RESOLUTION NO. 2007-926

Adopted by the Sacramento City Council

December 18, 2007

APPROVING REVISION TO STANDARD-FORM ACQUISITION AND SHORTFALL AGREEMENT FOR IMPLEMENTING THE NORTH NATOMAS FINANCING PLAN

BACKGROUND

A. On December 12, 2006, by Resolution No. 2006-918, the city council approved revisions in the standard-form reimbursement/credit agreements for North Natomas. The same resolution also re-adopted the other standard-form agreements for North Natomas, including the acquisition-and-shortfall agreement, that had been approved on July 18, 2000, by Resolution No. 2000-429. In re-adopting the acquisition-and-shortfall agreement, the city council did not intend to make any substantive changes. Yet such a change was inadvertently included at the end of the second paragraph in subsection 3(b).

B. To carry out the City Council's intent, expressed in Resolution No. 2006-918, that the acquisition-and-shortfall agreement be re-adopted without substantive change, the City Council desires to delete the change that was inadvertently included at the end of the second paragraph in subsection 3(b).

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

Section 1. The City Council finds that the statements in the Background are true and adopts them as findings.

Section 2. The standard-form acquisition-and-shortfall agreement attached as Exhibit A to this resolution is hereby approved for use on specific projects within the North Natomas Community Plan area. It supersedes the standard-form acquisition-and-shortfall agreement re-adopted by Resolution No. 2006-918.

Section 3. The City Manager is hereby authorized to sign acquisition-and-shortfall agreements in the form attached as **Exhibit A** to this resolution upon approval for legal form by the City Attorney's office. The City Manager is hereby further authorized, with the approval of the City Attorney's office, to make minor non-substantive changes to the standard-form acquisition-and-shortfall agreement when required for a specific development project. The City Council's approval is required for all major or substantive changes. The City Manager may, in his discretion, bring any individual standard-form acquisition-and-shortfall agreement to the city council for approval.

Section 4. This resolution takes effect immediately upon its adoption.

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Exhibit A- Acquisition and Shortfall Agreements

Adopted by the City of Sacramento City Council on December 18, 2007 by the following vote:

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

Noes: None.

Abstain: None.

Absent: None.

Heather Fargo

Mayor Heather Fargo

Attest:

Shirley Concolino

Shirley Concolino, City Clerk

ACQUISITION-AND-SHORTFALL AGREEMENT

[Name] Community Facilities District No. [Number]

THIS AGREEMENT is made and entered into this ____ day of _____ 20__, by and between the **City of Sacramento**, a charter municipal corporation (hereafter "City"), and [**Developer's name** and type of entity] (hereafter "Developer").

RECITALS

WHEREAS:

A. Developer has requested that City commence and complete proceedings under the Mello-Roos Community Facilities District Act of 1982, chapter 2.5 (commencing with section 53311) of part 1 of division 2 of title 5 of the Government Code of the State of California (hereafter "Act") for the purpose of forming a community facilities district to finance the acquisition and/or construction of certain public improvements to be owned by City or other public agencies, which improvements are specified in **Exhibit "A,"** attached hereto and incorporated herein by this reference (hereafter "Improvements").

B. The district to be formed will be named [Name] Community Facilities District No. [Number] (hereafter "District"). Special tax bonds of the District will be sold to finance a portion of the cost of the acquisition and construction of the Improvements.

C. Section 53313.5 of the Act provides that a community facilities district may finance the purchase of facilities completed after the adoption of the resolution of formation establishing the community facilities district if the facilities have been constructed as if under the direction and supervision, or under the authority of, the local agency whose governing body is conducting proceedings for the establishment of the district. The purpose of this Agreement is to provide for the establishment of the District, the issuance of the bonds for the District (hereafter "Bonds") to finance the design and acquisition of the Improvements and expenses incidental thereto and to provide the terms and conditions, including but not limited to prices and timing, for any reimbursement to Developer.

D. It is contemplated that certain of the Improvements will be constructed under a contract or contracts to be awarded by Developer. Upon their completion, the Improvements to be constructed by Developer are to be conveyed to and accepted by City, or, if appropriate, another public entity or regulated public utility, upon full satisfaction of all of the provisions of this Agreement.

E. Developer is fully aware that there may be insufficient funds from the sale of the Bonds to reimburse Developer for the cost of the Improvements, and that in that case the shortfall in funding must be paid entirely by Developer without reimbursement.

F. It is contemplated that the Improvements to be constructed by Developer will be constructed in phases and that City will sell the Bonds of the District in successive series to finance the acquisition of portions thereof from Developer. The Improvements contemplated to be acquired from developer from the first series of such Bonds are described in **Exhibit A1**.

AGREEMENT

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. **Recitals**. The above recitals are true and correct, and are made a part of this Agreement for all purposes.

2. **Formation of District**. To the extent the City has not already done so, City agrees to initiate and prosecute proceedings pursuant to the Act for the formation of the District. Such proceedings shall include but not be limited to elections pursuant to sections 53326 and 53353.5 of the Act on (a) the question of the issuance of bonds for the District to finance the construction and/or acquisition of the Improvements; (b) the issue of annual levy of special taxes on all taxable property within the District for the payment of principal and interest on the Bonds and the annual administrative expenses of City and the District in levying and collecting such special taxes, paying the principal and interest on the Bonds, including the fees of fiscal agents and paying agents, and any necessary replenishment for the reserve fund for such bonds, or accumulation of funds for future bond payments; and (c) the question of the establishment of an appropriations limit for the District. Developer shall cooperate with City in its conduct of the proceedings for and the establishment of the District.

3. **Sale of Bonds; Reimbursement**. Upon completion of the proceedings as specified in section 2 of this Agreement, City shall proceed with the sale of the Bonds; provided, however, that no Bonds shall be sold unless and until this Agreement is fully executed by all parties, and all required security has been posted. The amount of the Bonds and the phasing thereof (if applicable) shall be as specified in **Exhibit "B,"** attached hereto and incorporated herein by this reference. The timing of the issuance and sale of the Bonds, the aggregate principal amount thereof, and the terms and conditions upon which they shall be sold, shall be determined by City in its sole and exclusive discretion.

