COUNCIL AGENDA: 05-06-08
ITEM: 2.3

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Richard Doyle

SUBJECT: TADCO SUPPLY SEWER REALIGNMENT SETTLEMENT AGREEMENT AND RELEASE

DATE: April 23, 2008

Council District: 3

RECOMMENDATION

Adoption of a resolution authorizing the City Attorney to execute the Settlement Agreement and Release that provides for the installation of a new storm drain lateral connecting the existing storm inlet in the parking lot of Tadco Supply, Inc. owned by George Taddie, Sr., et al., to the existing storm sewer line on Almaden Avenue at an estimated cost of $130,000.

OUTCOME

To settle a dispute between George Taddie, Sr., et al., and the City of San José which will result in the installation of a new storm drain lateral and release the City from liability from claims arising from, or relating to, the storm drain inlet located in Tadco Supply, Inc.'s parking lot.

BACKGROUND

In December 2003, the City and its contractor started working on a project that required the abandonment of a storm box culvert that ran diagonally from Reed Street to Pierce Avenue underneath several properties ("Storm Box Culvert"). The process for abandoning the Storm Box Culvert consisted of filling it with a lightweight foam concrete grout to prevent access to, or collapse of the culvert.

On December 11, 2003, during the grouting operation, the lightweight foam concrete grout that was being injected into the storm box culvert overflowed out of a storm drain inlet located on the east side of the parking lot located on property owned by George Taddie, Sr., among others (collectively, "property owner").

The City determined there was an undocumented storm lateral beneath the parking lot connecting the storm drain inlet to the Storm Box Culvert. The connection would allow storm water to drain from the parking lot to the Storm Box Culvert.

The City's contractor cleaned up the area and removed all of the grout that had overflowed onto the parking lot immediately following the overflow. In addition, the City setup a sump pump in the drain inlet where the foam concrete was coming out from in order to temporarily divert water to another drain inlet located on the parking lot.

In February 2004, the City proposed installing a new storm drain lateral from the existing storm inlet to an existing 48" storm sewer line on Almaden Avenue. The proposed scope of work included an asphalt trench cap atop the new storm lateral trench. The property owner would not agree to this proposal and demanded that the City repave the entire lot. Negotiations stopped as the City staff did not agree with the property owner's position. During the spring of 2007, the property owner called the Department of Public Works and stated that he was now willing to accept the original scope of work proposed by the City.

ANALYSIS

Department of Public Works staff has conducted a site assessment of the parking lot and determined that without a permanent fix, rain water can only be removed by a sump pump that is placed in the storm inlet. Should this sump pump fail during heavy rain, the parking lot may experience shallow flooding. In addition, the adjacent building on the west side of the parking lot may also experience some flooding in its crawl space or basement.

As a result, the Department of Public Works is recommending that a new storm drain lateral be installed from the existing storm inlet to an existing 48" storm sewer line on Almaden Avenue on the grounds that the City eliminated the parking lot's storm water drain. The installation of a new storm drain will prevent the possibility of future flooding and provide the necessary storm water drainage facilities for the parking lot.

Had the City been aware of the storm drain lateral prior to the overflow, staff would have worked with the property owner to obtain an agreement from him that would have enabled the City to include the proposed scope of work as part of the original improvement project.

Tadco Supply, Inc. has executed the attached Settlement Agreement and Release.

The construction cost for restoring the storm drain system is estimated to be $90,000 with a contingency in the amount of $10,000. Department of Public Works' project delivery costs, which include staff time and incidentals related to the engineering design, construction management, construction inspection, material testing, etc., are estimated to be $30,000. The anticipated total cost of the project is $130,000. However, the project will be publicly bid so the actual amount of the project will be unknown until the bids are opened and staff determines who the successful bidder is. It is anticipated

that the project will be completed in December 2008 if the Settlement Agreement and Release is approved.

COORDINATION

This memo and the project have also been coordinated with the Department of Public Works, the Department of Planning, Building and Code Enforcement, and the Budget Office.

