



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Kim Welsh

**SUBJECT:** SEE BELOW

**DATE:** August 1, 2011

Approved

Date

8/8/11

**COUNCIL DISTRICT: #4**

**SNI: None**

**SUBJECT: FINDING AND DETERMINING THE PUBLIC INTEREST AND NECESSITY FOR CONDEMNING REAL PROPERTY OWNED BY FORTUNEFIRST LLC FOR CONSTRUCTION OF THE MONTAGUE EXPRESSWAY WIDENING PROJECT AND AUTHORIZING THE ACQUISITION OF THIS INTEREST BY EMINENT DOMAIN**

## RECOMMENDATION

- (a) Adopt a resolution determining that the public interest and necessity require the acquisition of a portion of land owned by Fortunefirst LLC located at 3101 North First Street, San José, California (APN Number 097-06-054) comprising 1,422.81 square feet.
- (b) Authorize the City Attorney to file suit in eminent domain to acquire such property interests, to apply for an order for possession before judgment, and to prosecute the action to final judgment; and
- (c) Authorize the deposit of money in court for possession of the property from the funds lawfully available.

## OUTCOME

Staff is requesting that the City utilize its power of eminent domain under Sections 1240.010, 1240.110 and 1240.120 of the California Code of Civil Procedure, all of which authorize the City to acquire the subject property from Fortunefirst LLC.

If a Resolution of Necessity is adopted, the City Attorney will then file the necessary papers with the court to commence an eminent domain action. Upon the filing of an eminent domain action, a deposit of probable compensation may be made. A request for an Order for Prejudgment Possession may also be made by the City Attorney which would allow City to take possession of the property before the issue of just compensation is determined.

## **BACKGROUND**

The North San José Area Development Policy was approved by Council on June 21, 2005. The Policy identifies transportation improvements necessary to support development in North San José. One of the improvements identified to serve the growth projected by the Policy was the Montague Expressway Improvement Project. The Montague Expressway Improvement Project later became the subject of settlement agreements between the City, the County of Santa Clara and others arising out of challenges to the Policy, which settlements expanded the scope of that project.

The Montague Expressway Widening Improvement Project is the first segment funded for improvement along Montague Expressway. The project widens the north side of Montague Expressway between Zanker Road and Orchard Drive adding a west bound high occupancy vehicle lane and sidewalk. The scope of the project also includes a dedicated right turn lane onto North First Street and a receiving lane for westbound traffic from North First Street onto Montague Expressway.

Acquisition of a portion of the subject property is necessary to accommodate the proposed improvements. The area to be acquired will ultimately be conveyed to the County.

The portion of the subject property to be acquired by City is more fully described in the plat map attached hereto as Exhibit "A".

## **ANALYSIS**

### **Acquisition**

An appraisal completed on November 12, 2010, by Carneghi-Blum & Partners, Inc., valued the subject portion of the property at \$21,500 taking into consideration the fact that it was subject to an existing public landscaping easement. An initial offer in that amount was sent to FortuneFirst LLC on May 10, 2011, together with a copy of the appraisal report. The property owner responded by letter dated June 14, 2011, presenting City with a counter-offer of \$56,912 with no supporting evidence other than asserting that City appraisal report's comparable properties were not comparable to the subject property and that the methodology was unusual.

On July 6, 2011, owner was informed by certified letter that City staff intended to schedule a public use and necessity hearing for Council approval on August 23, 2011, in view of the failure to reach a negotiated agreement. The letter also informed owner of its rights to obtain City reimbursement up to a maximum of \$5,000 of the cost of obtaining its own appraisal in the event it opts to do so.

On July 11, 2011, the property owner did provide additional support for the amount of the counter-offer. Among other items, the owner asserted that City's appraiser incorrectly discounted the property by 50% due to the fact that it is subject to the existing public landscaping easement. The owner claimed to have three comparable property sales and six property lease comparables but did not provide any identification or location information other than to say that the most comparable of the six property leases was located at 411 Plumeria, which using the City appraiser's methodology would result in a value of \$37,337. The information provided on July 11, 2011, was reviewed by City's appraisal consultant and discussed with City staff. Both City staff and the appraisal

consultant concluded that there was nothing in the July 11, 2011, letter that would warrant revising the original appraised value and staff and this was conveyed to owner on July 14, 2011.

Efforts to resolve these issues with Fortunefirst LLC have not been successful to date and staff does not believe that further attempts at negotiation will be fruitful.

