



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Norberto Duenas
Joseph Horwedel
Jennifer A. Maguire

SUBJECT: SEE BELOW

DATE: 07-11-11

Approved

Date

7/15/11

COUNCIL DISTRICT: 4
SNI AREA: NA

SUBJECT: APPROVAL OF AN ORDINANCE APPROVING A SECOND AMENDMENT TO THE DEVELOPMENT AGREEMENT WITH NOVELLUS SYSTEMS, INC., AND APPROVAL OF A PARKLAND AGREEMENT AND ENVIRONMENTAL AGREEMENT AND ADOPTION OF APPROPRIATION ORDINANCE AMENDMENTS FOR THE VISTA MONTANA TURNKEY PARK IMPROVEMENT PROJECT

RECOMMENDATION

- a. Approval of an ordinance approving the Second Amendment to the Development Agreement with Novellus Systems, Inc., Vista Montana Park Homes, LLC, and Equity-Tasman Apartments, LLC (collectively "Developer") setting forth the terms, conditions and obligations of the Developer in order to satisfy the Developer's Parkland Dedication Obligation and provide certain extraordinary park benefits to the City.
- b. Approval of a Parkland Agreement for Tentative Maps No. PT07-083 and PT07-084 with Developer under the Parkland Dedication Ordinance for the development of a one acre and five acre park and to provide certain extraordinary park benefits to the City.
- c. Approval of an Environmental Agreement related to the Parkland Agreement for Tentative Maps No. PT07-083 and PT07-084 with Developer for the completion of certain soil remediation required by the California Department of Toxic Substances Control for the one acre and five acre parks.
- d. Adoption of the following 2011-2012 Appropriation Ordinance amendments in the Subdivision Park Trust Fund (Fund 375):

1. Establish an appropriation to the Parks Recreation and Neighborhood Services Department in the amount \$3,000,000 for the Vista Montana Turnkey Park Improvements; and
2. Decrease the Reserve: Vista Montana Turnkey Park by \$2,800,000; and
3. Decrease the Reserve: Future PDO/PIO Projects by \$200,000

OUTCOME

City Council approval of the recommendations will authorize the turnkey park development and dedication of six acres of real property for Greenprint priority new park projects in the North San José Area Development Policy area.

BACKGROUND

On December 20, 2007, City and Novellus Systems, Inc. (“Novellus”) entered into a Development Agreement. The Development Agreement established certain development rights in real property that are the subject of development project applications. Novellus owns fee title to properties on or bounded by Vista Montana, Tasman Drive, North First Street and Highway 237 within the North San José Development Area. In fall of 2007, the City Council approved two Planned Development Zonings, PDC07-054 and PDC07-055, allowing for the development of 998 multi-family dwelling units, including a one acre neighborhood park and a five acre community park.

As part of the Development Agreement, Novellus is required to satisfy its Parkland Dedication Obligation under San José Municipal Code Section 19.38 (“Parkland Dedication Ordinance”) and provide certain extraordinary park benefits to the City consisting of the development of a one acre neighborhood park, development of a five acre community park, making twenty annual payments of \$75,000 to the City for operation and maintenance of the dedicated parks, and constructing certain private recreational improvements. The parties agreed that Developer’s maximum contribution towards the park improvements and operations and maintenance of the parks under the Development Agreement is \$4,500,000 (\$3,000,000 for park improvements and \$1,500,000 for operation and maintenance). Additionally, the Development Agreement required the Developer to dedicate the two parks totaling six acres without any liens or encumbrances affecting title. The park requirements and extraordinary park benefits were set forth in Exhibit E of the Development Agreement.

Novellus assigned certain rights under the Development Agreement to Vista Montana Park Homes, LLC (“Vista Montana”) and Equity-Tasman Apartments, LLC (“Equity-Tasman”). On March 9, 2010, the City and Developer entered into a First Amendment to the Development Agreement in order to extend various deadlines within the Development Agreement. In light of the economic and market conditions at the time, the Planning Commission recommended and the City Council approved extensions of deadlines set forth under the original Development Agreement by Ordinance 28662 on November 10, 2009 to provide the best opportunity for the projects to succeed.

The Developer has filed Tentative Maps (Maps) and Planned Development Permits (Permits) that align with the Development Agreement for the project. The Maps and Permits authorize nine hundred ninety-eight (998) multi-family residential units for construction. In order to satisfy the Developer's Parkland Dedication Obligation and the terms, conditions and obligations of the Development Agreement relating to the park benefits, the Developer is required to enter into a Parkland Agreement with the City. In working towards that goal, the Developer identified some soil contamination of the two future park sites that will require a two-foot depth clean soil cap or equivalent as remediation and as determined by the California Department of Toxic Substances Control (DTSC). In addition to the two-foot cap, DTSC is requiring a deed restriction to be recorded on the properties with annual monitoring, reports and a soil management plan when excavating below the cap. Because the responsibility for the contamination resides with the Developer and the City does not desire to assume certain responsibility for reporting and maintaining the two-foot soil cap, the City is requiring the Developer to enter into an Environmental Agreement as part of the Parkland Agreement, which is discussed in further detail below.

The Development Agreement needs to be amended to reflect the revised parkland obligations (Parkland Agreement and its associated Environmental Agreement as described above) and make other technical changes. On July 27, 2011, the Second Amendment to the Development Agreement will be presented to the Planning Commission. Staff is recommending that the City Council approves an ordinance approving the Second Amendment to the Development Agreement and approves the Parkland and Environmental Agreements with Developer.

ANALYSIS

The Developer's park obligations and extraordinary park benefits to be provided to City are set forth in Exhibit E of the original Development Agreement. Staff proposes to amend the Development Agreement to replace the existing Exhibit E with the proposed Parkland Agreement as an exhibit to the Development Agreement. Consistent with the original Development Agreement, the proposed Parkland Agreement requires Developer to provide City with a total extraordinary benefit of \$4,500,000 in park improvements while reducing funding for maintenance and operations of the dedicated parks from twenty (20) years to fourteen (14) years. Specifically, the proposed Parkland Agreement sets forth the terms and conditions for the Developer to provide the following:

1. Design and construct turnkey parkland improvements consistent with the Master Plan with a total monetary value of \$1,500,000 and dedicate the fully improved one acre Neighborhood Park Property to the City on or before the three anniversary of the issuance of the first building permits for any residential unit under PDC11-007; and
2. Design and construct turnkey park improvements consistent with the Master Plan with a total monetary value of \$5,000,000 with a City contribution of up to \$3,000,000 and dedicate the fully improved five acre Community Park Property to the City on or before the three year anniversary of the issuance of the first building permit for any residential unit under PDC11-007; or dedicate five acres of unimproved parkland and pay parkland fees to the City in the amount of \$2,000,000, at the City's sole option; and

3. Make fourteen (14) annual payments to the City for park maintenance and operations in the amount of at least \$75,000 to be used for the Neighborhood Park Property and/or Community Park Property; and
4. Construct certain private recreational improvements for the residential projects totaling at least 36,000 square feet; and
5. Complete the soil remediation as required by DTSC and as set forth in the Environmental Agreement.

To fully design and construct the two parks in accordance with the Master Plan for the parks, it will cost a total of approximately \$6,500,000. The one acre Neighborhood Park Property is estimated to cost \$1,500,000 and the five acre Community Park Property is estimated to cost \$5,000,000. A fully developed one acre park consistent with the Master Plan would include a picnic pavilion/shade structure, at least two additional picnic tables, walkways, two children's play structures with shaded seating, game tables, park signage, open turf area, drinking fountain, a bike rack, trash receptacles, and other associated landscaping and irrigation improvements. Additionally, a fully developed five acre park consistent with the Master Plan would include one concession/restroom building and shade structure, two lighted soccer fields with artificial turf and cricket pitch, one full basketball court, a bike rack, drinking fountain, picnic tables, trash receptacles, trash enclosure, parking lot with approximately seventy-one parking spaces, walkways, park signage and other associated landscaping and irrigation improvements.

The Developer has agreed to provide park improvements for the two parks in the maximum amount of \$3,500,000. The proposed Parkland Agreement requires the Developer to fully develop the one acre Neighborhood Park Property consistent with the Master Plan and dedicate it to the City at a cost of \$1,500,000. The Developer will contribute the remaining amount of \$2,000,000 to the five acre Community Park Property. There is a funding gap of approximately \$3,000,000 to fully develop the five acre park. The proposed Parkland Agreement provides the City with two options for the five acre Community Park Property.

Under the proposed Parkland Agreement, on or before August 31, 2011, the City will have to provide written notice to the Developer of its election to either proceed under the first or second options for the community park. If the City elects the first option, the Developer will be required to fully design and construct the park improvements consistent with the Master Plan at a cost of approximately \$5,000,000 and the City will reimburse the Developer up to \$3,000,000. The Developer would be required to first expend \$2,000,000 on the community park and the City will then issue a Notice to Proceed to allow Developer to continue work on the park and get monthly reimbursement for any amount expended thereafter, up to a maximum of \$3,000,000. In the event the total cost for the community park may exceed \$5,000,000, the Developer must notify the City in writing and Developer is not authorized to permit any additional work without written consent from the City. The option at that point would be to remove certain amenities from the park or the City Council may appropriate additional funding to complete the park. The community park is required to be completed on or before the three year anniversary of the issuance of the first building permit for any residential unit under PDC11-007. Staff anticipates the Developer will request building permits for PDC11-007 in September 2011 based upon statements made by the Developer.

07-11-11

Subject: Vista Montana Development, Parkland and Environmental Agreements and Adoption of Appropriation Ordinance Amendments

Page 5

If the City elects the second option, the Developer is required to dedicate the unimproved five acre parkland to the City and pay \$2,000,000 to City. Under this option, the Developer would not be required to provide any park improvements to the five acre community park. The City would construct the five acre park as a public works project in the future when funding is available.

As part of the recommendations, staff is requesting funding in the amount of \$3,000,000 to be appropriated from the Park Trust Fund to allow the Developer to fully construct the five acre park. Through negotiations with the Developer, staff determined that the second option where the Developer does not construct all park improvements consistent with the Master Plan may lead to potential disputes between the Developer and the City particularly when the City later installs utilities or other park improvements near or below the two-foot cap. In the event that the City installs park improvements at a later date and proper soil management was not addressed, the City may be required to assume responsibility for some or all long term reporting and maintenance activities required by DTSC. In order to minimize potential dispute issues and to provide a completed park for the public on the Community Park Property, staff recommends City Council appropriate the required funding to allow staff to move forward with the first option to require the Developer to completely build out the Community Park Property.

As part of the extraordinary park benefit the Developer will provide to the City under the Development and Parkland Agreements, the Developer has agreed to make fourteen (14) annual payments to the City to be deposited in a Gift Trust Fund to be used for the park maintenance and operations of both parks. The Developer will make payments in the amount of \$75,000 to the City beginning on the effective date of the Parkland Agreement and annually thereafter. The annual payment shall be adjusted at the end of every five (5) years for inflation based upon the Consumer Price Index for the San Francisco-Oakland-San José area published by the United States Department of Labor. It is anticipated that annual operations and maintenance costs will be funded through revenue generation at the Community Park Property with potential funding gaps absorbed by the Parks, Recreation and Neighborhood Services Department beginning in year fifteen (15).

DTSC has jurisdiction over both park properties resulting from soil tests identifying pesticide related contaminants of concern including arsenic, lead and DDT. The Developer has been working with DTSC over the past several years to come up with a remediation plan that will authorize park use for the Neighborhood Park Property and Community Park Property. DTSC issued a Notice of Determination dated May 9, 2008, the Final Removal Action Workplan (RAW), requiring the Developer to install a two-foot clean soil cap with natural cover to separate park users from the soil contamination. At the request of staff, the Developer gained approval of a RAW Update from DTSC on December 17, 2009 that provides for an alternate cap solution utilizing an artificial turf system in lieu of clean soil and vegetation for the soccer fields. Additionally, hardscape areas, such as the parking lot, walkways, basketball courts, will not require a two-foot cap as the hardscape surface will serve as the cap to protect the public. DTSC also required a Deed Restriction on the two park properties and a soil management plan for work in and around the cap. Because there are long term reporting and maintenance issues involved with the Deed Restriction, staff and the Developer negotiated an Environmental Agreement to satisfy the responsibility for ongoing remedial activities where the Developer agrees to continue to perform and retain liability for any

