



# Memorandum

**TO:** HONORABLE MAYOR AND CITY COUNCIL

**FROM:** Richard Doyle  
Jennifer A. Maguire

**SUBJECT:** SEE BELOW

**DATE:** April 14, 2011

**SUBJECT: SETTLEMENT WITH LICKING ENTERPRISES, INC./ PURCHASE OF PROPERTY AT 1157 EAST TAYLOR STREET AND ADOPTION OF APPROPRIATION ORDINANCE AMENDMENTS IN THE CONSTRUCTION EXCISE TAX FUND**

## RECOMMENDATION

- A. Approve a settlement and authorize the City Attorney to execute a Settlement Agreement and Release to settle the case of Licking v. City of San Jose. The settlement includes \$2,104,000 for purchase of property for the Route 101/Mabury interchange and attorney fees, payment of \$1,000,000 for loss of business goodwill at the time that the City takes possession of the property, plus estimated closing costs of \$13,200, for a total amount of \$3,117,200.
- B. Adopt the following 2010-2011 Appropriation Ordinance amendments in the Construction Excise Tax Fund:
  1. Establish an appropriation to the Department of Transportation for the Route 101/Mabury Acquisition project in the amount of \$1,021,200; and
  2. Decrease the Ending Fund Balance by \$1,021,200.

## OUTCOME

Settle disability discrimination lawsuit alleging a wrongful denial of rezoning, and purchase of the subject property for future freeway interchange, including payment for loss of business goodwill.

## BACKGROUND

Dr. John Licking, a practicing dentist in Sunnyvale, purchased the property at 1157 East Taylor Street in 2001, with the intent of establishing a large scale rehabilitation facility on the property. The property was zoned R-1, which would only allow a small facility of six or less persons.

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Dr. Licking applied for a rezoning of the property to R-M, which would allow larger facilities with a Conditional Use Permit. The application for a zoning change was consistent with the City's General Plan (medium high density residential – 12-20 dwelling units per acre) and the application was recommended by the Planning Department staff.

In the context of opposition from the surrounding community, former Councilmember Cindy Chavez issued a memorandum recommending denial of the rezoning as premature, since the property was being considered for inclusion in a future freeway interchange, or alternatively for an expansion to Watson Park.

On September 16, 2002, the rezoning application was denied by the City Council.

Licking unsuccessfully pursued remedies with the U.S. Department of Housing and Urban Development, and then initiated this lawsuit on February 5, 2007. The lawsuit alleges that the City's denial of the rezoning was based on discrimination against disabled individuals. In particular, the suit claims that since almost all conforming rezoning applications are approved, the denial of this application was the result of animosity toward recovering alcoholics and drug abusers, as reflected in the sentiments of community members. The lawsuit alleged that the City's explanation for denial was a pretext for the real discriminatory motivation.

During the course of litigation, it became apparent that the freeway interchange project at Route 101 and Mabury Road / Taylor Street was likely to proceed, and the subject property would be needed for construction of that interchange. The 101/Mabury interchange has been identified as an important transportation improvement to provide access to the planned Berryessa BART Station (proposed for completion in 2018). Therefore, the parties agreed to negotiate a settlement of the lawsuit through the purchase of the property by the City. The City's acquisition of the property for the 101/Mabury interchange demonstrates a local commitment to the project and can assist in securing regional transportation grants.

Previously, the parties tentatively agreed to a purchase of the property for the sum of \$2,096,000, including all fees, agreed to lease the property back to the rehabilitation facility until it was needed for the freeway project, and agreed to arbitrate the value of future business loss including any relocation expense. The price was based on the appraised value of the property and the agreement was approved by the City Council on October 27, 2009. However, the parties failed to fully execute the agreement when a dispute arose surrounding the legal representation of Plaintiff. Subsequently, the parties, with new counsel in place, agreed to mediate the value of future business loss and relocation expenses, and based on consultant's valuation of the business, arrived at a negotiated sum of \$1 million, to be paid at the time the City takes possession of the property.

The parties have tentatively agreed to the following terms: The City will purchase the property for \$2,023,000 which is approximately the appraised value of the property,

assuming that the property had been rezoned. A payment of \$81,000 will be made to Plaintiff's former attorney in full settlement of his claims for fees. In addition, the City will be responsible to pay closing costs related to the purchase of the property, in an amount estimated at \$13,200. The City will lease the property back to Dr. Licking's facility, LifeChoices, for \$1 per month, pursuant to a ground lease. When the City needs the property for construction of the freeway interchange, no sooner than October 1, 2014, the City will give six months notice for LifeChoices to vacate the property, and the lease will terminate. To compensate the owner for projected economic and relocation losses to the business due to the vacation of the property, the City will pay Licking Enterprises \$1,000,000 at the time written notice is provided to LifeChoices to vacate the property.

### **ANALYSIS**

In view of the ultimate need for the property for the freeway project, a resolution of the discrimination lawsuit by purchasing the property and compensating the owner for loss of goodwill is reasonable. The leaseback of the property for a nominal sum satisfies the plaintiff with regard to the alleged discrimination, which the City denies, without the expenditure of additional funds.

The settlement is reasonable in light of the inherent risks and costs of litigation and also addresses a potential City need for the property in the future. This settlement is made as a compromise of a disputed claim, and the City is not admitting that it is legally liable for any amounts claimed.

### **EVALUATION AND FOLLOW-UP**

No additional follow up actions with the City Council are expected at this time.

### **PUBLIC OUTREACH/INTEREST**

- ✓ **Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This memorandum was included in the Early Distribution packet, as it requires Council action on the use of public funds equal to \$1 million or greater. This memorandum and the settlement agreement are posted on the City's website for the May 3, 2011 Council Agenda.

**COORDINATION**

The settlement has been coordinated with the Department of Transportation and the Department of Planning, Building and Code Enforcement.

**COST SUMMARY/IMPLICATIONS**

The settlement will cost a total of \$3,117,200. The recommended appropriation actions included in this memorandum will increase the current allocation from \$2,096,000 to \$3,117,200.

**BUDGET REFERENCE**

The table below identifies the fund and appropriation proposed to fund the settlement recommended as part of this memorandum.

Fund #	Appn #	Appn. Name	Total Appn.	Amount for Settlement	2010-2011 Adopted Capital Budget (Page)	Last Budget Action (Date, Ord. No.)
<b>Current Funding Available</b>						
429	7150	Route 101/Mabury Acquisition Project	\$2,096,000	\$2,096,000	V – 820	06/29/2010, Ord. No. 28765
<b>Additional Funding Recommended</b>						
465	7150	Route 101/Mabury Acquisition Project	\$1,021,200*	\$1,021,200		
<b>Total Funding for Settlement</b>			<b>\$3,117,200</b>	<b>\$3,117,200</b>		

\* The recommended increase to the Route 101/Mabury Acquisition Project appropriation will be offset by a decrease to the Ending Fund Balance in the Construction Excise Tax Fund which currently has a balance of \$3,508,513.

HONORABLE MAYOR AND CITY COUNCIL

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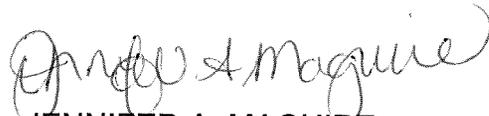
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**CEQA**

EIR Resolution No. 74195.1, File No.PP09-186.

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RICHARD DOYLE  
City Attorney

A handwritten signature in black ink that reads 'Jennifer A. Maguire' in a cursive script.

JENNIFER A. MAGUIRE  
Budget Director

For questions please contact Richard Doyle, City Attorney at (408) 535-1900.