

**California Regional Water Quality Control Board
San Francisco Bay Region
Attachment 1 to Resolution No. R2-2005-XXXX
Mutual Release and Covenant Not To Sue
for the
Oakland Uptown Mixed Use Site
Oakland, Alameda County**

I. INTRODUCTION

This mutual release and covenant not to sue (the "Mutual Release") is provided in response to a request jointly submitted by FC Oakland, Inc., a California corporation ("Forest City"), and the Redevelopment Agency of the City of Oakland, a community redevelopment agency organized and existing under the California Redevelopment Law ("ORA"), pursuant to San Francisco Bay Regional Water Quality Control Board ("Water Board") Resolution No. R2-2005-XXXX ("Resolution") authorizing its Executive Officer to negotiate and sign the Mutual Release concerning the site (approximately 6.5 acres) located between San Pablo Avenue on the west, Telegraph Avenue on the east, Thomas L. Berkley Way (formerly 20th Street) on the north, and 19th Street on the south in the City of Oakland, County of Alameda, California ("Property") that Forest City intends to lease from and redevelop pursuant to an agreement with ORA. The legal description of the Property is attached hereto and incorporated by reference as "Attachment A." This Mutual Release takes into consideration the State Water Resources Control Board ("State Board") Executive Director's memorandum dated July 9, 1996, regarding prospective purchaser agreements.

The Water Board understands that ORA desires to acquire the Property and that Forest City desires to lease the Property. Forest City and ORA desire a commitment, to the maximum extent permitted by law, that Forest City, ORA, subsequent purchasers, owners, tenants, owners associations, tenants associations, lenders, and any occupants of the Property, as well as all of their respective directors, officers, shareholders, managers, members, employees, partners, affiliates, agents, contractors, successors, and assigns (individually a "Released Party" and collectively the "Released Parties"), and their respective successors in interest, will not be subject to liability for, or the subject of, any actions, claims, orders, demands, enforcement actions or other civil or administrative proceedings, including without limitation, any investigation, monitoring or remediation requirements, related to or arising from the "Known Conditions" (defined below) as of June 15, 2005 ("Effective Date").

II. DEFINITIONS

For purposes of this Mutual Release, "Known Conditions" or "Known Condition" means all conditions of pollution in, at, under, or originating from the Property, or any portion thereof and all conditions of pollution originating from adjacent and nearby properties migrating onto or off of the Property, or any portion thereof that were known to the Water Board prior to the Effective Date. The term "known to the Water Board" means all information regarding the conditions of pollution in, at, under, or originating from the Property, or any portion thereof, and all conditions of pollution originating from adjacent and nearby properties migrating onto or off of the Property, or any portion thereof, that was disclosed to the Water Board or is reasonably

discernible from the reports, investigations, workplans, or any other information submitted to the Water Board prior to the Effective Date. A list of the reports, investigations, workplans, and other information related to the Property submitted to the Water Board prior to the Effective Date is attached hereto and incorporated by reference as "Attachment B." With respect to any claim, cause of action, investigation, or enforcement action asserted or required by the Water Board, the Released Parties shall bear the burden of proving that any conditions of pollution in, at, under, or originating from the Property, or any portion thereof, and all conditions of pollution originating from adjacent and nearby properties migrating onto or off of the Property, or any portion thereof, for which the Water Board is pursuing a claim, cause of action, investigation, or enforcement action is a Known Condition.

III. FINDINGS OF FACT

This Mutual Release is based on the findings made by the Water Board in Resolution No. R2-2005-XXXX, and on the following findings by Water Board staff:

