

RESOLUTION NO. 2006-766

Adopted by the Sacramento City Council

October 17, 2006

APPROVAL OF AGREEMENT WITH GRUBB & ELLIS COMPANY TO REPRESENT CITY IN SALE OF REAL PROPERTY FOR BENEFIT OF CROCKER ART MUSEUM EXPANSION

BACKGROUND

- A. On April 18, 2006, the Mayor and City Council approved the final Tier I and Tier II project lists for implementation under the Community Reinvestment Capital Improvement Program (CRCIP). The Crocker Art Museum Renovation and Expansion Project (CF56) was included as a Tier I project.
- B. In conjunction with its designation of CF56 as a Tier I project, the Mayor and City Council approved a financing plan entailing the sale and/or development of City-owned parcels identified by Assessors Parcel Numbers 006-0135-028 and 006-0135-029 (Lot X), the proceeds of which sale will fund a portion of CF56's project costs.
- C. A Request for Proposals (RFP) from commercial real estate brokers was prepared and released for purposes of identifying brokers capable and qualified to market for sale the Lot X property.
- D. Responses to the RFP were evaluated by a Selection Committee of City of Sacramento (City) staff and members of the Board of Directors of the Crocker Art Museum Association using selection criteria specified within the RFP.
- E. Grubb & Ellis Company (Broker) was unanimously chosen by the Selection Committee as being the most qualified among the firms responding to the RFP.
- F. An Exclusive Authorization of Sale Agreement (Agreement) has been negotiated with between the City and Broker specifying the terms under which Broker will market Lot X for sale on behalf of the City.

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

- Section 1. The terms of the Agreement presented at this meeting are hereby approved.
- Section 2. The City Manager is authorized to execute the Agreement on behalf of the City.

Table of Contents:

Exhibit A Pg 6-11

Adopted by the City of Sacramento City Council on October 17, 2006 by the following vote:

Ayes: Councilmembers, Cohn, Fong, Hammond, McCarty, Pannell, Sheedy, Waters, and Mayor Fargo.

Noes: None.

Abstain: None.

Absent: Councilmember Tretheway.

Attest:

for Dawn Bullwinkel

Shirley Concolino, City Clerk

Heather Fargo

Mayor, Heather Fargo

Exhibit A**EXCLUSIVE AUTHORIZATION OF SALE**

OWNER hereby appoints GRUBB & ELLIS COMPANY ("Broker") as the Owner's exclusive agent to arrange for the sale of the real property described below (the "Property") for a period commencing on OCTOBER 17, 2006 and ending at midnight on APRIL 17, 2007 (the "Listing Period") unless this Authorization is extended in writing and signed by both Owner and Broker. The Property is located at **SEC OF I-5 AND CAPITOL MALL CONSISTING OF APPROXIMATELY 114,172 SQ FT PER ATTACHED EXHIBIT "A"** in the City of **SACRAMENTO**, County of **SACRAMENTO**, State of California, and further described as **LOT X**.

The price and terms of the sale shall be as follows: **A price to be determined by the market, all cash or terms acceptable to Seller.**

~~If, during the Listing Period an option or right of refusal to purchase the Property or any interest therein is granted or an escrow is opened or negotiations involving the sale, transfer or conveyance of the Property have commenced and are continuing, then the term of the Listing Period shall be extended with respect to such transaction(s) and negotiations for a period through the exercise of such option or right of first refusal, the closing of such escrow, the final termination of all efforts to complete a transaction or the consummation of such transaction. The term of Listing Period shall be extended one day for each day the Property is off the market during the Listing Period, not to exceed six months. The Property shall be considered off the market for any time period after a purchase and sale agreement, letter of intent or other agreement is executed by Owner and a buyer and before the transaction contemplated by such agreement is terminated by the parties thereto.~~

In consideration of this Authorization and Broker's agreement diligently to pursue the procurement of a purchaser for the Property, Owner agrees to pay Broker a commission in cash as follows:

1. **Unimproved Property:** 1.5% of the gross sales price, **SUBJECT TO THE "OTHER TERMS AND CONDITIONS" PROVISION OF THIS AGREEMENT ON PAGE 3.**
2. ~~**Improved Property:** 6% of the gross sales price.~~
3. ~~**Joint Venture/Exchange:** If an exchange or joint venture is effected in lieu of a sale, a full sales commission shall be paid, computed on the basis of the type and fair market value of the property contributed to the joint venture or properties exchanged. The listing price stated herein shall be prima facie evidence of the fair market value of the Property.~~
4. **Business Opportunity:** 10% of the gross sales price.

