

INFORMATIONAL MEMORANDUM

TO: Agency Commissioners

FROM: Fred Blackwell, Executive Director

SUBJECT: Considering the Executive Director's decision to deny funding for the repair of a privately-owned walkway in front of Webster Tower & Terrace at 1489 Webster Street in the Western Addition neighborhood

EXECUTIVE SUMMARY

In June 2009, the Commission considered whether to uphold the Executive Director's decision to deny Agency funding for the repair of a privately-owned walkway in front of Webster Tower and Terrace at 1489 Webster Street in the Western Addition neighborhood (See Attachment 1). At that meeting, the Commission deadlocked on the matter, and voted to seek an opinion from the City Attorney's Office. The City Attorney concluded that the Agency has the authority to fund the repairs if the funding serves a public purpose of the Agency, and the Agency provides a sufficient factual basis for that determination. However, the City Attorney's opinion also noted that the expiration of the Western Addition A-2 Redevelopment Plan and the property owner's contractual obligation to maintain the walkway "raise serious issues."

The City Attorney's opinion is consistent with staff's advice to the Commission at the June 2009 hearing on this matter, namely that a decision to overturn the Executive Director's decision would require additional findings that staff would prepare for the Commission's consideration. Staff does not recommend making additional findings to approve funding. Staff continues to recommend upholding the Executive Director's decision to deny funding because (1) there are no funds available in the Western Addition A-2 budget, and (2) the California Community Redevelopment Law ("CRL") restricts the authority of the Agency to act after a redevelopment project area has expired.

Staff recommends not considering this matter further.

DISCUSSION**Previous Actions**

On June 16, 2009, the Commission considered whether to uphold the Executive Director's decision to deny Agency funding for the repair of a privately-owned walkway in front of Webster Tower and Terrace at 1489 Webster Street. As described in the Commission Memorandum for this matter (See Attachment 1), staff recommended upholding the Executive Director's denial based on the following facts:

- The owner purchased the property “as is” from the Agency in 1985 and it already included the finished diagonal walkway covered with interlocking brick pavers.
- The owner was legally and financially responsible for repairing and restoring any portion of the finished diagonal walkway that was damaged during the construction of Webster Tower & Terrace.
- The owner has been legally and financially responsible for maintaining and repairing the diagonal walkway since 1985.
- The California Constitution (Article 16, Section 6) prohibits the Agency from paying for improvements to private property without an additional public benefit (i.e., no gifts of public funds). Staff argued that there was not an additional public benefit to be gained from repairing a privately owned, publicly accessible walkway more than 20 years after it was built.

At the June 16 meeting, the Commission deadlocked on a motion to uphold the Executive Director’s decision, which under Roberts’ Rules of Order had the effect of upholding the decision. The Commission then voted to seek a City Attorney opinion on the matter.

On September 17, 2009, the City Attorney submitted its opinion. The opinion concludes that the Agency has the authority to fund the repairs if the funding serves a public purpose of the Agency, and the Agency provides a sufficient factual basis for that determination. Put another way, the Commission has the discretion to make a policy decision to fund the private walkway if it determines that repairing the walkway would serve a legitimate public purpose of the Agency and it has a reasonable basis for making that determination. If the Commission wants staff to develop a factual basis for the public purpose, it will do so at the Commission’s direction. However, the City Attorney’s opinion also noted that the expiration of the Western Addition A-2 Redevelopment Plan and the owner’s contractual obligation to maintain the walkway “raise serious issues.”

The City Attorney’s opinion is consistent with staff’s advice to the Commission at the hearing on this matter, namely that a decision to overturn the Executive Director’s decision would require additional findings that staff would prepare for the Commission’s consideration. Staff does not recommend making additional findings to approve funding. Staff continues to recommend upholding the Executive Director’s decision to deny funding. Additional information for the Commission’s consideration is summarized below.

