



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Santana Row Settlement and
Parkland Agreement

DATE: November 21, 2006

RECOMMENDATION

Approval of the Settlement and Parkland Agreement between the City and FRIT San Jose Town and Country Village, LLC to satisfy the parkland requirements under the Parkland Dedication Ordinance (SJMC 19.38) for Santana Row.

OUTCOME

The City will receive \$4,557, 010 in Parkland Fees for the 1201 units that have received zoning approvals and have been, or are in the process of being developed at Santana Row. FRIT will be allocated \$2,924,240 of private recreation credits and \$25,000 in credit for Parkland Fees it previously paid to the City which, together with the \$4,557,010 in parkland fees, will satisfy the Parkland Dedication Ordinance (PDO) requirements for the 1201 units.

EXECUTIVE SUMMARY

On June 30, 1998, the City Council adopted Ordinance No. 25627, the original rezoning ordinance for Santana Row (the "Original PD Zoning"). The provisions of the Ordinance with respect to park and open space requirements are internally inconsistent and changed substantially from the park and open space requirements before the Council at the first reading of the Ordinance. Under the PDO, developers of subdivided residential projects must dedicate land, pay a parkland fee in lieu of dedication or both, for neighborhood and community park improvements ("Parkland Dedication Obligation"). The purpose of the PDO is to mitigate the impacts placed on the City for added parkland and park improvements that are caused by new housing developments. FRIT's total Parkland Dedication Obligation for Santana Row is 8.25 acres. This obligation converted to in-lieu fees is \$7,506,250 ("Parkland Fees").

A dispute has arisen between the City and FRIT over the amount of private recreation credit FRIT is entitled to receive under the Original PD Zoning. The PDO allows developers to receive credits to offset their Parkland Dedication Obligations if certain recreational improvements are constructed for the project and other requirements are met ("Private Recreation Credit"). FRIT believes that it is entitled to "acre for acre" and

“dollar for dollar” credit for the recreational improvements it has constructed at Santana Row under the Original PD Zoning and as a result, has completely satisfied its PDO obligation. The City disagrees with FRIT’s position. While both parties acknowledge the inconsistencies, the City does not believe that the City Council intended to allow FRIT to offset its entire PDO obligation. Such an offset would not be allowed under the PDO. Many of the private recreation improvements described in the Ordinance were also not constructed as described in the Ordinance. In addition the inconsistent provisions were not before the Council at the first reading of the ordinance.

In light of this, and given the uncertainties involved in litigation, the parties propose that FRIT receive Private Recreation Credit for some of the private recreational improvements it has already constructed. FRIT will also receive Private Recreation Credit for private recreation improvements that will be built for the remaining 690 units in the future. The total amount of Private Recreation Credit being proposed is \$2,924,240. FRIT has already paid the City \$25,000 in Parkland Fees and may offset its total Parkland Dedication Obligation for this payment. The parties propose that the remaining amount of Parkland Fees due to the City \$4,557,010, be paid within 10 days of the execution of the Settlement and Parkland Agreement.

BACKGROUND

1. Approval of Ordinance No. 25627 on June 16, 1998

On June 16, 1998, the City Council passed for publication Ordinance No. 25627 approving the planned development rezoning for the property located at the corner of Winchester and Stevens Creek Boulevards in San Jose, from commercial to planned development to allow the construction of up to 650,000 square feet of commercial/retail space, 1200 residential units and two hotels. The development project is known as “Santana Row”. The City Council approved Ordinance No. 25627 subject to the conditions recommended in the staff report and the recommendations made by Councilmember Fiscalini in his memo dated June 12, 1998.

Councilmember Fiscalini’s June 12, 1998 memo contained the following recommendations relating to parks and open space requirements for the project:

- “Park acreage within ‘Winchester Square, La Verger de Mystere, Baywood Oasis, Giardino di Gioco and Lenzen Park’ is to be dedicated to the City with a mechanism to require maintenance by the developer, and parkland improvements to be the same or higher quality as those shown on the conceptual plans;
- Acreage within ‘Market Square’ not be counted for Parkland Dedication Ordinance purposes;

- Baywood oasis acreage to be relocated to the area west of and adjacent to the Pacific Bell parcel, this acreage and the housing needs to be designed in a way to improve accessibility, visibility and flow to Santana Park;
- Land acquisition for 'Rosewalk Gardens' to be achieved by developer or developer to fund City's eminent domain costs prior to issuance of Final Map;
- Acreage allowances for private recreation open space to be based upon Parkland Dedication Ordinance standards in effect at time of approval of the Tentative Map."