Owner shall pay said commission to Broker if during the Listing Period: (a) the Property or any interest therein is sold, transferred or conveyed by or through Broker, Owner or any other person or entity; or (b) a purchaser is procured by or through Broker, Owner or any other person or entity who is ready, willing and able to purchase the Property or any interest therein on the terms above stated or other terms acceptable to the owner of the Property; or (c) any contract for the sale, transfer or conveyance of the Property ~~or any interest therein, including without limitation the granting of an option or right of first refusal,~~ is made directly or indirectly by the owner of the Property; or (d) this Authorization is terminated or the Property is withdrawn from sale without the written consent of Broker or the Property is made

unmarketable by Owner's voluntary act. Owner shall also pay said commission to Broker if within one hundred eighty (180) days after the expiration of the Listing Period: (1) the owner of the Property enters into a contract for the sale, transfer or conveyance of the Property ~~or any interest therein, including without limitation the granting of an option or right of first refusal,~~ to any person or entity which during the term of the Listing Period or any extension thereof made a written offer to purchase the Property, or any interest therein, whether or not such transaction is consummated on the same or different terms and conditions contained in such offer; or (2) the owner of the Property enters into a contract for the sale, transfer or conveyance of the Property ~~or any interest therein, including without limitation the granting of an option or right of first refusal,~~ to any person or entity with whom Broker has negotiated or to whom Broker has submitted the Property in an effort to effect a transaction during the Listing Period and whose name appears on any list of such persons or entities (the "Registration List"), which Broker shall have mailed to Owner at the address below stated within ten (10) days following the expiration of the Listing Period. Where the Property is owned by a partnership or a corporation, not publicly traded, the transfer of a partnership interest in or any of the capital stock of such entity during the Listing Period shall be deemed to be a sale of the Property or of an interest in the Property. Notwithstanding anything to the contrary contained in this Agreement, Owner's payment of the commission to Broker shall be subject to and conditioned upon the close of escrow of the sale of the Property,.

Commissions shall be paid through escrow upon the closing of sales or exchange transactions; absent an escrow, commissions shall be paid upon recordation of a deed or upon delivery of such deed or other instrument of conveyance if recordation is deferred more than one month thereafter. In the event of a contract or agreement of sale, joint venture agreement, business opportunity or other transaction not involving the delivery of a deed, commissions shall be paid upon the mutual execution of the agreement evidencing the transaction.

Owner agrees to cooperate with Broker in effecting a sale of the Property and immediately to refer to Broker all inquiries of any person or entity interested in purchasing the Property. The final form, terms and conditions of the sale shall be subject to Owner's approval in its sole and absolute discretion. All negotiations are to be through Broker. Owner agrees to pay all customary escrow, title and revenue charges and to execute such documents as may be reasonably necessary to effect a sale of the Property.

Broker is authorized to accept a deposit from any prospective purchaser, and upon the opening of escrow, to transfer such deposit to the escrow agent for the account of the purchaser; provided that Broker acknowledges and agrees that Owner reserves the right to accept or reject any offer to purchase the Property in Owner's sole and absolute discretion. ~~In the event a transaction is not consummated, any deposits, payments, including payments for options, liquidated damages and other amounts retained by Owner shall be equally divided between Owner and Broker, except that Broker's portion thereof shall not exceed the amount of the commission otherwise payable upon the consummation of such transaction by the terms of this Authorization.~~ Broker is further authorized to advertise the Property and shall have the right to place a sign or signs on the Property if, in Broker's opinion, such would facilitate the sale thereof, subject to Owner's prior approval of the sign and the location of the sign on the Property.

It is understood that it is illegal for either Owner or Broker to refuse to present or sell real property to any person because of race, color, religion, national origin, sex, marital status, age or physical disability.

Except as disclosed in an addendum hereto signed by both Owner and an officer of Broker, Owner hereby warrants and represents to Broker that (1) Owner is the owner of record of the Property or has the legal authority to execute this Authorization on behalf of such owner, (2) no person or entity has any right to purchase the Property or to acquire any interest therein by virtue of option, right of first refusal or other agreement, (3) there are no delinquencies or defaults under any deed of trust, mortgage or other encumbrance on the Property, (4) the Property is not subject to the jurisdiction of any court in any bankruptcy, insolvency, conservatorship or probate proceeding, and (5) neither Broker nor any salesperson affiliated with Broker has made any promises or representations to or agreements with Owner not contained herein which in any manner affect Owner's and Broker's rights and obligations under this Authorization. Broker hereby warrants and represents to Owner that Broker has in good standing all licenses required under applicable law in order for such Broker to perform its obligations hereunder, and Broker hereby covenants and agrees to maintain such licenses in good standing during the term of this Agreement. Broker also warrants and represents to Owner that Broker has full power and authority to execute and deliver this Agreement and to perform its obligations hereunder

Owner agrees to defend, indemnify and hold Broker harmless from any and all claims, demands, liabilities and damages

arising from incorrect information supplied by Owner or any information which Owner fails to supply. Broker agrees to defend, indemnify and hold Owner harmless from any and all claims, demands and damages arising from any material breach by Broker and/or Broker's employees, agents or contractors, of Broker's duties and/or obligations under this Agreement, except to the extent caused by the gross negligence or willful misconduct of Owner.

In the event an escrow is opened with respect to the sale, transfer or conveyance of the Property or any interest therein, Owner hereby irrevocably assigns to broker and irrevocably authorizes and instructs the escrow agent to disburse to Broker the amount of the compensation provided for herein from the funds payable to Owner.

In the event of any material default by either party under this Agreement (including, without limitation, any breach of any representations, warranties and covenants made by such party in this Agreement), the non-defaulting party shall provide the defaulting party written notice of the default and an opportunity to cure such default within ten (10) days after receipt of such written notice. If thereafter the defaulting party fails or refuses either to cure such default within such ten (10) day period, and should the non-defaulting party so notify the defaulting party in writing after the expiration of the time allowed, this Agreement shall immediately terminate and, except as otherwise provided herein, the parties shall have no further rights or obligations hereunder.

Notwithstanding anything in this Agreement to the contrary, in no event shall Broker or Owner be liable to the other party under this Agreement for any special, indirect, incidental, consequential or punitive damages, including, without limitation, loss of anticipated profits or loss or diminution of revenue, regardless of the form of action, whether in contract, tort or otherwise.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MAY POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS SUCH RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY. WE HAVE READ AND UNDERSTOOD THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

OWNER _____ BROKER _____

Arbitration of Disputes. In the event a claim or controversy arises concerning any failure to pay Broker all or any portion of the amounts provided herein, Owner and Broker hereby agree that such claim or controversy shall be settled by final, binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, which rules are incorporated herein by reference, provided, however, that all persons nominated to act as arbitrators of such claim or controversy shall be attorneys at law duly licensed to practice before the courts of the State where the arbitration is conducted. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Depositions may be taken and other discovery may be obtained during such arbitration proceedings to the same extent as authorized in civil judicial proceedings. The unsuccessful party shall pay the costs of conducting the arbitration. In the event any arbitration proceeding or legal action to enforce an arbitration award is commenced to recover compensation hereunder, the prevailing party shall be entitled to recover its expenses and reasonable attorneys' fees incurred therein from the unsuccessful party.

In the event that Owner and Broker have not elected to resolve commission disputes by arbitration as provided above, if a claim or controversy arises concerning any failure to pay Broker all or any portion of the amounts provided therein, the prevailing party shall be entitled to its costs and attorneys' fees in any legal action regarding the collection of a commission due hereunder.