   (a) Improvement Fund. The proceeds of the Bonds shall be deposited, held, invested, and disbursed as provided in the Indenture pursuant to which the Bonds are issued. A portion of the proceeds of the Bonds shall be set

aside under the Indenture in a separate fund (the "Improvement Fund"). Monies in the Improvement Fund shall be withdrawn therefrom, in accordance with the provisions of the Indenture, to acquire and/or construct the Improvements, to pay for all or a portion of the costs of acquisition of the Improvements from Developer, and to pay for other costs, all as determined by City and as herein and in the Indenture provided.

(b) Acquisition. Upon completion of the construction of each Improvement, element or increment thereof to be acquired by the City, the City agrees to determine the acquisition price to be paid by the City from the Improvement Fund for such completed Improvement, element or increment, in accordance with the Guidelines, as defined in section 4 below. The acquisition price as to each Improvement, element or increment shall include Developer's actually paid cost of construction thereof as determined by the contract prices as set forth in contracts, invoices, cancelled checks and purchase orders entered into by Developer with its contractors and suppliers, in accordance with the Guidelines. For purposes of the Improvements covered by this Agreement, City may in its sole discretion calculate engineering costs by use of a percentage of project costs, up to a maximum of fifteen percent (15%). "Engineering Costs" shall mean and include engineering, surveying, construction management, plan check fees, and inspection fees.

Upon determining the acquisition price for a completed Improvement, element or increment, the City shall promptly notify Developer in writing of such acquisition price. Upon presentation by Developer to the City of such documents, including lien releases, as the City shall require as to the completed Improvement, element or segment, the City shall, within twenty (20) days thereafter, pay from the Improvement Fund the amount of the acquisition price therefor, minus a retention equal to 150% of the value of "Punch List" work not yet completed. The City shall hold the retention amount on all Improvements acquired until the Punch List work therefor is completed and accepted by the City.

Upon such completion of construction, the City shall accept and acquire the portion of the Improvements which are to be acquired by City. Where some portion of the Improvements are to be to be conveyed to other public entities or regulated public utilities, payment for same will be made by City from the Improvement Fund pursuant hereto, and such Improvements shall be conveyed to and accepted by such other public entities or utilities in accordance with their policies and procedures.

City agrees to allow Improvements to be acquired incrementally, as shown on **Exhibit "C,"** attached hereto and incorporated herein by this reference; provided, however, that no Improvement or element or

increment thereof will be acquired unless the Director of Development Services, or the Director of Utilities, as applicable, certifies in writing to the City Treasurer that the Improvement, element or increment thereof proposed for acquisition is completed and constructed in accordance with the provisions of section 4, and that the Improvement, element or increment thereof is a functional, usable unit of infrastructure capable of being incorporated into the City's infrastructure system.

The obligation of City to pay for the acquisition of the Improvements is limited to monies in the Improvement Fund relating to the Bonds. If the amount of such monies in the Improvement Fund available for the acquisition of the Improvements and incidental expenses is less than the total cost thereof, the shortfall shall be paid entirely by Developer. Developer shall not be precluded from carrying forward any such shortfall, in anticipation of being reimbursed by the City from monies in the Improvement Fund as may subsequently become available, and, subject to any applicable legal or other constraints or restrictions, the City shall pay Developer such shortfall as and when monies do become available in the Improvement Fund.

4. **Construction Standards**. Developer shall design, bid and construct the Improvements in accordance with those portions of the "City of Sacramento Guidelines for Special District Acquisition Projects" ("Guidelines") attached hereto as **Exhibit "D,"** and incorporated herein by this reference, which the Director of Utilities, in his discretion, determines to be applicable to the particular Improvements. Procedures for inspection, approval, application for and manner of payment for the Land and Improvements are also specified in the Guidelines. Developer understands and agrees that sections 53313.5 and 53314.9(a)(3) of the Act require that the Improvements be constructed as if they had been constructed under the direction and supervision, or under the authority of, the appropriate public agency. Compliance with the Guidelines is one manner of fulfilling that legal requirement. So long as that legal requirement is fulfilled, the Director of Utilities, in his discretion, may waive the requirement for compliance with portions of the Guidelines.

5. **Ownership and Transfer of the Improvements**. Any of the Improvements to be owned by public entities or utilities other than City shall be conveyed to and accepted by such public entity or utility in accordance with the entity's or utility's policies and procedures. For the Improvements to be owned by City, the following applies:

   (a) Real Property Interests. For purposes hereof, the term "Land" means either of the following: the real property interests required by the particular Drainage Improvement Agreement or other Improvement Agreement to which the particular Improvement, element or increment to be acquired is subject (the "Improvement Agreement"); or, if there is no such particular

Improvement Agreement, fee simple title or such lesser real property interests as City determines are necessary or convenient in conjunction with the Improvements to be acquired, including but not limited to basin site property to be held in fee by City, and any and all easements required in City's discretion for ownership, operation, maintenance and access to the Improvements. Developer agrees to execute and deliver or cause to be executed and delivered to City the documents required to complete the transfer of all said Land, together with a policy of title insurance provided at Developer's expense insuring that each of the interests to be transferred are free and clear of all liens, taxes, assessments, easements, leases, or other encumbrances (whether recorded or not), except for the following: the "Permitted Encumbrances" described in the applicable Improvement Agreement; or, if there is no applicable Improvement Agreement, the encumbrances which City determines in writing in its sole discretion will not interfere with the intended use of the Land or the related Improvement. Completion of the transfer of title to the Land shall be evidenced by recordation of the acceptance thereof by City.

(b) Improvements. The Improvements shall be transferred to City by such document or documents as City determines in its discretion to be required for that purpose, consistent with the terms of any applicable Improvement Agreement.

(c) Maintenance Pending Transfer. Pending transfer of title to the Land and/or the Improvements to City, Developer shall pay the entire cost of maintenance thereof and shall do so in accordance with the provisions of the Guidelines.