Under the City's Parkland Dedication Ordinance (PDO)¹, residential developers are required to dedicate land, pay a parkland fee in lieu of dedication or both, for neighborhood and community park improvements ("Parkland Dedication Obligation"). The PDO allows developers of residential subdivisions to receive credits against their Parkland Dedication Obligation when the developer agrees to construct certain eligible private recreation improvements and has entered into a parkland agreement which requires the construction of improvements within a specified period ("Private Recreation Credit").

Under the PDO, the amount of credit and the improvements eligible for credit shall be determined pursuant to the schedule of fees and credits adopted by the City Council. The total credit shall not exceed fifty (50%) of the developer's total Parkland Dedication Obligation. Since June of 1998, credit for private recreation improvements is based on the actual amount of acreage that contains the qualified private recreation improvement, and not on the cost of the improvements themselves.

On June 30, 1998, Ordinance No. 25627 was adopted by the City Council without any discussion of the park and open space requirements for the project that were approved on June 16, 1998. The Ordinance that was adopted on June 30, 1998, is hereinafter referred to as the "Original PD Zoning"².

2. Park and Open Space Requirements under the Original PD Zoning

The Original PD Zoning contains conditions in the General Development Plan, Exhibit C, Section 12, entitled "Open Space Requirements" that impose certain requirements upon FRIT with respect to satisfying its Parkland Dedication Obligation. Those conditions were different than those that were approved by the City Council on June 16, 1998. The conditions contained in the Original PD Zoning are restated here:

¹ San José Municipal Code Chapter 19.38.

² On June 26, 2001, the City Council adopted Ordinance No. 26427 amending the Original PD Zoning to, among other things, add another residential unit to the project for a total of 1201 units. For purposes of the proposed Settlement and Parkland Agreement the Original PD Zoning, includes the additional unit added by Ordinance No. 26427.

- I. The developer is required to meet the requirements of the City's Parkland Dedication Ordinance (PDO) in effect at the time of the issuance of a Tentative Map to the satisfaction of the Director of Public Works. Credit for private recreation areas shall be in accordance with the PDO and does not require that these areas be at grade.
- II. Prior to the issuance of any Planned Development Permit, the developer shall secure a minimum of 30,000 square feet of off-site public parkland located adjacent to the project site and Santana Park to the satisfaction of the Director of Public Works. Should the developer be unable to secure the property, the developer shall provide sufficient funds to fully reimburse the City of San Jose for the cost of acquisition and improvements including any costs associated with condemnation proceedings to the satisfaction of the Director of Public Works. Credit toward the developer's PDO obligation for meeting this condition shall be consistent with the PDO.
- III. Prior to the issuance of any Planned Development Permit, the developer shall provide a minimum of 20,000 square feet of on-site public parkland located at the southeast corner of the site to provide an unobstructed connection to Santana Park and the new off-site parkland, referenced in 12.III above to the satisfaction of the Director of Public Works.
- IV. In addition to the parkland identified in items 12.II and 12.III above, the developer shall provide a minimum of 50,000 gross square feet of improved on-site recreational space. Open space located between commercial uses and/or along primary commercial streets shall be in addition to this 50,000 square foot requirement. Improvements shall be the same or higher quality than that shown on the "Conceptual Park plans" (Sheets 7A and 7B of the approved zoning for PDCSH97-06-036) to the satisfaction of the Director of Planning. These improved recreation areas shall be retained in private ownership and the property owner shall assume the responsibility for funding the long-term maintenance and capital costs associated with the improvements. Credit toward the developers' PDO obligation for meeting this condition shall be consistent with the PDO.
- V. Prior to the issuance of any Tentative Map, the developer shall submit plans acceptable to the Director of Public Works for all improvements on lands to be dedicated to the City of San Jose. These improvements will be subject to a turnkey agreement between the developer and the City.