Additional Information to Consider

1. **No funds available in the Western Addition A-2 budget.** The only money left in the Western Addition A-2 budget (about \$408,000) is a property/asset management reserve to maintain and operate Agency-owned property in the Western Addition. These properties include the 112-stall public parking garage at the Fillmore Heritage Center at 1300 Fillmore Street, and the Ellis Street driveway that leads to the parking lot in front of Safeway (Parcel 725-C). These properties represent a significant current and future financial liability for the Agency, and the Agency is contractually and legally responsible, as the property owner, to meet these obligations. For example, the Reciprocal Easement Agreement that governs the

Fillmore Heritage Center requires the Agency to pay the garage's portion of the common area maintenance charges (currently \$14,382 a month) and any damages that may result from any negligence on the part of the Agency or its garage operator.

The biggest of the Agency's financial obligations is the ongoing monthly operating subsidy for the garage, which has totaled \$411,000 over the last three years (a subsidy of about \$11,400 a month). This means that, assuming no change in the garage's performance, the Agency could only cover the operating deficit for less than 2.5 years – which will likely be about the time it takes to improve the garage's performance, generate positive cash flow, and sell the property. Agency staff are working diligently to improve the garage's performance but the revenues are currently not able to cover the significant common area maintenance charges imposed by the overall mixed-use project. Staff will be detailing its plan for improving the garage's performance and ultimately selling and/or transferring the garage in an upcoming Informational Memorandum.

Additional Agency financial obligations include: (i) frequent and ongoing repairs to the street, sidewalks and signage for the Ellis Street driveway, and (ii) costs associated with trip-and-fall claims and settlements.

2. **Restrictions under CRL.** After a project area expires, the Agency has no authority to act pursuant to a redevelopment plan except in three specific ways: (1) to pay previously incurred indebtedness, (2) to fulfill its affordable housing obligations, and (3) to enforce existing covenants, contracts, or other obligations (See Section 33333.6). The little remaining funds in the Western Addition A-2 budget have been committed through Commission action to projects and/or programs that fall into one of those three categories. Moreover, as explained in the attached Commission Memorandum dated June 16, 2009, the Agency has no obligation to reimburse the property owner for repairs and maintenance to the walkway. Staff does not believe that using Agency funds to pay for repairs to a privately-owned sidewalk falls into one of these three categories.

Finally, although financial hardship would not be a reason to approve the funding, the property owner has not demonstrated such a financial hardship.

For these reasons, in addition to the reasons outlined in the attached June 16, 2009 Commission Memorandum, Agency staff strongly recommends keeping the current property/asset management reserve intact, in order to meet the significant current and future financial liabilities associated with the Agency's property ownership in the Western Addition.

Originated by Tracie Reynolds, Manager, Real Estate and Development Services

Fred Blackwell
Executive Director

Attachments:

Attachment 1: June 16, 2009 Commission Memorandum (without attachments)

ATTACHMENT 1

108-07009-002

Agenda Item No. 4(j)
Meeting of June 16, 2009

MEMORANDUM

TO: Agency Commissioners

FROM: Fred Blackwell
Executive Director

SUBJECT: Upholding the Executive Director's decision to deny Western Commercial Partnership I, LLC's March 12, 2009 written request to the Agency to pay half the cost of repairs to the privately owned walkway in front of Webster Tower & Terrace at 1489 Webster Street based on the Agency's lack of authority to pay for improvements to private property without an additional public benefit

EXECUTIVE SUMMARY

The Commission has asked for a hearing to discuss the Executive Director's decision to deny Western Commercial Partnership I, LLC's March 12, 2009 written request to the Agency to pay half the cost of repairs to the privately owned, diagonal walkway in front of Webster Tower & Terrace at 1489 Webster Street in the former Western Addition Redevelopment Project Area A-2. The diagonal walkway is owned by Mr. Kwok Hung Szeto ("Mr. Szeto"). Staff has researched the background on this issue, including when and how the walkway was originally constructed, the history of repairs and maintenance to the walkway, the entitlement history of the walkway and related development, who is responsible for maintenance/repairs, and other related issues.

