

**AGREEMENT TO FUND
DESIGN OF I-5 INTERCHANGE
AND
COSUMNES RIVER BOULEVARD EXTENSION**

Effective Date: _____, 2007

1. **Parties.** In this Agreement, "the City" means the City of Sacramento, a California municipal corporation and charter city; "M&H" means M & H Realty Partners VI, a California limited partnership; "SCDS" means SunCal Delta Shores, LLC, a Delaware limited liability company; "Developers" means both M&H and SCDS, and "Developer" refers to an individual Developer.

2. **Background.** The "Project" is a new freeway interchange at the future intersection of Cosumnes River Boulevard and Interstate Highway 5, as well as for the eastward extension of Cosumnes River Boulevard from Interstate Highway 5 to Franklin Boulevard and the westward extension of Cosumnes River Boulevard to Freeport Boulevard, as more particularly described in the Interstate 5/Cosumnes River Boulevard Interchange Project Draft Environmental Impact Statement/Environmental Impact Report, as supplemented in the Revised Draft Environmental Impact Report (collectively "EIS/EIS"). After City's issuance of a request for proposals for Project design and engineering services and the receipt of responses thereto, the City has selected and ranked the Mark Thomas Co. and HDR Engineering Inc. as the most qualified firms acceptable to City for the performance of Project design and engineering services. The City and Developers desire to have either the Mark Thomas Co. or HDR Engineering Inc. perform preliminary and final engineering design services for the Project. The City is currently preparing conceptual engineering designs for the Project, and the environmental documents reference two alternative alignments. The City is unable to contract with either the Mark Thomas Co. or HDR Engineering Inc. to perform final engineering design services for the Project until the Project receives Project Approval (as defined below). Developers wish to accelerate the Project schedule and are willing to retain and pay for the Mark Thomas Co. or HDR Engineering Inc. to perform preliminary and final engineering design services for the Project.

"Project Approval" means that all of the following actions have been approved: (i) the City Council's certification of the Final Environmental Impact Report ("FEIR") and selection of a Project alternative alignment, (ii) the Federal Highway Administration ("FHWA") issuance of a Record of Decision for the Final Environmental Impact Statement, and (iii) completion of the pre-award audit of the Consultant Contract (as defined below) by Caltrans. "Project Approval Date" means the last date that all of the foregoing actions have occurred.

Developers own or control certain real property located immediately adjacent to the Project, as depicted on the diagram attached hereto as **Exhibit "A"** and incorporated herein by reference (the "Developers' Property"), which they intend to develop and which would benefit from the extension of Cosumnes River Boulevard eastward to Franklin Boulevard and westward to Freeport Boulevard, as well as benefit from a new interchange at its intersection with Interstate 5. In order to accelerate the schedule for Project implementation if the Project ultimately receives Project Approval, the Developers are willing, to retain and fund the Consultant (as defined below) to commence performing such services for the Project, subject to City granting Developers a contingent right to receive credit against their Fair Share (as defined below) of the total cost of the Project, upon the terms and conditions set forth below.

3. Consultant Contract. Developers agree, with the City's participation, to negotiate in good faith first with Mark Thomas Co. to define the scope and cost to perform preliminary and final engineering design services for the Project. If such negotiations are unsuccessful, as determined by Developers and City, then the Developers and City would negotiate in good faith with HDR Engineering Inc. for such services. Developer will then enter into a contract with either Mark Thomas Co. or HDR Engineering Inc. to provide preliminary and final engineering design professional services for the Project (the "Consultant Contract" or "Contract"). The firm with whom Developers actually enter into the Consultant Contract shall be referred to herein as the "Consultant." Developers agree that they will afford the City a fifteen (15) business day period to review and approve the Consultant Contract prior to its execution with the Consultant. The Consultant Contract shall be in the form of the City's Professional Services Agreement and contain, at a minimum, all of the following provisions:

- a) All Project design and engineering work to be performed by Consultant shall be at City's sole direction and approval and shall be based on the Preferred Alternative identified in the Draft EIR. No work on final design of the Project may commence without City's prior written approval. No design and engineering work related to streets and utilities required for Developer's development project that may connect to or be affected by the Project shall be included in the scope of the Consultant Contract. No acceleration of completion of the Project design and engineering services and no betterments to the Project scope shall be included in the Consultant Contract or any changes thereto without the Developers' and City's approval; however, Developers' approval is not required after City assumes the Consultant Contract.
- b) Developer and Consultant shall copy City on all contract correspondence.
- c) The Contract shall provide for City ownership rights to the design and engineering work, including all preliminary and final plans, reports and all work product, and copyrights (subject to Developers' rights under Section 5 below).

- d) Consultant shall maintain insurance coverages consistent with City's standard Professional Services Agreement requirements, and name City and Developers as additional insureds.
- e) Consultant shall indemnify Developers and City for design defects.
- f) After Project Approval and upon issuance of a written notice to Developers and Consultant, City has the unilateral right to assume the Consultant Contract, replacing Developers as the contracting entity with Consultant without Developer(s)' or Consultant's prior approval. The City shall provide Developers and Consultant with thirty (30) days prior written notice specifying the effective date of the Consultant Contract assumption. If Developers default under the Consultant Contract, then City shall have the right, but not the obligation, to cure any such default and assume the Consultant Contract.
- g) Developers are solely obligated to pay Consultant its costs and fees and if the Developers default or otherwise terminate their participation in the Consultant Contract and City thereafter assumes the Consultant Contract, then City shall become solely responsible to pay Consultant costs and fees after the effective date of City's assumption of the Consultant Contract and City will not be liable to Consultant for any outstanding payments or damages that may be owed by Developer.
- h) Consultant shall be obligated to provide City with copies of all of its invoices and a summary of all payments received from Developers during the term of the Consultant Contract and prior to City's assumption of the Consultant Contract.
- i) Any changes to the Consultant Contract initiated by Developer(s) or Consultant after initial approval of the Consultant Contract by City is subject to City's prior written approval. Developer(s) agrees that it will afford the City a fifteen (15) business day period to review and approve the Consultant Contract amendment prior to its execution with the Consultant. City shall have the unilateral right to initiate changes to the Consultant Contract and Developer(s) shall execute the Consultant Contract amendment after Consultant's execution of the amendment; however any City initiated changes that increase the Consultant Contract cost, and thereby the Developer's obligation to pay such additional cost, shall be subject to the prior approval of Developer(s). If Developer(s) fail to approve the City's proposed amendment, the Consultant may nonetheless proceed with the amendment, but the Developer(s) will not be obligated to pay Consultant the additional cost.
- j) Developers and Consultant must provide City with 30 days prior written notice of termination or cancellation of the Consultant Contract.
- k) All design and engineering work performed by the Consultant on the Project shall be subject to the City's sole direction, review and approval; if City reasonably disapproves of any such work, the Consultant will be obligated to revise such work as specified by City in order to obtain the City's approval thereof.

- l) All coordination with Caltrans, the Federal Highway Administration (FHWA), SMUD and other public agencies regarding review of the Project design and engineering work performed by Consultant and the Project construction scheduling shall be performed by the City.
- l) Developers, collectively, shall have the right to terminate the Consultant Contract at any time, with or without cause, provided, however, that prior to such termination, Developers shall provide City with thirty (30) days prior written notice and thereafter City shall have the right to assume the rights and obligations of Developers thereunder and thereby continue the Consultant Contract if the City approves assumption of the contract within ninety (90) days after the Developer's contract termination becomes effective.

If City disapproves the Consultant Contract or any changes thereto, City shall give Developers written notice of the provision(s) it disapproves within the aforesaid fifteen (15) business day period and specify with particularity what changes must be made in order to obtain the City's approval of the Contract. City shall issue all approvals or disapprovals of the Consultant Contract or changes thereto in writing.

