

RESOLUTION NO. 2008-172

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ELK GROVE
AUTHORIZING FINANCING OF CERTAIN PUBLIC CAPITAL IMPROVEMENTS,
APPROVING FORM AND SUBSTANCE OF ACQUISITION AGREEMENT AND
AUTHORIZING CHANGES THERETO AND EXECUTION THEREOF**

WHEREAS, by Resolution No. 2004-108, adopted by this City Council on May 19, 2004 (the "SCIP Resolution"), the City of Elk Grove (the "Local Agency") joined the Statewide Community Infrastructure Program ("SCIP") sponsored by the California Statewide Communities Development Authority; and

WHEREAS, the SCIP Resolution authorized the financing of certain development impact fees ("Fees") for non-residential development projects through the levy of special assessments pursuant to the Municipal Improvement Act of 1913 (Streets and Highways Code Sections 10000 and following) and the issuance of improvement bonds (the "Local Obligations") under the Improvement Bond Act of 1915 (Streets and Highways Code Sections 8500 and following); and

WHEREAS, SCIP currently provides for pooled financing of public capital improvements ("Improvements") in addition to Fees, and the Local Agency has determined to authorize the financing of Improvements for non-residential projects through SCIP; and

WHEREAS, in connection with SCIP financing of certain Improvements, it is necessary for the Local Agency from time to time to enter into acquisition agreements with developers of real property subject to special assessment through SCIP providing for the acquisition of such Improvements by the Local Agency, and;

WHEREAS, there has been filed with the City Clerk of the Local Agency a form of agreement, attached hereto as EXHIBIT A, and entitled "Acquisition Agreement" (the "Acquisition Agreement"), by and between the Local Agency and the developer identified therein (the "Developer"); and

WHEREAS, this City Council wishes to approve the Acquisition Agreement as to form and substance, with provision for making changes thereto, and to authorize the execution thereof.


NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Elk Grove hereby finds and determines the following:

Section 1. The SCIP Resolution previously adopted by this City Council, authorizing the financing of Fees for non-residential development projects, is hereby amended to authorize the financing of certain public capital improvements through SCIP in the manner more fully prescribed by this Resolution, subject to the same

restrictions pertaining to property being developed for non-residential land uses as previously established for Fees.

Section 2. This City Council approves the form and substance of the Acquisition Agreement, and the City Manager or designee in writing of the City Manager (references hereafter to the City Manager shall be deemed to include such designee) is hereby authorized and directed to execute and deliver one or more Acquisition Agreements from time to time in substantially said form, with such changes therein as the City Manager may require or approve, such approval to be conclusively evidenced by the execution and delivery thereof. The City Clerk is hereby authorized and directed to attest such execution.

PASSED AND ADOPTED by the City Council of the City of Elk Grove this 23rd day of July 2008.


GARY DAVIS, MAYOR of the
CITY OF ELK GROVE

ATTEST:


SUSAN J. BLACKSTON, CITY CLERK

APPROVED AS TO FORM:


SUSAN COCHRAN, CITY ATTORNEY

EXHIBIT A

FORM OF ACQUISITION AGREEMENT

CALIFORNIA STATEWIDE COMMUNITIES DEVELOPMENT AUTHORITY
STATEWIDE COMMUNITY DEVELOPMENT PROGRAM

ACQUISITION AGREEMENT

BY AND BETWEEN
CITY OF ELK GROVE
AND
[DEVELOPER]

Dated as of _____, 20__

ACQUISITION AGREEMENT

Recitals

A. The parties to this Acquisition Agreement (the "Agreement") are the CITY OF ELK GROVE, (the "Local Agency"), and [HERE INSERT NAME OF DEVELOER] (the "Developer").

B. The effective date of this Agreement is _____, 20__.

C. The Developer has applied for financing of certain public capital improvements through the Statewide Community Infrastructure Program ("SCIP") administered by the California Statewide Communities Development Authority (the "Authority") and such application has been approved by the Local Agency.

D. Under SCIP, the Authority intends to issue bonds to fund, among other things, all or a portion of the costs of such improvements, and the portion of the proceeds of such bonds allocable to the cost of the improvements to be constructed and installed by the Developer, together with interest earned thereon prior to such acquisition, is referred to herein as the "Available Amount".

E. SCIP will provide financing for the acquisition by the Local Agency of such improvements and the payment of the Acquisition Price (as defined herein) of such improvements from the Available Amount. Attached hereto as Exhibits A are descriptions of the authorized public improvements to be acquired from the Developer (collectively, the "Acquisition Improvements"), which description is subject to modification by written amendment of this Agreement, subject to the approval of the Authority.