(d) Entry Upon City Property. Where the Improvements or any portion thereof are to be constructed upon property owned by City, Developer shall seek and obtain from City the appropriate right to enter and construct agreement specifying the rights and liabilities of the parties, including but not limited to insurance and indemnification.

6. **Warranties**. Developer's warranty and related obligations are as specified in the Guidelines.

7. **Payment for Incidental and Other Expenses Relating to the Improvements**. It is recognized that certain incidental expenses pertaining to the Improvements, such as environmental studies and engineering, may have been expended by Developer, and that other items to be acquired from Developer, such as Land, may be available for acquisition pursuant hereto, prior to the completion of any of the Improvements, elements or increments thereof. Subject to documentation thereof to the satisfaction of the Director, payment therefor may be made by City pursuant to the applicable provisions of the Indenture subject to the availability of

moneys in the Improvement Fund, and further subject to any applicable legal or other constraints or restrictions.

It is also recognized that certain other incidental expenses, such as costs incurred in the conduct of the financing proceedings and the issuance of the Bonds, will be incurred by City and that Developer may have advanced funding to defray such expenses. Upon appropriate request therefor by the parties advancing such funding, payment therefor may be made by City pursuant to the applicable provisions of the Indenture from available moneys in the Improvement Fund, subject to any applicable legal and other constraints or restrictions.

To the extent that there are unfunded and/or unreimbursed City expenses for review, inspection and project management, said expenses shall be payable to City from bond proceeds.

8. **Limitation of Liability; Excess Costs**. Developer agrees that any and all obligations of the City arising out of or related to this Agreement are special and limited obligations of the City and the City's obligations to make any payments hereunder are restricted solely and entirely to the moneys, if any, in the Improvement Fund and from no other source. This Agreement shall not constitute a general debt or general liability of City. Developer acknowledges that reimbursement hereunder shall be solely from special tax bond proceeds and/or special tax proceeds of the District, and that Developer may not look to the general or other funds of City, City's taxing power or assets for payment for sums advanced or expenditures made by Developer hereunder, whether for the Land, Improvements or the maintenance thereof. Cost overruns on all or any portion of the Improvements shall be the responsibility of Developer, provided that Developer may apply cost savings from any element or increment of the Improvements to another element or increment. Developer shall be solely and fully liable for, and agrees to pay all costs of the Improvements, and the incidental expenses, in excess of the moneys available therefor in the Improvement Fund. No City Councilmember, City officer, employee, contractor, consultant or agent shall incur any liability hereunder to Developer or any other party in their individual capacities by reason of their actions hereunder or execution hereof.

9. **Indemnification; Waiver and Release**.

   (a) Indemnification by Developer. Subject to the provisions of this section 9, Developer agrees and covenants to, and shall fully indemnify, defend and hold harmless City and its elective and appointive boards, commissions, officers, employees and agents, from and against any and all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims, or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, property damage or violation of

any law or regulation to the extent arising from any actions or omissions in connection with the design, construction, operation, maintenance or repair of the Improvements by any of the following: Developer, any of Developer's engineers, contractors or subcontractors, or any other person or entity employed by or acting on behalf of or as the authorized agent for Developer, or any of Developer's engineers, contractors or subcontractors. Provided, however, that Developer shall not be liable hereunder to indemnify, defend or hold harmless City and its elective and appointive boards, commissions, officers, employees and agents against Claims alleging sole and active negligence of City in its functions of design review, approval or construction inspection in connection with the Improvements; provided further, that nothing in this Agreement shall be construed as a waiver by City of any immunity or defense it may have relating to any such Claim, including without limitation immunity or defenses relating to design review and/or approval and/or construction inspection.

(b) Indemnification Regarding Hazardous Substances. Developer further agrees and covenants to, and shall fully indemnify, defend and hold harmless City, and its elective and appointive boards, commissions, officers, employees and agents, from and against any and all Claims arising by reason of any death, bodily injury, personal injury, property damage or damage to the environment to the extent arising from any use, storage, treatment, transportation, release or disposal, on, about or around the portion of the Land on which the detention basin or any of the Improvements or the easements which are required to be or which are transferred to City shall be located, of any Hazardous Substances, as defined in **Exhibit "E,"** attached hereto and incorporated herein by this reference, by any person or entity (except persons or entities acting on City's behalf or under City's control), occurring on or at any time prior to the date the Land and the Improvements are conveyed to City as provided in this Agreement. The foregoing indemnification obligation shall not apply to the incorporation of building materials as part of the Improvements, provided such incorporation is performed in accordance with applicable laws and is not in violation of Environmental Laws in effect at the time of such incorporation.

(c) Duration of Indemnification Obligations. The indemnification and hold harmless agreement made by Developer above, with respect to the Improvements, or each part thereof constructed by Developer, shall expire on a phase-by-phase basis. Such indemnification and hold harmless agreement shall expire with respect to a phase on the date which is one year after the completion of such phase of the Improvements and acceptance thereof by City (hereafter the "Expiration Date"), provided that subsection 9(a) above shall not expire and shall remain in effect with respect to any Claims which are made, initiated, claimed, filed or

assessed at any time prior to the Expiration Date, or which relate to (directly or indirectly) any such Claims. The indemnification and hold harmless agreement made by Developer in subsection 9(b) above shall survive the termination of this Agreement with respect to a phase until the date which is two years after the completion of such phase and acceptance thereof by City. Subsection 9(b) above shall not expire, however, and shall remain in effect with respect to any Claims which are made, initiated, claimed, filed or assessed at any time prior to such date, or which relate to (directly or indirectly) any such Claims. The provisions of this subsection 9(c) shall apply only with respect to the indemnification and hold harmless provisions of this Agreement, and shall not affect the liability, if any, which Developer might have under applicable law to the extent Developer is a contaminator of the Land.

