



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

**SUBJECT: FUNDING AGREEMENT FOR
THE EVERGREEN ♦ EAST HILLS
VISION STRATEGY**

DATE: June 5, 2006

Approved

Date 6/13/06

COUNCIL DISTRICT: 5, 7 and 8
SNI AREA: West Evergreen
K.O.N.A
East Valley/680

RECOMMENDATION

It is recommended that the City Council take the following actions:

1. Approval of a funding agreement with Yerba Buena Opco, Inc. for the work associated with Phase 2 of the preparation of the Evergreen ♦ East Hills Vision Strategy, Evergreen Development Policy update, and related documents; and
2. Adoption of a resolution authorize the Director of Planning, Building and Code Enforcement to approve and execute minor amendments to the agreement to account for increases in funding received from Yerba Buena Opco, Inc. and minor schedule or task changes that remain consistent with the information contained in and the goals identified in this memorandum.

OUTCOME

Approval of the funding agreement will provide a mechanism for Yerba Buena Opco, Inc. to continue funding City staff and City consultants working on the Evergreen ♦ East Hills Vision Strategy.

BACKGROUND

On November 4, 2003, the City Council adopted a resolution authorizing the City Manager to negotiate with Yerba Buena Opco, Inc and approve a Funding Agreement for the Evergreen

Smart Growth Strategy (now called the Evergreen ♦ East Hills Vision Strategy) and related documents. An Amendment to the Funding Agreement was approved by the City Council on March 16, 2004, shifting work items between the phases identified within the Agreement. While the term of the initial agreement was November 4, 2003 to June 30, 2005, provisions within the Agreement allowed for administrative extension of the Agreement through December 31, 2005.

On June 21, 2005, the City Council approved several actions pertaining to the Evergreen ♦ East Hills Vision Strategy, including adoption of a Work Plan, adoption of a Vision and Expected Outcomes and other items. The adopted Work Plan specified several specific tasks for the Task Force and established June 2006 as a target for City Council hearings on the outcome of the EEHVS process, including the EDP update. As discussed in an Information Memorandum to the City Council dated April 27, 2006, a significant amount of work has been completed by the Task Force, but the Task Force has not yet completed all of the items included in the Work Plan.

ANALYSIS

The proposed Agreement is very similar in scope and content to the previous Agreement, except that: 1) modifications have been made to the term of the Agreement to reflect changes in the EEHVS project schedule; 2) the total budget for staff and consultant work has increased; and 3) consultant work necessary for preparation of a Community Facilities District (CFD) has been removed.

Under the previous Funding Agreement, preparation of the Evergreen Development Policy update and all associated tasks was anticipated to be complete in June 2005, with the possible extension of work through December 2005. The prior Agreement did not anticipate changes made to the project Work Plan in June 2005. The proposed Agreement reflects the reformation of the project and includes funding for staff and consultant costs associated with all of the new Work Plan items. Although the previous Agreement ended in December 2005, staff and consultant work has continued in to the 2006 calendar year with the developers' verbal agreement to reimburse the City for expended costs concurrent with the drafting of a new Funding Agreement. This verbal agreement is being formalized with the proposed Funding Agreement, which has been under negotiation since November, 2005. City staff and representatives of Yerba Buena Opco have recently come to a consensus on the proposed Agreement now being put forward for Council consideration.

The original funding agreement, now expired, provided for funding of up to \$2,835,240 for City staff and non-personal costs and up to \$6,012,500 for consultant costs over all phases of the project. Under that agreement, Yerba Buena Opco has funded \$1,162,683 of City staff work and \$153,000 of consultant costs through the end of December 2005. The proposed Agreement acknowledges that work funded through the prior agreement addresses the work plan items of Phase 1 and provides for funding of up to \$2,021,758 for additional City staff and non-personal costs and \$306,600 for contractual services for the January 1, 2006 through December 31, 2006 term of the agreement. This represents a net increase of \$349,201 for total staff and non-

contractual non-personal costs over the original agreement. The overall budget for staff costs has increased to address staff work associated with the reformation of the project in June 2005, the adoption of an expanded work plan, the extension of the project timeline and increases in staff charge rates. Yerba Buena Opco has agreed to fund these additional costs.

The most notable difference between the proposed Agreement and the prior Evergreen Funding Agreement is that the proposed Agreement does not include funding (approximately \$5.4 million) for consultant costs associated with the formation of a Community Facilities District (CFD). For this reason no appropriation action is necessary to fund this new agreement. A rebudget action of \$1,436,046 to fund this agreement is recommended in the 2006-2007 Rebudget and Clean-Up Memo. Based upon the discussions of the EEHVS Task Force, City staff and representatives of Yerba Buena Opco have agreed not to include this work and within the proposed Agreement. Should a CFD be selected as a funding mechanism at some point in the future, a separate Agreement will be prepared to address associated consultant costs. City staff and representatives of Yerba Buena Opco acknowledge that the preparation and negotiation of a separate agreement or agreements for the funding of such services may delay the implementation of the EEHVS.