The "Conceptual Park Plans" 7A and 7B of 7, dated June 4, 1998, prepared by the developer is hereby incorporated into the General Development Plan. The developer shall receive full acre for acre credit for

private recreation open space against any applicable city requirement for dedication of land for park purposes. Furthermore, the developer shall receive dollar for dollar credit for the costs of improvement of those same sites against any city requirement for payment of fees for park purposes.

The construction of Rosewalk Gardens is subject to acquisition of adequate fee or easement interest in the land from PAC Bell, by the City of San Jose using the developer's fees paid to the city concerning park purpose requirements."

3. The 2000 Agreement

On February 29, 2000, the City and FRIT entered into an agreement entitled "Agreement Regarding Funding for Acquisition and Improvement of Off-Site Property and Dedication of On-Site Public Parkland for the Town & Country San Jose Development" (the "2000 Agreement") in order to satisfy the conditions contained in the General Development Plan described in Section 2. above.

Specifically, the 2000 Agreement required FRIT to acquire certain real property ("Off-Site Parkland") located adjacent to Santana Row and to dedicate that property along with park improvements to the property, or to provide the City with sufficient funds to acquire and improve the Off-Site Parkland. The 2000 Agreement also required FRIT to dedicate and improve 20,000 square feet of on-site parkland ("On-Site Parkland") for park purposes. Additionally, FRIT was required to pay the City \$25,000 to obtain an appraisal of the Off-Site Parkland and for pre-acquisition costs. FRIT's obligation to acquire and improve these properties was limited to its total Parkland Fees.

FRIT had attempted to acquire the Off-Site Parkland as required by the Original PD Zoning, but had been unable to do so. As a result, the parties entered into the 2000 Agreement in order to allow the City to proceed with consideration of the PD Permit for the project prior to the actual acquisition of the Off-Site Parkland. FRIT needed the PD Permit in order to proceed with construction of the project. FRIT paid the City the \$25,000 for the appraisal and costs as required by the 2000 Agreement, but was unable to acquire the Off-Site Parkland.

4. Subsequent Rezoning for Santana Row

The Original PD Zoning was amended by Ordinance No. 26284 on January 30, 2001 and by Ordinance No. 26427 on June 26, 2001 ("Zoning Amendments"). The amendments to the PD Zoning provided for, among other things, an increase in the number of hotel rooms, an increase in retail space, and the addition of two new buildings. The amendments to the Original PD Zoning restated the same park and open space requirements contained in the General Development Plan described in Section 2 above.

5. Parkland Dedication Obligation for Santana Row

The total Parkland Dedication Obligation for the 1201 units under the Original PD Zoning is 8.25 acres. This amount is calculated based on the number of units approved by the Original PD Zoning (1201), multiplied by the number of persons per dwelling type according to the 1990 Federal Census (2.29)³, multiplied by the minimum acreage dedication requirement set forth in the PDO (.003) [(1201 units x 2.29 persons per unit x .003 = 8.25 acres)].

FRIT's total Parkland Dedication Obligation if converted to an in lieu fee is \$7,506,250 ("Parkland Fees"). This amount is calculated based on the number of units approved in the Original PD Zoning (1201), multiplied by the fee per unit set forth in City Council Resolution No. 68207, as amended by City Council Resolution No. 68643 (the "1998 Fee Resolution"), which amount equals \$6,250 [(1201 units x \$6,250 = \$7,506,250)].

ANALYSIS

Disputes

A number of disputes have arisen between the City and FRIT as to the effect and FRIT's obligations arising out of: a) Ordinance No. 25627 that was adopted on June 30, 1998 in that some of the provisions of Ordinance No. 25627 as ultimately adopted on June 30, 1998, differed substantively in several respects from the ordinance that was passed for publication on June 16, 1998, and b) the City Council's adoption of several rezoning ordinances for the project since the adoption of Ordinance No. 25627 which retained the same language relating to FRIT's Parkland Dedication Obligation for the project as ultimately set forth in Ordinance No. 25627. These disputes include without limitation: 1) the interpretation and application of the apparently inconsistent Open Space Requirements stated in the Original PD Zoning; and 2) the manner and amount of private recreation credit FRIT is entitled to under the PDO and Original PD Zoning.