### **Resolution of Necessity**

On August 12, 2011, a notice was sent to Fortunefirst LLC, the owner of record, notifying it that a hearing is scheduled on August 23, 2011, before the Council to consider the adoption of a Resolution of Necessity determining the following issues:

**1. Whether the public interest and necessity require the proposed project.**

The City's North San José Area Development Policy identified the need for improvements to the transportation system to support development in the North San José Area.

**2. Whether the proposed project is planned and located in a manner that would be most compatible with the greatest public good and the least private injury.**

The proposed project is planned as part of the City's North San José Area Development Policy. It is located along the north side of Montague Expressway between Zanker Road and Orchard Drive and is the most logical location for the dedicated right turn lane.

The proposed property acquisition would not impact the current private land use.

**3. Whether the property sought to be acquired is necessary for the project.**

The proposed property to be acquired currently contains landscape and concrete sidewalk only would provide land necessary for the installation of relocated curb, gutter, sidewalk, and street trees adjacent to the proposed dedicated right turn receiving lane for traffic heading west onto Montague Expressway from North First Street.

**4. Whether the offer required by Section 7267.2 of the Government Code has been made to the owners of record.**

A title report dated November 9, 2010, shows the owner of record on the tax roll as "Fortunefirst LLC, a California limited liability company." Staff entered into negotiations with Fortunefirst LLC on May 10, 2011. In compliance with Government Code section 7267.2, an offer was sent to Fortunefirst LLC on May 10, 2011, together with a copy of Carneghi-Blum Partners, Inc.'s November 12, 2010, appraisal report. This offer was for the full-appraised value of the property, \$21,500. Fortunefirst LLC rejected the offer on June 14, 2011, and demanded \$56,912 for the property. Subsequent negotiations have failed to narrow the gap between the parties.

Based on the course of discussions between City staff and Fortunefirst LLC, staff does not believe that a purchase agreement can be reached. Accordingly, a notice of the August 23, 2011, hearing was sent to Fortunefirst LLC on August 12, 2011.

### EVALUATION AND FOLLOW-UP

The project is currently within budget and on schedule with a projected completion in June 2012. No additional follow up actions with the Council are expected at this time.

### PUBLIC OUTREACH

- 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 action does not meet any of the above listed criteria; however it will be posted on the City's website for the August 23, 2011, Council agenda.

### COORDINATION

This project has been coordinated with the City Manager's Budget Office and the City Attorney's Office.

### COST SUMMARY/IMPLICATIONS

The total amount of City's purchase offers for this property together with the other two properties needed for the Montague Expressway Widening project is \$196,000, which total will be deposited by the City Attorney with the filing of court condemnation. Additional acquisition costs consisting of such items as expert appraisal and other witness testimony in depositions and other court proceedings may also be incurred by the City above and beyond actual compensation for the land. These also include possible costs for payment of the property owner's attorney fees depending on whether these are awarded by the court.

1. AMOUNT RECOMMENDED FOR THIS ACQUISITION:  
Amount of City's offer to be deposited with filing of condemnation in court: \$21,500  
(Note: Final amount of compensation City is required to pay to owners for land may vary depending on outcome of court proceedings.)
2. SOURCE OF FUNDING: Fund 349, a Memo Fund to Fund 465, Construction Excise Tax Fund.
3. OPERATING COSTS: N/A-One time cost.

**BUDGET REFERENCE**

| Fund # | Appn. # | Appn Name                        | RC # | Total Appn.  | Amount for Contract | 2011-2012 Proposed Capital Budget (Page) | Last Budget (Date, Ord. No.)    |
|--------|---------|----------------------------------|------|--------------|---------------------|--|---------------------------------|
| 465    | 6319    | Montague Expressway Improvements | TBD  | \$1,827,000* | N/A                 | N/A                                      | 06/21/2011; Ordinance No. 28928 |

\* These funds were rebudgeted as part of the Recommended Amendments to the 2011-2012 Proposed Operating and Capital Budgets Manager's Budget Addendum #47. The 2011-2012 Capital Budget and the implementing appropriation ordinance were approved by the City Council on June 21, 2011.

**CEQA**

CEQA: Resolution 75696 Dated January 11, 2011.

/S/  
KIM WALES  
Director of Economic Development  
Chief Strategist

For questions please contact Nanci Klein, Deputy Director of Economic Development, at 408-535-8181.

Exhibits:

A – Legal Description and Plat of Subject Portion of Property at 3101 North First Street

# EXHIBIT A

