



CITY OF MILPITAS

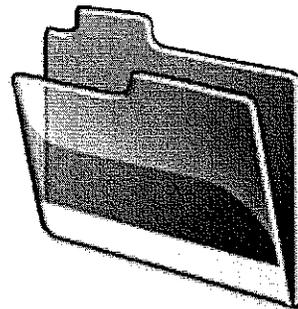
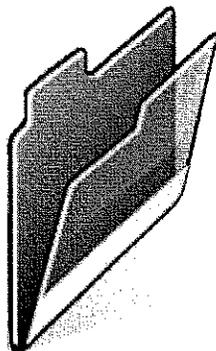
455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479
GENERAL INFORMATION: 408-586-3000, www.ci.milpitas.ca.gov

08/21/2012

Agenda Item No. 10



ATTACHMENT RELATED TO AGENDA ITEM AFTER AGENDA PACKET DISTRIBUTION



**CITY OF MILPITAS
ACQUISITION AND REIMBURSEMENT AGREEMENT
FOR PUBLIC FACILITIES**

This Acquisition and Reimbursement Agreement for Public Facilities ("Agreement"), dated as of August 21, 2012, is by and between the City of Milpitas, a municipal corporation ("City"), and D.R. Horton Bay, Inc., a Delaware corporation ("Developer").

RECITALS

WHEREAS, Developer is the owner of that certain real property in the Transit Area Specific Plan area, in the City of Milpitas, State of California, as more commonly referred to as the Harmony Project, located at 1615 McCandless Street in Milpitas, California ("Project").

WHEREAS, pursuant to conditions of approval for the Project set forth in the Milpitas City Council Resolution No. 8138, approving Major Tentative Map No. MT11-0001, Site Development Permit No. SD11-0007, and Conditional Use Permit No. UP11-0031, adopted on November 15, 2011, the Developer is required to pay Transit Area Specific Plan developer impact fees to defray all or a portion of the cost of sewer facilities to mitigate the impacts of the Project.

WHEREAS, Chapter 4 of Title VIII of the Milpitas Municipal Code (Fees for New Development) establishes the procedures for the collection of developer impact fees and funds as part of the infrastructure improvement program. These provisions and sections 66485-66487 of the Subdivision Map Act further authorize the City to enter into reimbursement agreements to defray a developer's costs in "oversizing" facilities (i.e., constructing facilities of supplemental size, length or capacity over that needed for the impacts of that development, and when such construction is necessary to ensure efficient and timely construction of the facilities network). In such instances, a reimbursement agreement with the developer and a credit against the fee, which would otherwise be charged, pursuant to the Milpitas Municipal Code and its implementing resolutions, shall be offered. Such reimbursement amount shall not include the portion of the improvement needed to provide services or mitigate the need for the facility or the burdens created by the development.

WHEREAS, Developer wishes to construct certain eligible sewer improvements and related facilities that would otherwise be financed by (i) the Transit Area developer impact fee program and (ii) the capital component of the City's sewer connection fee program.

WHEREAS, such sewer improvements and related facilities must be built in excess of the strict needs of the Project in order to efficiently provide supporting public infrastructure for the Project and for the benefit of other new development projects in the area for purposes of orderly community planning. Accordingly, Developer is requesting and is entitled to receive Transit Area Specific Plan developer impact fee and sewer fund payments for the oversizing of the sewer improvements, including amounts attributable to interest, as allowed by law and as set forth in this Agreement. The sewer improvements are included in the City adopted financing plan for Transit Area Specific Plan improvements ("Financing Plan"). In addition, the sewer improvements provide benefit to existing development in the City, so the City will participate in the cost of the sewer improvements for the share of costs not attributable to new development as more particularly set forth herein.

WHEREAS, the sewer improvements to be provided by Developer pursuant to this Agreement contain supplemental size and capacity relative to the demand generated by the development of the Project.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the City and the Developer hereby agree as follows:

AGREEMENT

1. **Project Scope.** Subject to the terms of this Agreement, the City agrees to provide reimbursement of funds and/or fee credits to the Developer for the acquisition and installation of the improvements depicted and described in Exhibit A ("Sewer 11A and 11B Improvements"), attached hereto and incorporated herein by reference.
2. **Allowable Credit/Reimbursement.** Pursuant to the terms and conditions herein, Developer shall be entitled to a combined partial credit and reimbursement of \$2,546,576.15, to be assigned as set forth in Exhibit B attached hereto, for costs and expenses incurred for the design, permitting and construction of the Sewer 11A and 11B Improvements, including design fees and costs, bond costs, legal costs, third party construction management costs, hard and soft construction costs, consulting fees and costs, engineering fees and costs, inspection costs, and fees and expenses payable to the City or other governmental or public utility that are incurred for the permitting, plan check, inspection and construction of the Sewer 11A/11B Improvements, including any changes to the Sewer 11A/ 11B Improvements mandated by requirements of, or conditions imposed by, any governmental authority or public utility which were not reflected in the approved plans ("Sewer Improvement Costs"). The Developer shall be reimbursed for the Sewer Improvement Costs as set forth in greater detail in this section through a combination of (i) the City's issuance of Transit Area Impact fee credits for fees ("Fee Credits"); (ii) cash reimbursement from City's sewer fund and (iii) an in-lieu construction credit for the Developer's otherwise owed TASP fees. The total combined reimbursement set forth below shall not exceed \$2,546,576.15 for actually incurred costs and expenses and shall be subject to the documentation and invoicing requirements of Section 3.
 - a. **Fee Credit.** The Developer shall be entitled to a \$1,378,053.24 Transit Area Impact Fee credit. The City acknowledges that Developer is a party to an agreement ("Cost Sharing Agreement") pursuant to which specific, named benefitting property owners ("Other Benefitting Landowners") will share in the cost of the Sewer 11A and 11B Improvements. Notwithstanding the foregoing, the Developer acknowledges that no provision of this Agreement shall constitute an allocation, freezing or setting of impact fees owed by any Other Benefitting Landowner under the development agreement provisions of Government Code section 65864 *et seq.* or the Mitigation Fee Act provisions of Government Code section 66000 *et seq.* The Other Benefitting Landowners shall merely receive Fee Credits as set forth in Exhibit B attached hereto, such that those benefitting projects shall receive a Fee Credit against Transit Area Impact fees imposed on their projects at the time of building permit. The City makes no representation that the credits assigned to specific properties constitute a proportional or fair allocation of Sewer 11A and 11B Improvement costs attributable to the developments contemplated by the Other Benefitting Landowners. Transit Area Impact fees may be increased at any time by the City, in accordance with applicable state law. All credits assigned under this Agreement shall be limited to a ten (10) year life span and may not be conveyed or transferred to parcels other than those listed in Exhibit B, unless approved or extended by the City at its sole discretion. All credits shall run with the land and may be used by successor property owners within the time limitations and other restrictions set forth herein.

determined by the City, in its sole discretion. This right to reimbursement shall be valid only for a seven (7) year period after the execution of this Agreement (i.e., August 21, 2019).

6. **Process and Procedures.** The Developer shall be responsible for complying with all applicable laws, codes, and regulations relating to contracting and construction procedures, including prevailing wage requirements, to the extent that they apply.
7. **Limited City Obligation.** The obligations arising from this Agreement are neither a debt of the City nor a legal or equitable pledge, charge, lien, or encumbrance upon any of its property or upon any of its income, receipts, or revenues, except for the developer impact fees that would have otherwise been collected for the Sewer 11A and 11B Improvements and other capital facilities set forth in the project plans for each fee program. Neither the City of Milpitas general fund nor any other fund of the City, except the Transit Area Impact Fee program and the City of Milpitas sewer fund, shall be liable for the payment of any obligations arising from this Agreement. The credit or taxing power of the City is not pledged for the payment of any obligation arising from this Agreement. The Developer shall not compel the forfeiture of any of the City's property to satisfy any obligations arising from this Agreement.
8. **Completion.** At such time as the Developer believes that the Sewer 11A and 11B Improvements are complete, the Developer shall provide written notice of completion to the City, requesting an inspection. To be in compliance with the conditions of approval for the Project, such dedication shall be made before the issuance of the first certificates of completion for the Project. Within ten (10) business days or as mutually agreed following the date of receipt of the Developer's written notice of completion of the Sewer 11A and 11B Improvements, the City shall conduct a final inspection of the Sewer 11A and 11B Improvements. If, during the final inspection, the City determines that the Sewer 11A and 11B Improvements have not been completed in accordance with all applicable codes, regulations, permits and approved plans, the City shall prepare a punch list of all items to be completed by the Developer and shall provide such punch list to the Developer within ten (10) business days or as mutually agreed following the final inspection. If the City delivers such punch list to the Developer within said ten (10) business day period or period as mutually agreed upon, then the Developer shall undertake to repair such punch list items in a diligent manner within sixty (60) calendar days. Upon completion of the punch list work, the Developer shall request another final inspection from the City and within ten (10) business days following such written notice from the Developer, the City shall conduct another final inspection. If the City determines that the punch list work is complete and no other deficiencies are identified, the Developer will be deemed to have successfully completed the final inspection. If the City determines that the punch list work is not complete, then City and Developer shall repeat the inspection/punch list procedures specified in this Section until the successful completion of the punch list work and a final inspection. At such time as Developer has successfully completed the final inspection, City shall accept the completed Sewer 11A and 11B Improvements within thirty (30) calendar days thereafter City shall not unreasonably withhold, delay or condition acceptance of the Sewer Improvements.
9. **Conveyance of the Sewer 11A and 11B Improvements.** Once the Sewer 11A and 11B Improvements are accepted by the City and no liens have been filed with respect to the Sewer 11A and 11B Improvements within ninety (90) days following the date of filing the Notice of Completion (or if valid liens were filed during such period, such liens have been bonded around or removed prior to acceptance), the Sewer 11A and 11B Improvements shall become the property of the City. The Developer shall take any and all actions necessary to convey to the City and vest in the City full, complete and clear title to the Sewer 11A and 11B Improvements through the City's initial and final acceptance procedures.