1. The Property is within the jurisdiction of the Water Board due to the Known Conditions. The Water Board enters into this Mutual Release pursuant to California Water Code Sections 13000, *et seq.* The Water Board has authority to release and covenant not to sue or assert claims for environmental investigation or remediation or other related claims against current owners and prospective purchasers of environmentally impacted properties, where, as here, the agreement is sufficiently in the public interest.
2. The Property has been used historically for various residential and commercial uses, including, but not limited to, a garment factory, an auto repair facility, and a gasoline station. No significant manufacturing operations are known to have been present on the Property. Current uses of the Property include vacant lots, surface parking, commercial and office buildings, vacant buildings, a multi-story parking structure, and a vacant gasoline station. Current and historical tenants at or in the vicinity of the Property use or have used fuels, oils, solvents, degreasers, and other materials that may pose a potential threat to human health and environmental resources, if released.
3. The Property is approximately 6.5 acres in size, is generally flat with an elevation of approximately 15 to 30 feet above mean sea level (msl). Depth to groundwater is reported between 9 and 25 feet below ground surface, with the groundwater gradient generally toward the northeast, with the exception of the eastern portion of the Property at which the groundwater appears to flow due east toward Lake Merritt. Surface drainage at the Property is generally to the north, toward a shallow swale along Thomas L. Berkley Way (20th Street) that drains into Lake Merritt.
4. For redevelopment purposes, the Property is divided conceptually into four parcels. Parcel 1 encompasses the northwest portion of the Property, bounded by Thomas L. Berkley Way (20th Street) to the north, Williams Street to the south, Parcel 3 to the east, and San Pablo Avenue to the west. Parcel 2 encompasses the southwest portion of the Property and is bounded by Williams Street to the north, 19th Street to the south, Parcel 4 to the east, and San Pablo Avenue to the west. Parcel 3 encompasses the northeastern

portion of the Site and is bounded by Thomas L. Berkley Way to the north, Williams Street to the south, Telegraph Avenue to the east, and Parcel 1 to the west. Parcel 4 encompasses the southeastern portion of the Property and is bounded by Williams Street to the north, 19th Street to the south, Telegraph Avenue to the east and Parcel 2 to the west. Development plans include two phases, with Parcels 1, 2, and 3 in the first phase and Parcel 4 in the second phase. Parcels 1 and 2 will have residential units, landscaped pedestrian pathways, courtyards and below-grade parking garages (one-level). Parcel 3 will have residential units, retail space, amenity space (i.e., swimming pool, community room, leasing offices, and management offices), courtyards, landscaped pedestrian pathways, and a one-level below-grade parking garage. Parcel 4 will have residential units, retail space, a public park, and most likely a one-level below-grade parking garage. Collectively, the Property will provide approximately 830 residential units, furthering the objectives of the City of Oakland's 10K Downtown Housing Initiative.

5. Several Phase I Environmental Site Assessments, subsurface investigations, and groundwater investigations have been conducted at the Property. In general, TPHg and associated benzene, toluene, ethylbenzene, and xylenes are present in soil, groundwater and soil gas at Parcel 4. Residual metals (primarily lead) and total petroleum hydrocarbons as motor oil (TPHmo) are present in soils at the Property at multiple locations and depths. Tetrachloroethene in groundwater along the western portion of the Site is likely from off-site, although not specifically identified, sources. Relatively low concentrations of trichloroethene have also been found in groundwater.
6. A risk evaluation is included as part of the Remedial Action Plan/Risk Management Plan (RAP/RMP) for the Property. This evaluation compared maximum soil and groundwater concentrations to relevant residential land use Environmental Screening Levels (ESLs). Soil gas data were compared with Cal/EPA (2004) soil gas screening numbers for residential land use for existing buildings, assuming no engineered fill beneath the building slabs. Because there is no surface water at the Property and drinking water is and will be supplied from off-site sources, the only potential exposure pathways from contaminated groundwater are (a) inhalation of indoor air impacted by volatile organic compounds (VOCs) and (b) inhalation of outdoor air impacted by VOCs. For contaminated soil, the potential exposure pathways are (a) ingestion of soil, (b) inhalation of dusts, (c) dermal contact with soil, (d) inhalation of indoor air impacted by VOCs, and (e) inhalation of outdoor air impacted by VOCs. Based on the evaluation of human health risks via the potential exposure pathways under a residential land use scenario, the RAP/RMP concludes the following:
 - Parcel 1 – potential risks and nuisance concerns if soil with elevated levels of lead, mercury, barium and TPHmo remain uncovered;
 - Parcel 2 – no risks;
 - Parcel 3 – potential risks and nuisance concerns if soils with elevated levels of lead and TPHmo remain uncovered;

