



REPORT TO COUNCIL City of Sacramento

915 I Street, Sacramento, CA 95814-2671
www.CityofSacramento.org

CONSENT
June 9, 2009

**Honorable Mayor and
Members of the City Council**

**Title: Depot Utilities and California Environmental Quality Act (CEQA) Railyards
Litigation**

Location/Council District: Downtown Railyards, Council District 1

Recommendation: Adopt a Resolution authorizing payments to Thomas Enterprises, Inc. (TEI) and City vendors owed payment by TEI for the Railyards CEQA litigation, in the total amount of \$124,699.06.

Contacts: Bill Sinclair, Program Manager, 808-1905
Sheryl Patterson, Senior Deputy City Attorney, 808-7292

Presenters: Not applicable

Department: General Services

Division: Facilities and Real Property Management

Organization No: 13001551

Description/Analysis

Issue: Thomas Enterprises, Inc., (TEI) has been paying the Sacramento Municipal Utility District (SMUD) for electricity usage at the Sacramento Depot since the City purchased this property in December of 2006 from TEI. There was only one electrical meter serving the Railyards property and TEI has continued to pay SMUD for the Depot's electricity use. TEI did not invoice the City until recently due to the need to determine the amount of usage by the Depot building and the Central Shops buildings. The amount owed to TEI is \$124,699.06 for the two year period from January 2007 through February 2009. The City's Track Relocation project includes installation of a new electrical meter for the Depot next year.

Policy Considerations: Electrical service to the Depot must be provided to support the transportation services and operations at the Sacramento Valley Station.

Environmental Considerations:

California Environmental Quality Act (CEQA): Authorization to pay for utilities is not a project as defined by CEQA guidelines, Section 15378. The recommended action involves no physical construction and has no potential to cause a significant impact to the environment. The Track Relocation project which involves installing the new meter is subject to environmental review and was addressed in the June 2, 2009 Intermodal staff report.

Sustainability Considerations: Not applicable

Committee/Commission Action: None

Rationale for Recommendation: TEI did not invoice the City for electricity usage until recently, after completion of an energy usage audit by Valley Utility Services, an independent utility consultant hired by TEI. Staff has reviewed the audit and concurs with the allocation of usage.

Financial Considerations: Sufficient funding exists within the Department of General Services General Fund operating budget (Fund 1001) to make payments in the amount of \$124,699.06 for electricity usage at the Sacramento Depot from January 2007 to February, 2009.

There are currently three entities consuming electricity at the Railyards: The California State Railroad Museum (CSRM); Environmental Remediation Management (ERM); and the City. From January 2007 to February 2009, CSRM used approximately 5%, ERM used approximately 22%, and the City used approximately 73% of the total electricity.

TEI has acknowledged that it owes money to the law firm, Stoel Rives, hired by the Redevelopment Agency of the City of Sacramento to represent the Agency and the City in the Railyards CEQA litigation for the costs to prepare the administrative record for the Railyards Specific Plan EIR in the amount of \$79,983.92. TEI's letter dated April 16, 2009 authorizes the City to deduct this amount from the \$124,699.06 payment for Depot electrical usage (Attachment 1) and SHRA has agreed that the City may remit the \$79,983.92 directly to Stoel Rives.

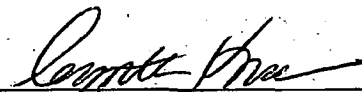
In addition, TEI owes payment to City consultants who were requested to produce documents from their files for the same administrative record. Their invoices were submitted to TEI for payment by the law firm TEI hired to defend the City, Sheppard Mullin, between July through September of 2008. It has been almost a year but TEI still has not made payment to these vendors. TEI was also reminded about these outstanding debts and its obligation to make payment in the City's letter of March 24,

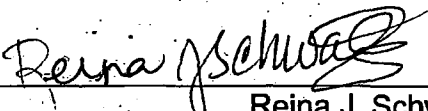
2009 (Attachment 2), but TEI did not address deductions for these invoices in its April 16, 2009 letter. Since these obligations may ultimately be the City's responsibility and TEI has an obligation to make such payments under the Railyards Development Agreement, staff is also requesting authorization to deduct these amounts from the \$124,699.06 payment for Depot electrical usage and remit the amounts to the consultants. The amounts owed are as follows: PBS&J - \$18,943.06; Economic and Planning Systems - \$2,936.25; and Dowling Associates - \$2,160.00.

