

**MOORPARK CITY COUNCIL  
AGENDA REPORT**

**TO:** Honorable City Council

**FROM:** Barry K. Hogan, Community Development Director  
Prepared By: Joseph Fiss, Principal Planner

**DATE:** May 16, 2006 (CC Meeting of 6/21/06)

**SUBJECT:** Consider an Agreement with Shea Homes, Inc. to Suspend Further Development of Residential Planned Development Permit (RPD) No. 1998-01 and Minor Modification 3 to Vesting Tentative Tract Map (VTTM) No. 5133, Located on the South Side of Los Angeles Avenue West of Fremont Street, on the Application of Shea Homes

**BACKGROUND**

Residential Planned Development (RPD) No. 1998-01 and Vesting Tentative Tract Map (VTTM) No. 5133, on the south side of Los Angeles Avenue, west of Fremont Street, were originally approved by the City Council on October 6, 1999, for seventy-nine (79) two-story condominium dwelling units on three (3) condominium lots within a 10.37 acre parcel. The project was designed for small, individual condominium "lots" with detached single family dwelling units, including private front and rear yards. A Homeowner's Association maintained clubhouse, pool, and tot lot were also included. The project is accessed from Los Angeles Avenue via a public street that extends southerly to the easterly extension of Majestic Court.

**DISCUSSION**

On June 18, 2003, the City Council approved Minor Modification 3 to Residential Planned Development Permit (RPD) No. 1998-01 and Minor Modification 3 to Vesting Tentative Tract Map (VTTM) No. 5133, which amended the project to allow certain site plan and product modifications. The following statement was made in the agenda report for that Modification:

*"Two thirds of this project lies within the Federal Emergency Management Agency (FEMA) 100 year floodplain. As a result any development in the 100 year floodplain must not increase the water level more than one foot above the 100 year water level. FEMA is currently in the final stages of completion to revise the Federal Insurance Rate Maps (FIRM) which allow properties to obtain flood insurance. This property could be*

*negatively affected, if FEMA identifies that more of the land is likely to be flooded in a 100 year storm. What all this means is that Shea Homes grading plan and ultimate development could be negatively impacted. Any grading plan which the City approves will have to conform to the FIRM maps in effect at the time of grading permit issuance, as well as any building permit."*

During improvement and grading plans, it was determined that only 77 of the originally approved 79 homes could be built. This is not unusual, and the project was found to be in substantial conformance with the original approvals.

Due to the boundary of the FEMA 100 year floodplain, development of the northern portion of the project was allowed to proceed. This area of development accommodated twenty-six (26) residential pads, although only twenty-four have been developed. The remaining two undeveloped pads are adjacent to the model complex, one being used as a temporary "tot-lot" and the other being used as a parking area for the model homes. In order to develop the remainder of the project, the applicant filed a request for a Conditional Letter of Map Revision (CLOMR) with FEMA. Shortly after FEMA issued its CLOMR, it released draft Digital Flood Insurance Rate Maps (DFIRM) which rendered the completion of the conditions of the CLOMR moot, because the CLOMR was based upon prior map data. Unless Shea Homes can get FEMA to agree that all 77 units will be allowed to develop upon completion of the conditions of the CLOMR, Shea Homes is unwilling to proceed with any further work on the project.

At this time, Shea Homes would like to "temporarily close-out" the project, and revisit it later, when total development becomes viable. Staff and the applicant have tentatively agreed upon the minimum improvements and timing required before the City would sign off on the project. Upon City Council approval, subject to the requirements included in the attached Agreement, occupancy of the first 26 homes would be allowed and the remainder of the project would be put on hold.

### **STAFF RECOMMENDATION**

Authorize the Mayor to sign the Agreement Regarding Conditions of Approval (Tract 5133) with Shea Homes, Inc., subject to final language approval by the City Attorney and City Manager.

Attachment: Draft Agreement

Recording Requested By  
And When Recorded Return to:

CITY CLERK  
CITY OF MOORPARK  
799 Moorpark Avenue  
Moorpark, California 93021  
EXEMPT FROM RECORDER'S FEES  
Pursuant to Government Code  
§ 6103

AGREEMENT REGARDING CONDITIONS OF APPROVAL  
(TRACT 5133)  
BY AND BETWEEN  
THE CITY OF MOORPARK  
AND  
SHEA HOMES, INC.

Agreement Regarding Conditions of Approval  
(Tract 5133)

This Agreement Regarding Conditions of Approval ("Agreement") is entered into by and between the City of Moorpark ("City") and Shea Homes, Limited Partnership ("Shea") and is dated and effective as of \_\_\_\_\_.