PUBLIC OUTREACH

The Evergreen Smart Growth Strategy process involves extensive participation through open community task force meetings, broad community meetings at key points in the process, and ultimately public hearings before Planning Commission, other relevant City Commissions, and the City Council.

COORDINATION

The preparation of this memorandum and the funding agreement was coordinated with the City Attorney's Office. Budget cost estimates were coordinated with the City Attorney's Office, Department of Public Works, Finance Department, Department of Parks, Recreation and Neighborhood Services and Department of Transportation.

COST IMPLICATIONS

In February 2003, the City Council approved the Mayor's Budget Strategy memorandum setting forth specific guidance to control costs. With respect to long range planning, the direction was "to defer or suspend advance land use planning efforts without outside funding." Per this Council direction, all City staff work associated with the preparation of the Evergreen East Hills Vision Strategy (Evergreen Area Development Policy update, associated General Plan amendments and related environmental documents) has been funded through a City Council approved funding agreement with self-selected Evergreen property owners (Yerba Buena Opco,

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Inc.). Approval of the proposed Funding Agreement would renew this arrangement and allow the preparation of the Evergreen East Hills Vision Strategy to continue without incurring General Fund costs.

CEQA

Exempt, PP03-10-349.

A handwritten signature in black ink, appearing to read "Joseph Horwedel". The signature is stylized with a large, looping initial "J" and a large, looping final "D".

JOSPEH HORWEDEL, ACTING DIRECTOR
Planning, Building and Code Enforcement

For question, please contact Andrew Crabtree at (408) 535-7893

Attachment

FUNDING AND REIMBURSEMENT AGREEMENT BY AND BETWEEN THE CITY OF SAN JOSE AND CERTAIN EVERGREEN PROPERTY OWNERS REGARDING THE EVERGREEN ♦ EAST HILLS VISION STRATEGY AND RELATED ENVIRONMENTAL DOCUMENTS

This Funding Agreement ("AGREEMENT") is made and entered into as of this _____ day of June, 2006 (the "EFFECTIVE DATE"), by and between the CITY OF SAN JOSE, a municipal corporation ("CITY"), and YERBA BUENA OPCO, INC., a California corporation ("PARTICIPATING PROPERTY OWNERS") (CITY and PARTICIPATING PROPERTY OWNERS may be collectively referred to as the "PARTIES").

RECITALS

WHEREAS, CITY's adopted General Plan, San José 2020 (the "General Plan"), contains goals and policies, identifies land use and transportation designations for all lands within CITY's Sphere of Influence, and provides other direction and guidance regarding land use and development in CITY; and

WHEREAS, the Evergreen Area Development Policy adopted by CITY's City Council in August 1976, and revised in July 1991, April 1993, November 1994, and May 1995, respectively (collectively, the "DEVELOPMENT POLICY"), contains flood protection and traffic capacity policies to allow development within the EVERGREEN ♦ EAST HILLS AREA (as defined herein) at a certain level, which otherwise could not have occurred under citywide flood and traffic policies due to constraints in both technical areas; and

WHEREAS, in November 2002, the Evergreen-Eastridge area in San Jose was selected by the Knight Program in Community Building for a charrette, which engaged CITY, other stakeholders, the broader community, graduate students, and outside technical experts in an intensive five-day planning exercise to suggest options for future land use development, transportation, and community facilities; and

WHEREAS, CITY believes it is in the best interest of CITY that it complete a community-based Visioning Strategy (“STRATEGY”) for the Evergreen ♦ East Hills Area, defined as that real property generally located south of Story Road and east of Highway 101 within CITY’s Urban Growth Boundary and more particularly described and shown upon that certain map, entitled “Evergreen ♦ East Hills Area Map” attached hereto as EXHIBIT “A” and incorporated herein by this reference (the “EVERGREEN ♦ EAST HILLS AREA”), to identify appropriate land uses and their intensities for non-contiguous developable sites and to update the DEVELOPMENT POLICY to address traffic issues; and

WHEREAS, PARTICIPATING PROPERTY OWNERS are property owners and potential developers in the EVERGREEN ♦ EAST HILLS AREA, and support the preparation of a community-based STRATEGY, related General Plan amendments, an updated DEVELOPMENT POLICY, and related studies and environmental and other documents for the EVERGREEN ♦ EAST HILLS AREA so that appropriate development within the EVERGREEN ♦ EAST HILLS AREA may proceed and occur in a manner consistent with CITY’s General Plan; and

