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CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Nadine Nader

SUBJECT: Early Council Packet

DATE: November 24, 2009

Approved Deanna J. Santana

Date 11/24/09

EARLY DISTRIBUTION COUNCIL PACKET FOR DECEMBER 8, 2009

Please find attached the Early Distribution Council Packet for the December 8, 2009 Council Meeting.

3.x Settlement of Property Damage Claims of 414, 420, 426, 432, 438, 444 and 450 Terrace Drive.

Recommendation: Approve proposed settlement and authorize the City Attorney to execute Settlement Agreements and any other documents necessary to effect settlements with homeowners of 414, 420, 426, 432, 438, 444 and 450 Terrace Drive relative to soil conditions present on their properties. CEQA: Exempt. Acting as the Lead Agency, the State Department of Toxic Substances Control (DTSC) on July 27, 2006 found the removal of soil in the rear yards of residences located at Terrace Drive to be categorically exempt under the provisions of Section 15330 of the CEQA Guidelines, as amended. Section 15330 covers minor actions to prevent, minimize, stabilize, mitigate, or eliminate the release or threat of release of hazardous waste or hazardous substances. The City may, as a responsible agency, rely upon the DTSC's prior CEQA determination to inform the City actions currently proposed related to soil conditions in the Terrace Drive rear yards. (City Attorney's Office)

5.x Deferment of Parkland In-Lieu Fees.

Recommendation: As referred by the Rules and Open Government Committee on October 28, 2009, consider adoption of a resolution amending the Schedule of Parkland In-Lieu Fees and Credits (Resolution No. 73587) charged pursuant to the Park Impact and Parkland Dedication Ordinance (Chapters 14.25 and 19.38 of the San José Municipal

Code) to retroactively defer payment of parkland in-lieu fees, interest and penalty until January 15, 2011, or the date of issuance of the first building permit for residential construction, whichever occurs earlier, for projects that currently have an approved parcel or final map by the City and have not been issued a building permit by the City for residential construction. CEQA: Not a Project. (Parks, Recreation and Neighborhood Services)
[Rules Committee referral 10/28/09 – Item H(2)]

These items will also be included in the Council Agenda Packet with a item numbers.

NADINE NADER
Assistant to the City Manager

COUNCIL AGENDA: 12-8-09
ITEM:

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: **Settlement of Property Damage Claims of Terrace Drive Homeowners**

DATE: November 24, 2009

RECOMMENDATION

Approve proposed settlement and authorize the City Attorney to execute Settlement Agreements and any other documents necessary to effect settlements with homeowners at 414, 420, 426, 432, 438, 444, and 450 Terrace Drive relative to soil conditions present on their properties.

OUTCOME

To settle claims of property damage and loss of value allegedly resulting from the presence of burn ash contaminants from the Watson Park dump site which are present on residential properties along Terrace Drive.

BACKGROUND

This proposed settlement involves seven residential properties on which burn ash and associated chemical and metal contaminants, consistent with similar material found at Watson Park, was found. Because of the presence of the burn ash contaminants, certain ongoing monitoring and soil management will be required for the properties, similar to the requirements for the Watson Park property. The City and the property owners participating in the settlement were able to reach an agreement without having to incur the expense of litigation, following an all-day mediation session and ongoing settlement discussions over the course of several months.

Watson Park is roughly bounded by N. 22nd Street, Taylor Street, Highway 101, and Coyote Creek, in central San José. Terrace Drive is located near the southern boundary of the park and is directly adjacent to Empire Gardens Elementary School, which is at the southern end of the park. The properties affected by this proposed settlement are 414, 420, 426, 432, 438, 444, and 450 Terrace Drive.

The City purchased the southern section of the park in 1913 and the northern section in 1959. Historically, this was an agricultural area, and the site is located within the flood

plain of Coyote Creek. An incinerator was erected on the site (approximately in what is now the middle of Watson Park) in 1914, and portions of the southern part of the park were used as a garbage dump. It appears from aerial photographs that the incinerator facility was closed by 1939, and that areas of soil from around the incinerator were spread about the southern part of what became Watson Park and surrounding areas.