TEI may receive reimbursement of all of these costs, a total of \$104,023.23, if the City is successful in defending the Railyards Specific Plan EIR litigation and the petitioners are ordered to pay for the record costs. The balance due for Depot electrical usage that would be paid to TEI is \$20,675.83. However, there is an outstanding dispute as to whether TEI owes the Redevelopment Agency \$22,592.89 for the costs of preparing the administrative record in the Railyards Redevelopment Plan EIR litigation under the terms of the Owner Participation Agreement. If the Agency is successful in defending this litigation, the petitioners may be ordered to pay this cost.

Therefore, payment to TEI of the remaining amount owed for the electrical usage of \$20,675.83 would be conditioned on resolution of the Agency's and TEI's dispute over the Agency's record costs or the final judgment in that litigation which would reimburse the Agency for such costs.

Emerging Small Business Development (ESBD): No goods or services are being purchased as a result of this report.

Respectfully Submitted by: 
Cynthia Kranc
Facilities Manager

Approved by: 
Reina J. Schwartz
Director, Department of General Services

Recommendation Approved:

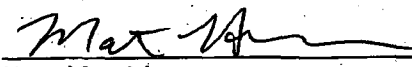
for 
Ray Kerridge
City Manager

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Attachment 1



THOMAS ENTERPRISES, INC.

Railway Express Annex
431 J Street, Suite 202
Sacramento, California 95814
Tel: 916.329.4500
Fax: 916.329.4501
www.thomasent.com

April 16, 2009

VIA ELECTRONIC AND U.S. MAIL

Bill Sinclair
City of Sacramento
5730 24th Street, Building 4
Sacramento, CA 95822

Re: *The Railyards – Utilities Reimbursement Offset*

Dear Bill:

I am following up on an invoice that I sent to William Crews on March 27, 2009 in the amount of \$124,699.06. This amount reflected the City's portion of electric utilities at the Sacramento Valley Station from January 1, 2007 through February 2009 that is owed to Thomas Enterprises. A copy of this letter was also sent to you.

It has since come to my attention that the Sacramento Housing & Redevelopment Agency (SHRA), through its letter from Michael Voss dated January 20, 2009 (copy enclosed), seeks to recover from Thomas Enterprises the amount of \$79,983.92 to reimburse it for administrative record costs for the Railyards CEQA litigation. This letter requests that the City pay directly to the SHRA the amount of \$79,983.92 and remit to Thomas the balance due of \$44,715.14 for utilities reimbursement at the Depot.

Finally, be advised that going forward, we will bill the City quarterly for Depot utilities reimbursement until such time as the Depot is separately metered.

Please contact me if you have any questions. Thank you.

Very truly yours,

THOMAS ENTERPRISES, INC.

A handwritten signature in black ink, appearing to read "L. Valpey", is written over the company name.

Leslie G. Valpey
Development Coordinator



**OFFICE OF THE
CITY ATTORNEY**

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IAN WANG
DAVID S. WOMACK

March 24, 2009

Jeffrey F. Montgomery
Cushing, Morris, Armbruster & Montgomery, LLP
229 Peachtree Street, N.E., Suite 2110
Atlanta Georgia 30303

**RE: Railyards Specific Plan EIR - CEQA Litigation Defense;
Preliminary Notice of Breach of Development Agreement**

Dear Jeff:

As stated in my February 23, 2009 letter, Thomas Enterprises owes \$80,000 to the Stoel Rives law firm to pay the third party costs and their paralegal costs to assemble the Specific Plan EIR administrative record. In addition, there is \$22,000 owed to the consultants who were requested to produce documents for inclusion in this record. These bills have remained unpaid for over six months and the City could be held liable for these costs if payment is not made by Thomas Enterprises in accordance with its obligations under the Development Agreement. Suheil Totah, Vice President of Thomas Enterprises, has concurred that your client is responsible for these costs and made commitments that payment would be made, but no checks have been issued. Payments must be made no later than April 10th or the City will have no choice but to proceed with formally initiating the default provisions in the Development Agreement.