WHEREAS, PARTICIPATING PROPERTY OWNERS wish to enter into a funding agreement with CITY pursuant to Section 18.20.090 of the San Jose Municipal Code and propose to expend and deposit with CITY certain funds estimated to be necessary to support preparation of the STRATEGY, and the related General Plan amendments, an updated DEVELOPMENT POLICY, and related studies, an infrastructure funding mechanism and environmental and other documents for the EVERGREEN ♦ EAST HILLS AREA, including without limitation environmental clearance documents required under the requirements of the California Environmental Quality Act of 1970, as amended, that must necessarily be prepared in conjunction therewith; and

WHEREAS, the PARTIES desire to set forth and memorialize the funding mechanisms related to the funds expended and provided by PARTICIPATING PROPERTY OWNERS for the preparation of a community-based STRATEGY, related General Plan

amendments, updated DEVELOPMENT POLICY, and related studies, and environmental and other documents for the EVERGREEN ♦ EAST HILLS AREA.

NOW, THEREFORE, the parties hereby agree as follows:

SECTION 1. Purpose.

- A. The purpose of this AGREEMENT is to provide a means for PARTICIPATING PROPERTY OWNERS to fund the costs of preparation of a community-based STRATEGY, related General Plan amendments, an updated DEVELOPMENT POLICY, and related studies, infrastructure funding mechanisms, and environmental and other documents analyzing the environmental impacts of the STRATEGY, all as they pertain to the EVERGREEN ♦ EAST HILLS AREA (all such documents hereinafter are collectively referred to as the "STRATEGY DOCUMENTS").
- B. As consideration for PARTICIPATING PROPERTY OWNERS' agreement to fund the preparation of the STRATEGY DOCUMENTS and to provide such funding and documentation relating to the preparation of the STRATEGY DOCUMENTS to the CITY in a reasonable and timely manner, CITY agrees to process the STRATEGY DOCUMENTS in an expeditious manner and, upon their completion, to bring the STRATEGY DOCUMENTS before CITY's Planning Commission and/or City Council for their consideration, as appropriate, all to the extent that adequate funding has been provided to CITY to cover the actual costs incurred by CITY (including consultant costs) to perform and complete such work and tasks.
- C. Without limiting the foregoing, the PARTIES each agree to take all reasonable steps in accordance with the terms and conditions of this AGREEMENT to meet timelines for performance and complete the deliverables in the manner set forth in the "Product Delivery Schedule" attached hereto as EXHIBIT "C" and incorporated herein by this reference.

SECTION 2. Term.

The term of this AGREEMENT ("Term") shall be from the EFFECTIVE DATE set forth hereinabove to December 31, 2006, subject to the provisions of SECTION 10 (Termination) hereinbelow.

SECTION 3. Financial Contributions of PARTICIPATING PROPERTY OWNERS.

- A. The parties agree that the party responsible for the payment of all sums due under this AGREEMENT is PARTICIPATING PROPERTY OWNERS. The parties further acknowledge and agree that nothing contained in this AGREEMENT is intended to nor shall limit or preclude CITY from obtaining additional funding from other sources to prepare or complete the STRATEGY DOCUMENTS. If CITY obtains such additional funding for the preparation of the STRATEGY DOCUMENTS, CITY shall appropriately credit PARTICIPATING PROPERTY OWNERS with that amount received by CITY from other sources against amounts that had been charged or would have been charged to PARTICIPATING PROPERTY OWNERS pursuant to the provisions of this AGREEMENT so that CITY is not reimbursed more than once for performing the same work or task.
- B. The parties hereto agree that the total estimated cost of activities involved with the preparation of the STRATEGY DOCUMENTS as of the date of this AGREEMENT is Two Million, Three Hundred Twenty-Eight Thousand, Three Hundred Fifty-Eight Dollars (\$2,328,358). This amount includes the estimated costs and amounts set forth in more detail in EXHIBIT "B," entitled "Estimated Plan Preparation Costs" which includes staff and consultant costs through each phase of the STRATEGY efforts (collectively, the "STRATEGY PREPARATION COSTS"). Other than the preliminary Special Tax Consultant and Appraiser fees included in item 4.B, the STRATEGY PREPARATION COSTS do not include any outside consultant costs relating to the formation of any community facilities district which shall require additional funding agreements between the CITY and PARTICIPATING PROPERTY OWNERS as well as additional funding from PARTICIPATING PROPERTY OWNERS for such work. The parties hereto acknowledge that the STRATEGY PREPARATION COSTS are estimates only at this time and may need to be refined

as the parties meet to discuss revised scopes of services and budgets pursuant to SECTION 6 hereinbelow.

- C. PARTICIPATING PROPERTY OWNERS agree to advance to CITY the STRATEGY PREPARATION COSTS in accordance with the timetable specified in SECTION 4 hereinbelow.
- D. Other than those certain consultants hired by PARTICIPATING PROPERTY OWNERS pursuant to SECTION 6.F hereinbelow, CITY shall retain the authority to engage the services of any consultants needed to prepare or complete the STRATEGY DOCUMENTS, as noted in the STRATEGY PREPARATION COSTS.