In the process of undertaking improvements to the park starting in 2004, the City discovered buried burn ash in an area of the park. That discovery began a voluntary environmental clean-up action in conformance with state Department of Toxic Substances Control ("DTSC") oversight and direction. As part of the effort to delineate the extent of burn ash in the area, soil borings and sampling were undertaken on behalf of the City. Borings on the Terrace Drive properties disclosed some elevated levels of contaminants, primarily lead, in some areas of those residential properties. Ultimately, the City removed soil from various areas of the backyards on Terrace Drive, to differing depths, pursuant to plans developed by the City's consultants overseeing the site remediation work, and approved by DTSC.

The soil excavations occurred initially in August 2006, and subsequent excavation work following the same guidelines as in the original workplans was performed this past summer. The property owners cooperated in these soil removal efforts, and because of their cooperation, the City was able to transport the soil through the residential properties to Watson Park for handling with other similar soils on the Watson Park property. This effort saved money on soil transport and disposal costs, and will allow the City to monitor and manage the excavated soils, along with other affected Watson Park soils, in a manner that is expected to save on future monitoring and soil management costs for the burn ash site. Because the work performed on the Terrace Drive properties did not remove all of the burn ash present on each property, DTSC has required the homeowners to sign deed restrictions that do not allow certain excavations on portions of the property where sub-surface or capped burn ash and debris remains.

ANALYSIS

The goal of the settlement discussions was to reach an agreement that balanced and addressed the owners' concerns about ongoing soil monitoring obligations and costs, the potential diminution of the value of their properties and homes as a result of the environmental findings, and the removal of as much debris ash as possible, and the City's interests in handling the clean-up in a cost-effective manner with the requisite deed restrictions required by DTSC, and clearly defining the City's future soil management and indemnity obligations. The settlement with the property owners avoids the expense and risks of litigation.

Each participating property owner and the City have agreed to proposed terms that are contained in a settlement agreement that is substantively identical for each property owner, although the City will enter into separate agreements with each owner. There

are a number of attachments to each agreement, including form deed restrictions, maps of affected areas of each property for which the deed restrictions apply, protocols for advising the City of projects that may trigger soil management obligations, and a protocol for establishing any future diminution in property values at the time of a sale or transfer of the properties to bona fide third party purchasers. The settlement agreements all contain the following terms:

- Deed restrictions agreeable to DTSC are to be signed by the homeowners who are responsible for complying with the terms of those restrictions.
- The City is to be responsible for all future costs associated with confirming compliance with deed restrictions and reporting to DTSC (this will be handled as part of the City's compliance and reporting obligation for Watson Park).
- The City is to pay for costs of current owners (and/or spouses or registered domestic partners if an ownership interest is transferred to a spouse or partner) to comply with certain soil management requirements, in excess of project costs, when Owners have a project that involves excavation and triggers a soil management plan imposed by DTSC.
- As to successor owners (through sale or transfer to unrelated third parties), the City is obligated to pay for DTSC costs indefinitely; however, the City is responsible for soil management for 10 years following the recordation of the transfer of the property or 20 years after the effective date of the settlement agreement, whichever is earlier, and the City is obligated to manage no more than ten cubic yards of soil.
- If the property is transferred or inherited by a current owner's child or children living at the time the agreement is signed, the City's obligations with respect to soil management will continue for 15 years after the youngest living child of the owner's to whom an interest was transferred reaches the age of majority (e.g. at the time the youngest living child reaches the age of 33); the City will continue to have responsibility for DTSC monitoring and compliance costs.
- When an Owner, or an Owner's child(ren), transfer ownership of the property, an appraisal process is set-out in the agreement so that a price for the Property if it was "clean" is established, and the City is obligated to pay the difference, if any, between the good faith sales price and the appraised "clean" price.
- The City is to pay amounts previously offered to the homeowners based upon our appraiser's estimate of the diminution in value of the property due to the deed restriction ($15,000, $20,000 or $30,000), which will be an offset towards any sums that may later be owed through the future appraisal process.
- The owners will release their claims and agree not to sue the City for the presence of contaminated soils on their property, but not personal injury and unrelated third party claims relating to the presence of the waste contaminants on the property.
- The City will release the current owners for all claims that it may have relating to the presence of disposal waste on their properties, but does not release claims against prior owners or other third parties.