(d) Additional Provisions Regarding Indemnification Obligations. The parties further agree and understand as follows: (1) City does not, and shall not be deemed to, waive any rights against Developer which it may have by reason of the aforesaid indemnity and hold harmless agreements because of any insurance coverage provided pursuant to this Agreement; (2) except as may otherwise be specifically and expressly provided in subsection 9(a) above relating to Claims based upon allegations of sole and active negligence on the part of City, the aforesaid indemnity and hold harmless agreements shall not be limited or waived in any way based upon the fact that City has or shall have prepared, supplied, or approved of plans and/or specifications for the Improvements, or has or shall have inspected or failed to inspect construction of the Improvements; (3) the scope of the aforesaid indemnity and hold harmless agreements is to be construed broadly and liberally to provide the maximum coverage for City in accordance with their terms; (4) no specific term or word contained in this section 9 shall be construed as a limitation on the scope of the indemnification and defense rights and obligations of the parties unless specifically so provided; and (5) Developer shall cause all engineering and construction contracts relating to the Improvements to require the engineer or contractor to fully and without limitation indemnify, defend and hold harmless City and its elective and appointive boards, commissions, officers, employees and agents, from and against any and all Claims arising by reason of any death, bodily injury, personal injury, property damage or violation of any law or regulation to the extent arising from any actions or omissions of such professional in connection with the design, construction, maintenance, operation or repair of the Improvements by said engineer or contractor, or any other person or entity employed by or acting as the authorized agent for said engineer or contractor, but only to the extent that such professional or other party has contractual responsibility for a portion or aspect of the Improvements. For example, a contractor responsible for constructing a portion of the Improvements would not be held responsible for the design, nor would an engineer who

designed a portion of the Improvements be held responsible for construction not in accordance with the design. So long as the construction contract contains the language contained in **Exhibit "F,"** attached hereto and incorporated herein by this reference, or other language approved in writing by the City, and if City is satisfied in its judgment with the adequacy of the engineer's or contractor's insurance, Developer shall be deemed to have satisfied its obligation under subsection 9(d)(5) to obtain for the City indemnification and defense obligations on the part of Developer's engineers and contractors.

(e) Waiver by Developer. In addition to Developer's obligations to indemnify, hold harmless and defend City as set forth above, Developer, its assigns, transferees and successors, hereby waives and releases any and all claims of whatever sort or nature which may arise against City or its officers, employees and agents, in connection with the design or construction of the Improvements.

(f) Unknown Claims. This waiver and release shall include any and all claims arising under section 1542 of the California Civil Code, which provides that:

> "A general release does not extend to claims which a 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."

Thus, notwithstanding the provisions of section 1542, and for the purpose of implementing a full and complete release, the parties hereto expressly acknowledge that this Agreement is intended to release and extinguish, without limitation, all claims as described in this section 9 which the parties do not know or suspect to exist. The provisions of this section 9 shall survive termination of this Agreement.

(g) Indemnification by City. City further agrees and covenants to, and shall fully indemnify, defend and hold harmless Developer, and its elective and appointive boards, commissions, officers, employees and agents, from and against any and all Claims arising by reason of any death, bodily injury, personal injury, property damage or damage to the environment (1) to the extent arising from any City use, storage, treatment, transportation, release or disposal, on, about or around the portion of developer Property on which the detention basin or any of the Improvements or the easements which are required to be or which are transferred to City shall be located, of any Hazardous Substances, as defined above, by any person or entity (except persons or entities acting on Developer's behalf or under Developer's control), occurring on or at any time after the date the detention basin site, the Improvements, and the

said easements are conveyed to City as provided in this Agreement; or (2) arising from any act (including but not limited to those covered by clause 9(g)(1) immediately above) on the part of City or its agents or employees in the use and operation of the Improvements. The provisions of this subsection 9(g) do not limit, in any way, the City's obligations under any applicable Improvement Agreement.

10. **Audit**. The Director shall have the right, during normal business hours and upon the giving of ten days written notice to Developer, to review all books and records of developer pertaining to costs and expenses incurred by Developer in constructing the Improvements, including any and all construction contracts, subcontracts, change orders, invoices and payroll records.

11. **Notices**. Any notice, payment or instrument required or permitted by this Agreement to be given or delivered to either party shall be deemed to have been received when personally delivered or one week following deposit of the same in any United States Post Office, registered or certified mail, postage prepaid, addressed as follows:

(a) To Developer:

[Name of contact]
[Name of entity]
[Street address]
[City, state, zip code]

with a copy to—

[Name of contact]
[Name of entity]
[Street address]
[City, state, zip code]

(b) To City:

City of Sacramento
Utilities Department
1395 35th Avenue
Sacramento, CA
Attention: Director

and

City of Sacramento
Planning Department
915 "I" Street, Third Floor
Sacramento, CA 95814
Attention: Manager, Public Improvement Financing

Each party may change its address for delivery of notice by delivering written notice of such change of address to the other party.

12. **Severability**. If any part of this Agreement is held to be illegal or unenforceable by a court of competent jurisdiction, the remainder of this Agreement shall be given effect to the fullest extent reasonably possible.

13. **Successors and Assigns**. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties. This Agreement may not be assigned by Developer without the prior written consent of City, which consent shall not be unreasonably withheld or delayed. In connection with any such consent of City, City may condition its consent upon the acceptability of the financial condition of the proposed assignee and upon any other factor which City deems relevant in the circumstances.

14. **Waiver**. Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Agreement thereafter.

15. **Termination**.

    (a) Mutual Consent. This Agreement may be terminated by the mutual, written consent of City and Developer, in which event City may let contracts for any remaining work related to the Improvements not theretofore acquired from Developer hereunder, and use all or any portion of the monies in the Improvement Fund to pay for same, and Developer shall have no claim or right to any further payments for the Improvements except as otherwise may be provided in such written consent.

    (b) City Election for Cause. The following events shall constitute grounds for City, at its option, to terminate this Agreement, without the consent of Developer.

        (1) Developer shall voluntarily file for reorganization or other relief under any Federal or State bankruptcy or insolvency law.

        (2) Developer shall have any involuntary bankruptcy or insolvency action filed against it, or shall suffer a trustee in bankruptcy or insolvency or receiver to take position of the assets of Developer, or shall suffer an attachment or levy of execution to be made against the property it owns within the District unless, in any of such cases, such circumstance shall have been terminated or released within sixty (60) days thereafter.

        (3) Developer shall abandon construction of the Improvements.