COST SUMMARY/IMPLICATIONS

1. AMOUNT OF RECOMMENDATION: $90,000
2. COST OF PROJECT:

Project Delivery	$30,000
Construction	$90,000
Contingency	$10,000
TOTAL PROJECT COSTS	$130,000
Prior Year Expenditures	$0
REMAINING PROJECT COSTS	$130,000

3. SOURCE OF FUNDING: 545 – Sewer Service and Use Charge Capital Improvement Fund.
4. IMPACT: It has been determined that the project will have no significant adverse impact on the General Fund operating budget.

BUDGET REFERENCE

Fund #	Appn #	Appn. Name	RC #	Total Appn.	Amt. For Contract	2007-2008 Adopted Budget (Page)	Last Budget Action (Date, Ord. No.)
Remaining Project Costs				$130,000			
Current Funding Available							
545	4271	Miscellaneous Rehabilitation Projects	150655	$4,667,000	$90,000	Capital V-75	10/16/07, Ord. No. 28143
Total Current Funding Available				$4,667,000	$90,000		

CEQA: EIR Resolution, No. 72767, File No. PP08-055

RICHARD DOYLE
City Attorney

JENNIFER POUSHO
Deputy City Attorney

For questions please contact Jennifer Pousho, Deputy City Attorney at (408) 535-1922.

Attachment: Settlement Agreement and Release for Tadco Supply, Inc.

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (collectively referred to as the "Settlement Agreement") is made by and between the City of San Jose ("City") and George Taddie, Jr. and Marie Taddie (George Taddie Sr. and Marie Taddie are collectively referred to as the "Taddies") and Tadco Supply, Inc., a California Corporation ("Tadco"). The City, Taddies and Tadco are collectively referred to as the "Parties."

WHEREAS, the Parties desire to resolve an issue arising from the City's D.O.T. Miscellaneous Sanitary Sewer Rehabilitation Project (2341-36); Storm Sewer Re-Routing Project ("Project") and to enter into this Settlement Agreement without resorting to litigation;

THEREFORE, for good and valuable consideration, the receipt and sufficiency is of which is hereby acknowledged, the Parties agree as follows:

Section 1. Underlying Facts.

The purpose of this Settlement Agreement is to settle a dispute between the Parties involving the following relevant facts (collectively "Dispute"):

1. Tadco Supply, Inc. ("Business") is located at 566 South Almaden Avenue in San Jose, California ("Property").
2. The Property (APN 264-32-022) is owned by the Taddies.
3. The City began constructing the Project in December 2003 on Reed Street and Pierce Avenue in San Jose. The Project consisted of the removal and replacement of the existing sanitary sewer pipes, installation of new storm drain pipes, inlets and manholes, and the abandonment of a storm box culvert.
4. The storm box culvert that is the subject of this Dispute ran diagonally from Reed Street to Pierce Avenue underneath several properties ("Storm Box Culvert"). The Storm Box Culvert was identified on the record drawings for the Project area; however, neither the record drawings, recorded easements, nor

City permits for the Project area indicated that there was a storm lateral connection from the Property to this culvert.

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5. The Project required the abandonment of the Storm Box Culvert since it was in conflict with the new sanitary sewer line. The process for abandoning the Storm Box Culvert consisted of filling it with a lightweight foam concrete grout to prevent access to, or collapse of the culvert.
6. On December 11, 2003, during the grouting operation, the lightweight foam concrete grout that was being injected into the storm box culvert overflowed out of a storm drain inlet located on the east side of the Property's parking lot.
7. The City determined that given the close proximity of the storm drain inlet to the Storm Box Culvert and the overflow that occurred during the grouting operation there must be an undocumented storm lateral beneath the Property connecting the storm drain inlet to the Storm Box Culvert. Such a connection would allow storm water to drain from the Property to the Storm Box Culvert.
8. The City's contractor cleaned up the area and removed all of the grout that had overflowed onto the parking lot immediately following the overflow. In addition, the City setup a sump pump in the drain inlet where the foam concrete was coming out from in order to temporarily divert water to another drain inlet located on the parking lot.
9. The City contends that the storm lateral from the Property connecting to the Storm Box Culvert was unlawfully installed and constructed on the basis that nothing in the public records indicates the presence of a storm drain lateral.
10. The Taddies deny that the storm drain lateral was unlawfully installed and constructed and contend that the entire parking lot was damaged by the City's abandonment of the Storm Box Culvert and grouting operation.

