



REPORT TO COUNCIL City of Sacramento

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915 I Street, Sacramento, CA 95814-2671
[www. CityofSacramento.org](http://www.CityofSacramento.org)

CONSENT
September 28, 2010

Honorable Mayor and
Members of the City Council

Title: Indemnification Agreement with Calvine & Elk Grove – Florin,LLC regarding the Curtis Park Village project

Location/Council District: Old Western Pacific Railyard: North of Sutterville Road, south of Portola Way, east of the Union Pacific Railroad/Regional Transit South Line, and west of the existing Curtis Park neighborhood/24th Street. (Council District 5)

Recommendation: Adopt a Resolution authorizing the City Manager to execute an indemnification agreement with Calvine & Elk Grove – Florin,LLC relating to the Curtis Park Village project (P04-109).

Contact: Lindsey Alagozian, Senior Planner, 808-2659, Joy Patterson, Principal Planner, 808-5607, David Kwong, Planning Director, 808-2691

Department: Community Development Department

Division: Current Planning

Organization No: 21001010

Description/Analysis:

Issue: Whenever suit is filed challenging the City's approval of a development project, the City can incur significant costs to defend the action. In addition, in some circumstances, the City may be liable to pay the attorney's fees of the challenger. Recognizing that approval of a development project is primarily for the benefit of the applicant/owner, the City regularly looks to the applicant/owner to assume all of the costs of such litigation. The proposed indemnification agreement with the Curtis Park Village applicant / owner is intended to formalize this understanding. Under the agreement, the applicant/owner agrees to defend, indemnify, hold harmless, and release the City from any liability arising out of, concerning, or in any manner connected with the processing of and action taken on the Curtis Park Village project.

Policy Considerations: Approval of a development project is primarily for the benefit of the applicant/owner, and the City regularly looks to the applicant/owner to assume all of the costs of such litigation. Under the proposed indemnification agreement, the Curtis Park Village applicant / owner agrees to defend, indemnify, hold harmless, and release the City from any liability arising out of, concerning, or in any manner connected with the processing of and action taken on the Curtis Park Village project.

Environmental Considerations/Sustainability: None

Commission/Committee Action: None

Rationale for Recommendation: Approval of a development project is primarily for the benefit of the applicant/owner, and the City regularly looks to the applicant/owner to assume all of the costs of such litigation. Under the proposed indemnification agreement, the Curtis Park Village applicant / owner agrees to defend, indemnify, hold harmless, and release the City from any liability arising out of, concerning, or in any manner connected with the processing of and action taken on the Curtis Park Village project.

Financial Considerations: This agreement provides protection for the City of Sacramento from any losses or damages incurred by the owner / applicant with regard to the Curtis Park Village project.

Emerging Small Business Development (ESBD):

City Council approval of this resolution is not affected by City policy related to the ESBD Program. No goods or services are being purchased.

Respectfully Submitted by: 
DAVID KWONG
Planning Director

Approved by: 
MAX FERNANDEZ
Director, Community Development Department

Recommendation Approved:


GUS VINA
Interim City Manager

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RESOLUTION NO. 2010-

Adopted by the Sacramento City Council

September 28, 2010

AUTHORIZING THE CITY MANAGER TO EXECUTE AN INDEMNITY AGREEMENT WITH CALVINE & ELK GROVE-FLORIN, LLC RELATING TO THE CURTIS PARK VILLAGE PROJECT (P04-109)

BACKGROUND

- A. On February 25, 2010, the City Planning Commission conducted a public hearing on and forwarded a recommendation of approval to the City Council for the Curtis Park Village project (P04-109).
- B. On April 1, 2010 the City Council conducted a public hearing on, certified the Environmental Impact Report, adopted two resolutions providing policy direction for, and continued the public hearing on the Curtis Park Village project.
- C. On September 28, 2010 the City Council is scheduled to complete the public hearing and take final action on the Curtis Park Village project.

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

- Section 1. The City Manager is hereby authorized to execute an indemnification agreement with Calvine & Elk Grove – Florin, LLC relating to the Curtis Park Village project (P04-109) in the form attached as Exhibit A.
- Section 2. Exhibit A is a part of this Resolution.

