



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Albert Balagso

SUBJECT: SEE BELOW

DATE: 08-11-10

Approved

Slame Jutan

Date

8/17/10

COUNCIL DISTRICT: 7

SNI AREA: Tully/Senter

**SUBJECT: FOURTH AMENDMENT TO THE DEVELOPMENT, OPERATIONS,
AND MAINTENANCE AGREEMENT WITH THE VIET HERITAGE SOCIETY
AND OPERATING AND MAINTENANCE CERTIFICATION**

RECOMMENDATION

1. Adoption of a resolution authorizing the City Manager to negotiate and execute a fourth amendment to the agreement ("Agreement") with the Viet Heritage Society (VHS) for the development, maintenance, and operations of the Vietnamese Heritage Garden (VHG) to:
 - a. Modify the current project delivery model to reflect a Phased project (Phase Ia, Phase Ib, and Phase II);
 - b. Define the elements contained within Phases Ia and Ib;
 - c. Update key project delivery dates;
 - d. Amend the payment amounts and schedule associated with Phases Ia and Ib;
 - e. Modify the period of VHS maintenance responsibility to include the maintenance of Phase Ia through completion of Phase Ib.
2. City Council certification that (a) funding strategies will be pursued so that the projected funding for the operation and maintenance of the VHG should be made available beginning in 2011-2012, the first year of operation, and (b) appropriate efforts will be undertaken so that those funding strategies cover the entire cost of the project, including operation and maintenance costs, as to not require a decrease in existing basic neighborhood services.

OUTCOME

With approval of the actions requested, the City Council will amend the Development, Operations and Maintenance Agreement with VHS, reshaping Phase I of the project into Phase

Ia and Ib. The amendment would retain all original development elements. The amendment would retain all existing appropriated funding and redefine payment terms to align with the new project phasing. This action would update the project delivery dates within the current agreement. Finally, the amendment will clarify maintenance of Phases Ia and Ib as a responsibility of the VHS. Approval of these actions would advance a longtime goal of the City and the Vietnamese community to create a public garden dedicated to recognizing the richness of the Vietnamese culture and the value of the cultural diversity in San José.

EXECUTIVE SUMMARY

On April 12, 2005, the City Council approved an agreement with the VHS for the development, maintenance, and operations of a 4.2-acre VHG located within Kelley Park. On October 31, 2006, the City Council approved the First Amendment to the Development, Operations and Maintenance Agreement with the VHS. On August 14, 2007, the City Council approved the second amendment to the agreement and on August 5, 2008 approved the third amendment. Collectively, amendments one, two, and three raised the City contribution toward the project to \$1,750,000 with an additional \$80,000 to go toward payment of Department of Public Works for plan review and inspection services for a total City contribution of \$1,830,000.

The current Phase I of the project consists of the entire garden with exception of two significant buildings. The current Phase II of the project consists of the 6,500 square foot art and exhibition hall and the 4,500 square foot cultural museum. Under the amended agreement, what is currently known as Phase I would be divided into Phase Ia and Phase Ib. Phase Ia would allow for construction of elements along the park frontage including sidewalk improvements, parking, entry area, main gate, and associated infrastructure. Phase Ib would consist primarily of the remaining garden elements. The current Phase II would remain unchanged.

Funding appropriated and committed to the VHS under the existing agreement would be reconfigured. Of the \$1,100,000 in remaining City funding, the proposed Phase Ia would receive up to \$400,000 and funding in the amount of \$700,000 would support Phase Ib. Phase II funding (structures) remains the responsibility of VHS to fully fund, as is currently agreed upon.

Furthermore, the requested amendment to the agreement updates several key delivery dates within the agreement. In addition, the amendment calls on VHS to maintain the newly proposed phase Ia of the garden until completion of Phase Ib.

BACKGROUND

On April 12, 2005, the City Council approved a Development, Operations and Maintenance Agreement (Agreement) with the VHS for a 4.2-acre Vietnamese Heritage Garden located within Kelley Park. Under the terms of the original Agreement the City was to provide a contribution

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of \$1,000,000 toward construction and design costs for Phase I of the project. It also includes an additional City contribution of \$80,000 for plan review and inspection services. In the agreement, VHS agreed to donate the project to the City of San José as a public park for the use and enjoyment of all City residents.

The project was intended to be built in two phases. The 4.2-acre Phase I site improvements include a central plaza, various elements of cultural significance, a 3-flags display, park restroom, utilities, miscellaneous plantings, and several specialized gardens made up of native California and Vietnamese plants. A sidewalk will be constructed along the west side of Roberts Avenue to provide pedestrian access to Phelan Avenue. Permanent lighting will include security lighting and streetlights. The park design proposes 57 parking spaces with overflow parking to be accommodated within Kelley Park or other nearby sites. Phase II of the project consisted of a 6,500 square foot Vietnamese Historical Museum (housing cultural artifacts, offices and restrooms), and a 4,500 square foot Ben Thanh Building, which will house an information center and rotating cultural exhibits.