Based on the above analysis, staff recommends upholding the Executive Director's decision to deny the request for Agency funds to pay for repairs to the privately owned walkway for the following reasons:

- The property that Mr. Szeto purchased "as is" from the Agency in 1985 to build Webster Tower & Terrace included the finished diagonal walkway and two plazas, which were already covered with interlocking brick pavers.
- Mr. Szeto was legally and financially responsible for repairing and restoring any portion of the finished diagonal walkway and two plazas that were damaged during the construction of Webster Tower & Terrace.
- Mr. Szeto has been legally and financially responsible for maintaining and repairing the diagonal walkway and two plazas since 1985.
- The California Constitution (Article 16, Section 6) prohibits the Agency from paying for improvements to private property without an additional public benefit (i.e., no gifts of public funds). In this case, staff does not believe there is an additional public benefit to

be gained from repairing a privately owned, publicly accessible walkway more than 20 years after it was built.

Staff recommends upholding the Executive Director's decision to deny Western Commercial Partnership I, LLC's written request to the Agency to pay half the cost of repairs to the privately owned walkway in front of Webster Tower & Terrace based on the Agency's lack of authority to pay for improvements to private property without an additional public benefit.

DISCUSSION

This section details staff's analysis of this issue. The analysis to follow frequently references a few key terms which are presented below to simplify the presentation of the material:

- Maintenance of the diagonal walkway is currently governed by a document called the Easements with Covenants and Restrictions Affecting Land ("ECR"). The ECR was established in 1985 to form a common set of rules governing the maintenance of the common areas surrounding the "commercial center" being built around the new Safeway store on Webster Street.
- Mr. Szeto owns two properties in this commercial center. He owns Webster Tower & Terrace at 1489 Webster Street, the diagonal walkway, Gene Suttle Plaza and the plaza at the corner of Geary Boulevard and Webster Street under a legal entity called Western Commercial Partnership I ("WCP I"). He also owns the three-story commercial building at 1426 Fillmore Street under Western Commercial Partnership II ("WCP II"). WCP I and II are together referred to in this Commission Memorandum as "Mr. Szeto."
- All the property owned under WCP I (i.e., Webster Tower & Terrace, the diagonal walkway, Gene Suttle Plaza and the plaza at the corner of Geary Boulevard and Webster Street) is also referred to in this Memorandum as the "Webster Tower Site."

What is the history of Mr. Szeto's diagonal walkway?

The diagonal walkway with interlocking brick pavers was built by Safeway during the mid-1980s under Safeway's 1981 Land Disposition Agreement with the Agency ("Safeway LDA"). Under the Safeway LDA, Safeway was required to build a supermarket, a parking lot, a three-story commercial building, the diagonal walkway, and two plazas: one on Fillmore Street (now called Gene Suttle Plaza) and the other at the corner of Geary Boulevard and Webster Street. The walkway and plazas, which were then owned by the Agency, were completed in early 1986.

Under the Safeway LDA, Safeway and the Agency agreed to share the approximately \$1.1 million cost of constructing the diagonal walkway and two plazas. The Agency's share was about \$567,000. It appears from the records that the Agency intended to pass on this common area cost to the future developer of the adjacent property, the Webster Tower Site.

In December 1985, the Agency sold the Webster Tower Site to Mr. Szeto “as is” for approximately \$1.8 million for the development of a mixed-use, 156-unit residential high-rise. The finished diagonal walkway and two plazas with the interlocking brick pavers were included in the sale. The deed conveying the property reserved a non-exclusive easement for pedestrian use of the walkway and plazas as a public right-of-way.

Mr. Szeto built Webster Tower & Terrace between 1986 and 1990. The ECR, as amended, allowed Mr. Szeto to temporarily use the common areas, including the diagonal walkway and plazas, during construction of the Webster Tower & Terrace project.