Exhibit A – Agreement with Calvine & Elk Grove-Florin, LLC

Indemnification Agreement

**City of Sacramento and Calvine & Elk Grove-Florin, LLC
Curtis Park Village (P04-109)**

THIS AGREEMENT, dated _____, _____, for purposes of identification, is between the City of Sacramento, a California municipal corporation (the “City”), and Calvine & Elk Grove-Florin, LLC, a _____ (“Owner”).

Recitals

- A. Owner has submitted to the City an application for a development project known as Curtis Park Village (P04-109) (the “Project”) and comprised of the following requested approvals and entitlements: Environmental Impact Report and Mitigation Monitoring Program, General Plan Amendment, Rezoning, Inclusionary Housing Plan, Planned Unit Development Development Guidelines and Schematic Plan, Large Lot Tentative Subdivision Map, Tentative Subdivision Map, and Subdivision Modifications (the “Application”).
- B. The Project is located at the Old Western Pacific Railyard: North of Sutterville Road, south of Portola Way, east of the Union Pacific Railroad/Regional Transit South Line, and west of the existing Curtis Park neighborhood/24th Street (APNs: 013-0010-008 & -009, 013-0010-021 through -028, and 013-0062-001 & -002).
- C. Owner acknowledges that its request for approval of the Project is for Owner’s benefit and , therefore, at all times during the processing of the application and upon approval of the application, in whole or in part and with or without conditions, Owner agrees to defend, indemnify, hold harmless, and release the City as set forth in this Agreement.

Agreement

- 1. ***Indemnity.*** Upon tender by the City, Owner shall defend, indemnify, and hold harmless the City, its officers, employees, and agents, and each and every one of them, from and against any and all claims, actions, or other proceedings of any kind to contest, attack, set aside, void, or annul any certification, approval, or other action or failure to act, arising out of, concerning, or in any way connected to the Application, the Project, or any portion of either, including the issuance of

Exhibit A – Agreement with Calvine & Elk Grove-Florin, LLC

or the refusal to issue any permits prior to or during the pendency of the claim, action, or proceeding. Owner's obligation to indemnify and hold harmless shall include all damages, costs of suit, fees (including attorney's fees awarded under Code of Civil Procedure section 1021.5 or otherwise), and expenses of every type and description, including the cost of preparing the administrative record, fees and/or costs reasonably incurred by the City for its staff attorneys or outside attorneys, and any fees and expenses incurred in enforcing this provision, where such damages, costs of suit, fees, and expenses are claimed by or awarded to any party against the City or otherwise incurred by the City.

2. **City to Notify Owner.** The City will promptly notify Owner of any claim, action, or proceeding filed and served on the City arising out of, concerning, or in any way connected to the Application or the Project, or any portion of either.
3. **City and Owner to Cooperate in Good Faith.** The City and Owner agree to cooperate in good faith in the defense of any claim, action, or proceeding that is subject to this Agreement.
4. **City Approval of Legal Counsel.** The City shall have the right to approve the legal counsel providing the City's defense under this Agreement, which approval shall not be unreasonably withheld.
5. **Separate Legal Counsel.** If a conflict of interest arises between Owner and the City in the joint defense of any claim, action, or proceeding, then, in the City's sole discretion,
 - a. Owner shall provide to the City separate counsel acceptable to the City at Owner's reasonable expense; or
 - b. The City shall retain its own counsel at the City's expense.
6. **Effect of Judgment.** If a judgment or order is entered against the City that includes an award of attorneys fees and /or costs in favor of the successful party or parties, Owner shall pay the entire award, without right of offset, contribution, or indemnity from the City, notwithstanding anything to the contrary in the judgment or order. The City and Owner shall meet and endeavor, in good faith, to reach agreement on whether or not to file an appeal and/or any amendments to the Project approvals needed to allow the development of the Project to proceed in a reasonable manner, taking into account the terms and conditions of the court's judgment or order. If the court's judgment or order requires the City to engage in other or further proceedings, the City agrees to comply with the terms of the judgment or order in a timely manner, subject to Owner's payment to the City of all of the City's costs to conduct the proceedings arising from the judgment or order.