SECTION 4. Deposits

- A. Upon execution of this Agreement and no later than June 30, 2006, PARTICIPATING PROPERTY OWNERS shall deposit with DIRECTOR a cash deposit as reimbursement for estimated staff costs to be incurred by the City representing the January – March 2006 Quarter, and April – June 2006 Quarter portions of the STRATEGY PREPARATION COSTS in the total amount of at least Eight Hundred and Ninety-Two Thousand, Three Hundred and Twelve Dollars (\$892,312).
- B. On or before June 30, 2006, PARTICIPATING PROPERTY OWNERS shall deposit with DIRECTOR a cash deposit as reimbursement of consultant costs to be incurred by the City representing the cost of consultants retained by CITY to perform appraisal work and financial analysis related to the development of potential financing options during the January – March 2006 Quarter and April – June 2006 Quarter portions of the STRATEGY PREPARATION and as reimbursement for consultant costs to be incurred by the City representing the cost of a CEQA legal consultant retained by CITY during the January – March 2006 Quarter, and April – June 2006 Quarter portions of the STRATEGY PREPARATION in the total amount of at least Three Hundred Six Thousand, Six Hundred Dollars (\$306,600).
- C. On or before September 30, 2006, PARTICIPATING PROPERTY OWNERS shall deposit with DIRECTOR a cash deposit as reimbursement for estimated staff costs to be incurred by the City representing the July – September 2006 Quarter and

October – December 2006 Quarter portions of the STRATEGY PREPARATION COSTS in the total amount of at least One Million, One Hundred Twenty-Nine Thousand, Four Hundred and Forty-Six Dollars (\$1,129,446).

- D. With the exception of the preliminary Special Tax Consultant and Appraiser fees included in item 4.B herein, this Agreement does not include any outside consultant costs associated with the formation of a community facilities district. A separate funding agreement or agreements with the CITY shall be necessary to provide advance funding of consultant costs incurred by the City associated with the formation of a community facilities district. The PARTIES acknowledge that the preparation and negotiation of a separate agreement or agreements for the funding of such services may delay the anticipated Product Delivery Schedule.
- E. If PARTICIPATING PROPERTY OWNERS fail to timely deposit with CITY any of the cash deposits required to be made by PARTICIPATING PROPERTY OWNERS under this SECTION, CITY may terminate this AGREEMENT pursuant to the provisions of SECTION 10 hereinbelow.

SECTION 5. Expenditure.

- A. CITY shall utilize and expend any funds provided by PARTICIPATING PROPERTY OWNERS to CITY as STRATEGY PREPARATION COSTS only for those costs incurred, arising from or reasonably related to the costs for work identified in this AGREEMENT, including without limitation, EXHIBIT "B," the STRATEGY PREPARATION COSTS and EXHIBIT "C," entitled the "PRODUCT DELIVERY SCHEDULE," attached hereto and incorporated herein by this reference.
- B. PARTICIPATING PROPERTY OWNERS agree to fund those CITY staff costs in the amounts and/or at the rates set forth in that section of EXHIBIT "B," STRATEGY PREPARATION COSTS, entitled "ESTIMATED CITY STAFF COSTS" attached hereto and incorporated herein by this reference.

SECTION 6. SCOPE OF WORK AND BUDGET

- A. The parties hereto have estimated the STRATEGY PREPARATION COSTS, including a preliminary scope of services and work needing to be performed as a part of the initial preparation of the STRATEGY DOCUMENTS, based upon an estimate of the costs of those consultant services and CITY administrative expenses anticipated to be incurred to prepare the STRATEGY DOCUMENTS, all as more fully described in EXHIBIT "B" hereto, STRATEGY PREPARATION COSTS. The Parties have also estimated the time required for preparation and completion of the STRATEGY DOCUMENTS as described in EXHIBIT "B" and EXHIBIT "C" hereto, and acknowledge that the work may extend beyond the termination date of this AGREEMENT requiring further mutual written agreement of the PARTIES to continue the work to completion.
- B. The DIRECTOR shall be authorized, on behalf of CITY, to approve in writing a Revised Scope of Services and Budget that is agreed to by PARTICIPATING PROPERTY OWNERS so long as the Revised Scope of Services and Budget agreed to with PARTICIPATING PROPERTY OWNERS remains consistent with CITY's General Plan 2020 and any and all action taken and direction provided by CITY's City Council in connection with this AGREEMENT, including without limitation, that City Council action taken and direction provided on November 4, 2003 in connection with the consideration of this AGREEMENT and that certain memorandum from the DIRECTOR to CITY's City Council dated November 3, 2003, does not exceed the total estimated STRATEGY PREPARATION COSTS and ESTIMATED CITY STAFF COSTS set forth hereunder, and does not exceed a cost recovery level.
- C. CITY shall not charge to PARTICIPATING PROPERTY OWNERS or hold PARTICIPATING PROPERTY OWNERS responsible under this AGREEMENT for those amounts incurred or contractually committed by CITY during the Term of this AGREEMENT for preparation of STRATEGY DOCUMENTS that exceed the amounts set forth in the Phase 2 Scope of Services and Budget or in the mutually agreed upon Revised Scope of Services and Budget without the express written consent of the PARTICIPATING PROPERTY OWNERS for those