Section 2. Settlement Terms and Conditions.

The Parties agree to settle the Dispute under the following terms and conditions:

A. The City shall:

1. In accordance with the plans and specifications entitled "Tadco Supply Sewer Realignment" dated October 2007, attached hereto as Attachment 1:

a. Re-route the existing storm lateral to drain to an existing 48" storm sewer in Almaden Avenue;

b. Abandon the existing storm lateral that drains into the abandoned storm box culvert; and

c. Install an asphalt trench cap atop the new storm lateral trench.

B. The Taddies hereby grant the City the right of entry set forth in Attachment 2 of this Settlement Agreement for the purposes of installing and constructing the storm drain connection described in Section 2.A of this Settlement Agreement.

Section 3. Release.

A. The Taddies hereby release and forever discharge the City, its past and present employees, partners, agents, predecessors, successors, consultants, attorneys, and assigns, all of whom expressly deny liability, from any and all claims, demands, damages, actions, or suits, known and unknown, relating to, arising out of, or in any way connected with the Dispute, which have accrued or arisen prior to the date of full execution of this Settlement Agreement.

B. The Taddies acknowledge that they are familiar with Section 1542 of the Civil Code of the State of California which provides:

> 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.

The Taddies waive and relinquish any right or benefit which they have or may have under Section 1542 of the Civil Code of the State of California or any similar provision of the statutory or nonstatutory law of any jurisdiction to the full extent that they may lawfully waive all such rights and benefits pertaining to the Dispute.

Section 4. General Terms.

A. The Parties represent and warrant that they have not assigned or transferred, in whole or in part, any claim, demand, action, or suit which they may now have, may have had or claim to have against each other including without limitation assignment or transfer by subrogation or by operation of law.

B. The Parties understand and agree that the provisions of this Settlement Agreement shall be binding upon and shall inure to the benefit of their respective agents, directors, officers, employees, assignees, predecessors, successors, beneficiaries and representatives.

C. This Settlement Agreement contains all of the terms and conditions agreed upon by the Parties with reference to the Dispute.

D. The Parties represent that they are relying solely upon their own judgment, beliefs, knowledge, investigations, and the advice and recommendations of their own counsel in determining whether to enter into this Settlement Agreement. This Settlement Agreement was drafted for both Parties and there shall not be a presumption or construction against any signatory.

E. The Parties shall bear their own costs, including attorneys' fees, and any other fees incurred in connection with this Settlement Agreement and the events underlying this Settlement Agreement.

F. This Settlement Agreement shall be governed by the laws of the State of California.

G. This Settlement Agreement may be executed in counterparts.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement effective as of the date last set forth below.

George Taddie, Jr.

Dated: 2/25/08

George Taddie, Sr.

Dated: 2/25/08

Marie Taddie

Dated: 2-25-08

APPROVED AS TO FORM:

By:_____
Jennifer Pousho
Deputy City Attorney

CITY OF SAN JOSE, a Municipal Corporation of the State of California

By:_____
GEORGE RIOS
Assistant City Attorney as Authorized Agent for Defendant,
CITY OF SAN JOSE

Dated:_____

ATTACHMENT 2

RIGHT OF ENTRY
For The
City Of San Jose
D.O. T. Miscellaneous Sanitary Sewer Rehabilitation Project

Property Owner ("OWNER"): George Taddie, Jr.	Date of Execution by CITY ("Effective Date"):
APN ("Property"): 264-32-022	Property Address: 566 Almaden Avenue, San Jose CA 95110

1. The City of San Jose plans to construct the Tadco Supply Sewer Realignment Project ("PROJECT"). As part of the PROJECT, the City of San Jose will re-route the OWNER's existing storm sewer drainage to drain to an existing 48" storm sewer in Almaden Avenue and then abandon the existing lateral that drains into a 4x4 storm culvert that runs underneath residential properties.

2. OWNER hereby grants to the City of San Jose its agents, employees, consultants, and contractors (collectively "CITY") the right to enter upon the OWNER's Property to perform all work necessary to re-route the existing storm inlet on the OWNER's property to drain into an existing 48" storm sewer in Almaden Avenue as shown in the plans entitled "Tadco Supply Sewer Realignment" dated October 2007 ("Project Plans"), attached herein. The work on the OWNER's Property may include, without limitation, clearing, grubbing, removal of obstructions, excavation, pavement restoration and all necessary incidents and appurtenances to accomplish the realignment and abandonment.