4. Developer's Funding Obligation. Developers agree to pay all costs and expenses owed to Consultant pursuant to the Consultant Contract during the term of the Consultant Contract between Developers and Consultant. Notwithstanding the foregoing, the Developers, individually or collectively, shall at all times have the right to terminate this Agreement and the Consultant Agreement as provided in sections 3 and 10 herein and thereafter will have no further liability for payment of the Consultant Contract under this Agreement, except with regard to the Developers' Fair Share Payment (defined below) of the Project costs. Developers' liability to Consultant after Developers' termination of this Agreement, and prior to any possible City assumption of the Consultant Contract, shall be subject to the applicable terms of the Consultant Contract.

5. City Obligation. If the Project receives Project Approval, City approves the Consultant Contract including all changes thereto, Developers transfer to City Developers' ownership rights to the Project design and engineering work, and City has approved Developers' payments to Consultant as being proper and within the scope of the Consultant Contract as approved by City; then City agrees that it will grant Developers a Fair Share Credit, which is a credit against the amount of the Developers Fair Share Payment of the Project's total costs. The Fair Share Credit shall be equal to the amount the Developers have paid, or a lesser amount as determined by the City as the proper payment amount, under the Consultant Contract. The Developers shall provide City with an accounting of the amount of each Developer's actual payments made to Consultant that should be credited to each Developer under this Agreement. The accounting must be approved by all of the Developers before the City is obligated to grant a Fair Share Credit to any individual Developer.

Notwithstanding anything herein to the contrary, nothing herein obligates the City to approve the Project or commence construction of the Project. In the event there is no Project Approval prior to completion of the work under the Consultant Contract, then City shall have no obligation whatsoever to grant Developers any Fair Share Credit of the Project's total costs for the sums they have paid to Consultant pursuant to the Consultant Contract for the Project's design and engineering, or to otherwise reimburse Developers for said sums. However, in that event, the City shall not be entitled to ownership of the Project design and engineering work, including all preliminary and final plans, reports and all work product, and copyrights, unless City reimburses Developers the amount of their payments under the Consultant Contract.

In the event that the Fair Share Credit, either for Developers collectively or for a Developer individually (based on the foregoing accounting), exceeds the amount of the Fair Share Payment obligation owed for the Project cost, the City will not be obligated to reimburse the Developer(s) or collect funds from another Developer or property owner benefited by the Project to reimburse Developer(s). Any payments made by Developers to Consultant in excess of the Fair Share Payment obligation shall be forfeited.

The "Fair Share Payment" is the amount of each Developer's obligation to pay for all or a portion of the Project's total cost. The amount of the Developer's Fair Share Payment will be determined by the public infrastructure finance studies to be commissioned by City to determine whether creation of a public funding mechanism and/or development fee is an appropriate method to fund the Project. The City shall utilize its best efforts to establish a public funding mechanism and/or development fee applicable to land which will benefit from the Project as recommended by the City's public infrastructure finance studies and any finance plan if the City adopts a finance plan for the Project which includes the Developers' Property. When the City establishes a public funding mechanism and/or a development fee obligation to fund the Project, the City will grant each Developer the applicable amount of its Fair Share Credit against its Fair Share Payment either at the time of establishment of the public funding mechanism or at the time the development fee payment is owed. Nothing herein shall require the City to grant any interest on the amount of the Fair Share Credit for the period of time from the Developer's payment of the Consultant's costs to the time that the City applies the Fair Share Credit to the Fair Share Payment.

6. **City's Discretion.** Nothing herein is intended, nor shall any provision of this Agreement be construed, as to limit, control, commit, condition or influence in any manner whatsoever the City's land use authority, judgment or discretion to approve, deny or condition approval on any or all of the development of Developers' Property, or to approve the Project or construct the Project.

7. **Assignment.** Developers may assign their respective rights to the credits to be granted hereunder, subject to the City's consent, with such consent not to be unreasonably withheld, conditioned or delayed. To be effective, both the assignment and the City's consent to the assignment must be in writing and approved as to form by the City Attorney and the City's consent signed by the City Manager or his designated representative.