~~If there is a failure to make any payment to Broker at the time required herein, the delinquent sum(s) shall bear interest at~~

~~the rate of 18% per year or the maximum rate permitted by law, whichever is lower.~~

Owner hereby authorizes Broker to represent and serve as agent for any prospective purchaser of the Property or of any interest therein, and Owner hereby waives any conflict of interests which might arise as a result thereof.

The heirs, transferees, successors and assigns of the parties hereto are duly bound by the provisions hereof. Broker may not assign its rights to, or delegate its duties or obligations under, this Agreement to any other party without the prior written consent of Owner.

**CALIFORNIA SALE/
LEASE AMERICANS WITH DISABILITIES ACT,
HAZARDOUS MATERIALS AND TAX DISCLOSURE**

The Americans With Disabilities Act is intended to make many business establishments equally accessible to persons with a variety of disabilities; modifications to real property may be required. State and local laws also may mandate changes. The real estate brokers in this transaction are not qualified to advise you as to what, if any, changes may be required now, or in the future.

Owners and tenants should consult the attorneys and qualified design professionals of their choice for information regarding these matters. Real estate brokers cannot determine which attorneys or design professionals have the appropriate expertise in this area. Various construction materials may contain items that have been or may in the future be determined to be hazardous (toxic) or undesirable and may need to be specifically treated/handled or removed. For example, some transformers and other electrical components contain PCBs, and asbestos has been used in components such as fire-proofing, heating and cooling systems, air duct insulation, spray-on and tile acoustical materials, linoleum, floor tiles, roofing, dry wall and plaster. Due to prior or current uses of the Property or in the area, the Property may have hazardous or undesirable metals (including lead-based paint), minerals, chemicals, hydrocarbons, or biological hazards (including, but not limited to, mold) or radioactive items (including electrical and magnetic fields) in soils, water, building components, above or below-ground containers or elsewhere in areas that may or may not be accessible or noticeable. Such items may leak or otherwise be released. Real estate agents have no expertise in the detection or correction of hazardous or undesirable items. Expert inspections are necessary. Current or future laws may require clean up by past, present and/or future owners and/or operators. It is the responsibility of the Seller/Lessor and Buyer/Tenant to retain qualified experts to detect and correct such matters and to consult with legal counsel of their choice to determine what provisions, if any, they may include in transaction documents regarding the Property.

Sellers/Lessors are required under California Health and Safety Code Section 25915 et seq. to disclose reports and surveys regarding asbestos to certain persons, including their employees, contractors, co-owners, purchasers and tenants. Buyers/Tenants have similar disclosure obligations. Sellers/Lessors and Buyers/Tenants have additional hazardous materials disclosure responsibilities to each other under California Health and Safety Code Section 25359.7 and other California laws. Consult your attorney regarding this matter, and make proper disclosures. Grubb & Ellis Company is not qualified to assist you in this matter or provide you with other legal or tax advice.

Sale, lease and other transactions can have local, state and federal tax consequences for the seller/lessor and/or buyer/tenant. In the event of a sale, Internal Revenue Code Section 1445 requires that all buyers of an interest in any real property located in the United States must withhold and pay over to the Internal Revenue Service (IRS) an amount equal to ten percent (10%) of the gross sales price within ten (10) days of the date of the sale unless the buyer can adequately establish that the seller was not a foreigner, generally by having the seller sign a Non-Foreign Seller Certificate. Note that depending upon the structure of the transaction, the tax withholding liability could exceed the net cash proceeds to be paid to the seller at closing. California poses an additional withholding requirement equal to three and one-third percent (3-1/3%) of the gross sales price on all individuals (California residents and non-residents alike) and on entities with a last known street address outside of the State of California if the sale price exceeds \$100,000. Consult your tax and legal advisor. Real estate brokers are not qualified to give legal or tax advice or to determine whether any other person is properly qualified to provide legal or tax advice.

NO AMENDMENTS TO OR MODIFICATIONS OF THIS AUTHORIZATION NOR THE TERMINATION OF THIS