- The City will indemnify current owners for any future claims from unrelated third parties in connection with disposal waste on the properties, but not claims from successor owners or claims stemming from a breach of the deed restrictions or the gross negligence or willful misconduct of the owners.
- The City will provide indemnification to successor owners as above, but this indemnity obligation ends 10 years after the transfer to the successor owner or 20 years from the effective date of the settlement agreement, whichever is earlier.
- The City will pay the attorney fees, expert costs and appraiser fees incurred by the owners.

The cost of the settlement includes the cost of the additional work that was performed this past summer. Those costs are not completely tallied, but are approximately $440,000. The homeowners' attorney, expert and appraiser fees that are to be reimbursed by the City as a term of this settlement are approximately $225,000. The ongoing monitoring costs are difficult to estimate, but we anticipate that they will be in the range of $5,000 annually. The City's soil remediation cost obligations are entirely dependent upon projects undertaken by homeowners in the future. The owners' claimed diminution in the value of their properties is disputed, and the settlement provides for immediate payments ranging between $15,000 and $30,000 for those claims based upon the estimates that the City obtained from a consulting appraiser, for a total of $205,000. The homeowners have claimed estimated diminished values in the range of $100,000 to $200,000 per property based upon information from an AIA appraiser that they retained. The settlement agreement contains a process to appraise what, if any, diminished value can be attributed to the remaining burn ash and debris waste, and the resulting deed restrictions, on these properties. The City will be obligated to pay that future appraised sum, less the amount already paid as part of this settlement.

PUBLIC OUTREACH/INTEREST

The City and the affected property owners participated in a mediation with Lester Levy of JAMS, and there have been lengthy ongoing settlement negotiations with the attorney for the owners. Because this proposed settlement potentially involves the expenditure of public funds in excess of $1 million dollars, this memorandum has been included in the Early Distribution packet. This memo and an exemplar proposed settlement agreement have been posted on the City's website for the December 8, 2009 Council agenda. .

COORDINATION

The matter has been coordinated with the Department of Public Works and the Manager's Budget Office.

BUDGET REFERENCE

Fund #	Appn #	Appn. Name	Total Appn	Amt. for Contract	Adopted Budget Page	Last Budget Action (Date, Ord. No.)
001	6696	Watson Site Clean-up and Restoration	$3,567,000	$3,567,000	V-352	10/20/09, Ord. No. 28653

CEQA

Exempt. Acting as the Lead Agency, the State Department of Toxic Substances Control (DTSC) on July 27, 2006 found the removal of soil in the rear yards of residences located at Terrace Drive to be categorically exempt under the provisions of Section 15330 of the CEQA Guidelines, as amended. Section 15330 covers minor actions to prevent, minimize, stabilize, mitigate, or eliminate the release or threat of release of hazardous waste or hazardous substances. The City may, as a responsible agency, rely upon the DTSC's prior CEQA determination to inform the City actions currently proposed related to soil conditions in the Terrace Drive rear yards.

RICHARD DOYLE
City Attorney

cc: Debra Figone

For questions please contact Richard Doyle, City Attorney, at 535-1900.