The ECR also contained provisions requiring Mr. Szeto to repair and restore to their original condition (at Mr. Szeto’s expense) any portion of the common areas damaged during construction (See Attachment 1, ECR Excerpt on Repairs). Photos taken on January 17, 1990 indicate that significant damage occurred during construction and Mr. Szeto was required under the ECR to repair the damage and restore the diagonal walkway and plazas to their original condition (See Attachment 2, Photos of Diagonal Walkway Before and After Construction).

It appears from the records that all parties intended to deed the walkway and plazas to the City of San Francisco (the “City”) at some future date. The walkway and plazas are described as a “public right-of-way” in legal documents, and the ECR contemplated the possible dedication of the walkway and plazas to the City. However, in the event that the City did not agree to accept the dedication, the ECR protects the public use of the walkway and plazas for 50 years to 2036.

Did the Agency hold up Mr. Szeto’s project approvals?

Agency staff has researched all the approvals required for the Webster Tower & Terrace project including the diagonal walkway and plazas. This research is summarized in Attachment 3, History of Approvals – Webster Tower & Terrace and briefly discussed below:

- **Site Permits for Construction of Building.** This set of permits covered the construction of the Webster Tower & Terrace building. As shown, all of these permits were approved promptly by the City and the Agency except for Addendums #4 (Life Safety, Mechanical, & Electrical) and #5 (Final Plans). Agency staff could find no documentation indicating that the Agency was holding up these permit approvals for any reason. Documents do show, however, that around this time Mr. Szeto was arguing with his general contractor, Dillingham Construction (“Dillingham”), over the pace of progress on the project. In a letter dated February 23, 1989 (See Attachment 4), the WCP I project manager writes to the Dillingham project manager: “It is our opinion that Dillingham does not have full control of the project at this time, and that senior management must act to man the project in order to comply with the terms of completing this contract. Based on the current level of effort and numerous incomplete and unacceptable work items, final completion does not appear to be available until June of 1989.” This dispute continued for many months (See Attachment 5) until Mr. Szeto fired Dillingham in June 1989 (See Attachment 6).
- **Additional Permits for Walkway Repair and Construction of the Arcade.** After Mr. Szeto fired Dillingham in June 1989, it appears that the project languished for several

months. Finally, in February 1990, Mr. Szeto applied for two additional permits related to repairing the walkway and plazas (which Mr. Szeto was required to do under the ECR) and constructing a permanent pedestrian arcade (which Mr. Szeto was required to do under his land disposition agreement with the Agency). As shown in the photos attached as Attachment 2, significant damage had been done to the diagonal walkway and plazas during construction of Mr. Szeto's project. These two additional permits were approved promptly by the Agency and the City, as shown in Attachment 3.

- **City's Final Certificate.** The City issued its Final Certificate of Occupancy on November 15, 1990.
- **Agency's Final Certificate.** Once Agency staff received the City's Final Certificate of Occupancy, it could issue and record an Agency Certificate of Completion ("COC"). Mr. Szeto requested his COC on November 20, 1990. However, Mr. Szeto had yet to complete some of the work required under his 1985 land disposition agreement with the Agency. These items included the outdoor art program, the terrace landscaping, and African graphics on the arcade. To facilitate Mr. Szeto's refinancing of the project, the Agency agreed to issue a COC if Mr. Szeto signed a Completion Assurance Agreement in which he promised to complete these three outstanding items and deposit \$190,000 with the Agency as security. This unfinished work was not completed until 1999.

Based on this research, there is no indication that the Agency held up any of Mr. Szeto's project approvals due to the diagonal walkway. In fact, as previously mentioned, Mr. Szeto purchased the Webster Tower Site in 1985 with the finished diagonal walkway and plazas already in place. The subsequent 1990 work was to repair the damage done to these common areas during the construction phase of Mr. Szeto's project, as was required under the ECR.

Who has legal responsibility to maintain Mr. Szeto's diagonal walkway?

Maintenance of the diagonal walkway is currently governed by the ECR, which was established in 1982 to form a common set of rules governing the maintenance of the common areas surrounding the "commercial center" being built around the new Safeway store on Webster Street. Under the ECR, each property owner in this commercial center would be responsible for maintaining its own privately owned common area.