F. The parties anticipate that, upon completion of the Acquisition Improvements and subject to the terms and conditions of this Agreement, the Local Agency will acquire such completed Acquisition Improvements with the Available Amount.

G. Any and all monetary obligations of the Local Agency arising out of this Agreement are the special and limited obligations of the Local Agency payable only from the Available Amount, and no other funds whatsoever of the Local Agency shall be obligated therefor.

H. In consideration of Recitals A through G, inclusive, and the mutual covenants, undertakings and obligations set forth below, the Local Agency and the Developer agree as stated below.

Agreement

ARTICLE I

DEFINITIONS; ASSESSMENT DISTRICT FORMATION AND FINANCING PLAN

Section 1.01. Definitions. As used herein, the following capitalized terms shall have the meanings ascribed to them below:

“Acceptable Title” means free and clear of all monetary liens, encumbrances, assessments, whether any such item is recorded or unrecorded, and taxes, except those items which are reasonably determined by the Local Agency Engineer not to interfere with the intended use and therefore are not required to be cleared from the title.

“Acquisition Improvements” shall have the meaning assigned to such term in Recital E.

“Acquisition Price” means the amount paid to the Developer upon acquisition of all of the Acquisition Improvements as provided in Section 2.03.

“Actual Cost” means the cost of construction of all of the Acquisition Improvements, as documented by the Developer to the satisfaction of the Local Agency, as certified by the Local Agency Engineer in an Actual Cost Certificate.

“Actual Cost Certificate” shall mean a certificate prepared by the Developer detailing the Actual Cost of all of the Acquisition Improvements to be acquired hereunder, as revised by the Local Agency Engineer pursuant to Section 2.03.

“Agreement” means this Acquisition Agreement, dated as of _____, 20__.

“Assessment District” means the assessment district established by the Authority pursuant to SCIP which includes the Developer's property for which the Acquisition Improvements are being funded.

“Authority” means the California Statewide Communities Development Authority.

“Available Amount” means the amount of funds deposited in the Developer Acquisition Account by the Authority pursuant to SCIP, together with any interest earnings thereon.

“Code” means the Streets and Highways Code of the State of California.

“Developer” means [DEVELOPER’S NAME].

“[DEVELOPER’S NAME] Acquisition Account” means the account by that name established by the Authority pursuant to SCIP for the purpose of paying the Acquisition Price of the Acquisition Improvements.

“Local Agency” means the City of Elk Grove.

“Local Agency Engineer” means the [Title of applicable Local Agency official] who will be responsible for administering the acquisition of the Acquisition improvements hereunder.

"Project" means the Developer's development of the property in the Assessment District, including the design and construction of the Acquisition Improvements and the other public and private improvements to be constructed by the Developer within the Assessment District.

"SCIP" means the Statewide Community Development Program of the Authority.

"SCIP Requisition" means a requisition for payment of funds from the [DEVELOPER'S NAME] Acquisition Account in substantially the form attached hereto as Exhibit B.

"SCIP Trust Agreement" means the Trust Agreement entered into by the Authority and the SCIP Trustee in connection with the financing for the Acquisition Improvements.

"SCIP Trustee" means Wells Fargo Bank, National Association, as trustee under the SCIP Trust Agreement.

"Title Documents" means, for each Acquisition Improvement acquired hereunder, a grant deed or similar instrument necessary to transfer title to any real property or interests therein (including easements) necessary or convenient to the operation, maintenance, rehabilitation and improvement by the Local Agency of the Acquisition Improvement (including, if necessary, easements for ingress and egress) and a Bill of Sale or similar instrument evidencing transfer of title to the Acquisition Improvement (other than said real property interests) to the Local Agency, where applicable.

Section 1.02. Participation in SCIP. Developer has applied for financing thorough SCIP of the Acquisition Improvements, and such application has been approved by the Local Agency. Developer and Local Agency agree that until and unless such financing is completed by the Authority and the Available Amount is deposited in the Developer Acquisition Account, neither the Developer nor the Local Agency shall have any obligations under this agreement. Developer agrees to cooperate with the Local Agency and the Authority in the completion of SCIP financing for the Developer's Project.

Section 1.03. Deposit and Use of Available Amount.

(a) Upon completion of the SCIP financing, the Available Amount will be deposited by the Authority in the [DEVELOPER'S NAME] Acquisition Account.

(b) The Authority will cause the SCIP Trustee to establish and maintain the [DEVELOPER'S NAME] Acquisition Account for the purpose of holding all funds for the Acquisition Improvements. All earnings on amounts in the [DEVELOPER'S NAME] Acquisition Account shall remain in the [DEVELOPER'S NAME] Acquisition Account for use as provided herein and pursuant to SCIP. The amounts in the [DEVELOPER'S NAME] Acquisition Account shall be withdrawn upon delivery of a SCIP Requisition as provided in Section 2.05 and paid to [DEVELOPER'S NAME] in accordance with SCIP procedures upon completion of the Acquisition Improvements within 30 days (or as soon thereafter as reasonably

practicable) of receipt by the Local Agency of the certification of the Local Agency Engineer required by Section 2.03 of this Agreement, and subject to satisfaction of all other conditions precedent to such acquisition pursuant to Section 2.04 of this Agreement, to pay the Acquisition Price of such completed Acquisition Improvements, as specified in Article II hereof. Upon completion of all of the Acquisition Improvements and the payment of all costs thereof, any remaining funds in the [DEVELOPER'S NAME] Acquisition Account (less any amount determined by the Local Agency as necessary to reserve for claims against such account) shall be applied to pay the costs of any additional improvements eligible for acquisition with respect to the Project as approved by the Authority and, to the extent not so used, (ii) shall be applied by the Authority as provided in Section 10427.1 of the Code to pay a portion of the assessments levied on the Project.

Section 1.04. No Local Agency Liability; Local Agency Discretion; No Effect on Other Agreements. In no event shall any actual or alleged act by the Local Agency or any actual or alleged omission or failure to act by the Local Agency with respect to SCIP subject the Local Agency to monetary liability therefor. Further, nothing in this Agreement shall be construed as affecting the Developer's or the Local Agency's duty to perform their respective obligations under any other agreements, land use regulations or subdivision requirements related to the Project, which obligations are and shall remain independent of the Developer's and the Local Agency's rights and obligations under this Agreement.

ARTICLE II

DESIGN, CONSTRUCTION AND ACQUISITION OF ACQUISITION IMPROVEMENTS

Section 2.01. Letting and Administering Design Contracts. The parties presently anticipate that the Developer has awarded and administered or will award and administer engineering design contracts for the Acquisition Improvements to be acquired from Developer. All eligible expenditures of the Developer for design engineering and related costs in connection with the Acquisition Improvements (whether as an advance to the Local Agency or directly to the design consultant) shall be reimbursed at the time of acquisition of such Acquisition Improvements. The Developer shall be entitled to reimbursement for any design costs of the Acquisition Improvements only out of the Acquisition Price as provided in Section 2.03 and shall not be entitled to any payment for design costs independent of the acquisition of Acquisition Improvements.

Section 2.02. Letting and Administration of Construction Contracts. State law requires that all Acquisition Improvements shall be constructed as if they were constructed under the direction and supervision of the Local Agency. In order to assure compliance with those provisions, except for any contracts entered into prior to the date hereof, Developer agrees to comply with the guidelines of the Local Agency for letting and administering said contracts. The Developer agrees that all such contracts shall call for payment of prevailing wages as required by the Labor Code of the State of California.

Section 2.03. Sale of Acquisition Improvements. The Developer agrees to sell to the Local Agency the Acquisition Improvements to be constructed by Developer (including any rights-of-way or other easements necessary for the operation and maintenance of the Acquisition

Improvements, to the extent not already publicly owned) when all Acquisition Improvements are completed to the satisfaction of the Local Agency for an amount not to exceed the lesser of (i) the Available Amount or (ii) the Actual Cost of the Acquisition Improvements. Exhibit A, attached hereto and incorporated herein, contains a list of each Acquisition Improvement. At the time of completion of each Acquisition Improvements, the Developer shall deliver to the Local Agency Engineer a written request for acquisition, accompanied by an Actual Cost Certificate and executed Title Documents for the transfer of the Acquisition Improvements, where necessary. In the event that the Local Agency Engineer finds that the supporting paperwork submitted by the Developer fails to demonstrate the required relationship between the subject Actual Cost and eligible work, the Local Agency Engineer shall advise the Developer that the determination of the Actual Cost (or the ineligible portion thereof) has been disallowed and shall request further documentation from the Developer. If such further documentation is still not adequate, the Local Agency Engineer may revise the Actual Cost Certificate to delete any disallowed items and such determination shall be final and conclusive.

In the event that the Actual Cost is in excess of the Available Amount, the Local Agency shall withdraw the Available Amount from the [DEVELOPER'S NAME] Acquisition Account and transfer said amount to the Developer. In the event that the Actual Cost is less than the Available Amount, the Local Agency shall withdraw an amount from the [DEVELOPER'S NAME] Acquisition Account equal to the Actual Cost, and shall transfer said amount to the Developer. Any amounts then remaining in the [DEVELOPER'S NAME] Acquisition Account shall be applied as provided in Section 1.03.

In no event shall the Local Agency be required to pay the Developer more than the amount on deposit in the [DEVELOPER'S NAME] Acquisition Account at the time such payment is requested.

Section 2.04. Conditions Precedent to Payment of Acquisition Price. Payment by the Local Agency to the Developer from the [DEVELOPER'S NAME] Acquisition Account of the Acquisition Price for the Acquisition Improvements shall be conditioned first upon the determination of the Local Agency Engineer, pursuant to Section 2.03, that such Acquisition Improvements are all complete and ready for acceptance by the Local Agency, and shall be further conditioned upon prior satisfaction of the following additional conditions precedent:

(a) The Developer shall have provided the Local Agency with lien releases or other similar documentation satisfactory to the Local Agency as evidence that the property which is subject to the special assessment liens is not subject to any prospective mechanics lien claim respecting the Acquisition Improvements.

(b) The Developer shall be current in the payment of all due and payable property taxes and installments for the special assessments of the Assessment District on property owned by the Developer or under option to the Developer.

(c) The Developer shall have provided the Local Agency with Title Documents needed to provide the Local Agency with title to the site, right-of-way, or easement upon which the subject Acquisition Improvement is situated. All such Title Documents shall be in a form acceptable to the Local Agency (or applicable governmental agency) and shall convey

Acceptable Title. The Developer shall provide a policy of title insurance as of the date of transfer in a form acceptable to the Local Agency Engineer insuring the Local Agency as to the interests acquired in connection with the acquisition of any interest for which such a policy of title insurance is not required by another agreement between the Local Agency and the Developer. Each title insurance policy required hereunder shall be in the amount equal to the Acquisition Price.

Section 2.05. SCIP Requisition. Upon a determination by the Local Agency Engineer to pay the Acquisition Price of the Acquisition Improvements pursuant to Section 2.04, the Local Agency Engineer shall cause a SCIP Requisition to be submitted to the SCIP Trustee and the SCIP Trustee shall make payment directly to the Developer of such amount pursuant to the SCIP Trust Agreement. The Local Agency and the Developer acknowledge and agree that the SCIP Trustee shall make payment strictly in accordance with the SCIP Requisition and shall not be required to determine whether or not the Acquisition Improvements have been completed or what the Actual Costs may be with respect to such Acquisition Improvements. The SCIP Trustee shall be entitled to rely on the SCIP Requisition on its face without any further duty of investigation.

ARTICLE III

MISCELLANEOUS

Section 3.01. Indemnification and Hold Harmless. The Developer hereby assumes the defense of, and indemnifies and saves harmless the Local Agency, the Authority, and each of its respective officers, directors, employees and agents, from and against all actions, damages, claims, losses or expenses of every type and description to which they may be subjected or put, by reason of, or resulting from or alleged to have resulted from the acts or omissions of the Developer or its agents and employees in the performance of this Agreement, or arising out of any contract for the design, engineering and construction of the Acquisition Improvements or arising out of any alleged misstatements of fact or alleged omission of a material fact made by the Developer, its officers, directors, employees or agents to the Authority's underwriter, financial advisor, appraiser, district engineer or bond counsel or regarding the Developer, its proposed developments, its property ownership and its contractual arrangements contained in the official statement relating to the SCIP financing (provided that the Developer shall have been furnished a copy of such official statement and shall not have objected thereto); and provided, further, that nothing in this Section 3.01 shall limit in any manner the Local Agency's rights against any of the Developer's architects, engineers, contractors or other consultants. Except as set forth in this Section 3.01, no provision of this Agreement shall in any way limit the extent of the responsibility of the Developer for payment of damages resulting from the operations of the Developer, its agents and employees. Nothing in this Section 3.01 shall be understood or construed to mean that the Developer agrees to indemnify the Local Agency, the Authority or any of its respective officers, directors, employees or agents, for any negligent or wrongful acts or omissions to act of the Local Agency, Authority its officers, employees, agents or any consultants or contractors.

Section 3.02. Audit. The Local Agency shall have the right, during normal business hours and upon the giving of ten days' written notice to the Developer, to review all

books and records of the Developer pertaining to costs and expenses incurred by the Developer (for which the Developer seeks reimbursement) in constructing the Acquisition Improvements.