excess amounts; provided, however, that this provision is not intended to nor shall preclude PARTICIPATING PROPERTY OWNERS from agreeing to fund any excess amounts incurred or encumbered in connection with the preparation of the STRATEGY DOCUMENTS at any time. In the event that PARTICIPATING PROPERTY OWNERS do not consent to fund to the CITY any amount that exceeds the amounts set forth in the Phase 2 Scope of Services and Budget or in the mutually agreed upon Revised Scope of Services and Budget, by December 31, 2006, CITY may discontinue the services required to be performed under this Agreement at such time as PARTICIPATING PROPERTY OWNERS' deposits pursuant to Section 4 have been exhausted. City shall endeavor to provide PARTICIPATING PROPERTY OWNERS with 15 days advance notice of discontinuation of services.

- D. PARTICIPATING PROPERTY OWNERS shall provide CITY with funding at least in the amount identified in a mutually agreed upon Revised Scope of Services and Budget in advance of the date anticipated for expenditure or encumbrance of those funds. If PARTICIPATING PROPERTY OWNERS fail to provide to CITY the amounts reflected in a mutually agreed upon Revised Scope of Services and Budget in advance of the date those funds are anticipated to be expended or encumbered, CITY may terminate this AGREEMENT pursuant to SECTION 10 hereinbelow.
- E. CITY agrees to deposit any and all funds provided to CITY by PARTICIPATING PROPERTY OWNERS under this AGREEMENT into an interest bearing account and to apply and utilize any interest revenue generated through such account towards STRATEGY PREPARATION COSTS in the same manner as provided for all other funds provided by PARTICIPATING PROPERTY OWNERS.
- F. Set forth in EXHIBIT "B," the Estimated Plan Preparation Costs, PARTICIPATING PROPERTY OWNERS have hired or will hire consultants with expertise in those certain technical disciplines set forth in the Estimated Plan Preparation Costs needed to complete the activities involved in the preparation of the Plan Documents at the PARTICIPATING PROPERTY OWNERS cost and expense. Initially, said consultants shall be hired to perform those services hired

during Phase I. CITY acknowledges that the PARTICIPATING PROPERTY OWNERS have entered into or will enter into a contract with consultants in each of the technical disciplines listed in the Estimated Plan Preparation Costs, not to exceed the scope of services and budget as set forth in the Estimated Plan Preparation Costs and the Phase I and Phase 2 Scope of Services. The parties anticipate that the PARTICIPATING PROPERTY OWNERS expenditures for those consultant contracts entered into pursuant to this Funding Agreement shall be eligible for any reimbursement to PARTICIPATING PROPERTY OWNERS that is established pursuant to Section 7.B hereinbelow. The parties hereto further acknowledge that any increases or decreases in the amounts paid by the PARTICIPATING PROPERTY OWNERS for these consultant contracts will result in adjustments to the total STRATEGY PREPARATION COSTS, which the parties hereto have acknowledged are estimates only.

SECTION 7. Refund and Reimbursement of Deposits.

- A. If any portion of the deposits made by PARTICIPATING PROPERTY OWNERS for Phase 2 under this AGREEMENT has not been expended or encumbered by CITY within sixty (60) days following completion of all work on the STRATEGY DOCUMENTS, such unexpended and unencumbered sums shall be returned by CITY to PARTICIPATING PROPERTY OWNERS.
- B. The CITY and the PARTICIPATING PROPERTY OWNERS anticipate that one of the deliverables to be achieved as a result of the Work to be performed by CITY, may be the creation of a Community Facilities District or some other appropriate financing mechanism ("CFD") for the purpose of facilitating the funding of some of the infrastructure requirements that are anticipated to be needed. CITY agrees that to the extent allowed by law, any STRATEGY PREPARATION COSTS which are paid by the PARTICIPATING PROPERTY OWNERS prior to the creation of the CFD, and which may lawfully be included to be financed through the CFD, shall be financed through the CFD and reimbursed to the PARTICIPATING PROPERTY OWNERS. The timing of any such reimbursement shall occur as soon as is reasonably possible. To the extent that

any of the STRATEGY PREPARATION COSTS can be paid directly from the CFD or as a result of the creation of the CFD, such as bond counsel, bond financial advisor, bond tax consultant, then the CITY agrees to have said costs paid by the CFD and not require the PARTICIPATING PROPERTY OWNERS to pay for such costs pursuant to the terms of this AGREEMENT. The provisions of this Section 7.B shall survive the termination of this Agreement.