On October 31, 2006, City Council approved the First Amendment to the Agreement with the VHS. The first amendment increased the level of direct City support to the VHG project by \$330,000 from \$1,080,000 to \$1,410,000 and outlined the term of use of those funds. On June 19, 2007, City Council approved the appropriation of an additional \$320,000 in support of the VHG as part of the Adopted 2007-2008 Capital Budget. The additional funds were comprised of \$170,000 from the Council District 7 Construction and Conveyance Fund (Fund 385) and \$150,000 from Council District 5 Construction and Conveyance Fund (Fund 382). On August 14, 2007, the Second Amendment to the Agreement was approved by the City Council, incorporating these additional funds and clarifying terms of their use. As part of the 2007-2008 San José Redevelopment Agency Capital Budget process, an additional contribution totaling \$100,000 was allocated to support the project and appropriated to the Department of Parks, Recreation and Neighborhood Services (PRNS) under PSM #534 which was executed on May 22, 2008, and further detailed in the Third Amendment to the Agreement.

More recently, the VHS have requested a Fourth Amendment to the agreement to redefine the phasing of the project. The VHS has been unable to raise the amount of funding needed to construct all of Phase I of the project as currently defined and required under the current agreement. An existing grant to VHS of \$1,300,000 from the State of California Cultural and Historical Endowment could expire within approximately two months if construction is not underway. The proposed changes to the current Phase I will allow the timely use of this grant funding.

The 100% construction documents are currently undergoing review by the Department of Public Works. Assuming all contractual conditions are met, construction could begin in the fall of 2010, with completion of Phase Ia in summer of 2011.

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ANALYSIS

Under this proposed amendment the project would be phased as outlined below:

- Phase Ia – sidewalk improvements, grading, utilities, 57-space parking area, entry area, imperial main gate, central plaza, limited landscape, storm water management, and associated infrastructure.
- Phase Ib – various cultural elements (One Pillar Pagoda, Heavenly Lady Pagoda, Cham Towers, Kung Hung Shrine, 4-Pillar Pagoda, a 3-flags display, park restroom, utilities, miscellaneous plantings, and several specialized gardens made up of native California and Vietnamese plants, security lighting and streetlights).
- Phase II – a 6,500 square foot Vietnamese Historical Museum (housing cultural artifacts, offices and restrooms), and a 4,500 square foot Ben Thanh Building, which will house an information center and rotating cultural exhibits.

Under the proposed Fourth Amendment, Phase Ia would be required to be complete by December 31, 2012, Phase Ib by December 31, 2015 and Phase II by December 31, 2018. However, completion of Phase Ia could occur as early as July 2011 and Phase Ib could occur as early as July 2012.

To date, the City has expended \$730,000 under the terms of the original agreement - \$650,000 to VHS for design and engineering support and \$80,000 to Public Works for project management and plan review services. \$1,100,000 in City funding remains to support the project. The Fourth Amendment calls for up to \$400,000 in City support, paid on a reimbursement basis within 30 days of Phase Ia Notice to Proceed and \$700,000 to support Phase Ib, also to be paid on a reimbursement basis, within 30 days of Phase Ib acceptance.

Under the current agreement VHS has responsibility to provide for utilities and maintenance of the garden for a minimum of three years from the point of acceptance, but up to four years, contingent on key economic triggers. The Fourth Amendment requires VHS to provide all utilities and maintenance of Phase Ia through the completion of Phase Ib, and to provide all utilities and maintenance for Phases Ia and Ib for a minimum of three years from the point of completion of Phase Ib, but potentially up to four years contingent on key economic projections as defined within the agreement.

The project estimate for the proposed Phase Ia is \$1,960,000. Funding consists of \$1,300,000 from the State Cultural and Historical Endowment Grant, \$400,000 in VHS contributions, and \$400,000 from the City of San Jose.

With the exception of the terms and conditions described within this report, the proposed amendment retains all of the terms and conditions as called for within the original agreement and the first, second and third amendments to the agreement.

EVALUATION AND FOLLOW-UP

The agreement between the City and VHS includes criteria that must be met by VHS prior to the issuance of a Notice to Proceed for construction, establishes project milestones that must be achieved to trigger the release of City funding and establishes criteria and checkpoints related to the post construction maintenance and operations of the facility.

POLICY ALTERNATIVES

Alternative #1: Do not amend the agreement.

Pros: The proposed project falls significantly short of that originally envisioned. The completed phase Ia will provide a marginally functional site until such time as the remaining garden elements can be constructed.

Cons: The current agreement does not allow the City and VHS to complete construction of the project within the timelines set by the state to receive grant funds totaling \$1.3 M.