The Redevelopment Agency of the City of Sacramento (Agency), which hired Stoel Rives to represent the Agency in the Specific Plan EIR litigation, has been attempting for many months to collect payment from Thomas Enterprises for the Specific Plan EIR administrative record, as noted in the enclosed copy of their January 20, 2009 letter. All of the supporting documentation to verify these costs has been provided by the Agency to Suheil Totah. Michael Voss, Agency Counsel, has informed the City that Thomas Enterprises has not been responsive to his repeated letters, e-mails and phone calls regarding this matter.

Jeffrey F. Montgomery, Esq.
RE: Railyards Specific Plan EIR - CEQA Litigation Defense
March 24, 2009
Page 2

The City recently received the enclosed letter from Stoel Rives dated March 23, 2009, asserting that payment of these costs is ultimately the City's obligation because the record is for the Specific Plan EIR litigation. The Agency has separately funded the costs for Stoel Rives to prepare the administrative record in the Railyards Redevelopment Plan EIR litigation. There is no overlap in expenses and Thomas Enterprises is only being requested to pay for the Specific Plan EIR record costs.

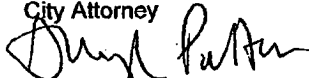
The law firm Thomas Enterprises hired to represent the City in this litigation under the terms of the Development Agreement indemnity provision, Sheppard Mullin, is located in San Francisco. The hard-copy of the City's records were in Sacramento and Art Friedman with Sheppard Mullin and Andrea Matarazzo with Diepenbrock Harrison, representing Thomas Enterprises in this litigation, jointly requested that Stoel Rives assemble the revised record and represented that Thomas Enterprises would fund these costs.

In addition to Stoel Rives costs, three consulting firms produced documents for the Specific Plan EIR administrative record and their costs of production have also not been paid for over six months. The three consultants, PBS&J, Dowling and EPS were directed to send their invoices to Art Friedman, who forwarded them to Andrea Matarazzo and Jeff Dorso with Diepenbrock Harrison for payment by Thomas Enterprises. These firms are owed a collective amount of \$22,043 as set out in the enclosed documents. Because Thomas Enterprises has not fully paid Sheppard Mullin or Diepenbrock Harrison for their legal fees, they are unable to front the costs to pay these third party vendors. Ultimately, the City would be liable for these expenses.

Failure to make payment for these litigation costs would constitute a default under the Development Agreement. Thomas Enterprises may be able to recoup these costs if we are successful in convincing the court that the EIR complied with CEQA. In the interim, payment must be made so that the City and Thomas Enterprises can continue to work cooperatively in implementing the Railyards agreements and development entitlements. If you require any further information, you can reach me at (916) 808-5346.

Sincerely,

EILEEN M. TEICHERT
City Attorney



Sheryl N. Patterson
Senior Deputy City Attorney

c: (w/o enc) Marty Hanneman, Assistant City Manager
Eileen Teichert, City Attorney
Michael Voss, Redevelopment Agency

Attachment 3



November 26, 2008

Jeffrey M. Montgomery
 Cushing, Morris, Armbruster & Montgomery, LLP
 229 Peachtree Street, Ste 2110
 Atlanta, Georgia 30303

RE: Railyards CEQA Cases – Administrative Record Costs

Dear Mr. Montgomery:

The Redevelopment Agency of the City of Sacramento and the City of Sacramento have certified the administrative records for both sets of Railyards CEQA cases. On September 29, 2008, Judge Lloyd Connelly ordered that administrative record cost recovery for the Railyards Specific Plan cases (Downtown Plaza I and SCARRY) be deferred until the conclusion of the litigation. Therefore, the defendants are required to carry the costs of the Railyards Specific Plan administrative record prior to the decision. Judge Connelly issued a similar order for the Railyards Redevelopment Plan cases (Downtown Plaza II and Castro) on October 3, 2008, although petitioners are required to contribute \$10,000 toward the administrative record preparation cost.

I have enclosed invoices for the Railyards administrative record costs that the Agency has received to date from Stoel Rives. These invoices reflect non-attorney costs that were incurred in the preparation of the administrative record certified by the City and the Agency. The attached invoices for preparation of the Railyards Specific Plan administrative record total \$42,737.50. The Agency requests payment of these costs pursuant to the terms of Section 7.1 of the Railyards Development Agreement.

I have also enclosed invoices for the Railyards Redevelopment Plan administrative record costs that the Agency has received to date. The invoices for preparation of the Railyards Specific Plan administrative record total \$32,592.89. As required, petitioners have contributed \$10,000 toward this effort; therefore the total amount outstanding is \$22,592.89. The Agency requests payment of these costs pursuant to the terms of Section 8 of the Railyards Master Owner Participation Agreement.

Please feel free to contact me at (916) 440-1330 if you have any questions.

Sincerely,

 Michael Voss
 Agency Counsel

cc (w/o encl.): Mr. Suheil Totah, Thomas Enterprises
 Mr. Tim Taylor, Stoel Rives
 Ms. Sheryl Patterson, City of Sacramento

LEGAL DEPARTMENT
 630 I Street
 Sacramento, CA 95814
 Phone: 916.448.0300
 Fax: 916.448.0301

RESOLUTION NO. 2009-

ADOPTED BY THE SACRAMENTO CITY COUNCIL

June 9, 2009

AUTHORIZING PAYMENT TO THOMAS ENTERPRISES, INC. (TEI) AND CITY VENDORS OWED PAYMENT BY TEI FOR THE RAILYARDS CEQA LITIGATION IN THE TOTAL AMOUNT OF \$124,699.06

BACKGROUND

- A. Thomas Enterprises, Inc. (TEI) has been paying the Sacramento Municipal Utility District (SMUD) for electricity usage at the City's Sacramento Depot since the City acquired this property in December of 2006. TEI recently invoiced the City for the Depot electrical usage over a two year period, from January 2007 through February, 2009, after completion of an energy usage audit by Valley Utility Services under contract to TEI. The audit showed that the Depot building used 73% of the electrical usage from that meter during this period. The amount of TEI's invoice is \$124,966.06. City staff has reviewed and verified this audit and SMUD's billing statements.
- B. TEI has authorized the City to pay a portion of the amount owed to TEI for electrical usage to pay TEI's obligation pay for the Railyards CEQA litigation costs. In addition, TEI owes City vendors and the Redevelopment Agency of the City of Sacramento (Agency) for other costs related to the Railyards CEQA litigation under the terms of the Railyards Development Agreement and the Owner Participation Agreement.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

- Section 1. The City Manager or the City Manager's designee is authorized to deduct and remit the following amounts from the \$124,966.06 that the City owes for Depot electrical usage:
 - (a) Steel Rives in the amount of \$79,983.92.
 - (b) PBS&J in the amount of \$18,943.06.
 - (c) Economic and Planning Systems in the amount of \$2,936.25.
 - (d) Dowling Associates, Inc. in the amount of \$2,160.00.

Section 2: The City Manager or the City Manager's designee is authorized to make payment of the net remaining amount of \$20,675.83 to Thomas Enterprises, Inc. (TEI) conditioned on either: (1) resolution of the dispute between TEI and the Agency regarding whether TEI owes the Agency \$22,592.89 for the Railyards CEQA litigation administrative record costs for the Railyards Redevelopment Plan EIR in the cases of Castro and Downtown Plaza; or (2) the court in the Castro and Downtown Plaza cases orders those petitioners to pay the Agency's record costs and that order is not appealed. If TEI and the Agency do not resolve their dispute before the court issues judgment in the above-referenced cases and the petitioners are not required by the court to pay the Agency for the record costs, then City Manager or the City Manager's designee is authorized to make payment of the net remaining amount of \$20,675.83 to the Agency.