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June 2, 2015

Barbara Parker  
Oakland City Attorney  
1 Frank Ogawa Plaza  
Oakland, CA 94612

**Re: East 12<sup>th</sup> Street Remainder Parcel Legal Compliance**

Dear Ms. Parker:

We write on behalf of Eastlake United for Justice (EUJ), a neighborhood organization of concerned residents who live in Oakland's Eastlake neighborhood, to request full legal compliance in connection with any disposition or authorization to dispose of the 12<sup>th</sup> Street Remainder Parcel ("E. 12<sup>th</sup> Street Parcel"), located at East 12<sup>th</sup> Street and 2<sup>nd</sup> Avenue.

As detailed in our May 4, 2015, letter to the Oakland City Council (attached and incorporated herein), federal, state, and local laws establish specific procedures and substantive requirements that must be followed when local governments dispose of public land such as the E. 12<sup>th</sup> Street Parcel. We have reviewed the City's initial response to our Public Records Act request sent on May 8, 2015 ("Public Records Act Request – 12<sup>th</sup> Street Remainder Parcel"), and concluded that the City has not complied with many of these requirements.

We ask that the City of Oakland come into full compliance with these laws before either (a) authorizing the negotiation or execution of a disposition and development agreement and related documents between the City and any development entity for sale of the East 12th Street parcel, (b) executing a disposition and development agreement or other contractual obligations with any developer for sale of the E. 12<sup>th</sup> Street Parcel, or (c) transferring the E. 12<sup>th</sup> Street Parcel to any purchaser or developer. If the City takes any of these actions without first ensuring full legal compliance, we may ask a court to enforce unfulfilled legal obligations and enjoin the transfer of the parcel.

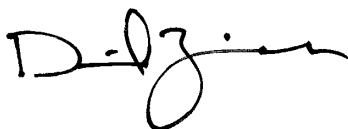
Full compliance includes fulfilling, *inter alia*, all of the following obligations:

- i. Offering to sell or lease the property for the purpose of developing low- and moderate-income housing to housing sponsors, including nonprofit housing providers, as required by Government Code § 54222, Oakland Municipal Code § 2.42.040, and the City of Oakland's 2015-2023 Housing Element, Action 2.7.3 (p.306);

- ii. Calling publicly for oral or written competitive bids or offers, including publishing notice of the proposed sale and competitive process in the newspaper or posting on the City's website, as required by Oakland Municipal Code § 2.42.050;
- iii. Giving first priority to, and entering good faith negotiations for a period of not less than 90 days with, an entity that proposes to use the parcel for developing low- and moderate-income housing and agrees to make available not less than 25 percent of the total number of units developed as affordable to lower income households, as required by Government Code §§ 54222, 54222.5, and 54227, and Oakland Municipal Code § 2.42.040;
- iv. Giving priority to the entity that proposes to provide the greatest number of affordable units at the deepest level of affordability, as required by Government Code § 54227; and
- v. Ensuring at minimum that at least 15 percent of the total number of units is affordable to lower income households, as required by Government Code § 54233 and the City of Oakland's 2015-2023 Housing Element, Action 2.7.3 (p.306).

By complying with these legal requirements, the City will also demonstrate responsible stewardship of public land and promote a vision for Oakland that supports inclusion and diversity.

Sincerely yours,



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Cc: Oakland City Councilmembers  
John Flores, Interim City Administrator  
LaTonda Simmons, City Clerk

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**Re: Item #13, Agenda for the May 5<sup>th</sup> Concurrent Meeting of the  
Oakland Redevelopment Successor Agency and the City Council**

Dear President McElhaney and Members of the Oakland City Council:

We write on behalf of Eastlake United for Justice (EUJ), a neighborhood organization of concerned residents who live in Oakland's Eastlake neighborhood, regarding the disposition of the 12<sup>th</sup> Street Remainder Parcel located at East 12<sup>th</sup> Street and 2<sup>nd</sup> Avenue. EUJ is committed to ensuring that Oakland uses all public land for the public good and that the 12<sup>th</sup> Street Parcel include affordable housing.

As described below, there are serious unanswered questions about the City's compliance with federal, state and local laws governing disposition of this property, including the California Surplus Lands Act, Oakland Ordinance No. 13287, the Housing Element of Oakland's General Plan, and federal and state fair housing laws. EUJ's concerns center on compliance with these legal requirements:

- 1) Disposition of the 12<sup>th</sup> Street Parcel is governed by the Surplus Lands Act;
- 2) The 12<sup>th</sup> Street Parcel must include at least 15% affordable housing;
- 3) Disposition of the 12<sup>th</sup> Street Parcel must comply with specific state and local procedural requirements; and
- 4) Disposition of the 12<sup>th</sup> Street Parcel for housing development must comply with fair housing laws.