Credits for Santana Row

FRIT contends under the Original PD Zoning that it is entitled to receive: 1) acre for acre credit for private recreation open space against any applicable City requirement for dedication of land for park purposes, and 2) and dollar for dollar credit for the costs of improvement of those same sites against any City requirement for payment of fees for park purposes, pursuant to Section 12 of the General Development Plan described in Section 2. above. As a result, FRIT believes that it could be considered to have satisfied its Parkland Dedication Obligation for Santana Row because the costs of the park improvements constructed on the development far exceed the \$7,506,250 in Parkland Fees that are due to the City under the PDO.

³ The applicable Federal census at the time the first Tentative Map was issued for the project.

However, the City disagrees on the basis that the PDO in effect at the time the Original PD Zoning was adopted did not provide "acre for acre" credit or credit based on the costs of the improvements. Instead, the PDO provided that credit for private recreation improvements would be granted if certain requirements were met, but in no case would they exceed 50% of the actual square footage of private recreation amenities constructed. The City also disagrees with FRIT's position that it is entitled to "dollar for dollar" and "acre for acre" credit because even if the City accepted that FRIT were entitled to credit on this basis, many of the park amenities described in the General Development Plan have not been built.

Dispute Resolution

FRIT has built 511 of the 1201 units approved under the PD Zoning. Both FRIT and City Staff acknowledge there are inconsistencies in the documents. The City also acknowledges that some of the recreation improvements constructed would be eligible for Private Recreation Credit notwithstanding that those improvements are different than those identified at the first reading of the Ordinance on June 16, 1998 or the Original PD Zoning. In light of this, and given the uncertainties involved in litigation, the parties propose that FRIT receive Private Recreation Credit for some of the private recreation improvements it has already constructed and for the \$25,000 it paid to the City under the 2000 Agreement. FRIT will also receive Private Recreation Credit for private recreation improvements that will be built for the remaining 690 units in the future. Specifically, the parties propose that :

A. Private Recreation Credits:

1. FRIT shall receive credit against its total Parkland Dedication Obligation for constructed private recreation improvements, private recreation improvements to be constructed in the future, and constructed improvements in the Market Square area of the development as set forth in Attachment A, in the amount of \$2,924,240.
2. FRIT shall install the future private recreation improvements referenced in Attachment A in conjunction with the construction of the associated residential units, in accordance with the Schedule set forth in Attachment B. The future private recreation improvements described in Attachment B shall be completed on each parcel on or before the date the Certificate of Occupancy is issued for the last building to be constructed on the the parcel that includes the planned private recreational improvements described in Attachment B.
3. With respect to any credited improvements which relate to the Original 1201 Units and which have not been completed in

accordance with the Schedule set forth in Attachment B, the credits for the incomplete improvements shall be disallowed and FRIT shall be required to pay Parkland Fees calculated using the methodology set forth in Attachment A.

B. Credit under the 2000 Agreement

FRIT shall receive \$25,000 in credit against its total Parkland Dedication Obligation for the \$25,000 it paid to the City under the 2000 Agreement in order to obtain an appraisal of the Off-Site Parkland and for pre-acquisition costs.

C. In Lieu Fees Due

FRIT shall pay the City Parkland Fees as follows:

1. FRIT shall pay the City \$4,557,010 in Parkland Fees in satisfaction of its remaining Parkland Dedication Obligation for the Original 1201 Units. This amount is calculated based on the total amount of Parkland Fees due the City \$7,506,250, less the total Private Recreation Credit \$2,924,240, less the \$25,000 credit under the 2000 Agreement.

2. Payment of Parkland Fees

The Parkland Fees in the amount of \$4,557,010 shall be paid by FRIT to City within ten (10) days of the execution of the proposed Settlement and Parkland Agreement by FRIT.

CONCLUSION

Approval of the proposed Settlement and Parkland Agreement will enable the City to resolve its disputes with FRIT and obtain satisfaction of FRIT's obligations under the PDO.

POLICY ALTERNATIVES

The City Council could choose not to approve the Settlement and Parkland Agreement and the parkland dedication obligations for Santana Row would be unresolved.

