). Two (2) written comment submissions opposed the Modification generally stating that the commentators' opposition to the Project leads them to oppose any modification to the GPP, and citing issues including: opposition to housing within in the Project (addressed above), the need to make the Project site municipal parkland owned by the City, controlled by the City's Departments of Parks, and funded solely with public funds (addressed above), opposition to the transfer of City public property to the ownership or control of a public authority or a not-for-profit entity (addressed above), and the governance structure of BBPC (addressed above). Three (3) comments indicated neither support nor opposition to the Modification but addressed issues, such as the preservation of the Tobacco Warehouse in its current condition and prohibiting any further restoration (addressed above), preservation of scenic vistas, honoring historic events that have occurred on Project site, and the investigation of alternative funding sources to replace development of the Development Parcels (addressed above).

Many of the of those giving spoken or written testimony (both in support and in opposition) referred to a memorandum of understanding ("MOU") between the City and local elected officials (State Senator Daniel Squadron and Assembly Member Joan Millman) providing for the investigation of revenue producing alternatives to housing and other revenue producing development on the Development Parcels and granting the elected officials an *ex officio* veto power with respect to development on certain Development Parcels described in the MOU. Neither ESDC nor BBPDC is a party to the MOU which is not the part of the Modification.

## ENVIRONMENTAL REVIEW

The actions requested of the Board either constitute a Type II actions as defined in Section 617.5(c) (26) of the New York State Environmental Quality Review Act ("SEQRA") and the implementing regulations for the New York State Department of Environmental Conservation or have been previously addressed in the Project's SEQRA review concluded in 2005. Therefore, no further environmental review is required in connection with the requested actions.

As background, ESDC, as the lead agency and on behalf of BBPDC, conducted an environmental review for the Project. A Final Environmental Impact Statement was prepared and SEQRA Findings have been adopted by the ESDC Board of Directors. The requested actions do not change the Project analyzed in the FEIS in any material way and do not affect the conclusions and determinations represented in the FEIS and the SEQRA Findings.

For any future Project actions requiring environmental review, ESDC will continue to serve as the lead agency on behalf of BBPDC and BBPC.

Furthermore, as ESDC and BBPDC are signatories to the Letter of Resolution (“LOR”) that stipulates the treatment of and procedures for archaeological and historic resources on the Project site, ESDC, as well as BBPDC, will continue their respective roles in ensuring that adherence to the LOR, as it may be amended in the future, is followed through completion of the Project.

#### AFFIRMATIVE ACTION

ESDC’s Non-Discrimination and Affirmative Action policies will apply. There is a 20% Minority/Women-owned Business Enterprise contractor and/or subcontractor participation goal during development of the Project and an overall goal of 25% minority and female workforce participation during construction of the Project.

#### REQUESTED ACTIONS

The Board is requested to: (1) affirm the Modified General Project Plan as modified; (2) determine that there is no reasonable alternative to the proposed below-market transfer that would achieve the purposes of the property transfers described in the materials, and (3) authorize all actions and agreements related to the foregoing.

#### RECOMMENDATION

Based on the foregoing, I recommend approval of the requested actions.

#### ATTACHMENTS AND DOCUMENTS

- Resolutions
- Exhibit 1 - Modification to the Modified General Project Plan
- Exhibit 2 – Public Hearing Transcript
- Exhibit 3 – Public Hearing Written Comment

June 15, 2010

New York City (Kings County) – Brooklyn Bridge Park Civic and Land Use Improvement Project (the “Project”) – Affirmation of the Modified General Project Plan as Modified; and Authorization to Take Related Actions

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RESOLVED, that on the basis of the materials presented to this meeting (the “Materials”), a copy of which is hereby ordered filed with the records of the Corporation relating to the Brooklyn Bridge Park Civic and Land Use Improvement Project (the “Project”), the Corporation does hereby affirm the Modified General Project Plan as modified pursuant to the modification that is part of the Materials (the “Modification”); and be it further

RESOLVED, that on the basis of the Materials, it is determined that there is no reasonable alternative to the property transfer described in the Materials that would achieve the purposes described in the Materials; and it is further

RESOLVED, that the President and Chief Executive Officer of the Corporation or his designee(s) be, and each of them hereby is, authorized and directed, in the name and on behalf of the Corporation, to execute, deliver, and record any and all documents and to take any and all actions as may be deemed necessary or appropriate to effectuate the foregoing resolutions.

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