8. **Disputed Right to Credits.** If Developers, individually or collectively, and a third party assert a right to the same credits, then the City will place the amount of the disputed credit in suspension until Developer(s) and the third party come to an agreement resolving their dispute which specifies who is entitled to the disputed credits. Until the dispute is resolved, the amount of the disputed credit shall not be available for use by either the Developer or the third party. The term "third party" includes disputes between Developers that are parties to this Agreement and excludes the Consultant. Any such agreement resolving the dispute shall be reasonably acceptable to the City Attorney.

9. **Indemnification.** Developers and City agree and acknowledge that this Agreement is for funding purposes only and that the City will retain sole and absolute final approval rights over the design and engineering services provided by the Consultant for the Project. Accordingly, City agrees to indemnify, defend, protect, and hold the Developers and the Developers' officers, partners, members, shareholders, employees, agents and consultants harmless from all liabilities, claims, demands, damages, and costs (including reasonable attorneys' fees and litigation costs through final appeal) (collectively "Claims") that arise out of, or are in any way related to, caused by, or based upon, Developers' payment for the design and engineering services performed by the Consultant for the Project under this Agreement, but excluding any Claims that (i) arise out of, or are in any way related to, caused by, or based upon, disputes regarding the credits given to Developers, or (ii) are filed by Consultant or any of its officers, partners, members, shareholders, employees, agents and/or subconsultants which arise out of, or are in any way related to, caused by, or based upon, Developers' failure to pay under the Consultant Contract during the period in which the Developers, or either of them, are parties thereto. City's obligation under this Section 9 will survive the expiration or an early termination of this Agreement.

10. **Termination.** Developers, either individually or jointly, may terminate their participation in this Agreement by providing at least thirty (30) days' prior written notice to the City and the other Developer; said notice shall specify a date of termination that is no sooner than thirty (30) days after the date such notice is received by City, after which date the Developer(s) giving said notice will have no further obligation under this Agreement to pay for the design and engineering services provided by Consultant after the termination date of Developer(s) participation in this Agreement. An early termination by a Developer shall not terminate that Developer's right to receive a credit for the funding of the

Consultant Contract actually provided by such Developer, subject to reduction of the credit for the Developer's pro-rata share of any additional Consultant costs incurred that were caused by any delays or stop work orders that were necessitated due to such Developer's early termination.

In the event any individual Developer gives notice that it is terminating its participation in this Agreement, the City and the remaining Developer shall meet and confer within fifteen (15) business days following the date such termination notice was given for the purposes of determining the terms and conditions upon which the remaining Developer might continue to fund the services of the Consultant. If the City and the remaining Developer are unable to agree upon such terms prior to the terminating Developer's effective date of termination, then this Agreement shall be terminated as of the same date unless the remaining Developer agrees in writing to extend the term of this Agreement. Upon termination of this Agreement, neither of the Developers shall be liable to the City under this Agreement to pay any of the Consultant costs incurred after the effective date of termination.

The City may terminate this Agreement by providing Developers with thirty (30) days prior written notice and specifying the effective date of termination. The City's written notice of its intent to assume the Consultant Contract will serve as the City's notice of termination of this Agreement. Notwithstanding the City's termination of this Agreement, the City nonetheless will be obligated to provide a Fair Share Credit against a Developer's Fair Share Payment as specified in Section 5 in the amount of the Developer's proper payments to Consultant under the Consultant Contract prior to the effective date of termination of this Agreement.

11. Construction Costs. This Agreement is not an agreement among the parties hereto as how the actual construction costs of the Project ultimately will be funded or the amount of the Project construction costs, and nothing herein shall be deemed to create a precedent or agreement among the parties as to how such Project construction funding will be provided, nor shall anything in this Agreement be the foundation for determining the amount of a Developer's Fair Share Payment for the funding for the Project's construction costs. The construction of the Project will provide benefits not only to the Developers' Property, but likely also to other areas of the City and the region as may be determined in the public infrastructure financing studies.

12. Notices. Any notice, delivery, or other communication under this Agreement must be in writing and will be considered properly given when personally delivered or mailed to the following persons in the manner provided in this paragraph:

- (a) If to City: Saed Hasan
City of Sacramento

Engineering Services Division
915 "I" Street, Room 2000
Sacramento, CA 94814

(b) If to M&H: M&H Realty Partners VI, L.P.
12555 High Bluff Drive, Suite 385
San Diego, CA 92130
Attn: Scott McPherson

(c) If to SCDS. SunCal Delta Shores, LLC
1430 Blue Oaks Blvd., Suite 200
Roseville, CA 95747
Attn: Tom Karvonen

and

SunCal Delta Shores, LLC
2392 Morse Avenue
Irvine, CA 92614
Attn: Bruce Cook, General Counsel

(d) With copies to: Law Offices of Gregory D. Thatch
1730 "I" Street, Suite 220
Sacramento, CA 95814
Attn: Gregory D. Thatch, Esq.

If sent by mail, a notice, delivery or other communication will be considered to have been received forty-eight (48) hours after it has been deposited in the United States Mail, addressed as set forth above, with postage prepaid, certified mail/return receipt requested. A 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.

13. Interpretation and Venue. This Agreement shall be interpreted and applied in accordance with the laws of the State of California. Any litigation concerning this agreement must be brought and prosecuted in the Sacramento County Superior Court.

14. Waiver. A party's failure to insist on strict performance of this Agreement or to exercise any right or remedy upon another party's breach of this Agreement will not constitute a waiver of the performance, right, or remedy. A party's waiver of another 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.

15. Warranties and Representations. Each person who signs this Agreement on behalf of a party warrants and represents that he or she has the capacity and legal authority to execute this Agreement for that party and to bind that party to the obligations imposed on it by this Agreement.

16. Execution of Agreement. The parties may sign this Agreement in counterparts, each of which will be considered an original, but all of which will constitute one and the same Agreement.

17. Entire Agreement. This Agreement sets forth the parties' entire understanding regarding the matters set forth herein. It supersedes all prior or contemporaneous agreements, representations, and negotiations, whether written, oral, express or implied, and may be modified only by another written agreement signed by both parties.

[Signatures on following pages.]

IN WITNESS WHEREOF, the parties have executed this Agreement as set forth below.

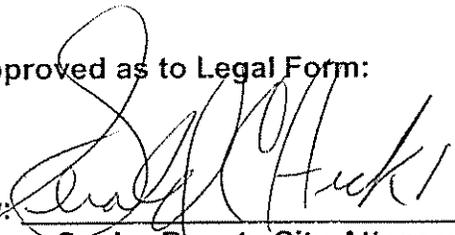
City of Sacramento

By: _____
Ray Kerridge
City Manager

Attest:
City Clerk

By: _____

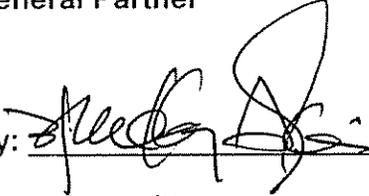
Approved as to Legal Form:

By:  _____
Senior Deputy City Attorney

M & H Realty Partners VI, L.P.
a California limited partnership

By: MHRP VI, L.P.
Its: General Partner

By: Merlone/Hagenbuch VI, Inc.
Its: General Partner

By:  _____

Name: BRADLEY A. GEIER
MANAGING DIRECTOR

Its: _____

Dated: _____

SunCal Delta Shores, LLC
a Delaware limited liability company

By: _____

Name: _____

Its: _____

Dated: _____

M & H Realty Partners VI, L.P.
a California limited partnership

By: MHRP VI, L.P.
Its: General Partner

By: Merlone/Hagenbuch VI, Inc.
Its: General Partner

By: _____

Name: _____

Its: _____

Dated: _____

SunCal Delta Shores, LLC
a Delaware limited liability company

By: Bill Myers

Name: Bill Myers

Its: EVP

Dated: 3/30/07

EXHIBIT "A"
ATTACH DIAGRAM
SHOWING
DEVELOPERS' PROPERTY,
THE I-5 INTERCHANGE, AND COSUMNES BLVD. EXTENSION

City Matter No. 07-0096