PUBLIC OUTREACH/INTEREST

This item appears to qualify as an item of significant public interest under Criteria 1. This memorandum will be distributed according to the early distribution process and posted on the City's webpage.

COORDINATION

This memorandum has been coordinated with the Department of Parks, Recreation and Neighborhood Services and the Department of Planning, Building and Code Enforcement.

CEQA

Final EIR Town and Country Village certified on June 16, 1998, EIR Resolution No. 68210.

RICHARD DOYLE
City Attorney

By 
Jennifer Pousho
Deputy City Attorney

cc: Les White

For questions please contact JENNIFER POUSHO, DEPUTY CITY ATTORNEY, at
(408) 525-1922

ATTACHMENT A

Total Parkland Obligation			
# of Units	Total Parkland	Fee/Unit	Total Amount
1201	8.25 acres	\$6,250	\$7,506,250

Parkland Obligation Calculated as follows:

1201 Units x 2.29 Persons/ Unit x 3 acres/1000 Population = 8.25 acres of Park Obligation

1201 Units x \$6,250/Unit = \$7,506,250 Total In-Lieu Fee Obligation

Constructed Private Recreational Improvements	Active Elements		Match Area
	Sq. Ft.	Area Use	Sq. Ft.
Market Square Chess & Deck	5,500	Chess Area	5,500
Valencia Plaza	2,356	Play Area - Badminton	2,356
7B Building	18,400	Picnic + 1/3 Pool	11,296
Sub Totals – Built	26,256		19,152
Adjustments	0	7B Building Match	7,104
Total sq. ft.	26,256	0	26,256
A	B	C	D
$B + D / 298.3 = 176.0$	Units		
$52,512/298.3 = 176.0$	Units	Total In Lieu Fees for 176.0 Units x \$6,250/Unit = \$1,100,000	
Private Recreational Improvements to be Constructed in the Future			
Parcel 2	1,000	Future picnic area = 1/3 of pool deck	1,000
Parcel 6B	1,650	Future picnic area = 1/3 of pool deck	1,650
Parcel 8B	5,000	Future picnic area = 1/3 of pool deck	5,000
Parcel 9 & 10	3,000	Future picnic area = 1/3 of pool deck	3,000
Parcel 11	3,000	Future picnic area = 1/3 of pool deck	3,000
Parcel 12	1,330	Future picnic area = 1/3 of pool deck	1,330
Parcel 12 – Park Area	4,750	Community park site	0
Parcel 12 – Garden Plots Area	0	Garden Plots Area	4,750
Total sq. ft.	19,730		19,730

A	B	C	D
$B + D / 298.3 = 132.3$	Units		
$39,460/298.3 = 132.3$	Units	Total In Lieu Fees for 132.3 Units x \$6,250/Unit = \$826,875	

Constructed Market Square Improvements				
Actual Cost of Chess Board	\$372,354			
Actual Cost of Deck Area surrounding Chess Area including associated tables, chairs and decking	\$625,011			
Total Credit for Market Square Improvements	\$997,365			

Credit under the 2000 Agreement

FRIT shall receive \$25,000 in credit against its total Parkland Dedication Obligation for the \$25,000 it paid to the City under the 2000 Agreement in order to obtain an appraisal of the Off-Site Parkland and for pre-acquisition costs.

Total Private Recreation Credit for Constructed and Future Private Recreation Improvements =

\$1,926,875 (1,100,000 + \$826,875)