Reason for Not Recommending: Approval of the proposed amendment allows VHS and the City to leverage resources provided by the State (\$1,300,000). Currently, under the terms of the State Cultural Heritage Grant to VHS, construction must be underway by September 30, 2010, or funding may be lost.

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)**

No public outreach was necessary as this is an amendment to an existing agreement which is limited primarily to project delivery issues within the context of an already approved project. This memorandum will be posted on the City's website for the August 31, 2010 City Council agenda.

COORDINATION

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

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. On February 9, 2010, the City Council voted to defer the construction of new parks capital projects unless an alternative maintenance funding source can be identified that would provide at least three years of maintenance. The agreement with VHS to maintain the site for at least three years following the completion of Phase Ib exceeds this requirement.

Budget Principle Certification

As a part of the Mayor's March Budget Message for 2008-2009, the City Council adopted the following Budget Principle:

Capital Improvement Projects shall not proceed for projects with annual operating and maintenance costs exceeding \$100,000 in the General Fund without City Council certification that funding will be made available in the applicable year of the cost impact. Certification shall demonstrate that funding for the entire cost of the project, including operations and maintenance costs, will not require a decrease in existing basic neighborhood services.

As mentioned earlier, the Fourth Amendment requires VHS to provide all utilities and maintenance of Phase Ia through the completion of Phase Ib, and to provide all utilities and maintenance for Phases Ia and Ib for a minimum of three years from the point of completion of Phase Ib, but potentially up to four years contingent on key economic projections as defined within the agreement. Per the agreement with VHS, they will be required to provide evidence of their ability to maintain the site for the first year to the Director of PRNS prior to receiving their notice to proceed for construction. Under an optimistic construction schedule, it is projected that Phase Ia of the project may be completed and operational as early as July 2011 and Phase Ib in July 2012. Therefore, the City will not need to provide funding for maintenance until 2015-16, at the earliest. However, operating costs for the project, projected at \$13,000, will be needed with the opening of phase Ia in July 2011 through the second year of operations. These costs are anticipated to be off-set by revenues from reservations, permit fees, evening events and parking fees resulting in a net zero operating impact to the General Fund. After the third year of operations after Phase Ib is completed (2015-16), the City's operating and maintenance cost may increase to approximately \$269,000 (if the VHS does not provide funding for the fourth year of

operation). Revenues from the facility during the third year of Phase Ib being operational are estimated to be approximately \$110,000, netting a \$159,000 annual cost to the General Fund in 2015-2016.

As such, staff recommends that the Capital Improvement Budget Principle be interpreted so that the City Council makes a certification that (1) funding strategies will be pursued so that the projected funding for operation and maintenance of the VHG should be made available in 2011-2012, the first year of operation, and (2) appropriate efforts will be undertaken so that those funding strategies cover the entire cost of the project, including operation and maintenance costs, as to not require a decrease in existing basic neighborhood services. The earliest anticipated net cost to the General Fund is projected to occur in 2015-2016, if VHS does not provide funding for the fourth year of operation. It should be noted, however, that changes to the fiscal environment or future City Council action may impact the ability to fund the operations and maintenance costs of the VHG which could have an impact on existing basic neighborhood services. The VHS and staff shall continue to identify additional revenue generation strategies.

COST SUMMARY/IMPLICATIONS

1. AMOUNT OF RECOMMENDATION/COST OF PROJECT: N/A (Funding in the amount of \$1,100,000 for the project were appropriated in prior fiscal years.)
2. COST ELEMENT OF AGREEMENT/CONTRACT:
This amendment calls for up to \$400,000 in City support, paid on a reimbursement basis within 30 days of Phase Ia Notice to Proceed, and \$700,000 to support Phase Ib, paid on a reimbursement basis, within 30 days of phase Ib acceptance.
3. SOURCE OF FUNDING:
001- General Fund
391 – Construction Tax and Property Conveyance Tax Fund: City Wide Parks Purposes
450 - Services for Redevelopment Capital Projects Fund
VHS - includes California Cultural Historical Endowment funds, and donations
4. FISCAL IMPACT:

As proposed, VHS would provide all utilities and maintenance of Phase Ia through the completion of Phase Ib, and to provide all utilities and maintenance for Phases Ia and Ib for a minimum of three years from the point of completion of Phase Ib, but up to four years contingent on key economic projections. PRNS staff would be responsible for handling reservations for the VHG. This is estimated to add additional operating costs of approximately \$159,000 beginning in 2015-16. As mentioned above, the VHS and staff shall continue to identify additional revenue generation strategies.

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BUDGET REFERENCE

Not applicable (Funding for the project was encumbered in prior fiscal years.)

CEQA

PP04-228 (Addendum to an EIR).

/s/

ALBERT BALAGSO
Director of Parks, Recreation and
Neighborhood Services

For questions please contact Matt Cano, Acting Deputy Director, at 535-3580.