Exhibit A – Agreement with Calvine & Elk Grove-Florin, LLC

7. **Subdivision Map Act.** With respect to approvals and entitlements governed by the Subdivision Map Act, California Government Code section 66410 et seq., the obligations under this Agreement shall be construed to be consistent with and shall apply to the extent permitted under California Government Code Section 66474.9. In these cases, if the City should fail to promptly notify Owner of the claim, action or proceeding or cooperate fully in the defense, the Owner shall not thereafter be responsible to defend, indemnify, and hold harmless the City or its agents, officers, and employees to the extent California Government Code section 66474.9 applies. The Owner shall not be required to pay or perform any settlement of such claim, action, or proceeding unless the settlement is approved in writing by Owner.
8. **Owner's Obligations.** The Owner's obligations under this Agreement shall apply regardless of whether any permits or entitlements are issued.
9. **Release of Claims.** Owner unconditionally and forever releases and discharges the City, its officers, employees, and agents, and each and every one of them, from all liabilities, claims, demands, damages, and costs (including reasonable attorneys' fees and litigation costs through final resolution on appeal) that in any way arise from, or are connected with, the issuance of or the refusal to issue any building or other permit for the Project while any claim, action, or proceeding concerning the Application, the Project, or any portion of either, is pending. This release and discharge covers all claims, rights, liabilities, demands, obligations, duties, promises, costs, expenses, damages, and other losses or rights of any kind, past, present, and future, whatever the theory of recovery, and whether known or unknown, patent or latent, suspected or unsuspected, fixed or contingent, or matured or unmatured. Owner hereby waives all rights it has or may have in the future under section 1542 of the California Civil Code, which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."
10. **Miscellaneous.**
 - a. **Notices.** Any notice or other communication under this Agreement must be in writing and will be considered properly given and effective only when mailed or delivered in the manner provided by this Section 9(a) to the persons identified below. A mailed notice or other communication will be effective or will be considered to have been given on the third day after it is deposited in the United States Mail (certified mail and return receipt requested), addressed as set forth below, with postage prepaid. A notice or other communication sent in any other manner will be effective or will be considered properly given when actually delivered. Any party may change its address for these purposes by giving written notice of the change to the other party in the manner provided in this section.

Exhibit A – Agreement with Calvine & Elk Grove-Florin, LLC

If to the City:

If to Owner:

b. *Assignment.* A party may not assign or otherwise transfer this agreement or any interest in it without the other party's written consent. An assignment or other transfer made contrary to this Section 9(b) is void.

c. *Successors and Assigns.* This agreement binds and inures to the benefit of the successors and assigns of the parties. This Section 9(c) does not constitute the City's consent to any assignment of this agreement or any interest in this agreement.

d. *Interpretation.* This agreement is to be interpreted and applied in accordance with California law, without regard to conflict-of-law principles, subject to the following:

i. The rule of interpretation in Civil Code section 1654 will not apply.

ii. Sections 1 and 8 of this Agreement are to be interpreted so as to provide the City and the City's elected officials, its officers and employees, and each and every one of them, with the maximum protection possible against any obligation or liability that in any way arises out of, concerns, or in any way was connected to the Application, the Project, or any portion of either.

iii. "Includes" and "including" are not restrictive. "Includes" means "includes but not limited to," and "including" means "including but not limited to."

e. *Waiver of Breach.* A party's failure to insist on strict performance of this Agreement or to exercise any right or remedy upon the other party's breach of this Agreement will not constitute a waiver of the performance, right, or remedy. A party's waiver of the other party's breach of any term or provision in this Agreement will not constitute a continuing waiver or a waiver of any subsequent breach of the same or any other term or provision. A waiver is binding only if set forth in writing and signed by the waiving party.

f. *Severability.* If a court with jurisdiction holds any nonmaterial provision of this Agreement to be invalid, void, or unenforceable, then the remaining provisions will remain in full force

g. *Counterparts.* The parties may execute this Agreement in counterparts, each of which will be considered an original, but all of which will constitute the same agreement.

Exhibit A – Agreement with Calvine & Elk Grove-Florin, LLC

h. *Integration and Modification.* This Agreement sets forth the parties' entire understanding regarding the matters addressed. It supersedes all prior or contemporaneous agreements, representations, and negotiations (written, oral, express, or implied) and may be modified only by another written agreement signed by both parties.

City of Sacramento

Owner _____

By: _____
Gus Vina
Interim City Manager
Dated: ____, 2010

By: _____
[Name and Title]
Dated: ____, 2010

Approved as to Form
Sacramento City Attorney

Approved as to Form
Name of Counsel (if any)

By: _____
[Name]
[Title]

By: _____
[Name]
Attorneys for _____