Section 3.03. Cooperation. The Local Agency and the Developer agree to cooperate with respect to the completion of SCIP financing for the Project. The Local Agency and the Developer agree to meet in good faith to resolve any differences on future matters which are not specifically covered by this Agreement.

Section 3.04. General Standard of Reasonableness. Any provision of this Agreement which requires the consent, approval or acceptance of either party hereto or any of their respective employees, officers or agents shall be deemed to require that such consent, approval or acceptance not be unreasonably withheld or delayed, unless such provision expressly incorporates a different standard. The foregoing provision shall not apply to provisions in the Agreement which provide for decisions to be in the sole discretion of the party making the decision.

Section 3.05. Third Party Beneficiaries. The Authority and its officers, employees, agents or any consultants or contractors are expressly deemed third party beneficiaries of this Agreement with respect to the provisions of Section 3.01. It is expressly agreed that, except for the Authority with respect to the provisions of Section 3.01, there are no third party beneficiaries of this Agreement, including without limitation any owners of bonds, any of the Local Agency's or the Developer's contractors for the Acquisition Improvements and any of the Local Agency's, the Authority's or the Developer's agents and employees.

Section 3.06. Conflict with Other Agreements. Nothing contained herein shall be construed as releasing the Developer or the Local Agency from any condition of development or requirement imposed by any other agreement between the Local Agency and the Developer, and, in the event of a conflicting provision, such other agreement shall prevail unless such conflicting provision is specifically waived or modified in writing by the Local Agency and the Developer.

Section 3.07. Notices. All invoices for payment, reports, other communication and notices relating to this Agreement shall be mailed to:

If to the Local Agency:

CITY OF ELK GROVE

If to the Developer:

[DEVELOPER'S NAME]

Either party may change its address by giving notice in writing to the other party.

Section 3.08. Severability. If any part of this Agreement is held to be illegal or unenforceable by a court of competent jurisdiction, the remainder of this Agreement shall be given effect to the fullest extent reasonably possible.

Section 3.09. Governing Law. This Agreement and any dispute arising hereunder shall be governed by and interpreted in accordance with the laws of the State of California.

Section 3.10. Waiver. Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Agreement.

Section 3.11. Singular and Plural; Gender. As used herein, the singular of any word includes the plural, and terms in the masculine gender shall include the feminine.

Section 3.12. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original.

Section 3.13. Successors and Assigns. This Agreement is binding upon the heirs, assigns and successors-in-interest of the parties hereto. The Developer may not assign its rights or obligations hereunder, except to successors-in-interest to the property within the District, without the prior written consent of the Local Agency.

Section 3.14. Remedies in General. It is acknowledged by the parties that the Local Agency would not have entered into this Agreement if it were to be liable in damages under or with respect to this Agreement or the application thereof, other than for the payment to the Developer of any (i) moneys owing to the Developer hereunder, or (ii) moneys paid by the Developer pursuant to the provisions hereof which are misappropriated or improperly obtained, withheld or applied by the Local Agency.

In general, each of the parties hereto may pursue any remedy at law or equity available for the breach of any provision of this Agreement, except that the Local Agency shall not be liable in damages to the Developer, or to any assignee or transferee of the Developer other than for the payments to the Developer specified in the preceding paragraph. Subject to the foregoing, the Developer covenants not to sue for or claim any damages for any alleged breach of, or dispute which arises out of, this Agreement.

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IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year written above.

CITY OF ELK GROVE

By _____
Authorized Officer

ATTEST:

By _____
Clerk

[DEVELOPER'S NAME]

By: _____
(Signature of Authorized Representative)

(Print Name)

(Title)

**CERTIFICATION
ELK GROVE CITY COUNCIL RESOLUTION NO. 2008-172**

STATE OF CALIFORNIA)
COUNTY OF SACRAMENTO) **ss**
CITY OF ELK GROVE)

I, Susan J. Blackston, City Clerk of the City of Elk Grove, California, do hereby certify that the foregoing resolution was duly introduced, approved, and adopted by the City Council of the City of Elk Grove at a regular meeting of said Council held on July 23, 2008 by the following vote:

AYES : COUNCILMEMBERS: *Davis, Hume, Scherman, Cooper, Leary*

NOES: COUNCILMEMBERS: *None*

ABSTAIN : COUNCILMEMBERS: *None*

ABSENT: COUNCILMEMBERS: *None*



***Susan J. Blackston, City Clerk
City of Elk Grove, California***