

THE BOARD OF SUPERVISORS OF THE COUNTY OF STANISLAUS
ACTION AGENDA SUMMARY

DEPT: Chief Executive Office

BOARD AGENDA # *B-14

Urgent

Routine

AGENDA DATE May 24, 2011

CEO Concurs with Recommendation YES NO

4/5 Vote Required YES NO

(Information Attached)

SUBJECT:

Approve a Memorandum of Understanding (MOU) For Cost Reimbursement and Indemnification Related to the PCCP WestPark, LLC Development Proposal At and Adjacent to the Former Crows Landing Air Facility

STAFF RECOMMENDATIONS:

1. Approve a Memorandum of Understanding (MOU) for Cost Reimbursement and Indemnification related to the PCCP WestPark, LLC Development Proposal at and adjacent to the former Crows Landing Air Facility.
2. Authorize the Chief Executive Officer, or designee, to sign the Memorandum of Understanding for Cost Reimbursement and Indemnification.
3. Direct the Auditor Controller to deposit Cost Reimbursement funds to the Crows Landing Air Facility Budget, 0100-0016046, and increase appropriations by equal amounts, as detailed in the attached budget journal.

FISCAL IMPACT:

On March 8, 2011, the Board of Supervisors approved a 15 month extension to the PCCP WestPark Development effort at the County owned Crows Landing Air Facility in western Stanislaus County. In light of on-going fiscal challenges, including staffing limitations, the Chief Executive Officer has requested that the developer enter into a Cost Reimbursement and Indemnification Memorandum of Understanding (MOU) to provide a cost share of \$169,000. (Continued)

BOARD ACTION AS FOLLOWS:

No. 2011-324

On motion of Supervisor O'Brien, Seconded by Supervisor Withrow

and approved by the following vote,

Ayes: Supervisors: O'Brien, Chiesa, Withrow, DeMartini, and Chairman Monteith

Noes: Supervisors: None

Excused or Absent: Supervisors: None

Abstaining: Supervisor: None

1) X Approved as recommended

2) _____ Denied

3) _____ Approved as amended

4) _____ Other:

MOTION: This Item was removed from the consent calendar for discussion and consideration.

ATTEST: CHRISTINE FERRARO TALLMAN, Clerk

File No.

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FISCAL IMPACT: (Continued)

These funds are to be paid in four equal installments of \$42,250 in: June 2011, October 2011, January 2012, and May 2012 to assist the Chief Executive Office, Public Works, Planning/Community Development and the Department of Environmental Resources with performing required project management and oversight including analysis of the Environmental Impact Report (EIR) as required by the California Environmental Quality Act (CEQA). The Fiscal Year 2010-2011 budget is to be adjusted by \$42,250. The Fiscal Year 2011-2012 budget will include appropriations for these funds. County department costs for performing the required project work will be reviewed and reimbursed from the Crows Landing Air Facility budget. The County has made an initial estimate of the staff costs of 1,127 hours, for a total of \$169,000.

DISCUSSION:

On March 8, 2011 the Board of Supervisors approved a 15 month extension to the development relationship between the County and Master Developer PCCP West Park (Developer). In that public meeting, the Board provided the master developer additional planning time to complete the preparation of an Environmental Impact Analysis (EIR), Specific Plan and a Draft Disposition and Development Agreement (DDA) based upon a revised project description. The Board has required a project update and full status report by the end of second quarter 2012.

County staff have met with the West Park development team and prepared a comprehensive 15 month time line to achieve all deliverables by the second quarter 2012 due date. In light of the changing fiscal landscape which include significant staffing challenges the developer has been requested via MOU, to absorb a significant portion of staff cost related to project management, CEQA chapter review, Disposition and Development Agreement and land lease negotiations. The anticipated cost share over the 15 month time frame reflects approximately 1,127 total staff hours.

MOU Highlights

The MOU is intended to express the Parties agreement regarding the Developer's indemnification obligation and its obligation to pay costs incurred by the County and any consultants or attorneys retained by the County during the extent of the development extension.

Both the County and the Developer expressly acknowledge and agree that this MOU creates no obligation on the part of any Party to:

- Certify the environmental impact report,

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- Enter into a development agreement or disposition and development agreement,
- Grant any approvals or authorizations requested by Developer,
- Agree to any specific terms or obligations,
- Provide financing for the Project, or
- Proceed with the development of the Property.

The term of the Agreement shall commence on the Effective Date (Board approval date), and shall terminate on August 31, 2012, unless extended or earlier terminated per terms of the agreement. The Term may be extended for up to a maximum of three (3) thirty (30) additional day terms upon the mutual written agreement of the Developer and the County acting through and in the discretion of its Chief Executive Officer.

The Developer shall be responsible for all County costs incurred in analyzing, negotiating, preparing, and processing any documents related to the Revised Plan and associated environmental documents or technical studies and all notice, publication and public hearing costs related to the Revised Plan and associated environmental documents. The County has made an initial estimate of the staff and material cost of \$169,000.

The Developer shall pay the County staff costs listed above through four equal payments of \$42,250. West Park shall make the payments on or prior to the following dates:

- June 26, 2011
- September 5, 2011
- January 5, 2012
- May 5, 2012

To the extent the County staff costs are anticipated to exceed the total amount listed above, the County shall provide the Developer with an updated written estimate of the additional costs and an updated payment schedule. Upon receipt of that updated cost and payment schedule, West Park shall pay the additional costs pursuant to the terms of the updated payment schedule.

Upon conclusion of action by the Board of Supervisors on the Revised Plan and upon the Developer's payment of all outstanding invoices for County Consultants, County shall return any unused portion of the County costs deposit to the Developer.

The agreement also provides for the County in its sole discretion may determine that it is necessary to obtain additional assistance from external sources to expedite the actions necessary for the County to consider the Revised Plan application and to provide subject matter expertise. The Developer shall pay for County's third-party costs

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and expenses (including, without limitation, all legal and/or consultant fees and related expenses) incurred to assist in analyzing and processing the Revised Plan including:

- All necessary land use entitlements,
- Williamson Act contract cancellations,
- The environmental impact report,
- The development agreement,
- The ground leases,
- The disposition and development agreement,
- A redevelopment plan (if applicable), and
- Any permits that must be obtained by other regulatory agencies.

The County shall forward invoices or invoice summaries as determined appropriate by the County from consultants to the Developer, and upon receipt, Developer shall pay the County the amount(s) owed for all invoices within thirty (30) calendar days.

In addition, the Developer shall be provided a copy of all contract proposals and amendments, including the scope of work and pricing, for all consultants that the County intends to retain. The County will take into consideration the Developer's input regarding the scope of work, pricing and deliverables, but final determination on the scope of work, pricing and deliverables shall solely be the discretion of County Executive Officer, or his designee.

In the event that PCCP West Park fails to pay any County Expenses as set forth in the attached MOU (Sections 4.1 and 4.2) on or before the due date, the County may, but is not required to, suspend further work on the application until such time as any and all required payments have been made.

In all instances the Developer shall pay for its own third-party costs and expenses (including, without limitation, all legal and/or consultant fees and related expenses) incurred in connection with processing the Revised Plan, associated environmental documents or technical studies, and related requested permits or approvals.

No County Liability.

The MOU clearly defines Developer acknowledgement and agreement that Stanislaus County has no obligation whatsoever to accept or approve any agreement, lease, land use entitlements, development agreement or disposition and development agreement or related documents associated with the Revised Plan. The County has no obligation whatsoever to reimburse the Developer for any costs incurred by the Developer in processing the Revised Plan and any associated agreements, land use entitlements, redevelopment plan and the environmental impact report, including reimbursement costs for County retained consultants.

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Finally, the Developer covenants on behalf of itself and its permitted successors and assigns, to indemnify, hold harmless and defend the County and its elected and appointed officers, officials, employees, agents and representatives ("Indemnitees") from and against all liability, loss, cost, claim, demand, action, suit, legal or administrative proceeding, penalty, deficiency, fine, damage and expense (including, without limitation, reasonable attorney's fees and costs of litigation) arising out of or from any action on or related to the Revised Plans. Developer shall have no indemnification obligation with respect to the gross negligence or willful misconduct of any Indemnitee.

POLICY ISSUE:

The Board should consider whether this Cost Reimbursement and Indemnification Agreement is appropriate and consistent with stated Board priorities of A Strong Local Economy, A Well-Planned Infrastructure System, and Efficient Delivery of Public Services.

STAFFING IMPACT:

The Chief Executive Office will continue to coordinate a multi-disciplinary task force consisting of representatives from County Planning and Community Development, Department of Environmental Resources, Public Works, and County Counsel existing staff.

CONTACT INFORMATION:

Keith D. Boggs, Deputy Executive Officer - 209.652.1514

**MEMORANDUM OF UNDERSTANDING FOR COST REIMBURSEMENT AND
INDEMNIFICATION RELATED TO PCCP WEST PARK, LLC'S DEVELOPMENT
PROPOSAL AT AND ADJACENT TO THE FORMER CROWS LANDING AIR
FACILITY**

THIS MEMORANDUM OF UNDERSTANDING FOR COST REIMBURSEMENT AND INDEMNIFICATION (this "MOU"), dated and made effective as of May ____, 2011 (the "Effective Date"), is entered into by and between the County of Stanislaus, a political subdivision of the State of California ("County") and PCCP West Park, LLC, a Delaware limited liability company ("Developer"). County and Developer are hereinafter collectively referred to as the "Parties."

RECITALS

A. County is or will be the owner of 1524 acres of that certain real property located in the County of Stanislaus and known as the Crows Landing Naval Air Facility as shown on the map attached hereto as Exhibit A and incorporated herein by this reference (the "Property").

B. On February 27, 2007, the Board of Supervisors of the County authorized an exclusive negotiation with Developer regarding the master development of the Property.

C. On April 22, 2008, the Board of Supervisors approved a non-binding Memorandum of Understanding between and among the Developer, County and the Redevelopment Agency of the County of Stanislaus (the "Agency"). That Memorandum of Understanding has since expired.

D. On May 12, 2009, Developer submitted the "Entitlement Costs and Indemnity Provisions" as an attachment, a copy of which is attached hereto as Exhibit B, for the then current project application. This agreement is intended to supersede that agreement for any cost or indemnification obligations that arise on or after the effective date of this Agreement.

E. On March 8, 2011, Developer proposed a revised plan for development of the Property (the "Revised Plan"), a copy of which is attached here as Exhibit C. The Revised Plan is anticipated to include: a specific plan amendment, a General Plan amendment, a rezone, a Williamson Act Cancellation, a parcel map, a development agreement, a proposed redevelopment plan, a disposition and development agreement including the related ground leases, and any related agreements, approvals or actions. On March 8, 2011, the Board of Supervisors of the County authorized the Developer to continue processing the Revised Plan.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Purpose of this MOU.** This MOU is intended to express the Parties agreement regarding Developer's indemnification obligation and its obligation to pay costs incurred by the County, the Agency and any consultants or attorneys retained by the County.

2. **No Obligation to Proceed or Approve.** Each Party expressly acknowledges and agrees that this MOU creates no obligation on the part of any Party to: (i) certify the environmental impact report, (ii) enter into a development agreement or disposition and development agreement; (iii) grant any approvals or authorizations requested by Developer; (iii) agree to any specific terms or obligations; (iv) provide financing for the Project, or (v) proceed with the development of the Property.

3. **Term.** The term of this MOU (the "Term") shall commence on the Effective Date, and shall terminate on August 31, 2012, unless extended or earlier terminated as provided herein. The Term may be extended for up to a maximum of three (3) thirty (30) additional day terms upon the mutual written agreement of Developer and the County acting through and in the discretion of its Chief Executive Officer.

4. **Payment of County Expenses.**

4.1 **County Staff.** Developer shall be responsible for (1) all County costs incurred in analyzing, negotiating, preparing, and processing any documents related to the Revised Plan and associated environmental documents or technical studies and (2) all notice, publication and public hearing costs related to the Revised Plan and associated environmental documents. The County has made an initial estimate of the staff costs which, as shown below, total 1,127 hours at \$150 per hour for a total of \$169,000.

*	Planning/RDA	\$43,750
*	Public Works	\$20,000
*	DER	\$15,000
*	CEO/Project Mgr	\$75,000
*	10% Contingency Fee	\$15,250

Developer shall pay the County staff costs listed above through four equal payments of \$42,250. Developer shall make the payments on or prior to the following dates:

- GM* * June 26, 2011
- * September 5, 2011
- * January 5, 2012
- * May 5, 2012

To the extent the County staff costs are anticipated to exceed the total amount listed above, the County shall provide the Developer with an updated written estimate of

the additional costs and an updated payment schedule. Upon receipt of that updated cost and payment schedule, Developer shall pay the additional costs pursuant to the terms of the updated payment schedule. Upon conclusion of action by the Board of Supervisors on the Revised Plan and upon Developer's payment of all outstanding invoices for County Consultants, County shall return any unused portion of the County costs deposit to the Developer.

4.2 County Consultants.

- (a) Reimbursement. County may in its sole discretion determine that it is necessary to obtain additional assistance from external sources to expedite the actions necessary for the County to consider the Revised Plan application and to provide subject matter expertise. Subject to the requirements of this Section 4.2, Developer shall pay for County's third-party costs and expenses (including, without limitation, all legal and/or consultant fees and related expenses) incurred to assist in analyzing and processing the Revised Plan including: (1) all necessary land use entitlements, (2) Williamson Act contract cancellations, (3) the environmental impact report, (4) the development agreement, (5) the ground leases, (6) the disposition and development agreement, (6) a redevelopment plan and (7) any permits that must be obtained by other regulatory agencies. County shall forward invoices or invoice summaries as determined appropriate by the County from consultants to Developer, and upon receipt, Developer shall pay the County the amount(s) owed for all invoices. within thirty (30) calendar days.
- (b) Consultation with Developer. Developer shall be provided a copy of all contract proposals and amendments, including the scope of work and pricing, for all consultants that County intends to retain. County will take into consideration Developer's input regarding the scope of work, pricing and deliverables, but final determination on the scope of work, pricing and deliverables shall solely be the discretion of County Executive Officer or his or her designee.

4.3 Suspension of Processing for Non-Payment of County Costs. In the event that Developer fails to pay any County Expenses as set forth in Sections 4.1 and 4.2 above on or before the due date, the County may, but is not required to, suspend further work on the application until such time as any and all required payments have been made.

4.4 Developer Expenses. Developer shall pay for its own third-party costs and expenses (including, without limitation, all legal and/or consultant fees and related expenses) incurred in connection with processing the Revised Plan, associated environmental documents or technical studies, and related requested permits or approvals.

5. No County Liability.

5.1 Project Costs. Developer hereby acknowledges and agrees that County has no obligation whatsoever to accept or approve any agreement, lease, land use entitlements, development agreement or disposition and development agreement or related documents associated with the Revised Plan. County has no obligation whatsoever to reimburse Developer for any costs incurred by Developer in processing the Revised Plan and any associated agreements, land use entitlements, redevelopment plan and the environmental impact report, including reimbursement costs for County retained consultants.

5.2 Indemnification.

- (a) Developer hereby covenants on behalf of itself and its permitted successors and assigns, to indemnify, hold harmless and defend County and its elected and appointed officers, officials, employees, agents and representatives (“Indemnitees”) from and against all liability, loss, cost, claim, demand, action, suit, legal or administrative proceeding, penalty, deficiency, fine, damage and expense (including, without limitation, reasonable attorney’s fees and costs of litigation) (collectively, “Claims”) arising out of or from any action on or related to the Revised Plans. Developer shall have no indemnification obligation with respect to the gross negligence or willful misconduct of any Indemnitee.
- (b) The obligations of Developer under this indemnification shall survive the termination of the Board of Supervisors' consideration process for the Revised Plans, regardless of whether any approvals, permits or entitlements are granted by County.
- (c) County will promptly notify Developer of any Claim that is or may be subject to this indemnification and will cooperate fully in the defense.
- (d) County and/or Agency may, in its respective unlimited discretion, participate in the defense of any Claim if the County and/or Agency defends the Claim in good faith. To the extent that County and/or Agency uses any of its resources responding to a Claim, Developer shall reimburse County and/or Agency its reasonable expenses within thirty days of receipt of a written request for reimbursement. Such expenses include, but are not limited to, staff time, court costs, legal fees (County Counsel’s time at their regular rate for external or non-County agencies or retained outside counsel), and any other direct or indirect cost associated with responding to the Claim. Developer shall not pay or perform any settlement by County of the Claim unless the settlement is approved in writing by Developer, which approval shall not be unreasonably withheld.
- (e) Developer shall pay all court ordered costs and attorney’s fees.

6. **Termination; Effect of Termination.** This MOU may be terminated for cause at any time by any Party. Upon thirty (30) days prior written notice and upon a showing of cause, each Party shall have the right to terminate this MOU in its sole discretion. Upon termination as provided herein, or upon the expiration of the Term and any extensions, this MOU shall forthwith be void, and there shall be no further liability or obligation on the part of each Party or their respective officers, employees, agents or other representatives; provided however, the provisions of Section 4 (Expenses), and Section 5.2 (Indemnity) shall survive such termination.

7. **Notices.** Except as otherwise specified in this MOU, all notices to be sent pursuant to this MOU shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other Parties in accordance with this Section. All such notices shall be sent by:

(i) personal delivery, in which case notice is effective upon delivery; or

(ii) nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service.

County: County of Stanislaus
1010 Tenth Street, Suite 6800
Modesto, CA 95354
Attn: Chief Executive Officer
Telephone: (209) 525-6333
Facsimile: (209) 525-6226

Agency: Redevelopment Agency of the County of Stanislaus
1010 Tenth Street, Suite 3400
Modesto, CA 95354
Attn: Executive Director
Telephone: (209) 525-6330
Facsimile: (209) 525-6557

with a copy to: The Office of County Counsel
1010 Tenth Street, Suite 6400
Modesto, CA 95354
Attention: County Counsel
Telephone: (209) 525-6376
Facsimile: (209) 525-4473

Developer: PCCP West Park, LLC
111249 Gold Country Blvd, Suite 190
Gold River, CA 95670
Attn: Gerry Kamilos
Phone: (916) 631-8440
Facsimile: (916) 631-8445

with a copy to: Trainor Fairbrook
980 Fulton Avenue
Sacramento, CA 95825
Attn: Charles W. Trainor
Phone: (916) 929-7000
Facsimile: (916) 929-7111

8. **Severability.** If any term or provision of this MOU or the application thereof shall, to any extent, be held to be invalid or unenforceable, such term or provision shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining terms and provisions of this MOU or the application of such terms and provisions to circumstances other than those as to which it is held invalid or unenforceable unless an essential purpose of this MOU would be defeated by loss of the invalid or unenforceable provision.

9. **Entire Agreement; Amendments in Writing; Counterparts.** This MOU contains the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, oral and written, between the Parties with respect to such subject matter. This MOU may be amended only by a written instrument executed by the Parties or their successors in interest. This MOU may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

10. **Successors and Assigns; No Third-Party Beneficiaries.** This MOU shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided however, that neither Party shall transfer or assign any of such Party's rights hereunder by operation of law or otherwise without the prior written consent of the other Party, and any such transfer or assignment without such consent shall be void. Subject to the immediately preceding sentence, this MOU is not intended to benefit, and shall not run to the benefit of or be enforceable by, any other person or entity other than the Parties and their permitted successors and assigns.

11. **Governing Law.** This MOU shall be governed by and construed in accordance with the laws of the State of California.

12. **Relationship of Parties.** The Parties agree that nothing in this MOU is intended to or shall be deemed or interpreted to create among them the relationship of buyer and seller, or of partners or joint venturers.

SIGNATURES ON THE NEXT PAGE

IN WITNESS WHEREOF, the Parties have executed this Memorandum of Understanding effective as of the date first written above.

COUNTY

COUNTY OF STANISLAUS, a political subdivision of the State of California

By: 

Richard W. Robinson
Chief Executive Officer

APPROVED AS TO FORM:

By: 

John P. Doering
County Counsel

DEVELOPER

PCCP WEST PARK, LLC,
a Delaware limited liability company

By: WESTPARK HOLDINGS, LLC,
a Delaware limited liability company,
Administrative Member

By: 

Gerry N. Kamilos, co-Trustee of the
Gerry and Karen Kamilos Family Trust u/t/a
dated August 31, 1998, sole Member

1633040.1