COUNCIL AGENDA: 12-08-09
ITEM:

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Albert Balagso

SUBJECT: **DEFERMENT OF PARKLAND IN-LIEU FEES**

DATE: 11-19-09

Approved

Date 11-23-09

COUNCIL DISTRICT: Citywide

RECOMMENDATION

Adopt a resolution amending the Schedule of Parkland In-Lieu Fees and Credits (Resolution No. 73587) charged pursuant to the Park Impact and Parkland Dedication Ordinance (Chapters 14.25 and 19.38 of the San José Municipal Code) to retroactively defer payment of parkland in-lieu fees, interest and penalty until January 15, 2011, or the date of issuance of the first building permit for residential construction, whichever occurs earlier, for projects that currently have an approved parcel or final map by the City and have not been issued a building permit by the City for residential construction.

OUTCOME

City Council approval of the recommended action will allow developers with approved parcel or final maps who are not in a position to begin construction of the residential development to defer payment of parkland in-lieu fees to January 15, 2011, or the date of the issuance of the first building permit for residential construction, whichever comes first.

BACKGROUND

Mayor Reed issued a memo dated October 21, 2009 to the Rules and Open Government Committee recommending that staff evaluate options to allow developers who are currently in default, or will be in default shortly, to defer payment of parkland in-lieu fees to the City. The memo discussed certain residential developments that have an approved parcel or final maps, but due to the economic climate, are not in a position to request a building permit to begin construction of the residential units.

At the October 28, 2009 Rules and Open Government Committee meeting, Mayor Reed discussed his memo and deferring the timing of payment of parkland in-lieu fees to assist residential

development projects that may have been delayed for economic reasons. This memorandum is in response to direction from the Rules and Open Government Committee on October 28, 2008 and provides recommendation to the City Council to adopt a resolution that will allow the deferment of parkland in-lieu fees for projects that meet the conditions discussed herein.

ANALYSIS

Pursuant to San Jose Municipal Code 19.38.335, parkland fees may be paid to the City before the City's approval of the final or parcel map for the subdivided residential project. Alternatively, a subdivision developer may enter into a parkland agreement with City, which provides for payment of the parkland fee in full, concurrent with the issuance of the first building permit, but no later than one year after the final or parcel map is approved by City.

Based on the research conducted by staff, it appears that there are five residential projects that have an approved parcel or final map, and have entered into a parkland agreement with the City to defer payment of parkland in-lieu fees until the issuance of a building permit, or within one year of the approval of the parcel of final map. Three of these projects are currently in default pursuant to the parkland agreements entered into between the City and these developers. These developers have not paid the required parkland fees even though it has been more than a year since the approval of the parcel or final map. Parkland fees are due for the other two projects in December 2009.

A summary of the five projects is as follows:

Project	Developer or Representative	Amount Due	*Payment Deadline	Late Fee (Not including interest)
**Northpointe Apartments Zanker Road and Tasman Drive	FF Development Company	$2,234,777	12-23-2009	$1,360 per month
**Morrison Park Apartments Cinnabar Street and Stockton Avenue	Morrison Park Apts. LLC	$4,214,092	12-08-2009	$2,020 per month
Zeman Estates East Taylor Street and North Sixth Street	Todd Zeman	$53,000	09-12-2009	$40 per month
Almaden Skylark Townhomes Skylark Drive at Hummingbird Drive	JSM Enterprises, Inc.	$336,000	12-21-2008	$320 per month
Springbrook Springbrook Avenue and Canyon Ridge Drive	HMH, Inc.	$56,600	06-20-08	$40 per month

* Payment deadline shown is one year after approval of the final tract map.
** These projects must also provide private recreation facilities or land dedication in addition to payment of in-lieu fees according to the terms of their individual parkland agreements.

For projects that do not pay parkland fees within the required deadline, a late fee of $10.00 per unit per month is assessed pursuant to Resolution No. 73587. Additionally, interest on the overdue amount is also charged at a rate of one half of one percent per month. As part of the recommendation of this memorandum, staff recommends making the proposed resolution retroactive to June 20, 2008 since there are three developers who are currently in default and are not in a position to commence construction. In addition to payment of parkland in-lieu fees, two projects have also agreed to dedicate land or construction of private recreation facilities to meet their parkland obligations and the terms and timing for these actions are set forth in their existing parkland agreements. These terms will also need to be amended in order for these projects to continue to receive credits as originally envisioned.