Total Credit for Market Square Improvements =

\$997,365

Total Credit under the 2000 Agreement =

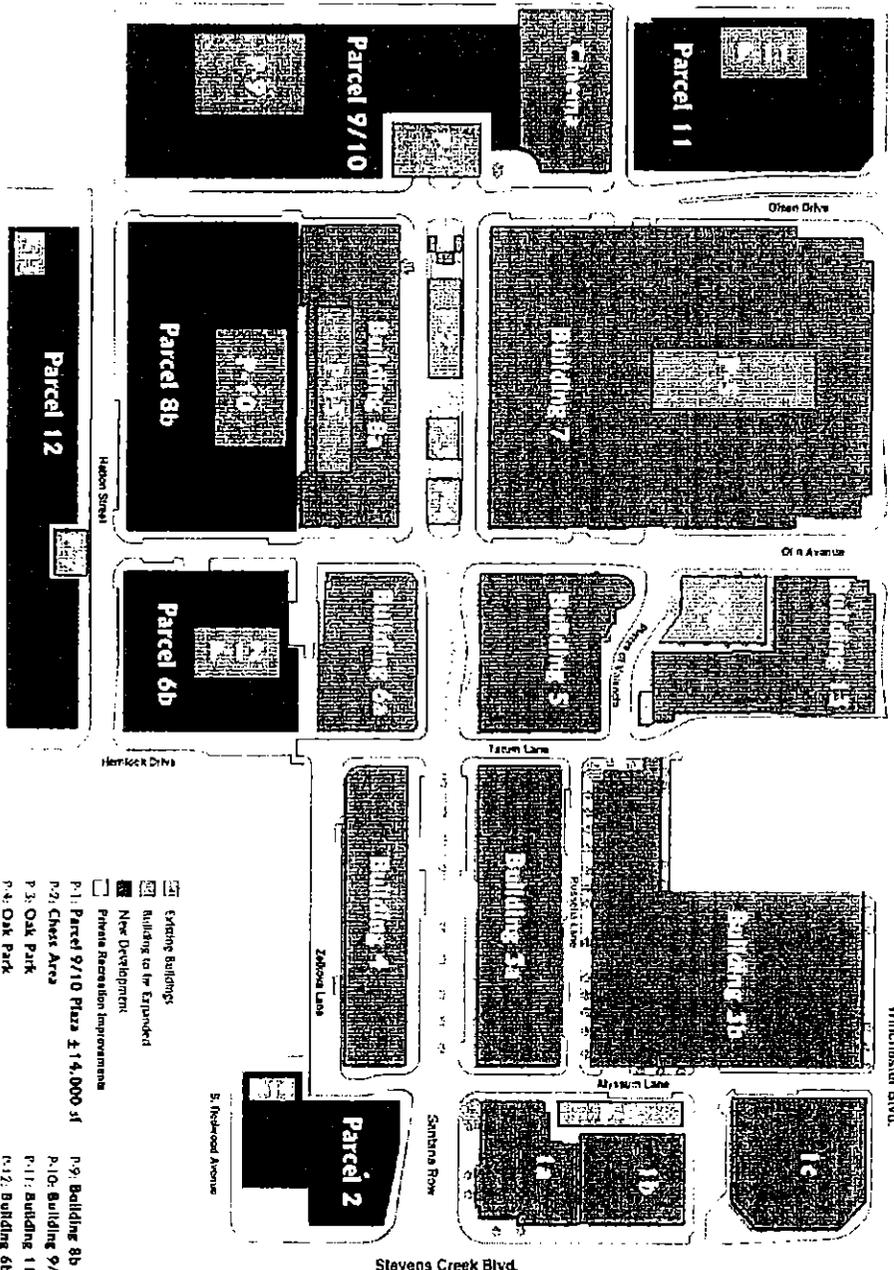
\$25,000

Total In Lieu Fee Obligation Due for the 1201 Original Units =

\$4,557,010 (\$7,506,250 - \$2,924,240 - \$25,000)

ATTACHMENT B

SANTANA ROW



- Existing Buildings
- Building to be Expanded
- New Development
- Pavement Recession Improvement
- P-1: Parcel 9/10 Plaza 3, 14, 000 sf
- P-2: Chest Area
- P-3: Oak Park
- P-4: Oak Park
- P-5: Building 7 Pool Area
- P-6: Valencia Park
- P-7: Parcel 12 Park 2, 6, 000 sf
- P-8: Building 1 Plaza
- P-9: Building 8b Pool Area
- P-10: Building 9/10 Pool Area
- P-11: Building 11 Pool Area
- P-12: Building 6b Pool Area
- P-13: Parcel 12 Garden
- P-14: Building 2 Pool Area
- P-15: Building 8a Podium

Parks and Recreation Map

SG
SLAVIK GROUP
Name for Project

SANTANA ROW

March 21, 2006