SECTION 8. Administration.

- A. Preparation of the STRATEGY DOCUMENTS shall be directed by CITY and all work related thereto shall be performed and completed to the reasonable satisfaction of the DIRECTOR regardless of which entity hired the performance of the work; provided that the parties hereto acknowledge that PARTICIPATING PROPERTY OWNERS are anticipated to hire the consultants and other professionals needed to perform and complete the work contemplated hereunder pursuant to the provisions of Section 6.F hereinabove. CITY may utilize independent consultant services at CITY's sole discretion. All consultants retained by CITY will be selected by and report exclusively to CITY,
- B. DIRECTOR shall manage and keep an accounting of the funds deposited with and expended by CITY pursuant to this AGREEMENT.
- C. PARTICIPATING PROPERTY OWNERS may hire additional consultants to further the preparation of the STRATEGY DOCUMENTS as described in this AGREEMENT at PARTICIPATING PROPERTY OWNER's sole cost and expense. Any and all monetary amounts expended by PARTICIPATING PROPERTY OWNERS for additional consultants shall not be deducted from the funds to be provided by PARTICIPATING PROPERTY OWNERS to CITY under this AGREEMENT. If PARTICIPATING PROPERTY OWNERS desire for CITY to utilize the information or other work product produced by an additional consultant hired by PARTICIPATING PROPERTY OWNERS in the preparation of any of the STRATEGY DOCUMENTS, then PARTICIPATING PROPERTY OWNERS shall provide to CITY all of the information or other work product produced by that consultant, together with any supporting material or information upon which that

information or work product is based. CITY shall not be obligated in any way to utilize that additional consultant's work in the preparation of the STRATEGY DOCUMENTS, but may, at CITY's sole discretion, choose to do so if the information or work product was prepared to the satisfaction of CITY. If CITY chooses to utilize that additional consultant's information or work product, then CITY and PARTICIPATING PROPERTY OWNERS shall meet to determine whether a Revised Scope of Services and Budget pursuant to SECTION 6 above is warranted and, if mutually agreed upon, to prepare and execute such Revised Scope of Services and Budget.

SECTION 9. Activity Reports and Accounting.

- A. No less frequently than every three (3) months during the term of this AGREEMENT, with such three (3) month period beginning on the EFFECTIVE DATE, CITY shall provide PARTICIPATING PROPERTY OWNERS with a report ("ACTIVITY REPORT") summarizing the following information:
1. The period of time covered within the ACTIVITY REPORT; and
 2. A detailed account of the activities performed by or on behalf of CITY and funded by PARTICIPATING PROPERTY OWNERS pursuant to the provisions of this AGREEMENT, including the week that work was performed, the amount of time expended upon a task, and a summary of the nature of the work performed, during the period of time covered in the ACTIVITY REPORT; and
 3. The amount of funding provided by PARTICIPATING PROPERTY OWNERS and expended by CITY during the time period covered in the ACTIVITY REPORT.
- B. CITY shall provide PARTICIPATING PROPERTY OWNERS with a final accounting of all CITY staff and consultant expenditures no later than January 31, 2007.
- C. CITY AND PARTICIPATING PROPERTY OWNERS hereby acknowledge and agree that CITY has performed activities prior to the EFFECTIVE DATE in the furtherance of the goals of this AGREEMENT in anticipation of its execution by

CITY and PARTICIPATING PROPERTY OWNERS. PARTICIPATING PROPERTY OWNERS agree to fund those activities of CITY in full as a part of the deposit made by PARTICIPATING PROPERTY OWNERS on the EFFECTIVE DATE, provided that CITY has provided PARTICIPATING PROPERTY OWNERS with an ACTIVITY REPORT for those activities performed by CITY prior to the EFFECTIVE DATE.

- D. After receipt of an ACTIVITY REPORT, PARTICIPATING PROPERTY OWNERS may request that CITY provide PARTICIPATING PROPERTY OWNERS with additional reasonable detail regarding any activity performed or amount expended as summarized in the report.
- E. If at any time PARTICIPATING PROPERTY OWNERS dispute any information contained in an ACTIVITY REPORT, PARTICIPATING PROPERTY OWNERS may select and hire at PARTICIPATING PROPERTY OWNERS' sole cost and expense an auditor to review and confirm the accuracy of that information. PARTICIPATING PROPERTY OWNERS shall provide to CITY all information generated by such audit that calls into question the accuracy of any information contained in an ACTIVITY REPORT. CITY and PARTICIPATING PROPERTY OWNERS shall meet promptly to resolve any such disputes through a Revised Scope of Services and Budget, if the parties mutually agree that such a revision would be necessary or appropriate. If the parties are unable to reach a mutually agreeable resolution to any such dispute, then either party may terminate this AGREEMENT pursuant to SECTION 10, in addition to pursuing any appropriate remedy to obtain funds that may be owed to that party.

