

RESOLUTION NO. 2010-82

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ELK GROVE
AUTHORIZING THE MAYOR TO EXECUTE REIMBURSEMENT AGREEMENT
RC2010-01 FOR PRIVATELY CONSTRUCTED PUBLIC FACILITIES INCLUDED
IN THE ELK GROVE ROADWAY FEE PROGRAM WITH ELK GROVE TOWN
CENTER L.P. IN SUBSTANTIALLY THE FORM PRESENTED AND AUTHORIZING
THE CITY ENGINEER TO DETERMINE THE MINIMUM REIMBURSEMENT
AMOUNT FOR THE AGREEMENT**

WHEREAS, Elk Grove Municipal Code Section 16.95.070 provides for reimbursement to developers for the private construction of any facilities designated in the Roadway Fee Program subject to entering into a reimbursement agreement with the City of Elk Grove; and

WHEREAS, Elk Grove Town Center, L.P. is constructing road improvements within the Lent Ranch Marketplace Special Planning Area which are included in the Roadway Fee Program.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Elk Grove hereby authorizes the Mayor to execute Reimbursement Agreement RC2010-01 for reimbursement from the Roadway Fee Program with Elk Grove Town Center, L.P. in substantially the same form as presented in the attached Exhibit A, granting staff the ability to work with opposing counsel and the Bankruptcy Court.

BE IT FURTHER RESOLVED that the City Engineer is hereby authorized to determine the minimum reimbursement amount based on review of cost documentation submitted to this point by Elk Grove Town Center, L.P., and that this amount is to be inserted into the placeholder shown in Section 2.1 of the agreement prior to execution by the Mayor.

PASSED AND ADOPTED by the City Council of the City of Elk Grove this 28th day of April 2010.


SOPHIA SCHERMAN, MAYOR of the
CITY OF ELK GROVE

ATTEST:


SUSAN J. BLACKSTON, CITY CLERK

APPROVED AS TO FORM:


SUSAN COCHRAN, CITY ATTORNEY

EXHIBIT A

CITY OF ELK GROVE REIMBURSEMENT AGREEMENT FOR PRIVATELY CONSTRUCTED PUBLIC FACILITIES INCLUDED IN THE ELK GROVE ROADWAY FEE PROGRAM

Agreement No. RC2010-01

This Agreement, dated as of _____, 2010, by and between the City of Elk Grove, a municipal corporation (the "City"), and Elk Grove Town Center, L.P. ("Developer").

WITNESSETH:

WHEREAS, Chapter 16.95 of the Elk Grove Municipal Code established development fees and special funds as part of the City's Roadway Fee Program (the "Roadway Fee Program");

WHEREAS, Chapter 16.95.090 of the Elk Grove Municipal Code authorizes the City to enter into reimbursement agreements for the construction of any facilities designated in the Roadway Fee Program upon application of property developers;

WHEREAS, on April 16, 2009, the Developer filed a petition for relief under chapter 11, title 11, of the United States Code in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court");

NOW, THEREFORE, in consideration of the mutual promises contained herein, the City and the Developers hereby agree as follows:

Section 1. Project Scope

Subject to the terms of this Agreement, the City agrees to provide reimbursement of funds to Developer for the acquisition and installation of the improvements listed in Exhibit A (the "Improvements") and agree as follows:

- 1) the improvements, quantities, and prices shown in Exhibit A may be supplemented or otherwise revised by an addendum executed by both, the Assistant City Manager, Development Services, and Developer, to balance cost overruns and underruns when all the improvements originally listed in Exhibit A have been completed and actual costs have been determined by the City.
- 2) If another entity constructs improvements that are portions of the Improvements in Exhibit A, the Developer may direct the City to make payment for the construction thereof to the Constructor only if: (1) the improvements are constructed in accordance with all of the requirements of this Agreement; and (2) the Constructor assumes the obligations of the Developer under this Agreement as applicable to such construction, including without limitation, the obligations under Section 7, 8, 9, and 10 and (3) the City consents in writing in advance, such consent shall not be unreasonably withheld.

Section 2. Reimbursement Amount

The City agrees to reimburse Developer for acquisition and/or installation of those Improvements constructed by Developer an amount based on the lesser of:

- 1) the actual construction cost of eligible facilities, as determined by the City, through its review of the construction contract for the Improvements and based upon the City's Reimbursement Policies and Procedures for Privately Constructed Public Facilities, plus an allowance for soft costs in the amount of twenty-five (25) percent of the actual construction cost determined by the City, however, in no event shall the City's reimbursement to Developer be less than \$____; and
- 2) the allowable costs, based on the cost schedules set forth in the Roadway Fee Program and amendments and updates thereto, not to exceed \$6,032,454 as listed in Exhibit A (unless this total amount is increased pursuant to an amendment to this Agreement) Funds will be reimbursed without interest.

Section 3. Reimbursement Timing

3.1. Reimbursement Priority. The City has, and shall continue to, collect Roadway Improvement Fees from all property owners benefiting from the Improvements in the amount required by the Roadway Fee Program as such Roadway Fee Program may be amended or updated from time to time and shall place such fees in a separate capital facilities account in accordance with Section 16.95.030 of the City's Municipal Code. The parties acknowledge that a number of developer constructed projects are identified for reimbursement in the Roadway Fee Program. As set forth in Chapter 16.95 of the City's Municipal Code, developers who have constructed improvements reimbursable from one (1) or more of the funds associated with the Roadway Fee Program (the "Fund(s)") shall be reimbursed in the order in which their respective improvements are formally accepted by the City. The City shall prioritize the developer constructed public facilities identified in the Roadway Fee Program when accepted by the City, as the City determines there are adequate monies in the corresponding Fund(s). The City represents that, as of the date of this Agreement, adequate funds are available from the Roadway Fee Program to reimburse the costs identified in Exhibit A. As funds are available, reimbursements will be paid to the next developer awaiting reimbursement on such priority list until such developer is paid in full, then to the next developer on such list, subject to and according with the following:

3.2. Payment Preconditions. No payment from the Fund(s) shall be made unless all of the following conditions, together with any other conditions set forth in this Agreement, have been met to City's satisfaction:

- 3.2.1. The Developer has obtained an order of the Bankruptcy Court (i) authorizing their completion of the Improvements, (ii) authorizing the Developments conveyance of the Improvements to the City; and (iii) acknowledging the City's obligation to release the funds to the Developer; and

3.2.2. City has given final approval to and has formally accepted the Improvements as complete; and,

3.2.3. Developer shall not be in default of any monetary obligation to the City, including without limitation plan check and inspection fees and any loan repayment due to the City. City agrees that it shall invoice Developer, and provide reasonably necessary detailed documentation of the charges incurred, for all amounts due within sixty (60) days of such amount accruing (“City Invoice”). Developer shall then have thirty (30) days from its receipt of the City Invoice to accept or object to it (“Protest Period”), and should Developer fail to object within that time, Developer shall be deemed to have accepted the City Invoice and shall not be entitled to dispute such City Invoice. Developer shall pay City all amounts due, for which no objection has been raised within the Protest Period, within twenty-one (21) business days following expiration of the Protest Period. Payment of such City Invoice shall be full and final satisfaction of the amounts due for work specified in such City Invoice, and City shall not have the right to increase or modify such amounts. Any amounts not paid by such date shall be deemed defaulted amounts. Upon receipt of any such written notice of default from City, Developer shall cure the identified default(s) within five (5) days after receipt of any such notice. If Developer fails to cure such default within such five (5) day period, City shall have the right to withhold such defaulted amounts from the reimbursement due to Developer hereunder and to use such reimbursement amount to satisfy the default. Payment in full of defaulted amounts from the reimbursement due to Developer hereunder shall be deemed full and final satisfaction for such amounts owed, and upon such collection of reimbursement funds by City, City waives all other remedies for such default. Following City’s collection of any defaulted amounts, any remaining available reimbursement owed Developer shall be promptly paid to Developer. In the event City does not collect such defaulted amounts from reimbursement due Developer hereunder, City retains all other remedies, at law or in equity, for such default. In the event a timely objection to the City Invoice is made by Developer, City and Developer shall meet and confer for a period of at least thirty (30) days in an effort to resolve any dispute between them and, if the dispute is not so resolved, either party may then resort to any remedy available to it at law or in equity. Developer currently owes the City past due amounts and may opt to have the City retain those amounts from reimbursement as satisfaction of their debt.

Section 4. Process and Procedures

The Developer's construction contracts, construction work, and requests for reimbursement relating to the Improvements shall be performed in conformance with the City's most current "Reimbursement Policies and Procedures for Privately Constructed Public Facilities" and upon receipt and approval by the City of a request for payment in the form attached hereto as Exhibit B, and subject to cost limitations set forth in Exhibit A (as it may be amended in accordance with Section 1). The Developer shall be responsible for complying with all applicable laws, codes, and regulations relating to contracting and construction procedures for publicly funded public works projects.

Section 5. Limited City Obligation

The obligations arising from this Agreement are neither a debt of the City nor a legal or equitable pledge, charge, lien, or encumbrance upon any of its property or upon any of its income, receipts, or revenues, except the fees collected for the Improvements. Neither the General Fund nor any other fund of the City, except the applicable fund(s) associated with the Roadway Fee Program, shall be liable for the payment of any obligations arising from this Agreement. The credit or taxing power of the City is not pledged for the payment of any obligation arising from this Agreement. No Developer shall compel the forfeiture of any of the City's property to satisfy any obligations arising from this Agreement.

Section 6. Conveyance of the Improvements

Once the Improvements are accepted and deemed satisfactory by the City, the Improvements automatically become the property of the City. The Developer shall take any and all actions necessary to convey to the City and vest in the City full, complete and clear title to the Improvements that the Developer has constructed.

Section 7. Delivery of Plans and Specifications

Prior to final acceptance of Improvements by the City, the constructing Developer shall deliver to the City copies of all plans, specifications, shop drawings, as-built plans, operating manuals, service manuals, warranties and other documents relating to the design, construction, installation, and operation of the Improvements.

Section 8. Liens, Claims, and Encumbrances

Concurrent with the parties' execution of this Agreement, Developer shall seek authorization from the Bankruptcy Court pursuant to 11 U.S.C. § 363(f) to convey Improvements free and clear of all liens, claims and encumbrances. Prior to final acceptance of Improvements by the City, Developer shall provide the City the applicable order of the Bankruptcy Court..

Section 9. Warranty and Repair

(a) Warranty. Developer hereby warrants the Improvements that it constructs as to materials and workmanship and, should any failure of those Improvements occur within a period of three (3) months after final acceptance thereof by the City, Developer shall promptly cause the needed repairs to be made without cost to the City.

(b) Repair. The City is hereby authorized to make such repairs if Developer fails to make or undertake with due diligence the aforesaid repairs within twenty (20) days after the City has given written notice of such failure. In case of emergency where, in the sole opinion of the City, delay would cause serious hazard to the public, the necessary repairs may be made or lights, signs and barricades erected, without prior notice to Developer. In all cases of failure of Improvements within the warranty period where the City has taken action in accordance with this paragraph, Developer shall reimburse the City for all costs, direct and indirect, incurred by the City.

Section 10. Indemnity

Developer, by execution of this Agreement, specifically agrees to assume the defense of, indemnify, and hold harmless the City and its officers, employees, consultants, and agents from and against all liabilities, actions, damages, claims, losses or expenses of every type and description, including attorneys' and consultants' fees and expenses (collectively "Liabilities"), to which they may be subjected or put, by reason of, or resulting from, the acquisition or installation of the Improvements constructed by Developer, except Liabilities arising from the sole negligence or willful misconduct of the City. This indemnification shall extend to Liabilities occurring after this Agreement is terminated as well as while it is in force.

Section 11. No Third Party Beneficiary

The City and Developer enter into no contract or agreement with any general contractor, subcontractor, or other party by entering into this Agreement; nor is any general contractor, subcontractor, or other party a third party beneficiary of this Agreement; and the City shall have no obligation to pay any general contractor, subcontractor, or other party for any work that such general contractor, subcontractor, or other party may do pursuant to the plans and specifications for the Improvements.

Section 12. Notice

Any notice, payment, or instrument required or permitted by this Agreement to any party shall be deemed to have been received when personally delivered to that party or seventy-two (72) hours following deposit of the same in any United States Post Office, first class, postage prepaid, addressed as follows:

CITY: City of Elk Grove
Public Works
Attn: City Engineer
8401 Laguna Palms Way
Elk Grove, CA 95758

WITH A COPY TO: City of Elk Grove
Attn: Finance Director
Finance Department
8401 Laguna Palms Way
Elk Grove, CA 95758

DEVELOPER: Elk Grove Town Center, L.P.

c/o General Growth Properties, Inc.
110 North Wacker Drive
Chicago, Illinois 60606
Attention: General Counsel

Any party hereto may, by notice given hereunder, designate a different address to which subsequent notices, payments, and instruments shall be delivered to it.

Section 13. Term

The term of this Agreement shall start as of the date first written above and shall remain in effect until all the terms and conditions contained in this Agreement have been satisfied.

Section 14. Captions

Captions to Sections of this Agreement are for convenience purposes only, and are not part of this Agreement.

Section 15. Severability

If any portion of this Agreement is declared by a court of competent jurisdiction to be invalid or unenforceable, such portion shall be deemed severed from this Agreement and the remaining parts shall remain in full effect as though such invalid or unenforceable provision had not been a part of this Agreement.

Section 16. Successors and Assigns

This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto. The City's agreement to carry out the requirements of this Agreement is made in reliance upon the reputation, creditworthiness, and expertise of Developer. Therefore, Developer's interest herein may not be assigned without the prior, express, written consent of the City.

Section 17. Governing Law; Venue

This Agreement is made under, and shall in all respects be interpreted, enforced, and governed by, the laws of the State of California. In the event of a dispute concerning the terms of this Agreement, the venue for any legal action shall be with the appropriate court in the County of Sacramento, State of California.

Section 18. Entire Agreement

This Agreement contains the entire agreement between the parties with respect to the matters contained herein and may be amended only by subsequent written agreement signed by all parties.

Section 19. Counterparts

This Agreement may be executed in counterparts, each of which shall be deemed an original, but both of which together shall constitute one instrument.

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

CITY OF ELK GROVE

By: _____
Sophia Scherman, Mayor

Attest:

By: _____
City Clerk

Approved as to form:

By: _____
Susan Burns Cochran, City Attorney

Elk Grove Town Center, L.P., a debtor in possession

By: Elk Grove Town Center, L.L.C., its general partner

By: GGPLP L.L.C., its sole member

By: GGP Limited Partnership, its managing member

By: General Growth Properties, Inc., its general partner

By: _____
Authorized Officer

EXHIBIT A

IMPROVEMENTS DESCRIPTIONS / LOCATIONS

DRAFT
EXHIBIT A
REIMBURSEMENT AGREEMENT
FOR PRIVATELY CONSTRUCTED PUBLIC FACILITIES INCLUDED IN
ELK GROVE ROADWAY FEE PROGRAM

Improvement Costs

EGRF ID	LSFP ID	Improvement	Segment	Quantity	Unit	Unit Cost	Engineering & Soft Costs	Contingency	Total
309	28	Promenade Pkwy/Lent Ranch Pkwy - Intersection	6x4 Tee Intersection	1	LS	\$ 823,079	\$ -	\$ -	\$ 823,079
299	31a	Promenade Pkwy/Kyler Rd - Signal	3-Way Signal	1	LS	\$ 126,465	\$ 31,616	\$ 12,647	\$ 170,728
307	31b	Promenade Pkwy/Bilby Rd - Signal	3-Way Signal	1	LS	\$ 126,465	\$ 31,616	\$ 12,647	\$ 170,728
309	31c	Promenade Pkwy/Lent Ranch Pkwy - Signal	3-Way Signal	1	LS	\$ 126,465	\$ 31,616	\$ 12,647	\$ 170,728
288	32	Kammerer/Promenade Pkwy - Intersection	6x6x2 Intersection	1	LS	\$ 403,763	\$ -	\$ -	\$ 403,763
251	41	Promenade Pkwy - Kammerer Road to Lent Ranch Pkwy	4 Center Lns and Median	850	LF	\$ 385	\$ 96	\$ 39	\$ 442,000
250	42a1	Promenade Pkwy - Lent Ranch Pkwy to Bilby Rd	4 Center Lns and Median	256	LF	\$ 385	\$ 96	\$ 39	\$ 133,120
249	42a2	Promenade Pkwy - Bilby Rd to Kyler Rd	2 Center Lns and Median	772	LF	\$ 276	\$ 69	\$ 28	\$ 287,956
248	42a3	Promenade Pkwy - Kyler Rd to Lent Ranch North Border	2 Center Lns and Median	819	LF	\$ 276	\$ 69	\$ 28	\$ 305,487
167	46a	Kammerer Rd - 1,550 ft East of Promenade Pkwy to Promenade Pkwy	6 Center Lns and Median	1012	LF	\$ 646	\$ 162	\$ 65	\$ 882,919
165 &		Kammerer Rd - East side of Southpointe to 1,550 feet east of Promenade Pkwy							
165A	46b	Promenade Pkwy	6 Center Lns, Median	447	LF	\$ 646	\$ 162	\$ 65	\$ 389,985
173	64	Lent Ranch Pkwy - Kammerer Road to Promenade Pkwy	2 Center Lns and Median	562	LF	\$ 266	\$ 67	\$ 27	\$ 202,320
307	65a	Promenade Pkwy & Bilby Rd - Intersection	4x4 Intersection	1	LS	\$ 505,860	\$ -	\$ -	\$ 505,860
299	65b	Promenade Pkwy & Kyler Rd - Intersection	4x4 Intersection	1	LS	\$ 505,860	\$ -	\$ -	\$ 505,860
292	67	Lent Ranch Pkwy/Kammerer Rd - Intersection	4x4 Intersection	1	LS	\$ 505,860	\$ -	\$ -	\$ 505,860
199	68	Bilby Rd - Promenade Parkway to Western Lent Ranch Boarder	2 Center Lns. And Median	192	LF	\$ 263	\$ 66	\$ 26	\$ 68,160
200	69	Kyler Rd - Promenade Parkway to Western Lent Ranch Boarder	2 Center Lns. And Median	180	LF	\$ 263	\$ 66	\$ 26	\$ 63,900
Total									\$ 6,032,434

Notes:

West Stockton as referenced in the fee program has been renamed Promenade Parkway
South E-W Roadway as referenced in the fee program has been renamed Bilby Road
North E-W Roadway as referenced in the fee program has been renamed Kyler Road
Bilby Road Program Length based upon percentage of Program Total on On-site
Kyler Road Program Length based upon percentage of Program Total on On-site
Engineering and Soft Costs 25%
Contingency 10%

Exhibit B

City of Elk Grove

Payment Request Form for Reimbursement of Privately Constructed Public Facilities

The undersigned (the "Developer") hereby requests payment pursuant to the Reimbursement Agreement _____ dated _____ (the "Agreement"), between the City of Elk Grove and the Developer, in the total amount of \$ _____. (Capitalized terms used herein shall have the meanings ascribed thereto in the Agreement.) The payment requested is for Projects identified in the Agreement Exhibits that have been completed by the Developer or the party designated for payment herein (the "Constructor") and are the subject of this request for payment, as more fully described in the Agreement.

In connection with this request for payment, the undersigned hereby represents and warrants to the City as follows:

1. The persons executing this request on behalf of the Developer is duly authorized to do so and is knowledgeable as to the matters set forth herein.
2. The Projects described in the Agreement have been completed in accordance with the approved plans therefor. To the extent a Project is to be accepted, owned, and operated by a public agency other than the City, attached hereto is documentation from that agency acknowledging that the construction is complete and accepting the Project from the Developer.
3. The true and correct actual cost of each Project for which payment is requested is set forth in the Agreement.
4. Attached hereto are invoices, receipts, worksheets, and other evidence of actual cost that are in sufficient detail to allow the City's Public Works Director to verify the actual cost of the Project for which payment is requested.
5. There has not been filed with or served upon the Developer or the Constructor notice of any lien, right to lien or attachment upon, or claim affecting the right to receive the payment requested herein that has not been released or will not be released simultaneously with the payment of such obligation, other than materialmen's or mechanics' liens accruing by operation of law. Copies of lien releases for all work for which payment is requested hereunder are attached hereto.
6. With respect to all Projects, construction contracts were competitively bid and prevailing wages have been paid relative to the construction of the Project to the extent required by law if such Projects were constructed by the City.
7. The Developer and the Constructor are in compliance with the terms and provisions of the Agreement.

8. Payment should be made payable to:

and sent to:

at the following address:

I hereby declare under penalty of perjury that the above representations and warranties are true and correct.

Date: _____

DEVELOPER

By:

Signature

Print name

Title

By:

Signature

Print name

Title

CERTIFICATION
ELK GROVE CITY COUNCIL RESOLUTION NO. 2010-82

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

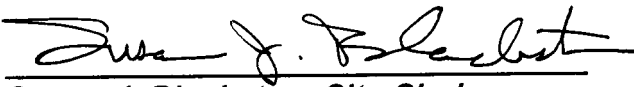
I, Susan J. Blackston, City Clerk of the City of Elk Grove, California, do hereby certify that the foregoing resolution was duly introduced, approved, and adopted by the City Council of the City of Elk Grove at a regular meeting of said Council held on April 28, 2010 by the following vote:

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

NOES: **COUNCILMEMBERS:** *None*

ABSTAIN : **COUNCILMEMBERS:** *None*

ABSENT: **COUNCILMEMBERS:** *None*



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