- Parcel 4 – potential risks if soil and groundwater with benzene and other VOCs remain unmitigated, and potential risks and nuisance concerns if soils with TPHmo remain uncovered; and
 - Property-wide – potential risks if groundwater containing benzene, PCE and/or TCE were to enter subterranean parking levels extending into the groundwater table.
7. For soil, cleanup goals are based on the direct exposure ESLs for residential land use and background metals concentrations used in the Tier 1 Environmental Risk Assessment. For groundwater and soil gas, short-term cleanup goals reflect the ESLs for residential indoor air quality, adjusted upward by a factor of ten to account for protocol identified in the City of Oakland’s Urban Land Redevelopment Program. Long-term cleanup goals for groundwater reflect California Maximum Contaminant Levels (MCLs). Cleanup goals for soil will be achieved through removal and off-site disposal of soils. The short-term cleanup goals for groundwater and soil gas will be achieved through source removal and/or operation of a multi-phase extraction system. The long-term cleanup goals for groundwater will be achieved primarily through monitored natural attenuation. Where necessary to prevent groundwater intrusion, a water-impermeable and chemical-resistant membrane will be installed beneath appropriate portions of building foundations. ORA and Forest City are jointly responsible to implement and comply with the RAP/RMP.
 8. Exposure risks during soil excavation and dewatering activities will be addressed through implementation of the Site Management Plan (SMP) detailed in the RAP/RMP, a comprehensive health and safety plan (HSP), and the employment of a site health and safety officer (HSO) to ensure that the measures specified in these plans are maintained. Excavated soils will be segregated based upon chemical concentration information and then temporarily stockpiled on site for additional handling or directly transported off-site. Excavated soils meeting the approved on-site soil reuse criteria (based on residential land use ESLs and background concentrations for metals used in the Tier 1 Environmental Risk Assessment) may be re-used on the Property.
 9. No active discharge of pollutants/contaminants is currently occurring on the Property.
 10. The Released Parties are not responsible parties for, or affiliated with a responsible party for, the Known Conditions, and the sole interest of Forest City and ORA in the Property is to redevelop the Property for commercial and multi-family residential uses.
 11. Forest City and ORA plan to develop the Property to a productive use that will benefit the public and the community. Estimated benefits to the community from the proposed mixed-use redevelopment project include infilling, brownfields redevelopment, the use of certain existing infrastructure, affordable housing, new jobs, development of a new public street, commercial space and public park, and additional real estate, municipal and sales taxes and fees.
 12. By entering into this Agreement, Forest City and ORA certify that to the best of their knowledge and belief, they have fully and accurately disclosed to the Water Board any

and all information known to them and all information in their possession or control that relates in any way to any existing contamination or any past or potential future release of hazardous substances, pollutants or contaminants in, at, under, or originating from the Property, or any portion thereof, and any existing contamination or any past or potential future release of hazardous substances, pollutants or contaminants originating from adjacent and nearby properties migrating onto or off of the Property, or any portion thereof.

13. The Property is not the subject of active enforcement actions or agreement(s) with another agency to address the remediation at the site.
14. Forest City will pay for all costs associated with the Water Board's development and oversight of this Agreement.
15. This Mutual Release is consistent with the goals and purposes of the Porter-Cologne Act and the federal Clean Water Act.
16. In order to ensure that no activities at the Property, with the exercise of due care, will aggravate, contribute to, or create a condition of, pollution as a result of the Known Conditions, this Agreement imposes certain requirements on Forest City and ORA, as set forth herein, regarding implementation and compliance with the remedial action and risk management measures that will be implemented at the Property pursuant to the RAP/RMP dated May 23, 2005 and approved by the Water Board. These remedial action and risk management measures are described above in paragraph 7.