10. **Delivery of Plans and Specifications.** Prior to acceptance of the Sewer 11A and 11B Improvements by the City, the Developer shall deliver to the City copies of all plans, specifications, shop drawings, as-built plans, operating manuals, service manuals, warranties and other documents relating to the design, construction, installation and operation of the Sewer 11A and 11B Improvements. Plans shall be submitted in CAD format, GIS format and PDF format as acceptable to the City.
11. **Liens, Claims, and Encumbrances.** Prior to acceptance of the Sewer 11A and 11B Improvements by the City, the Developer shall provide a written guarantee and assurance to the City that there are no liens, claims, or monetary encumbrances on the Sewer 11A and 11B Improvements, together with unconditional final releases from all contractors and material suppliers, and with copies of invoices and corresponding checks issued by the Developer for all items for which reimbursement is requested under this Agreement for the Sewer 11A and 11B Improvements. Notwithstanding any other provision or term of this Agreement, the City shall have no obligation to issue any Fee Credits until the Developer has cleared any and all liens, claims and monetary encumbrances from the Sewer 11A and 11B Improvements and provided the required documentation, guarantee and assurance in writing, to the satisfaction of the City.
12. **Performance Bond.** Upon the execution of this Agreement, Developer shall file and submit a performance bond to City, as obligee, in the penal sum of TWO MILLION TWO HUNDRED FIFTY THOUSAND DOLLARS (\$2,250,000.00), conditioned upon the full and faithful performance of each of the terms, covenants, and conditions of this Agreement and conditioned upon the full and faithful performance of any and all improvement work required hereunder. Any faithful performance security required hereunder shall be reduced to 10% of the security's original value for one year after the date of final completion and initial acceptance of said work to fulfill the one-year maintenance guarantee period for said improvements.
13. **Warranty and Repair.** The Developer hereby warrants the Sewer 11A and 11B Improvements as to materials and workmanship and, should failure of such improvement occur within a period of one (1) year after final acceptance of such improvement by the City, the Developer shall promptly cause the needed repairs to be made without cost to the City ("Warranty Period"). Nothing herein shall be construed to limit any other warranties the City may have from the manufacturer or any materials used in the Sewer 11A and 11B Improvements, but the warranty contained in this Section 13 shall be the exclusive warranty of Developer and all other express or implied warranties of Developer are expressly disclaimed. Notwithstanding the foregoing, Developer's warranty excludes remedy for damage and defect caused by modifications not performed by Developer or its contractors or agents or the active negligence of City, its agents and employees.
14. **Repair.** The City is hereby authorized to make such repairs if the Developer fails to make or undertake with due diligence the aforesaid repairs within twenty (20) calendar days after the City has given written notice of such failure. In case of emergency where, in the sole opinion of the City Engineer, delay would cause serious hazard to the public, the necessary repairs may be made or lights, signs and barricades erected, without prior notice to the Developer. In all cases of failure of the Sewer 11A and 11B Improvements within the Warranty Period where the City has taken action in accordance with this paragraph, the Developer shall reimburse the City as appropriate for all reasonable costs, direct and indirect, incurred by the City.

15. **Insurance.** Prior to commencing any work, Developer, agrees to obtain an encroachment permit from the Engineering Division and at Developer's expense, provide City with a duplicate public general liability and automobile liability insurance policy with endorsements showing the City as additional insured which insures City, its officers and employees against liability for injuries to persons or property (with minimum coverage of \$1,000,000 for each person and \$1,000,000 for each occurrence and \$1,000,000 for property damage for each occurrence) in connection with work performed by, for or on behalf of Developer. Said Policy shall: (a) be issued by an insurance company authorized to transact business in the State of California; (b) be written on the Standard California Comprehensive General Liability Policy Form which includes, but not limited to property damage, and bodily injury; (c) be written on an occurrence basis; (d) require thirty (30) days prior written notice to City of cancellation or coverage reduction; (e) provide that it is full primary coverage so that if said City, its officers and employees have other insurance covered by said policy, said other insurance shall be excess insurance; (f) provide that said City, its officers and employees shall not be precluded from claim against other insured parties thereunder; (g) be maintained in effect until final acceptance of Developer's improvements. If Developer does not comply with the provisions of this paragraph, City may (at its election and in addition to other legal remedies) take out the necessary insurance, and Developer shall forthwith repay City the premium therefor.
16. **Workers Compensation Insurance.** Developer agrees that any general contractor engaged by the Developer for any work of improvement under this Agreement will have:
- a. In full force and effect, a Worker's Compensation Insurance as shown by a Certificate of Worker's Compensation Insurance issued by an admitted insurer. Said Certificate shall state that there is in existence a valid policy of Worker's Compensation Insurance in a form approved by the California Insurance Commissioner. The certificate shall show the expiration date of the policy, that the full deposit premium on the policy has been paid and that the insurer will give City at least thirty (30) days prior written notice of the cancellation or coverage reduction of the policy.
- or
- b. In full force and effect, a Certificate of Consent to Self-Insure issued by the Director of Industrial Relations and certified by him to be current, together with a Declaration under penalty of perjury in a form satisfactory to the City Attorney that said Certificate is in full force and effect and that the Developer or its general contractor shall immediately notify the City in writing in the event of its cancellation or coverage reduction at any time prior to the completion of all work of improvement.
17. **Indemnity.** The Developer, by execution of this Agreement, specifically agrees to assume the defense of, indemnify, and hold harmless the City and its officers, employees, consultants, and agents from and against all liabilities, actions, damages, claims, losses or expenses of every type and description, including attorneys' and consultants' fees and expenses, the payment or requirement of payment of prevailing wages, the failure to comply with any state or federal labor laws, regulations or standards in connection with this Agreement, or any act or omission of the City related to this Agreement with respect to the payment or requirement of payment of prevailing wages, whether or not any insurance policies shall have been determined to be applicable to any such claims (collectively "Liabilities"), to which they may be subjected or put, by reason of, or resulting from, the acquisition or installation of the Sewer 11A and 11B Improvements, except Liabilities arising from the sole negligence, active negligence, or willful misconduct of the City. It is further agreed that City does not, and shall not, waive any rights

against the Developer which they may have by reason of this indemnity and hold harmless agreement because of the acceptance by City, or Developer's deposit with City of any of the insurance policies described in this Agreement. The indemnity provided hereunder shall terminate at the expiration of the Warranty Period.

18. **No Third Party Beneficiaries Except for Other Benefitting Landowners.** The City and the Developer enter into no contract or agreement with any general contractor, subcontractor, or other party by entering into this Agreement; nor is any general contractor, subcontractor, or other party a third party beneficiary of this Agreement; and the City shall have no obligation to pay any general contractor, subcontractor, or other party for any work that such general contractor, subcontractor, or other party may do pursuant to the plans and specifications for the Sewer 11A and 11B. Notwithstanding the foregoing, the Other Benefitting Landowners shall constitute third party beneficiaries solely to the extent that those landowners are entitled to impact fee credits as set forth in Exhibit B and that those landowners have completion rights under Section 26 of this Agreement.
19. **Notice.** Any notice, payment, or instrument required or permitted by this Agreement to either party shall be deemed to have been received when personally delivered to that party or seventy-two (72) hours following deposit of the same in any United States Post Office, first class, postage prepaid, addressed as follows:

City: City Engineer
Milpitas City Hall
455 East Calaveras Boulevard
Milpitas, CA 95035

Phone: 408-586-3240; Fax: 408-586-3056

Developer: D. R. Horton, America's Builder
6630 Owens Drive
Pleasanton, CA 94588
Attn: Richard P. Ambrosini, Division President and Nicholas A. Arenson, Vice President Land Acquisitions
E-mail:
rambosini@drhorton.com; narenson@drhorton.com
Phone: 925-225-7400; Fax: 925-225-7402

20. **Term.** The term of this Agreement shall start as of the date first written above and shall remain in effect until all the terms and conditions contained in this Agreement have been satisfied.
21. **Severability.** If any portion of this Agreement is declared by a court of competent jurisdiction to be invalid or unenforceable, such portion shall be deemed severed from this Agreement and the remaining parts shall remain in full effect as though such invalid or unenforceable provision had not been a part of this Agreement.

22. **Governing Law; Venue.** This Agreement is made under, and shall in all respects be interpreted, enforced, and governed by, the laws of the State of California. In the event of a dispute concerning the terms of this Agreement, the venue for any legal action shall be with the appropriate court in the County of Santa Clara, State of California.
23. **Entire Agreement.** This Agreement contains the entire agreement between the parties with respect to the matters contained herein and may be amended only by subsequent written agreement signed by both parties.
24. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but both of which together shall constitute one instrument.
25. **Allocation of Fee Credits.** Other than the allocation of Fee Credits hereunder to the projects identified in Exhibit B, Fee Credits shall not be further assignable except that the Fee Credits shall run with the land and specifically with each project identified in Exhibit B.
26. **Assignment.** Developer shall not assign the obligations under this Agreement to any non-Other Benefitting Landowner without the prior written consent of the City Manager, provided however, in the event Developer is in default of any obligations to construct the Sewer Improvements, and any party identified on Exhibit B steps in to cure such default and takes over construction of the Sewer Improvements, upon the written assumption of all obligations hereunder (including bonding, insurance and indemnity obligations), such party shall be substituted as the "Developer" hereunder. The Other Benefitting Landowners listed in Exhibit B shall be considered pre-approved for assignment in the event of a construction default of this Agreement and shall require no further action by the City to accept assignment of this Agreement other than the City's acceptance of a written notice of assignment from the Other Benefitting Landowner. By accepting the assignment of this Agreement in the event of a construction default, the Other Benefitting Landowner hereby specifically agrees to assume the defense of, indemnify, and hold harmless the City and its officers, employees, consultants, and agents from and against all liabilities, actions, damages, claims, losses or expenses of every type and description, arising from the Other Benefitting Landowner's acceptance of the assignment and performance of obligations under this Agreement.
28. **Expiration of Credits.** The Fee Credits issued hereunder shall expire ten (10) years from the date Developer files a Notice of Completion for the Sewer 11A/11B Improvements, unless such Fee Credits are extended in the City's sole discretion.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and the year first written above.

CITY OF MILPITAS:

By: _____

Developer:

By: _____

EXHIBIT A
Sewer 11A and 11B Improvements



**SEWER REPLACEMENT PROJECT
11A AND PORTION OF 11B
MILPITAS, CA**

EXHIBIT B
ASSIGNMENT OF REIMBURSEMENT PAYMENTS AND CREDITS TO DEVELOPER AND
OTHER BENEFITTING LANDOWNERS

| Other Benefitting Landowners | Sewer Fund Payment | TASP Credit | TASP Construction In Lieu Credit | Assessor parcel Numbers of Other Benefitting Landowners Receiving TASP Credit Running with Land |
|--|--------------------|--------------|----------------------------------|---|
| DR Horton | \$914,405.15 | \$183,434.24 | \$254,117.76 | 086-41-019, 086-41-020, 086-41-021, 086-41-022 |
| Taylor Morrison | | \$228,321.00 | | 086-33-094, 086-33-095, 086-33-098, 086-33-099 |
| Nine at the District Project Owner, LLC (Integral) | | \$384,252.00 | | 086-33-092 |
| Great Mall Parkway Project, LLC (Integral) | | \$214,749.00 | | 086-33-093 |
| The Milpitas Project Owner, LP (Integral) | | \$367,297.00 | | 086-33-101 |

Total Credits and Reimbursements Payment: \$2,546,576.15