During the early 1980s, Safeway and the Agency were the only two parties to the ECR because a developer had yet to be selected for the Webster Tower Site. In 1985, Mr. Szeto became a party to the ECR because he bought two properties covered under the ECR. That year, Mr. Szeto (as WCP I) bought the Webster Tower Site -- including the diagonal walkway and two plazas with interlocking brick pavers -- from the Agency. That same year, Mr. Szeto (as WCP II) also bought the three-story commercial building at 1426 Fillmore Street from Safeway (See Attachment 7 – Map of ECR Parcels).

These purchases made Mr. Szeto responsible for the maintenance costs of the diagonal walkway and two plazas under the ECR. Specifically, the ECR requires Mr. Szeto to pay the cost to maintain the surfaces of the diagonal walkway and two plazas "in a level, smooth and evenly

covered condition with the type of surfacing material originally installed or such substitute as shall in all respects be equal in quality, use and durability” (see Attachment 8, ECR Excerpt on Maintenance).

During the early 1990s, there was a brief period (March 1990 – July 1991) when Safeway, the Agency, and Mr. Szeto jointly shared the cost of maintaining the common areas in this commercial center (including the diagonal walkway and plazas) under a Common Area Maintenance Agreement (the “CAM Agreement”). Under the CAM Agreement, Safeway would pay for all the costs and the Agency and Mr. Szeto would reimburse Safeway for their proportionate costs. However, Safeway ultimately terminated the CAM Agreement, citing “differing needs of the parties.” After the CAM Agreement was terminated, all three parties (i.e., Safeway, the Agency and Mr. Szeto) assumed responsibility for maintaining their own privately owned common areas, as is required under the ECR.

What is the history of the special sidewalks in the Fillmore Jazz Preservation District?

After Safeway built the diagonal walkway and two plazas with interlocking pavers, the Agency spent money two additional times to expand on this theme. The urban design concept was to give the lower Fillmore a unified look, with the same special sidewalks, street lights, and street trees. With one exception, all of the area under these two expansions was publicly owned land.¹

The first time was in 1985, when the Agency entered into a contract with a construction company to continue the special sidewalks around much of the block bounded by Geary Boulevard, Ellis Street, Fillmore Street and Webster Street (See Attachment 9). The second time was in 2003, when the Agency entered into a contract with another construction company to: (1) further extend the sidewalks with the interlocking pavers along Fillmore Street between Post Street and Geary Boulevard, between Turk and McAllister Streets, and along the east side of Fillmore Street between Turk and Eddy Streets, (2) widen the sidewalks with the interlocking pavers in front of the property conveyed to the developer of the Fillmore Center and in front of Agency Parcel 732A which was yet to be developed, and (3) improve Gene Suttle Plaza² (See Attachment 9). These contracts cost the Agency about \$832,000 and \$5.0 million respectively.

Which sidewalks are being repaired under the Agency’s current contract with the City?

During the months leading up to the expiration of the Western Addition A-2 Redevelopment Project Area, the Agency was in discussions with City officials to have the City maintain and repair the special sidewalks with the interlocking pavers along Fillmore Street. The City owns

¹ Improvements also were made to Gene Suttle Plaza in 2003, which was then owned by Mr. Szeto and was already covered with the interlocking brick pavers. Under the 2003 contract, with Mr. Szeto’s permission, the Agency redesigned the plaza to make it more publicly useable, adding a stage, benches, and a large planter with palm trees. Plaques also were added to the plaza, featuring 62 names representing Western Addition community founders, neighborhood pioneers, and local heroes.