**We urge you to remove the "DDA For 12th Street Remainder Parcel" (item #13) from the Meeting Agenda for the May 5<sup>th</sup> Concurrent Meeting of the Oakland Redevelopment Successor Agency and the City Council until the City has publicly demonstrated that it has complied with all legal requirements.**

**1. Disposition of the 12<sup>th</sup> Street Parcel Is Governed by the  
Surplus Lands Act**

Pursuant to the California Surplus Lands Act, Gov. Code §§ 54220 *et seq.*, the 12<sup>th</sup> Street Parcel qualifies as "surplus land" and disposition must therefore comply with all procedural and substantive provisions of the Act.

The Surplus Lands Act provides an unambiguous definition of “surplus land”: “land owned by any local agency, that is determined to be no longer necessary for the agency’s use, except property being held by the agency for the purpose of exchange.”<sup>1</sup> The Act enumerates only limited exemptions from the procedural and substantive requirements for disposition of surplus land, none of which apply to the 12<sup>th</sup> Street Parcel.<sup>2</sup>

Strict adherence to all provisions of the Act is necessary to accomplish the Legislature’s intent that all public lands no longer needed for public use be made available for affordable housing, recreation, and other state priorities.<sup>3</sup>

The relevance of the City’s characterization of the 12<sup>th</sup> Street Parcel as “property for development” as defined by local Ordinance No. 13287<sup>4</sup> does not change the property from surplus property to non-surplus property. Indeed, the Ordinance acknowledges explicitly and appropriately that disposition of both “surplus land” and “property for development” must “comply with the Surplus Lands Act.”<sup>5</sup> Moreover, Staff analysis of the Ordinance noted that “[t]here is no basis for distinguishing between ‘surplus’ and ‘nonsurplus’ property transactions.”<sup>6</sup>

## **2. The 12<sup>th</sup> Street Parcel Must Include At Least 15% Affordable Housing**

To help ensure “a decent home and a suitable living environment for *every* Californian,” the Surplus Lands Act mandates any entity that develops more than 10 units of housing on surplus land “provide not less than 15 percent of the total number of units developed on the parcels at affordable housing cost ... or affordable rent ... to lower income households.”<sup>7</sup> There are no exceptions.

Despite this state statutory requirement, it appears that the City is preparing to enter into a DDA with a developer that intends to build 298 market-rate units and no affordable units on the 12<sup>th</sup> Street Parcel.<sup>8</sup> In order for the City, developer, and public to be assured of compliance with Government Code § 54233, it is important that any Council resolution relating to disposition of the 12<sup>th</sup> Street Parcel and any DDA explicitly require inclusion of at least 15 percent lower-income units in all future housing development on the site.

## **3. Disposition of the 12<sup>th</sup> Street Parcel Is Subject to Specific Procedural Requirements**

The Surplus Lands Act, Oakland’s General Plan, and Oakland’s Municipal Code all impose procedural requirements on the disposal of city owned property. These procedures ensure compliance with the affordable housing and other obligations of the Act and laws of Oakland. It appears that many, if not all, of these procedures were ignored in preparing the 12<sup>th</sup> Street Parcel for sale.

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<sup>1</sup> Gov. Code § 54221(b).

<sup>2</sup> See Gov. Code § 54221(e).

<sup>3</sup> Gov. Code § 54220(a)-(b).

<sup>4</sup> Codified as Oakland Municipal Code Chapter 2.42, available at

[https://www.municode.com/library/ca/oakland/codes/code\\_of\\_ordinances?nodeId=TTT2ADPE\\_CH2.42DIREPRCI](https://www.municode.com/library/ca/oakland/codes/code_of_ordinances?nodeId=TTT2ADPE_CH2.42DIREPRCI)

<sup>5</sup> Oakland Municipal Code §§ 2.42.040 and 2.42.160.

<sup>6</sup> Agenda Report (Oct. 13, 2014), p.3, attached.

<sup>7</sup> Gov. Code §§ 54220; 54233 (*emphasis added*). The City’s 2014 Housing Element reiterates this requirement in Action 2.7.3, p.306, available at <http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak050615.pdf>.

<sup>8</sup> See Agenda Report, Attachment C, Project Description (Feb. 27, 2015), attached.