SECTION 10. Termination.

- A. PARTICIPATING PROPERTY OWNERS may terminate this AGREEMENT upon thirty (30) days written notice to CITY. CITY shall upon receipt of a notice of termination, terminate all consultant contracts. PARTICIPATING PROPERTY OWNERS shall not be responsible for any consultant costs incurred more than thirty (30) days after the consultant contracts have been terminated. CITY shall within sixty (60) days of the Effective Termination Date refund to

PARTICIPATING PROPERTY OWNERS any funds deposited with CITY pursuant to this AGREEMENT to the extent such funds are not needed to pay for costs incurred, encumbered or committed by CITY to and including the Effective Termination Date of the AGREEMENT.

- B. If PARTICIPATING PROPERTY OWNERS or CITY in any way default or breach any of its obligations under this AGREEMENT, CITY or PARTICIPATING PROPERTY OWNERS may provide the defaulting party with a notice of default ("Default Notice"). CITY or PARTICIPATING PROPERTY OWNERS may terminate this AGREEMENT effective no earlier than thirty (30) days after the date of a Default Notice.
- C. In the event of any termination of this AGREEMENT, CITY shall have no obligation to proceed with preparation of the STRATEGY DOCUMENTS. Following the effective date of any termination of this AGREEMENT, CITY shall within sixty (60) days refund to PARTICIPATING PROPERTY OWNERS any funds deposited with CITY pursuant to this AGREEMENT to the extent such funds are not needed to pay for costs incurred, encumbered or committed by CITY to and including the date of termination of the AGREEMENT.
- D. If the PARTICIPATING PROPERTY OWNERS elect to terminate this AGREEMENT as provided for within this section, the CITY shall within 60 days of receipt of the written request for termination provide to the PARTICIPATING PROPERTY OWNERS a final ACTIVITY REPORT for all costs incurred by the CITY up to a final date 30 days subsequent to the receipt of the written request. Within 30 days of receipt of the final ACTIVITY REPORT from the CITY, the PROPERTY OWNERS shall deposit with the DIRECTOR a cash reimbursement equal to the total amount of the final ACTIVITY REPORT.

SECTION 11. Notices

- A. All notices to be given hereunder shall be in writing and shall be served, either personally or by certified or registered mail, return receipt requested, postage prepaid, to the persons at the addresses set forth below or to any other address provided by one party to the other from time to time in writing in conformance with

the provisions of this SECTION.

- B. Notices required to be given to CITY pursuant to this AGREEMENT shall be addressed as follows:

Director of Planning, Building and Code Enforcement
City of San Jose
801 N. First Street, Room 400
San Jose, CA 95110

with a copy to:

City Attorney
City of San Jose
151 West Mission Street
San Jose, CA 95110

- C. Notices required to be given to PARTICIPATING PROPERTY OWNERS under this AGREEMENT shall be addressed as follows:

James J. Eller
Eller & Associates
60 S. Market Street, Suite 1201
San Jose, CA 95113

SECTION 12. Legal Actions.

- A. In addition to any other remedies that a party may have arising out of this AGREEMENT, a party may institute proceedings for mandamus, specific performance or other injunctive or declaratory relief to enforce this AGREEMENT; provided, however, that in no event shall CITY be liable in damages for any breach or violation of this AGREEMENT. Nothing in this SECTION shall preclude PARTICIPATING PROPERTY OWNERS from enforcing their rights to any sums CITY is obligated to return to PARTICIPATING PROPERTY OWNERS under this AGREEMENT.
- B. In the event that suit shall be brought by either party hereto arising out of this AGREEMENT, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or, if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San

José, California.

SECTION 13. No Third Party Rights.

Nothing in the provisions of this AGREEMENT is intended to create duties or obligations to or rights in third parties not parties to this AGREEMENT.

SECTION 14. Assignment.

- A. PARTICIPATING PROPERTY OWNERS may, with the prior written consent of CITY, assign its rights and obligations under this AGREEMENT to another financially solvent entity that is clearly capable of and has the desire to fulfill the obligations of PARTICIPATING PROPERTY OWNERS under this AGREEMENT. Prior to the effective date of any such assignment, PARTICIPATING PROPERTY OWNERS shall deliver or cause to be delivered to CITY an agreement duly executed by the proposed assignee under which the assignee agrees to the satisfaction of CITY to assume, be bound by and timely fulfill all of PARTICIPATING PROPERTY OWNERS' obligations under this AGREEMENT.
- B. The above notwithstanding, CITY agrees that its consent shall not be required in the event that this AGREEMENT is assigned to one or more of the following:
- Berg & Berg Enterprises, LLC, a California limited liability company,
 - Pacific Rim Science Park, LLC, a California limited liability company,
 - Arcadia Development Co., a California corporation,
 - KB Home, South Bay Inc., a California corporation, or
 - San Jose/Evergreen Community College District.