² Records show that the Agency asked for and received a Temporary Construction License and Permit to Enter (“Permit to Enter”) from both WCP I and WCP II each dated December 12, 2000 (and both re-executed again in 2001) to allow for the construction of the improvements in Gene Suttle Plaza. The Permits to Enter do not place any obligation on the Agency to maintain the improvements once constructed.

these sidewalks, but the Agency agreed to maintain and repair them under binding agreements called encroachment permits which the Agency signed in 2000 and 2001. Under these permits, the Agency was legally bound to maintain and repair the sidewalks until the City or other party, such as the adjacent property owner, would agree to maintain them.

At the end of 2008, the City and the Agency agreed that if the Agency gave the City \$1.8 million for repairs and ongoing maintenance, the City would terminate the encroachment permits and assume all future responsibility for the care and maintenance of these special sidewalks. Under the Agency's \$1.8 million contract with the City, the City's Department of Public Works is repairing the publicly owned sidewalks along Fillmore Street between Post and McAllister Streets. This area includes the publicly owned sidewalks in front of the Fillmore Center and the publicly owned sidewalks in front of Mr. Szeto's properties (i.e., the three-story commercial building and Webster Tower & Terrace).

Can the Agency finance improvements on private property?

The California Constitution prohibits the Agency from paying for improvements to private property without an additional public benefit (i.e., no gifts of public funds). In the past when the Agency has financed improvements to private property (i.e., tenant improvement loans, improvements to Gene Suttle Plaza), there has been a larger public policy goal in mind, such as economic revitalization along a commercial corridor or creating a more functional space for public gatherings.

In this case, there is no additional public benefit to be gained from paying for repairs to Mr. Szeto's privately owned walkway. Agency funding of this project does not give the public anything it doesn't already have. The creation of these publicly accessible spaces (i.e., the diagonal walkway and two plazas) were part of real estate deals done in the 1980s with Safeway and Mr. Szeto in exchange for their development rights on Agency-owned parcels. The public benefit was achieved at that time. Staff does not believe there is an additional public benefit to be gained from repairing a privately owned, publicly accessible walkway more than 20 years after it was built.

California Environmental Quality Act

Determining that the Agency will not pay half the cost of repairs to the privately owned walkway is not a Project as defined by California Environmental Quality Act ("CEQA") Guidelines Section 15378(b)(5), will not independently result in a physical change in the environment, and is not subject to environmental review under CEQA.

CONCLUSION

Based on the above analysis, staff recommends upholding the Executive Director's decision to deny the request for Agency funds to pay for repairs to the privately owned walkway in front of Webster Tower & Terrace for the following reasons:

- The property that Mr. Szeto purchased “as is” from the Agency in 1985 to build Webster Tower & Terrace included the finished diagonal walkway and two plazas, which were already covered with interlocking brick pavers.
- Mr. Szeto was legally and financially responsible for repairing and restoring any portion of the finished diagonal walkway and two plazas that were damaged during the construction of Webster Tower & Terrace.
- Mr. Szeto has been legally and financially responsible for maintaining and repairing the diagonal walkway and two plazas since 1985.
- The California Constitution (Article 16, Section 6) prohibits the Agency from paying for improvements to private property without an additional public benefit (i.e., no gifts of public funds). In this case, staff does not believe there is an additional public benefit to be gained from repairing a privately owned, publicly accessible walkway more than 20 years after it was built.

Originated by Tracie Reynolds, Manager, Real Estate and Development Services, Denise Blades, Development Specialist, and Thomas Ma, Supervisor, Architecture and Engineering

Fred Blackwell
Executive Director

Attachments:

- Attachment 1: ECR Excerpt on Repairs
- Attachment 2: Photos of Diagonal Walkway Before and After Construction
- Attachment 3: History of Approvals – Webster Tower & Terrace
- Attachment 4: Letter from WCP I to Dillingham Construction dated Feb. 23, 1989
- Attachment 5: Sampling of 1989 Letters between WCP I and Dillingham Construction
- Attachment 6: Letter from WCP I to Dillingham Construction dated June 1, 1989
- Attachment 7: Map of ECR Parcels
- Attachment 8: ECR Excerpt on Maintenance
- Attachment 9: Map – Streetscape Improvements (1980’s & 2003)