IV. AGREEMENT

1. In accordance with the Resolution, and the findings of the Water Board staff, the Water Board expressly finds that the Released Parties shall not be liable or otherwise responsible for such Known Conditions and hereby covenants and agrees not to initiate, bring, or support any claim, order, demand, enforcement action or other civil or administrative proceeding against the Released Parties arising out of or related to such Known Conditions under any local, state or federal statute or the common law, including but not limited to, in their entirety, the United States Code, the various California Codes, or other applicable laws, regulations, ordinances, or civil, judicial or administrative authorities, having application to the handling, release, presence, migration, cleanup, containment or maintenance of the Known Conditions. This Mutual Release shall inure to the benefit of, and pass with each and every portion of the Property and the benefits and burdens provided under this Agreement shall run with the land, to the benefit and burden of any respective successors and assignees of the Released Parties, unless such successors and assignees caused or contributed to the Known Conditions, and provided further each Released Party that is not a signatory to this Mutual Release executes a written instrument in the form of Attachment C hereof.
2. Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, Liability and Recovery Act of 1980, 42 U.S.C. Section 9613(f)(2) ("CERCLA") provides

that: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." Accordingly, the Water Board affirms that this Mutual Release and Covenant Not To Sue resolves the Released Parties' liability to the Water Board with regard to any claims related to the matters included in the Resolution, including all claims regarding the Known Conditions.

3. This Release shall remain effective notwithstanding the revocation or modification of Water Board Resolution No. R2-2005-XXXX and shall be without prejudice to the ability of the Water Board to take action against any party other than the Released Parties, relating to the investigation, cleanup, or cost of investigation or cleanup of the Known Conditions. Except as expressly stated below in Section IV.6, nothing contained in this Mutual Release is intended to waive, limit, preclude, diminish or hinder any right of the Released Parties now or in the future available in law, equity, or by agreement.
4. Notwithstanding any other provisions of this Mutual Release, the Water Board reserves the right to assert any claims, enforcement actions or other civil or administrative proceedings against the respective Released Parties relating to the acts or omissions of the Released Parties arising after the Effective Date and which are based on the failure of the respective Released Parties, to the extent they have control over the Property, to (i) exercise due care at the Property with respect to the Known Conditions; (ii) implement and comply with the RAP/RMP; and (iii) cooperate in providing reasonable access to the Property for remediation and monitoring purposes and construction, maintenance, and repair of any necessary remediation and/or monitoring system required by the Water Board, the Alameda County Health Care Services ("ACHCS"), or the City of Oakland Fire Services Agency ("OFSA"). If the Water Board determines that a Released Party has failed to comply with any of these three enumerated requirements, after notice and a reasonable opportunity for cure, and the Water Board elects to proceed against that Released Party, then this Mutual Release shall be suspended as to that Released Party, and the Water Board and the Released Party shall then have any rights or defenses they would have had if this Mutual Release and Covenant Not to Sue had not existed. If, following such proceeding, the Water Board determines such action to be warranted, it may declare this Mutual Release to be null and void, with respect to that specific Released Party.
5. This reservation by the Water Board shall be separately and distinctly applied with respect to each of the Released Parties, the intent being that failure by a particular Released Party to comply with any applicable requirement shall not render the Water Board's covenant inapplicable to any other Released Party. Nothing contained in this Mutual Release shall be deemed a waiver of, or a release by, any Released Party of any defense, cross-claim, counter claim, offset or other rights available to such Released Party in response to any claim, order, demand, enforcement action or other civil or administrative proceeding by the Water Board, as specifically reserved hereunder.
6. In partial consideration for this Mutual Release, the Released parties, on behalf of themselves and their respective successors in interest, hereby release and covenant not to

sue the Water Board, its authorized officers, employees or representatives, with respect to any and all liability or claims associated with or arising out of the Known Conditions.

7. The Mutual Release shall not prohibit the Water Board from asserting any claim, enforcement action, or other civil or administrative proceeding related to any condition of pollution at, under, or originating from the Property prior to the Effective Date that are not Known Conditions.
8. Each Released Party not represented as a signatory below shall, as a precondition to receiving the benefits conferred by this Mutual Release, execute a written instrument in the form attached hereto and incorporated by reference as "Attachment C." Execution and mailing of Attachment C to the Water Board by or on behalf of any corporation, partnership, or other entity, shall be sufficient to confer the benefits of the Mutual Release upon all affiliates, parent or subsidiary corporations, and the respective directors, officers, employees, partners, members, agents, successors, and assigns of each such entity.
9. Forest City and ORA are jointly responsible to implement and comply with the RAP/RMP. Forest City and ORA shall require that the remedial action and risk management measures set forth in the RAP/RMP dated May 23, 2005 are implemented by contractors retained to develop the Property. Moreover, to the extent that Forest City and ORA enter into any agreement under which another party assumes responsibilities for any of the remedial action or risk management measures contemplated in the RAP/RMP, Forest City and ORA shall ensure that the terms of such agreement include a requirement for the party performing the remediation activities to comply with the RAP/RMP. In the event that Forest City sells or otherwise transfers its interest in the Property prior to development of the Property, it shall ensure that its successor in interest assumes responsibility for implementation of and compliance with such remedial action and risk management measures as they pertain to the Property.
10. ORA will submit a deed restriction referred to as a Covenant and Environmental Restriction on Property ("CERP") in a form acceptable to the Executive Officer and in accordance with the provisions of Paragraph 12 below. Upon execution by the Water Board's Executive Officer, ORA will record the CERP on the Property. In relevant part, the CERP will restrict land use, restrict use of groundwater, notify future owners and occupants of subsurface conditions, and restrict the excavation of soil. This CERP shall be recorded with the Alameda County Recorder's Office within the time period set forth in Paragraph 13, below.
11. The Released Parties further agree to comply with the above-described CERP, to comply with the RAP/RMP (and any amendments thereto approved by the Water Board), to comply with all applicable local, state, and federal laws and regulations regarding the Property, and to cooperate in providing reasonable access to the Property for monitoring purposes and operation, maintenance, and repair of any monitoring wells and remediation facilities on the Property.

13. This Mutual Release shall be in full force and effect from the Effective Date. ORA shall have ninety (90) days from adoption of Resolution No. R2-2005-XXXX to record the Mutual Release and CERP against the Property, provided that such ninety (90) day period shall be extended by a period of time required by the Executive Officer to fully execute the Mutual Release and CERP. A copy of the recorded Mutual Release and CERP shall be provided to the Water Board within twenty (20) days of the recording. The Water Board shall provide written acknowledgement of receipt of the recordings as required by this paragraph. ORA and the Water Board may extend the deadlines set forth in this paragraph by mutual agreement documented in writing.
14. This Mutual Release may be executed in one or more counterparts, each such counterpart being deemed an original but all counterparts constituting a single instrument.
15. Each of the undersigned parties hereby certifies, and warrants that he or she is authorized to bind his or her agency or entity to the continuing obligations described herein, and that the foregoing is a full, true and correct copy of Attachment 1 to Resolution No. R2-2005-XXXX, Mutual Release and Covenant Not To Sue adopted by the California Water Quality Control Board, San Francisco Bay Region, on June 15, 2005.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

By: _____
Bruce H. Wolfe, Executive Officer

Date: _____

FC OAKLAND, INC.
a California corporation

By: _____

Name: _____

Title: _____

Date: _____

THE REDEVELOPMENT AGENCY OF THE
CITY OF OAKLAND, CALIFORNIA
a community redevelopment agency organized and
existing under the California Redevelopment Law

By: _____
Name: _____
Title: _____
Date: _____

Attachments:

- A – Legal Description of Property
- B – List of Documents
- C – Written Instrument of Release and Transfer Document

STATE OF CALIFORNIA)
) ss:
COUNTY OF _____)

On _____, before me, _____, Notary Public, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

STATE OF CALIFORNIA)
) ss:
COUNTY OF _____)

On _____, before me, _____, Notary Public, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

**California Regional Water Quality Control Board
San Francisco Bay Region**

Attachment A

Legal Description and Site Map of Property in the City of Oakland

**California Regional Water Quality Control Board
San Francisco Bay Region**

Attachment B to Mutual Release

**List of Documents Submitted to the Water Board prior to the Effective Date
Regarding Known Conditions at the Site**

1. Fugro West, Inc. 2005. "Site Assessment Report, Uptown Project Area, Oakland, California." [In Press; to be submitted to the Water Board].
2. Harding ESE. 2001. "Draft Environmental Investigation Report: Oakland Uptown Redevelopment Project." May 1.
3. LSA Associates, Inc. 2003. "Uptown Mixed Use Project Environmental Impact Report, Public Review Draft." Prepared for the City of Oakland Community and Economic Development Agency. September.
4. Matrix Environmental Services, LLC. 2004. "Revised Final Due Diligence Review for the Oakland Uptown Mixed Use Site." November.
5. Treadwell & Rollo, Inc. 2005. "Draft Remedial Action Plan/Risk Management Plan: Parcels 1 through 4, Oakland Uptown Mixed Use Site." February.
6. URS. 2004. "2004 Second Quarter Groundwater Monitoring Report, Former Sears Retail Center #1039, 1911 Telegraph Avenue." August 10.
7. URS. 2002. "2002 Third Quarter Groundwater Monitoring Report, Former Sears Retail Center #1039, 1911 Telegraph Avenue." December 12.
8. Woodward Clyde Consultants. 1991. "Oakland/East Bay Galleria Project, Phase IA Environmental Site Assessment, Preliminary Review of Background Data for Site and Parcels, Interim Report." Prepared for the Redevelopment Agency of the City of Oakland. January 9.

**California Regional Water Quality Control Board
San Francisco Bay Region**

**Attachment C to Mutual Release
Written Instrument Of Release And Transfer Document**

_____ [name of new purchaser, lender, lessee, or occupant] (hereinafter “Released Party”), by signing below verifies and warrants as follows:

1. Released Party has read the recorded Mutual Release and Covenant Not to Sue (“Mutual Release”) document, and the related Regional Water Quality Control Board (“Water Board”) Resolution No. R2-2005-XXXX, including Attachment and Exhibits recorded in Book _____, Page _____ in Alameda County, California for the “Property” located between San Pablo Avenue on the west, Telegraph Avenue on the east, and Thomas L. Berkley Way (formerly 20th Street) on the north, and 19th Street on the south in the City of Oakland, Alameda County, California.

2. Released Party understands and agrees that the Mutual Release contains a release by the Water Board and a covenant not to bring or support any action or order against subsequent purchasers, tenants, lenders, and occupants of all or a portion of the Property (as defined in the Mutual Release), including their directors, officers, shareholders, managers, employees, partners, affiliates, members, contractors, agents, successors, and assigns, related to the Known Conditions (as defined in the Mutual Release), including contamination at, under, or originating from the Property (as defined in the Mutual Release).

3. Released Party understands and agrees that it may enjoy the benefits of the Mutual Release only if it releases and covenants not to sue the Water Board as set forth in the Mutual Release, and that by executing this Release, Released Party releases and covenants not to sue the Water Board in accordance with the terms of the Mutual Release.

4. Released Party understands and agrees that its right to rely on the benefits of the Mutual Release is subject to and conditioned on its own, but only its own, acceptance of all of the provisions of the Mutual Release and its compliance with its obligations under the terms of the Mutual Release.

5. Released Party accepts and agrees to abide by all provisions of the Mutual Release.

This Instrument of Release and Transfer Document shall be effective upon execution by the Released Party. Within three days of execution, Released Party agrees to mail a copy of the executed Release to: Executive Officer, Regional Water Quality Control Board, San Francisco Bay Region (address as of June 15, 2005 is 1515 Clay Street, Suite 1400, Oakland, CA 94612).

Authorized Signature (Released Party)

Date

Name/Title: _____

Company Name/Address: _____