(4) Developer shall breach any material covenant or default in the performance of any material obligation hereunder.

(5) Developer shall transfer any of its obligations under this Agreement without the prior written consent of the City.

(6) Developer or any of its successors or assigns shall at any time challenge the validity of the District, the Bonds, or the levy of the special tax within the District. (This provision is not intended to preclude developer from reviewing the annual levy of the special tax for conformity with the special tax formula.)

(7) Developer shall materially fail to complete the Improvements.

If any such event occurs, City shall give written notice thereof to Developer, and Developer shall meet and confer with the Director and other appropriate City staff and consultants as to options available to assure timely completion of the Improvements. Such options may include, but not be limited to the termination of this Agreement by City. If City elects to terminate this Agreement, then City shall first notify Developer (and any mortgagee or trust beneficiary Developer has identified to City, in writing, as entitled to receive such notice) in writing of the grounds for such termination and shall allow Developer at least sixty (60) days to eliminate or mitigate the grounds for such termination to the satisfaction of the City Engineer and the City Attorney. If the particular mitigation or elimination is such that, by its nature, it cannot be completed within sixty (60) days, then the period therefor shall be extended for the period reasonably necessary to effect such mitigation or elimination, so long as Developer commences within such sixty (60)-day period, and diligently pursues completion. Any period may be extended, at the sole discretion of City, if Developer, to the satisfaction of City, is proceeding with diligence to eliminate or mitigate such grounds for termination. If at the end of such period (and any extension thereof), as determined solely by City, Developer has not eliminated or completely mitigated such grounds, to the satisfaction of City, City may then terminate this Agreement. In such a case, City shall proceed in accordance with the provisions of subsection 15(a) above.

(c) Liability for taxes in case of termination. Notwithstanding termination of this Agreement, Developer's land shall remain fully liable for its allocable share of the payment of the special taxes supporting the debt service on the Bonds.

16. **Entire Agreement**. This Agreement constitutes the entire agreement between the parties with respect to the matters provided for herein, except for any Credit/Reimbursement Agreement and/or Reimbursement Agreement or

Drainage Improvement Agreement executed concurrently herewith or prior hereto.

17. **Counterparts**. This Agreement may be executed in counterparts, each of which shall be deemed an original.

18. **Amendments**. Amendments to this Agreement shall be made only by written instrument executed by each of the parties hereto.

19. **City Attorney Costs**. Developer shall pay to City the sum of $1,500.00 for the costs incurred by the City Attorney in negotiation of and preparation of this Agreement.

20. **Term of Agreement**. This Agreement shall become effective as of the date first written above, and shall terminate one (1) year after the transfer of the Land and completion of all the Improvements and acceptance thereof by City.

21. **No Agency**. Neither Developer nor any of Developer's agents, engineers, contractors or subcontractors are or shall be considered to be agents of City in connection with the performance of any of Developer's obligations under this Agreement.

22. **Other Agreements**. This Agreement is not intended to, and shall not, cancel, supersede, modify or otherwise affect any other agreements which have been or may be made or any approvals or permits which have been issued between or by any party regarding the subject matter hereof, including but not limited to development agreements, subdivider agreements, improvement agreements and/or drainage improvement agreements.

23. **Attorneys' Fees and Costs**. A party to this Agreement may bring a suit or proceeding to enforce or require performance of the terms of this Agreement, and the prevailing party in such suit or proceeding shall be entitled to recover from the other parties reasonable costs and expenses, including attorneys' fees, including outside counsel (and, in the case of City, the City Attorney).

24. **Consultation With Attorneys**. The parties to this Agreement expressly state and represent that they have consulted with their respective attorneys concerning all portions of this Agreement and have been fully advised by their attorneys with respect to their rights and obligations hereunder. Relying on that consultation and advice, each party voluntarily enters into this Agreement.

25. **Recording**. The parties agree that any party may record this Agreement in the office of the Recorder of Sacramento County. Upon request of Developer, and if Developer is not then in default under this Agreement, City agrees to execute such documents as are required to remove this Agreement from the title to a residential lot within the Developer's property at the time of closing to a

residential purchaser. City shall also, upon request of Developer, take such action to remove this Agreement from title upon City acceptance of a phase of the Improvements, as to any of Developer's land as to which building permits were or could have been issued for said phase.

IN WITNESS WHEREOF, the parties have execute this Agreement as of the day and year first-above written.

City of Sacramento

By: _____
Ray Kerridge
City Manager

Approved for Content
Planning Department
Public Improvement Financing Division

By: _____

Approved for Legal Form
City Attorney

By: _____
Senior Deputy City Attorney

Approved for Financial Provisions
Utilities Department

By: _____

[Developer's Name]

By: _____
[Name]
[Title]

Certificate of Acknowledgment pursuant to Civil Code section 1189 must be attached.

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
)
County of_____)

On _____, before me, (here insert name and title of the officer), personally appeared_____

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official Seal.

_____

EXHIBIT A

IMPROVEMENTS AND BUDGETED AMOUNTS

Phase 1 Improvements Identified by Incremental Portions	Budgeted Amounts

EXHIBIT A-1

PHASING OF IMPROVEMENTS (IF APPLICABLE) AND BONDS

EXHIBIT B

AMOUNT OF BONDS AND PHASING THEREOF

EXHIBIT C

INCREMENTS OF IMPROVEMENTS ELIGIBLE FOR ACQUISITION

EXHIBIT D

City of Sacramento
Development Services Department

GUIDELINES FOR SPECIAL DISTRICT ACQUISITION PROJECTS

INTRODUCTION

The City of Sacramento Policies and Procedures Manual for Special Assessment and Community Facilities Districts provides for the use of acquisition districts. Listed in this Exhibit are guidelines which must be followed in order to qualify improvement project costs for reimbursement through the contemplated Mello-Roos CFD ("District"). It is further understood and agreed that reimbursement is dependent upon City's actual receipt of bond proceeds, when and if bonds are issued in the District, and upon the legality of reimbursement for individual expense items under applicable law.

1.0 Definitions

1.1 *Acquisition Agreement.* An agreement between a Developer and the City allowing the District to acquire certain public facilities from a Developer.

1.2 *Acquisition Facility or Acquisition Facilities.* Those public facility improvements which are described in an Engineer's Report filed in the District proceedings, and in Acquisition Agreements.

1.3 *Advertisement.* Published public notice soliciting bids for the Project, in accordance with these guidelines and applicable law.

1.4 *Bid Documents.* Plans, specifications, and proposal documents prepared by/under the supervision of the Design Engineer conforming with policies, rules, regulations and laws applicable to the City, suitable for the solicitation and submittal of bids by contractors for construction of an Acquisition Facility.

1.5 *Completed Facility.* A Facility which, by virtue of its having been completed prior to transfer to the City and its being a functional, usable unit of infrastructure capable of being incorporated into the City's infrastructure system is eligible as an Acquisition Facility.

1.6 *Construction Security.* Performance bonds and labor and material bonds or other security provided by the Contractor to the Developer which guarantee that the contractor will meet all contractual obligations, and which will be in a form assignable to the City.

1.7 *Contractor.* A Contractor under contract to construct the Acquisition Facility who possesses the appropriate California contractor license(s) for the work required to be performed.

1.8 *Design Engineer*. A licensed California Civil Engineer who has been retained by the Developer for the purpose of designing and/or supervising construction of the Acquisition Facilities.

1.9 *District Engineer*. Engineer appointed by the City.

1.10 *Engineer's Estimate*. A cost estimate for the Acquisition Facilities prepared by the Design Engineer and approved by the District Engineer.

1.11 *Facility*. An element or increment of an entire "Acquisition Facility." A Facility shall be eligible for acquisition at such time as it is complete and available for public benefit (i.e., at the time it becomes a Completed Facility).

1.12 *Plans*. Final bid drawings prepared by the Design Engineer and its consultants and approved by the City for construction of the Acquisition Facilities.

1.13 *Purchase Price*. The amount to be paid by a District for the Acquisition Facilities in accordance with the provisions of the Acquisition Agreement.

1.14 *Specifications*. Documents prepared by the Design Engineer or its consultants which describe in detail for construction contract purposes the material and workmanship required to complete an Acquisition Facility.

2.0 Pre-Advertisement Procedures

2.1 Developer shall submit project schedules to the District Engineer.

2.2 As and if required, the City will endeavor to obtain necessary interests in real property, provided that Developer has provided full and complete funding, and has executed a funding agreement for this purpose in form acceptable to the City Attorney. Developer shall negotiate all utility relocations.

2.3 Design Engineer shall prepare and submit Plans and Specifications to the City for approval. The Plans shall indicate those portions of the improvements which are Acquisition Facilities which qualify for reimbursement from the District. Such indications shall not be construed as City approval or disapproval of eligibility for cost reimbursement. Actual District reimbursement eligibility is determined by City independent of Plan notes and Plan approval.

2.4 Developer shall pay City plan check and inspection fees (normal and specific) in accordance with normal City procedures.

2.5 Developer shall provide construction security in the same manner as is provided for in normal City public works projects.

2.6 The Design Engineer shall prepare bidding documents for the Acquisition Facilities and shall submit said documents to the District Engineer for review and approval. The bidding documents must be in conformance with all ordinances, laws, policies, rules and regulations applicable to the City including but not limited to the following:

(a) Compliance with all applicable City and State of California requirements for public works contracts, including but not limited to prevailing wage requirements.

(b) The invitation to bidders shall be publicly advertised.

(c) A non-collusion affidavit shall be executed by Developer in a form acceptable to City.

(d) The bid documents must comply with all other applicable City requirements.

(e) A certificate stating compliance with all of requirements set forth in this section 2.6.

2.7 District Engineer shall review the bidding documents to determine whether they meet the following requirements:

(a) The Design Engineer's estimate is reasonable and has been approved by the District Engineer.

(b) Bidding procedures are consistent with public contract advertising and bid opening procedures and bid forms clearly describe each bid item and are formatted substantially similar to the Engineer's Report Cost Breakdown.

(c) The construction contract requires payment of prevailing wages.

(d) The bidding documents include a non-collusion affidavit in a form acceptable to City.

(e) The number of allotted working days specified in the contract documents are reasonable for the proposed work.

(f) Liquidated damage clauses are consistent with City policy.

3.0 Advertisement and Bid Opening Procedures

3.1 After the Plans have been approved by City and the bid documents have been approved by the District Engineer, Developer may advertise project.

3.2 Developer shall advertise project in a newspaper of general circulation published in the County of Sacramento. Such notice shall be published for at least 10 consecutive times in a daily newspaper of general circulation published in the County or for at least two consecutive times in a weekly newspaper published in the County. Developer may use other advertising procedures in addition to the procedures specified in this section 3.2.

3.3 Developer shall conduct a bid opening at a location open to the public. Sealed bids will be required to be submitted on or before the specified date and time and will be publicly opened and the bidder's name and total bid announced at the bid opening in the presence of any interested party.

3.4 Developer shall notify City and the District Engineer a minimum of 10-days prior to the bid opening date and provide the District Engineer a copy of the public advertisement(s) and all final bid documents. Any addenda to the bid documents shall be included in the final bid documents.

3.5 The District Engineer or representative shall attend any pre-bid meeting(s) and the public bid opening.

4.0 Construction Contract Award

4.1 Developer shall provide the District Engineer a summary of all bids and a copy of the low bid proposal submitted, together with a written evaluation and recommendation for award. Developer shall provide the following information with the evaluation and recommendation, in the form of a certificate:

(a) A statement that there are no pending disputes over the bidding procedures.

(b) A statement that all bidders received the same set of bid documents and all of the addenda issued.

(c) A statement that all applicable City approvals required for the work have been obtained.

(d) A statement that the bid proposal has not been conditioned in any way.

(e) Developer shall retain the original of all bids received for a minimum of four years.

4.2 Within five working days of receipt of the bid material specified in section 4.1, the District Engineer shall review the bid summary and a copy of the low bid and determine whether or not to concur in the Developer recommendation, or shall advise Developer that additional review time will be required and the date by which such review will be complete.

4.3 The District Engineer shall give the Developer written notification of the determination under section 4.2 within the time period stated therein.

4.4 In the event the low bidder is not recommended, or the District Engineer does not concur with the Developer recommendation, or the District Engineer is aware of any irregularities or possible disputes over the bidding procedure, the Developer or District Engineer shall notify the Director of Public Works or Director of Utilities, as applicable. This notification shall be in writing and shall be submitted to City within five working days after the determination required by section 4.2 has been made. The Director will review the bid documents and procedures and advise the Developer within ten days of the City's decision relative to award of the contract.

4.5 No individual bids will be rejected by the Developer without concurrence of the District Engineer. However, the Developer shall have the discretion to reject all bids.

4.6 Prior to award of the construction contract, Developer shall obtain written concurrence for award from the District Engineer.

4.7 Developer shall award the contract within 60 days after bid opening with concurrence of the District Engineer and shall authorize the Contractor to proceed with the work within 60 days after award.

4.8 Developer shall provide the following items to the District Engineer within 30 days after the Developer has authorized the Contractor to proceed:

(a) A copy of the signed contract with the Contractor specifying the award date.

(b) A written statement that the contract award amount is within the Engineer's estimate and does not exceed the overall funds available from the CFD. Should the Project bid exceed the aforementioned estimate or available funds the shortfall shall be paid by the Developers.

5.0 Construction

5.1 Developer or the Design Engineer shall schedule and conduct a pre-construction meeting prior to beginning work on the Acquisition Facilities.

The pre-construction meeting will be attended by the Developer, the Design and District Engineers, the Contractor, agencies issuing permits, affected utilities, and other interested parties. The District Engineer and City shall receive written notification five days prior to the meeting setting a mutually agreeable time, place, and date.

5.2 The District Engineer shall review the construction progress no less frequently than monthly and shall meet no less frequently than monthly with representatives to discuss project status.

5.3 The Contractor shall coordinate all inspections on Acquisition Facilities in accordance with City policy and the provisions of the [if North Natomas: drainage or other] improvement agreement applicable to the Acquisition Facilities.

5.4 Developer shall provide the District Engineer with copies of all progress payments to the Contractor.

5.5 If the Developer desires to be reimbursed for any contract change order, the Developer shall, prior to allowing the Contractor to undertake such work, obtain the written acknowledgment of the City Representative overseeing such work as designated in the drainage or other improvement agreement, as to the need to perform the change order work in order to satisfactorily complete the project. The District Engineer shall subsequently determine if any of the adjustments shall be made to the Reimbursement Amount set forth in the Acquisition Agreement as a result of such change order.

5.6 Contractor and all subcontractors shall pay prevailing wages for all work performed on the Acquisition Facilities. Developer shall provide certification to the District Engineer that all contractors have complied with prevailing wage requirements. Copies of certified payrolls shall be provided to the District Engineer upon request.

5.7 Revisions to the Plans shall be reviewed and approved in advance by the District Engineer.

5.8 For the purposes of these guidelines, the construction shall be considered complete at such time as the Acquisition Facility is fully completed and available for public benefit, City has accepted the Acquisition Facility pursuant to the provisions of the applicable drainage or other improvement agreement, and when the Developer has obtained the following as applicable:

(a) Approval of City if grading permit is required.

(b) Approval of all facilities shown on the Plans or included in the Acquisition Facilities by the affected utility companies and/or other affected County Departments.

(c) Approval of City of all erosion control improvements required by the Plans and/or grading permit.

(d) Approval by the City Surveyor of all monumentation.

(e) Approval of City of all street improvements, storm drains, street lighting, traffic signals, etc., shown on the Plans.

6.0 Reimbursement

6.1 Developer shall submit a request for reimbursement to the District Engineer after the completion of a Facility. The request shall follow the format provided in Schedule A, entitled "Developer Reimbursement Request Format," and shall contain, but not be limited to, the following:

(a) Final quantities and final costs on each contract item, certified by the Design Engineer, and the total of all construction costs for the particular Facility accompanied by any other supporting documentation necessary to justify reimbursement.

(b) Approved contract change orders with final quantities and/or final costs.

(c) Certification that the Contractor and all Subcontractors have complied with all applicable City and State of California "public works" provisions, including prevailing wages on the Project.

(d) Itemized breakdown of other reimbursable costs as delineated in the applicable Acquisition Agreement.

(e) Copies of invoices, vouchers, canceled checks, and other available materials to support all expenditures by the Developer claimed for reimbursement.

(f) Copies of Notice of Completion (recorded).

(g) Certification or proof of advertisement as required by City Guidelines.

(h) Copies of Final Mechanics Lien Releases for the Facility. If the Facility is an increment of a larger Acquisition Facility, the Lien Releases may be Unconditional Lien Releases upon receipt of the progress payments applicable to such Facility.

(i) Documentation that all required easements have been transferred to City or that other arrangements for such transfer, as required by the City, have been made.

(j) Documentation that all fee interests required for the Acquisition Facilities have been transferred to City or that other arrangements for such transfer, as required by the City, have been made.

(k) Submission of written certification from other agencies or utilities involved in the reimbursement request, that the Facility was inspected and completed according to approved Plans and specifications, and that any utilities or agency cost reimbursements are disclosed in the CFD reimbursement requests.

(l) Where applicable, all equipment manuals for the Acquisition Facilities.

(m) All warranties relating to the Acquisition Facilities.

In addition, Developer shall submit to the District Engineer a finalized copy of Plans and Specifications which incorporates all approved changes, and a copy of the recorded tract map(s), if any.

6.2 The District Engineer shall review the request for reimbursement and all supporting data. The District Engineer shall be entitled to rely on the authenticity of all supporting data, documents, representations and certifications provided by the Developer and the respective Design Engineers without independent verification by the District Engineer. Developer shall be required to sign a certification on all submitted data.

If additional information is required during the review process to comply with section 6.1, District Engineer may request in writing that the Developer supply the supplemental data, and Developer shall promptly comply with such request.

6.3 Upon review of the submitted information, if complete, the District Engineer shall determine whether and to what extent the costs and expenses claimed are reimbursable, and make a recommendation to the Director with respect thereto. The Director shall make a final determination of reimbursability.

SCHEDULE A TO EXHIBIT D
Developer Reimbursement Request Format

City of Sacramento
[Name] Community Facilities District No. ___

REQUEST FOR PAYMENT

The undersigned (the "Developer"), hereby requests payment pursuant to the Acquisition and Shortfall Agreement (the "Agreement"), dated as of _____, 20__, between the City of Sacramento (the "City"), and Developer, in the total amount of $_____ for an Improvement, or portion thereof, as identified in Exhibit A to the Agreement, all as more fully described hereinbelow. In connection with this request for payment, the undersigned hereby represents and warrants to the City of Sacramento as follows:

1. He(she) is a duly authorized officer of Developer, qualified to execute this request for payment on behalf of Developer and knowledgeable as to the matters set forth herein.

2. All costs of the Improvements or portions thereof for which payment is requested hereby are actual costs and have not been inflated in any respect. The items for which payment is requested have not been the subject of any prior payment request submitted to the City.

3. Supporting documentation (such as third party invoices) is attached with respect to each cost for which payment is requested.

4. The Improvements or portions thereof for which payment is requested were constructed in accordance with all applicable City standards.

I hereby declare under penalty of perjury that the above representations and warranties are true and correct.

Date: _____, 20__

[Name of Developer]

By:_____
[Name & title]

Improvement(s) accepted and request for payment approved by City:

By: _____
[Name & title]

By: _____
[Name & title]

Attached as Exhibit A is a list of all Improvements or portions thereof for which payment is requested, with supporting documentation.

EXHIBIT E

HAZARDOUS SUBSTANCES

A. No Review, Examination or Assessment. The parties acknowledge and understand that City has not conducted any review, examination or assessment to assess, identify or detect the presence of any Hazardous Substances, as defined below, on, under or around Landowner Property. As between the City and Landowner, any liability associated with the presence of any Hazardous Substances on, under or around the Landowner Property, including any interests in said property dedicated to City as provided herein, shall be governed by the indemnity provisions of this Agreement, regardless of whether any such review, examination or assessment is conducted.

B. Definitions.

(1) As used herein, the term "Hazardous Substances" means:

(a) Those substances included within the definitions of hazardous substance, hazardous waste, hazardous material, toxic substance, solid waste, or pollutant or contaminant under any Environmental Law, as defined below;

(b) Those substances listed in the United States Department of Transportation Table [49 C.F.R. § 172.101], or by the Environmental Protection Agency, or any successor agency, as hazardous substances [40 C.F.R. Part 302];

(c) Other substances, materials, and wastes that are or become regulated or classified as hazardous or toxic under federal, state or local laws or regulations; and

(d) Any material, waste, or substance that is—

(i) a petroleum or refined petroleum product;

(ii) asbestos;

(iii) polychlorinated biphenyl;

(iv) designated as a hazardous substance pursuant to 33 U.S.C. § 1321 or listed pursuant to 33 U.S.C. § 1317;

(v) a flammable explosive; or

(vi) a radioactive material.

(2) As used herein, the term "Environmental Law" means all federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, decrees or requirements of any government authority regulating, relating to, or imposing liability or standards of conduct concerning any

Hazardous Substance, or pertaining to environmental conditions on, under, or about the detention basin site or any of the easement areas which Landowner is required to and does convey to City pursuant to this Agreement, as now or may at any later time be in effect, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) [42 U.S.C. § 9601 et seq.]; the Resource Conservation and Recovery Act of 1976 (RCRA) [42 U.S.C. § 6901 et seq.]; the Clean Water Act, also known as the Federal Water Pollution Control Act (FWPCA) [33 U.S.C. § 1251 et seq.]; the Toxic Substances Control Act (TSCA) [15 U.S.C. §2601 et seq.]; the Hazardous Materials Transportation Act (HMTA) [49 U.S.C. § 1801 et seq.]; the Insecticide, Fungicide, Rodenticide Act (7 U.S.C. § 136 et seq.]; the Superfund Amendments and Reauthorization Act [42 U.S.C. § 6901 et seq.]; the Clean Air Act [42 U.S.C. §7401 et seq.]; the Safe Drinking Water Act [42 U.S.C. § 300f et seq.]; the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.]; the Surface Mining Control and Reclamation Act [30 U.S.C. § 1201 et seq.]; the Emergency Planning and Community Right to Know Act [42 U.S.C. § 11001 et seq.]; the Occupational Safety and Health Act [29 U.S.C. §§ 655 and 657]; the California Underground Storage of Hazardous Substances Act [Health and Safety Code § 25280 et seq.]; the California Hazardous Substances Account Act [Health and Safety Code § 25100 et seq.]; the California Safe Drinking Water and Toxic Enforcement Act [Health and Safety Code § 24249.5 et seq.]; the Porter-Cologne Water Quality Act [Water Code § 13000 et seq.], together with any amendments of or regulations promulgated under the statutes cited above, and any other federal, state or local law, statute, ordinance or regulation now in effect or later enacted that pertains to the regulation or protection of the environment, including ambient air, soil, soil vapor, groundwater, surface water, or land use.

EXHIBIT F

CONSTRUCTION CONTRACT LANGUAGE

Contractor agrees and covenants to, and shall fully indemnify, defend and hold harmless City and its elective and appointive boards, commissions, officers, employees and agents, from and against any and all liabilities, penalties, losses, damages, costs, expenses (including reasonable attorneys' fees, whether for outside counsel or the City Attorney), causes of action, claims or judgments (collectively, "Claims") arising by reason of any death, bodily injury, personal injury, property damage or violation of any law or regulation to the extent arising from any actions or omissions in connection with the design, construction, operation, maintenance or repair of that portion of the Improvement designed or constructed by Contractor, by any of the following: Contractor, any of Contractor's engineers, subcontractors, or any other person or entity employed by or acting on behalf of or as the authorized agent for Contractor, or any of Contractor's engineers of subcontractors.