corrective or remedial actions required by DTSC or other government authority for both the Neighborhood Park Property and the Community Park Property while the City agrees to maintain normal wear and tear of the cap due to park use and repair damage caused by or resulting from City activities that compromise the cap. Because the Developer is taking responsibility for the soil remediation and long term reporting and maintenance activities as specifically described in the Environmental Agreement, staff recommends City Council approval of the Environmental Agreement.

With respect to the analysis above, staff recommends City Council approval of the Second Amendment to the Development Agreement simultaneously with the approval of the Parkland Agreement and the Environmental Agreement. If approved by Council, the Parkland and Environmental Agreements will become effective on the same effective date for the Second Amendment to the Development Agreement. The provisions of these agreements are consistent with and reflected in the revised rezoning proposals for the subject real properties, which rezoning proposals are agendaized separately on this Council agenda for consideration.

POLICY ALTERNATIVES

Alternative #1: Do not simultaneously approve the Second Amendment to the Development Agreement, the Parkland Agreement and the Environmental Agreement

Pros: The extraordinary public benefit will be received by the City from the Developer.

Cons: Complete build out of the Community Park Property will be deferred and an Environmental Agreement with the Developer will not be executed.

Reason for not recommending: Does not support Greenprint priorities, obligates the Developer to provide a clean and unencumbered site that may not be financially feasible to attain and delay park development indefinitely and does not support the City Council adopted San José Economic Strategy 2010-2015.

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. A community meeting was held to discuss the future plans for this park on May 9, 2009. This memo was posted on the City's website as an agenda item prior to the City Council meeting on August 2, 2011.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office and the Environmental Services Department.

FISCAL/POLICY ALIGNMENT

This Project is consistent with the Council-approved Greenprint 2009 Update new park priority areas in the North San José Planning Area.

COST SUMMARY/IMPLICATIONS

1. AMOUNT OF RECOMMENDATION: \$3,000,000
2. COST OF AGREEMENT: None
3. SOURCE OF FUNDING: 375 – Subdivision Park Trust Fund (\$3,000,000)
Total - \$3,000,000
4. FISCAL IMPACT: This project has been reviewed and is anticipated to have no adverse impact on the General Fund. Annual operations and maintenance costs are paid for by the Developer for fourteen (14) years. Annual operations and maintenance costs are anticipated to be funded through revenue generation at the Community Park Property with potential funding gaps absorbed by the Parks, Recreation and Neighborhood Services Department beginning in year fifteen (15).

07-11-11

Subject: Vista Montana Development, Parkland and Environmental Agreements and Adoption of Appropriation Ordinance Amendments

Page 8

BUDGET REFERENCE

Fund #	Appn. #	Appn. Name	RC #	Total Appn. Amount	Amount for Contract	Proposed Budget Page	Last Budget Action (Date, Ord. No.)
Total Project Cost				\$3,000,000			
<u>Recommended Funding Sources*</u>							
375	8301	Reserve: Vista Montana Turnkey Park		\$2,800,000		V-515	6/21/11 28928
375	8845	Reserve: Future PDO/PIO Projects		\$200,000**		V-516	6/21/11 28928
<u>Total Current Funding Available</u>				<u>\$3,000,000</u>			

* Included in this memorandum are recommendations to allocate funding totaling \$3,000,000 from two reserves for the complete build out of the Community Park Property.

** The Future PDO/PIO Reserve in the Subdivision Park Trust Fund totals \$14,559,190; however, only \$200,000 will be used for the development of this park.

CEQA

EIR Resolution No 72768.

/s/
NORBERTO DUENAS
Deputy City Manager/Acting Director of
Parks, Recreation and Neighborhood Services

/s/
JOSEPH HORWEDEL
Director of Planning, Building and Code
Enforcement



JENNIFER A. MAGUIRE
Budget Director

For questions please contact Matt Cano, Acting Deputy Director PRNS, at 408-535-3580.