City staff recommends that parkland fees be deferred until January 15, 2011 or prior to issuance of the first building permit, whichever occurs first, for developers that meet all of the following conditions:

1. City has approved a parcel or final map for the residential project; and
2. City has not issued the first building permit for residential construction for the project; and
3. City and developer enter into a fully executed Parkland Agreement by no later than March 1, 2010.

If a building permit for residential construction is issued for a project before January 15, 2011, payment of parkland fees would be required to be fully paid to the City prior to the issuance of the building permit. It is important for the City to require full payment before the issuance of the building permit because the City has very little leverage to collect parkland fees after the issuance of building permits. Additionally, the City would then be in the position to have to require collateral for the deferment, which would be an administrative burden and additional cost to developers.

The two largest fee payments affected by the recommended action would be collected from Northpointe Apartments in North San José and Morrison Park Apartments in the Central/Downtown area.

City staff has attempted to contact the developers for all five projects listed above. Representatives of Northpointe Apartments and Morrison Park Apartments have been in contact with the City and there has been no response from the other developers. Developers currently in default are subject to a penalty for late payment in the amount of ten dollars ($10.00) per unit per month plus interest as outlined in Resolution No. 73587 (Schedule of Parkland Fees and Credits). If the proposed resolution is adopted by Council and these five projects fail to enter into an amended parkland agreement with the City to defer parkland fees, interest and penalty within the required deadline, these developers will continue to be in default of their written agreements and staff will look for legal options to enforce the agreements.

EVALUATION AND FOLLOW UP

If the resolution is passed, City staff will work with applicants to amend existing parkland agreements to extend the term of each agreement to January 15, 2011.

POLICY ALTERNATIVES

Alternative #1: Do Nothing

Pros: The City will collect late fees for untimely payment at the time of building permit issuance.
Cons: Development applicants will be required to pay late fees which will further impact their ability to finance and construct delayed projects.
Reason for not recommending: It would not support Council's goals regarding economic stimulus.

Alternative #2: Allow deferment of payment of parkland fees until issuance of Certificate of Occupancy or by another type of deadline than that proposed.

Pros: Developers would have more flexibility.
Cons: Parks would not be available to serve the residents that generate the need for park facilities because it can take between up to 3 years to build park facilities once fees have been paid and the City has very little leverage to collect fees at that point in development
Reason for not recommending: The risk of never collecting fees is high and it is difficult to meet the needs of new residents for park facilities in a timely way. In park deficient areas such as the Central/Downtown area (Morrison Apartments Project) the impact is severe.

PUBLIC OUTREACH/INTEREST

☑ **Criterion 1:** Requires Council action on the use of public funds equal to $1 million or greater. **(Required: Website Posting)**

☐ **Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**

☐ **Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

The proposed Council action meets Criterion 1. The topic was discussed at the October 28, 2009 Rules and Open Government Committee. This memo was posted on the City's website as an agenda item prior to the City Council meeting on December 8, 2009. This topic was discussed at

the November 4, 2009 Parks and Recreation Commission Hearing and the Commission unanimously supported an extension to developers.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office, the Department of Planning, Building and Code Enforcement, the City Manager's Budget Office, and the Public Works Department.

FISCAL/POLICY ALIGNMENT

This Project is consistent with the Council-approved Budget Strategy Economic Recovery section in that it will spur construction spending in our local economy.

COST IMPLICATIONS

Since the City has not received this funding it has not been included or projected in the Five Year Capital Improvement Program so there are no direct cost implications associated with this proposal. However, by deferring the collections of these fees, the allocations of these fees to new projects will be delayed in the future.

BUDGET REFERENCE

Not Applicable

CEQA

Not a Project

ALBERT BALAGSO
Director of Parks, Recreation and
Neighborhood Services

For questions please contact Matt Cano, Division Manager, at 408-535-3580.