SECTION 15. Prior Agreements and Amendments.

This AGREEMENT including any and all EXHIBITS hereto represents the entire understanding of the parties hereto as to those matters addressed herein. No prior oral or written understanding between the parties shall be of any force or effect with respect to those matters covered hereunder with the exception of the previous Funding and Reimbursement Agreement, which shall continue to pertain regarding any activity conducted prior to January 1, 2006 subject to the terms of that Agreement, but which

shall have no bearing upon activities conducted on January 1, 2006 or subsequently. Subject to a letter extension of the term of this AGREEMENT by DIRECTOR as provided under SECTION 2 hereinabove, and approval of the Revised Scope of Services and Budget pursuant to SECTION 6 hereinabove, this AGREEMENT may be modified only by a written amendment to this AGREEMENT duly executed by the parties to this AGREEMENT.

WITNESS the execution hereof as of the date first hereinabove written.

<p>APPROVED AS TO FORM:</p> <p>By: _____ VERA M. I. TODOROV Senior Deputy City Attorney</p>	<p>"CITY"</p> <p>CITY OF SAN JOSE, a municipal corporation</p> <p>By: _____ PETER JENSEN</p> <p>Its: Assistant to the City Manager</p>
	<p>"PARTICIPATING PROPERTY OWNERS"</p> <p>YERBA BUENA OPCO, INC., a California Corporation</p> <p>By: _____  STEVEN DUNN</p> <p>Its: _____ <i>Agent</i> Title</p>

EXHIBIT "A"
EVERGREEN•EAST HILLS AREA

- A. The EVERGREEN•EAST HILLS AREA is defined as the land within San José's Urban Service Area Boundary, south of Story Road, east of U.S. Highway 101, and north of the intersection of U.S. Highway 101 and Hellyer Avenue.
- B. The EVERGREEN•EAST HILLS AREA is further depicted upon that certain boundary map attached hereto as ATTACHMENT "1" to EXHIBIT "A" and incorporated herein as part of this EXHIBIT "A" by this reference.

EXHIBIT "B"
ESTIMATED PLAN PREPARATION COSTS
SUBJECT TO REVISION

The costs of preparation of the PLAN DOCUMENTS has been estimated by accounting for the following services at the following estimated costs and hourly rates, subject to change and refinement:

	Phase 1	Phase 2		Total	
		01/06 – 06/06	07/06 – 12/06		
Staff Costs (Salary/Overhead/Non-personal)	Addressed by Previous Agreement				
Planning		\$203,982	\$246,052		
Public Works		\$427,601	\$481,636		
City Attorney		\$17,166	\$20,135		
Transportation		\$161,202	\$168,475		
PRNS		\$60,000	\$116,636		
Finance		\$22,360	\$96,512		
<i>Subtotal</i>		\$892,312	\$1,129,446		
Contractual Services					
CEQA Legal Counsel		\$42,000			
Special Tax Consultant/Appraiser		\$250,000			
5% Contingency		\$14,600			
<i>Subtotal</i>		\$306,600			
Total Estimated Budget			\$1,198,912	\$1,129,446	\$2,328,358

EXHIBIT "C"
"PRODUCT DELIVERY SCHEDULE"
SUBJECT TO REVISION

The schedule for completion of the PLAN DOCUMENTS, major tasks, and respective products is estimated below, subject to change and refinement:

Phase 1: August 2003 through December 2005

- Initiation of Community Task Force Process
- Identification of Land Use Scenario(s) and direction to urban design consultants
- Management of consultants
- Direction and evaluation of preliminary traffic analysis based on land use scenarios
- Preparation and circulation to all interested parties of a comprehensive Initial Draft of Evergreen Area Development Policy Update
- Completion of project description for Environmental Impact Report
- Completion of scope for Environmental Impact Report and commence second submittal period

Phase 2: January 2006 to December 2006

- Refinement of Evergreen Area Development Policy Update and land use scenarios, as needed
- Discussion with Community Task Force if needed for follow up issues
- Engage services of Preliminary Special Tax Consultant and Appraiser related to the development of potential financing options
- Review and Process and have final hearing for Draft Environmental Impact Report, including community meetings and public hearings
- Review and Process General Plan amendments reflective of preferred land use scenario, including community meetings and public hearings
- Review and Process and have final hearing for Evergreen Area Development Policy Update, including community meetings and public hearings
- Complete final versions of approved documents.
- Conduct outreach related to new policies (e.g. update website).
- To the extent only that CFD outside consultant services are not required to perform and complete the work, City staff work to initiate CFD formation process.
- To the extent only that outside consultant services are not required to perform and complete the work, City staff work to complete all tasks necessary to present to the Council for its independent consideration whether to establish an Assessment District, including public hearings, etc., and formation work if a District is formed by Council.