3. OWNER shall refrain from interfering with the operations of CITY's Contractor during construction of the PROJECT. In the event that OWNER observes any deficiencies in CITY's Contractor's work, or experiences any problems with CITY's Contractor, OWNER shall immediately notify CITY's Engineer by telephone with subsequent written confirmation, to provide CITY with the opportunity to require CITY's Contractor to address or resolve such deficiencies and/or problems.

4. The permission to enter granted by this Right of Entry shall be effective as of the date of execution by the OWNER and shall continue in full force and effect until completion of the PROJECT.

5. Upon completion of the Project, the new drainage system improvements shall be the property of the Owner, and the Owner shall be responsible for all future maintenance and alterations.

6. OWNER expressly waives any and all claims for compensation resulting from this Right of Entry and CITY's use of the Property to construct the PROJECT.

7. CITY agrees to restore the surface of the Property as described in the Project Plans for purposes of carrying out the PROJECT. Notwithstanding the foregoing, OWNER expressly consents to the modifications to the sewer lateral, park strip, and sidewalk and other surface improvements on the Property, in accordance with the Project Plans.

8. OWNER shall protect, indemnify, defend and hold CITY, its officers, agents and employees harmless from and against any and all liability, loss, cost and obligations on account of or arising out of or resulting from any injury or loss

caused directly or indirectly by any cause whatsoever in connection with or incidental to the activities to be performed under this Right of Entry, except to the extent such injury or harm is caused by the sole active negligence or willful misconduct of CITY, its officers, agents, or employees.

9. CITY's Contractor will verbally notify OWNER's representative, _____ or other designated representative at phone number _____ at least two (2) business days prior to CITY's entry onto the Property.

10. CITY's contact for purposes of this Right of Entry is Mathew Nguyen, Project Manager, at (408) 975-7477.

11. OWNER represents and warrants that its signatory(ies) to this Right of Entry Agreement is/are authorized to execute this Right of Entry on OWNER's behalf.

12. If the Property is tenant occupied, OWNER represents and warrants that OWNER's tenant has consented to this Right of Entry, as shown by the fully authorized signature of tenant below. If the tenant signature portion of this Right of Entry is not completed, OWNER's signature shall constitute a representation and warranty that no person other than OWNER is entitled to use or possession of the Property, or that OWNER has full legal authority to execute this Right of Entry without tenant consent or permission.

13. OWNER represents and warrants that OWNER has no knowledge of any hazardous materials release on the Property and that, to the best of OWNER'S knowledge, the Property is free and clean of any environmental contamination. If any hazardous materials, environmental contamination, or other unforeseen conditions are discovered on the Property during the course of work by CITY's Contractor, CITY's Contractor may immediately cease work and CITY shall have no further obligations under this Agreement or as a result of the entry onto the Property.

14. This Agreement represents the entire understanding of the parties as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder.

Dated: 4/16/08, 2008

"TENANT"	"OWNER"
a TADCO Supply Inc.	a George Taddei Jr
Type of Legal entity (corp. or individual)	Type of Legal entity (corp. or individual)
By: George Taddei Jr	By: George Taddei Jr
Print Name: George Taddei	Print Name: George Taddei Jr
Title: President	Title: Partner
Address: 566 S. Almaden	Address: 566 S. Almaden
SJ CA 95110	SJ CA 95110

"OWNER"

a_____

Type of Legal entity (corp. or individual).

By: George Taddie

Print Name: GEORGE TADDIE

Title: PARTNER

Address: 566 S. ALMADEN

SJ CA 95110

"OWNER"

a_____

Type of Legal entity (corp. or individual)

By: Myrlin Taddie

Print Name: MYRLIN TADDIE

Title: PARTNER

Address: 566 S. ALMADEN

SJ CA 95110

Dated: _____, 2 008

APPROVED AS TO FORM

By:_____

Deputy City Attorney

"CITY"

CITY OF SAN JOSE, a municipal corporation

By:_____

Name:

Title: