

**RESOLUTION NO. 2012-85**


**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ELK GROVE  
AUTHORIZING THE MAYOR TO EXECUTE REIMBURSEMENT AGREEMENT  
RC2012-04 WITH TAYLOR MORRISON OF CALIFORNIA, LLC FOR PRIVATELY  
CONSTRUCTED PUBLIC FACILITIES INCLUDED IN THE EAST FRANKLIN FEE  
PROGRAM (LANDSCAPE COMPONENT) IN SUBSTANTIALLY THE FORM  
PRESENTED**

**WHEREAS**, Elk Grove Municipal Code Section 16.81.110 provides for reimbursement to developers for the private construction of any facilities designated in the East Franklin Facilities Fee Program subject to entering into a reimbursement agreement with the City of Elk Grove; and

**WHEREAS**, Taylor Morrison of California, LLC is constructing landscape improvements within the East Franklin Specific Plan Area commonly referred to as Franklin Crossing which are included in the East Franklin Facilities 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 RC2012-04 for reimbursement from the East Franklin Facilities Fee Program with Taylor Morrison of California, LLC in substantially the same form as presented in the attached Exhibit A, granting staff the ability to work with opposing counsel.


**PASSED AND ADOPTED** by the City Council of the City of Elk Grove this 23<sup>rd</sup> day of May 2012.

  
\_\_\_\_\_  
JAMES COOPER, MAYOR of the  
CITY OF ELK GROVE

ATTEST:

  
\_\_\_\_\_  
JASON LINDGREN, CITY CLERK

APPROVED AS TO FORM:

  
\_\_\_\_\_  
JONATHAN HOBBS,  
INTERIM CITY ATTORNEY

**CITY OF ELK GROVE**  
**REIMBURSEMENT AGREEMENT**  
**FOR PRIVATELY CONSTRUCTED PUBLIC FACILITIES INCLUDED IN THE**  
**EAST FRANKLIN FEE PROGRAM (LANDSCAPE COMPONENT)**

**Agreement No. RC2012-04**

This Agreement, dated as of \_\_\_\_\_, 2012, is by and between the City of Elk Grove, a municipal corporation ("City"), and Taylor Morrison of California, LLC, a California limited liability company ("Developer").

**WITNESSETH**

WHEREAS, Developer is the owner of that certain real property in the East Franklin Specific Plan area ("EFSP"), in the City of Elk Grove, State of California, as more commonly referred to as Franklin Crossing ("Project");

WHEREAS, Chapter 16.81 of the Elk Grove Municipal Code established development fees and special funds as part of the East Franklin Fee Program ("Fee Program"), which applies to an area that includes the East Franklin Specific Plan area;

WHEREAS, Chapter 16.81.110 of the Elk Grove Municipal Code authorizes the City to enter into reimbursement agreements for the construction of any facilities designated in the Fee Program upon application of property developers;

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

**A G R E E M E N T**

**Section 1. Project Scope**

Subject to the terms of this reimbursement agreement ("Agreement"), the City agrees to provide reimbursement of funds to the Developer for the acquisition and installation of the improvements depicted in Exhibit A and listed in Exhibit B ("Improvements"), attached hereto and incorporated herein by reference. The Developer and the City agrees as follows:

1.1 The Improvements, quantities, and prices shown in Exhibits A and B may be supplemented or otherwise revised by an amendment executed by the City Manager and the Developer to balance cost overruns and underruns when all the Improvements originally listed in Exhibit B have been completed and actual costs have been determined by the City.

1.2 If another entity constructs improvements that are portions of the Improvements in Exhibit B, the City, at its sole discretion, may make payment for the construction thereof to the constructor only if: (i) the Improvements are constructed in

accordance with all of the requirements of this Agreement; and (ii) the constructor assumes the obligations of the Developer under this Agreement as applicable to such construction, including without limitation, the obligations under Sections 8, 9, 10 and 11; and (iii) the City consents in writing, which consent shall not be unreasonably withheld. Additionally, the Developer agrees that it shall not be entitled to such payment if City remits payment to constructor.

## **Section 2. Reimbursement Amount**

The City agrees to reimburse the Developer for the acquisition and installation of the Improvements an amount based on the lesser of (such lesser amount shall be referred to herein as the "Improvement Cost"):

- (a) The actual construction cost of the Improvements, as determined by the City, in its sole discretion, through its review of the construction contract for the Improvements plus an allowance for soft costs associated with the actual construction costs, as determined by the City, but in no event shall such soft costs exceed the amount of twenty percent (20%) of the actual construction costs, less the Credit Amount; or
- (b) The total of allowable costs for all Improvements based on the total amount in the cost schedules set forth in the Fee Program (without interest) listed in Exhibit B ("Cost Schedule Amount"). The total allowable costs for the Improvements shall be based on the sum of all segments listed in Exhibit B, such that actual costs in any one segment that are greater than or less than the allowable costs shown for such segment may be offset against any other segments.

## **Section 3. Reimbursement Timing**

3.1. **Reimbursement Priority.** As set forth in Chapter 16.81 of the Elk Grove Municipal Code, developers who have constructed improvements reimbursable from one (1) or more of the funds associated with the Fee Program ("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 Fee Program when accepted by the City. 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 in accordance with the Section 3.2 below.

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:

- (a) City has given final approval to and has formally accepted the Improvement(s) as complete (with reimbursement for an Improvement separately identified in the Fee Program being eligible for reimbursement

on acceptance of such Improvement, notwithstanding the status of construction of any other Improvement to be constructed by Developer);

- (b) 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 fifteen (15) 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 three (3) days after receipt of any such notice. If Developer fails to cure such default within such three (3) 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 in law or in equity.

**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" document which is available from the City Engineer, and upon receipt and approval by the City of a request for payment in form attached hereto as Exhibit C. 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, including, but not limited to competitively bidding the construction work and paying prevailing wages.

**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 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. The Developer shall not compel the forfeiture of any of the City's property to satisfy any obligations arising from this Agreement.

**Section 6. Completion**

At such time as the Developer believes an Improvement is complete, the Developer shall provide written notice of completion to the City, requesting an inspection. Within ten (10) business days following the date of receipt of the Developer's written notice of completion, the City shall conduct a final inspection of the Improvements. If, during the final inspection, the City determines that the Improvement(s) have not been completed in accordance with all applicable codes, regulations, permits and approved plans, the City shall prepare a punch list of all items to be completed by the Developer and shall provide such punch list to the Developer within five (5) business days following the final inspection. If the City delivers such punch list to the Developer within said five (5) business day period, then the Developer shall undertake to repair such punch list items in a diligent manner within sixty (60) calendar days. Upon completion of the punch list work, the Developer shall request another final inspection from the City and within five (5) business days following such written notice from the Developer, the City shall conduct another final inspection. If the City determines that the punch list work is complete and no other deficiencies are identified, the Developer will be deemed to have successfully completed the final inspection. If the City determines that the punch list work is not complete, then City and Developer shall repeat the inspection/punch list procedures specified in this Section 7 until the successful completion of the punch list work and a final inspection. At such time as Developer has successfully completed the final inspection, City shall recommend acceptance of the completed Improvements to the City Council within thirty (30) calendar days thereafter.

**Section 7. Conveyance of the Improvements**

Once the Improvements are accepted by the City and no liens have been identified as attached to the Improvements, 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.

**Section 8. Delivery of Plans and Specifications**

Prior to acceptance of the Improvements by the City, the 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 9. Liens, Claims, and Encumbrances**

Prior to acceptance of the Improvements by the City, the Developer shall provide a written guarantee and assurance to the City that there are no liens, claims, or monetary encumbrances on the Improvements, together with unconditional final releases from all contractors and material suppliers, and with copies of invoices and corresponding checks issued by the Developer for all items for which reimbursement is requested under this Agreement for the Improvements. Notwithstanding any other provision or term of this Agreement, the City shall have no obligation to make any reimbursement payments until the Developer has cleared any and all liens, claims and monetary encumbrances from the Improvements and provided the required documentation, guarantee and assurance in writing, to the satisfaction of the City.

**Section 10. Warranty and Repair**

- 10.1 **Warranty.** The Developer hereby warrants each Improvement as to materials and workmanship and, should any failure of an Improvement occur within a period of one (1) year after final acceptance of such Improvement by the City, the Developer shall promptly cause the needed repairs to be made without cost to the City (“Warranty Period”). The provisions contained herein shall not be deemed to limit any rights the Developer has or may have to seek damages or other relief from any acts or omissions of any contractor involved in the construction or design of the Improvements. Notwithstanding the foregoing, the Developer’s warranty excludes remedy for damage or defect caused by ordinary wear and tear under normal usage, abuse, neglect, modifications not performed by the Developer or its agents, and improper or insufficient maintenance not performed by the Developer or its agents. Nothing herein shall be construed to limit any other warranties the City may have from the manufacturer or any materials used in the Improvements, but the warranty contained in this Section 10 shall be the exclusive warranty of the Developer, and all other express or implied warranties of the Developer are expressly disclaimed.
- 10.2 **Repair.** The City is hereby authorized to make such repairs if the Developer fails to make or undertake with due diligence the aforesaid repairs within twenty (20) calendar days after the City has given written notice of such failure. In case of emergency where, in the sole opinion of the City Engineer, delay would cause serious hazard to the public, the necessary repairs may be made or lights, signs and barricades erected,

without prior notice to the Developer. In all cases of failure of the Improvements within the Warranty Period where the City has taken action in accordance with this paragraph, the Developer shall reimburse the City as appropriate for all costs, direct and indirect, incurred by the City.

**Section 11. Indemnity**

The 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, except Liabilities arising from the sole negligence, active negligence, or willful misconduct of the City. Notwithstanding the foregoing, this indemnification shall apply for any Improvement only to Liabilities occurring and accruing during the period commencing with the start of the Work and ending upon the expiration of one-year warranty period for such Improvement (the one-year warranty period begins upon acceptance by the City of the Improvements), and solely for Liabilities for which City has notified Developer in writing on or before the date that is six (6) months after the expiration of the warranty period for such Improvement. Any action or claim received by the City in which the accrual of the cause of action did not occur prior to expiration of the warranty period, or for which City has not notified Developer on or before six (6) months after the expiration of the warranty period, will not be the responsibility of the Developer. The foregoing indemnification for Liabilities related to any repair work performed by Developer within the warranty period shall extend for one (1) year from the date of completion of such repair work, provided that the City must notify Developer of any such Liability in writing on or before the date that is six (6) months after the expiration of such warranty period for such repair work.

**Section 12. No Third Party Beneficiary**

The City and the 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 except as provided for in Section 1.2.

**Section 13. Notice**

Any notice, payment, or instrument required or permitted by this Agreement to either 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  
8401 Laguna Palms Way  
Elk Grove, CA 95758

With a copy to: Attn: City Engineer  
City of Elk Grove  
Public Works  
Administrative Services  
8401 Laguna Palms Way  
Elk Grove, CA 95758  
Attn: Finance Administrator

Developer: Taylor Morrison California, LLC,  
a California Limited Liability Company  
1180 Iron Point Road, Suite 100  
Folsom, California 95630  
Attn: Jay Pawlek

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

**Section 14. 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 15. Captions**

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

**Section 16. 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 17. 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 the Developer. Therefore, the Developer's obligations to construct the Improvements hereunder may not be assigned without the prior, express, written consent of the City, which shall not be unreasonably withheld, conditioned or delayed.



**Section 18. 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 19. 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 both parties.

**Section 20. 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.

**Section 21. Attorneys' Fees**

In the event any party to this Agreement commences litigation for specific performance or damages for the breach of this Agreement, the prevailing party shall be entitled to a judgment against the other for an amount equal to reasonable attorneys' fees and court costs incurred.

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

CITY OF ELK GROVE:

By: \_\_\_\_\_  
James Cooper, Mayor

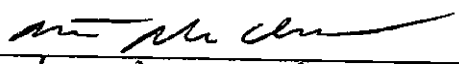
ATTEST:

\_\_\_\_\_  
Jason Lindgren, City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Jonathan Hobbs, Interim City Attorney

DEVELOPER:  
Taylor Morrison of California LLC, a California  
Limited Liability Company

By   
Title VILE PRESIDENT  
Its KENNETH DAR AHRENS

**CALIFORNIA ALL PURPOSE ACKNOWLEDGMENT**

STATE OF California )SS  
COUNTY OF Sacramento )

On March 28, 2012, before me, Kathleen Faye Lopez, Notary Public, personally appeared Kenneth Dar Ahrens, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

Kathleen Faye Lopez



My Commission Expires: July 31, 2013

*This area for official notarial seal*

Notary Name: Kathleen Faye Lopez

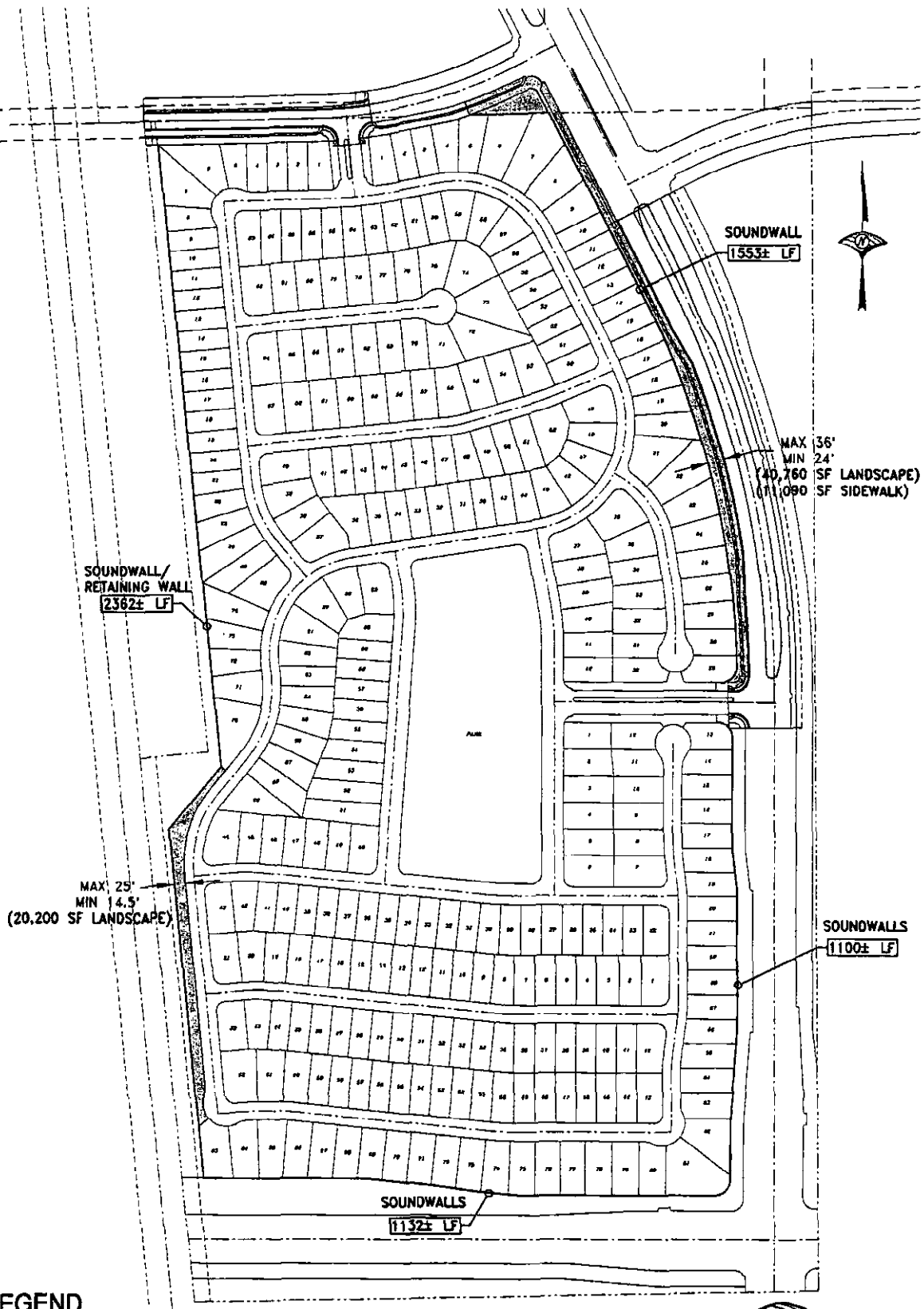
Notary Phone: 916-355-8900

Notary Registration Number: 1859582

County of Principal Place of Business: Sacramento

EXHIBIT A  
LOCATION OF IMPROVEMENTS

**EXHIBIT FOR**  
**FRANKLIN CROSSING**  
**LANDSCAPE FEE PROGRAM PRELIMINARY REIMBURSEMENT**  
 CITY OF ELK GROVE CALIFORNIA  
 AUGUST, 2010



**LEGEND**



EAST FRANKLIN LANDSCAPE  
 FEE ELIGIBLE IMPROVEMENTS

**WOOD RODGERS**  
 DEVELOPING INNOVATIVE DESIGN SOLUTIONS  
 3901 C St. Bldg. 100-B Tel 916.341.7790  
 Sacramento, CA 95810 Fax 916.341.7787

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**EXHIBIT B**

**LANDSCAPE FEE PROGRAM PRELIMINARY REIMBURSEMENT ESTIMATE**

***Franklin Crossing***

QUANTITY		UNIT	DESCRIPTION	UNIT PRICE	AMOUNT
<b>IMPROVEMENTS</b>					
1	60,960	SF	Landscaping	TBD	_____
2	2,411	SF	Attached Sidewalk	\$4.75	\$11,452
3	695	SF	4' Detached Sidewalk	\$5.85	\$4,066
4	7,121	SF	6' Detached Sidewalk	\$6.70	\$47,711
5	1,553	LF	Type 3 Curb	\$14.50	\$22,519
6	3,427	LF	Soundwall (6' min. high)	\$153.00	\$524,331
7	358	LF	Soundwall (8' min. high)	TBD	_____
8	1,577	LF	Soundwall (6-8' high with 4-5' earth ret.)	\$240.00	\$378,480
9	785	LF	Soundwall (8' min. high with 5+' earth ret.)	TBD	_____
				<b>TOTAL:</b>	<b>\$988,558</b>

EXHIBIT C  
PAYMENT REQUEST FORM

**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:

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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. 2012-85**

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

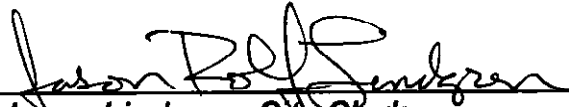
*I, Jason Lindgren, City Clerk of the City of Elk Grove, California, do hereby certify that the foregoing resolution was duly introduced, approved, and adopted by the City Council of the City of Elk Grove at a regular meeting of said Council held on May 23, 2012 by the following vote:*

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

**NOES:**       **COUNCILMEMBERS:**    *None*

**ABSTAIN :**   **COUNCILMEMBERS:**    *None*

**ABSENT:**     **COUNCILMEMBERS:**    *Cooper*

  
**Jason Lindgren, City Clerk  
City of Elk Grove, California**