As the California Court of Appeal recently observed: “The applicable provisions of the Surplus Land Act are quite simple. When a local agency wishes to dispose of land it no longer requires (surplus land), the Surplus Land Act requires the local agency to send a written offer to sell or lease the property to certain entities for affordable housing or park purposes.”<sup>9</sup> Among other things, notice must be provided to housing sponsors agreeing “to make available not less than 25 percent of the total number of units developed on the parcels at affordable housing cost ... or affordable rent ... to lower income households.”<sup>10</sup>

The Oakland Municipal Code both requires compliance with the Surplus Lands Act and imposes additional procedures to advance affordable housing goals, including 1) offering “housing providers first priority for 90 days to negotiate for the purchase or lease of the property for the development of affordable housing;” 2) transparent notice requirements beyond the floor established by the Surplus Lands Act; and 3) competitive bidding.<sup>11</sup> The City’s Housing Element imposes similar requirements.<sup>12</sup> Waiver of some locally mandated procedures is permitted only in limited circumstances and requires specific public findings by the City Council, and in some cases by the City Administrator.<sup>13</sup> We note, however, that the City is *not* empowered to waive the minimum requirements of the Surplus Lands Act.

It is unclear whether the City complied with any of these procedural requirements. On the contrary, it appears that “staff issued a Request for Proposals (RFP) to those developers who had shown interest in the Property.”<sup>14</sup> The City Administrator and City Council’s failure to take the necessary procedural steps would put the City out of compliance with Ordinance No. 13287 and its predecessor, Ordinance No. 13185 (July 2013), as well as the City’s Housing Element.

#### **4. Disposition of the 12<sup>th</sup> Street Parcel Is Subject to State and Federal Fair Housing Laws**

The federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968) prohibits practices that “actually or predictably result[] in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns....”<sup>15</sup> California’s Fair Employment and Housing Act (FEHA) also makes it “unlawful ... to discriminate through public or private land use practices, decisions, and authorizations” that have “the effect, regardless of intent, of unlawfully discriminating on the basis of [a protected class].”<sup>16</sup> And, as an entitlement jurisdiction that receives federal housing funds from the U.S. Department of Housing and Urban Development, the City is also required to take actions that eliminate identified impediments by “[p]romot[ing] opportunities for inclusive patterns of housing occupancy” and “eliminating racial and ethnic segregation.”<sup>17</sup> To this end, Oakland’s Analysis of Impediments to Fair Housing identifies the “severe shortage of

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<sup>9</sup> *The Flanders Foundation v. City of Carmel-by-the-Sea*, 202 Cal. App. 4th 603, 613 (2012); see also *City of Cerritos v. Cerritos Taxpayers Assn.*, 183 Cal. App 4th 1417, 1444 (2010), citing Gov. Code §§ 54222(a)-(b).

<sup>10</sup> Gov. Code § 54222.5.

<sup>11</sup> Oakland Municipal Code §§ 2.42.040; 2.42.140; 2.42.170(A); 2.42.050(A).

<sup>12</sup> 2014 Housing Element, Action 2.7.3, p. 306.

<sup>13</sup> Oakland Municipal Code at §§ 2.42.050(B)(4)-(5); 2.42.170(B).

<sup>14</sup> Agenda Report, (Feb. 27, 2015), p.3.

<sup>15</sup> Department of Housing and Urban Development (HUD), 24 CFR Part 100, Implementation of the Fair Housing Act’s Discriminatory Effects Standard; Final Rule, Federal Register, Vol. 78, No. 32, Part IV (Feb. 15, 2013) 11482 (24 CFR 100.500(a)), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=discriminatoryeffectrule.pdf>.

<sup>16</sup> Gov. Code § 12955.8(b).

<sup>17</sup> U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity (FHEO), Fair Housing Planning Guide (Mar. 1996) 1-1 to 1-5 available at <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.

decent housing available and affordable to low income persons” as a “significant impediment to fair housing choice” because “minorities are far more likely than non-minorities to be low income.”<sup>18</sup>

Approving a DDA that allows for 100 percent luxury housing on a publicly owned site without including affordable housing, accordingly, would disproportionately impact people of color and individuals with disabilities, perpetuating segregation in the city.

Finally, state law also forbids local governments in “the enactment or administration of ordinances” from taking any action to prohibit any residential development because “of the method of financing” or because “the development ... is intended for occupancy by persons and families of very low, low, or moderate....”<sup>19</sup> To the extent that the City discouraged affordable housing, prioritized luxury housing over affordable housing or refused to consider affordable housing during its disposition process, it would be in violation of this requirement.

We look forward to public disclosure by the City of the steps that have been and will be taken to comply with the legal requirements for disposition of the 12<sup>th</sup> Street Parcel outlined in this letter. We urge you to postpone consideration or authorization of a DDA for the Parcel until this information has been disclosed and vetted by the public and the City Council and until the proposed disposition is in full compliance with all legal requirements.

Sincerely yours,



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Cc: Barbara Parker, City Attorney  
John Flores, Interim City Administrator  
LaTonda Simmons, City Clerk

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<sup>18</sup> City of Oakland, Fair Housing Planning: Analysis of Impediments to Fair Housing (Jan. 2011) 64, available at <http://www.achhd.org/documents/OAK3aifh.pdf>.

<sup>19</sup> Gov. Code § 65008(a)-(b).