Section 1. Purpose of this Agreement

a. Shea is the owner of property located at the south side of Los Angeles Avenue, west of Fremont Street ("Property"). The Property is described and depicted on Exhibit A, attached hereto. Shea submitted a subdivision map for development of a 77 unit residential project, Tract 5133 and Residential Planned Development Permit 98-01 collectively referenced as the Project.

b. Tentative Tract 5133 was approved by the Moorpark City Council on September 15, 1999 and modified by the City Council on three occasions, July 17, 2001, July 14, 2002, and July 2, 2003. The Residential Planned Development Permit 98-01 was approved by the City Council on September 15, 1999 modified by the City Council on three occasions, July 17, 2001, July 14, 2002, and July 2, 2003. The Final Map for Tract 5133 was approved by the Moorpark City Council on September 7, 2005 and was recorded on October 18, 2005.

c. Subsequent to approval of the Final Map for Tract 5133, Shea commenced construction of homes within the subdivision.

d. During the commencement of construction, but prior to approval of final building permits for any dwelling units in the project, the Federal Emergency Management Association ("FEMA") issued its updated Digital Flood Insurance Rate Map ("DFIRM"). The DFIRM shows that 51 of the residential units within Tract 5133 are within the floodway, and are therefore unbuildable under Federal and State law.

e. The City of Moorpark has appealed the draft DFIRM, but such appeal, even if successful, will not necessarily alter the designation on the 51 units in question.

f. Ventura County Water Protection District and the Federal Emergency Management Agency have determined that if certain improvements are made to the Arroyo Simi, the course of flooding in a storm event would change to the extent that the DFIRM could be revised to remove the 51 units from the floodway, thereby making them developable.

g. The cost of the Arroyo Simi improvements is approximately \$22 million. Shea is exploring ways to finance such improvements. In the interim, Shea wishes to continue development of the 26 units not affected by the DFIRM (the "26 units") and sell such units for residential occupancy.

h. Both the City and Shea wish to clarify the phasing of certain project conditions of approval as a result of the DFIRM issue, to ensure the 26 units, once developed and occupied, are adequately served with public infrastructure, as the ultimate resolution of the 51 units affected by the DFIRM is uncertain at this juncture.

## Section 2. Phasing for Interim Development of 26 units.

Development of the 26 units shall be governed by the Project approvals and conditions of approval for the project, except as otherwise described herein:

1. Prior to the approval of final inspections on the residential units on the 26 lots:

a. Shea shall include a disclosure to all purchasers of the 26 units concerning the present DFIRM issues, Shea's current efforts in that regard, and the possibility that only 26 of the 77 units (or some number less than the total 77) may ultimately be developed.

b. Shea shall give the City of Moorpark right of first refusal to acquire any of the 23 units that fall out of escrow, not otherwise required to be sold or offered for sale to the City or a qualified buyer as a part of Shea's affordable housing requirement as provided for in the Affordable Housing Purchase and Sale Agreement.

c. In the event Shea seeks to sell the remainder of the Project (the property excluding the 26 units) Shea shall give the City of Moorpark or a City development partner the right of first refusal on the purchase of such remainder for a period of not less than 120 calendar days from receipt of written notice to City by Shea of this right of first refusal.

d. Prior to occupancy of the first (1<sup>st</sup>) dwelling unit, Shea shall pay to City all outstanding fees and deposits, including condition compliance, owed on the Project for the 26 units and, where appropriate the full fees for the entire project or a percentage of the outstanding fees for the 26 units, whichever the City determines to be appropriate. Any overpayment of fees shall be reimbursed to Shea after all 26 units have been released for occupancy.

e. Prior to occupancy of the first (1<sup>st</sup>) dwelling unit Shea shall enter into a Purchase and Sale Agreement with the City for construction and

administration of the project affordable units and payment of affordable housing fees.

f. Prior to occupancy of the twentieth (20th) dwelling unit, Shea shall complete all improvements to Los Angeles Avenue (Hwy 118) adjacent to the site consistent with the conditions of approval for the Project.

g. Prior to occupancy of the twentieth (20th) dwelling unit, Shea shall record all required dedications and easements to the City and other identified agencies.

h. Prior to occupancy of the twentieth (20th) dwelling unit, all interior streets and landscaping shall be completed in the developed areas, north of Majestic Court.

i. Prior to occupancy of the twentieth (20th) dwelling unit, Shea shall construct an on-site passive recreation area south of the developed areas and north of Majestic Court. The recreation area shall be landscaped and irrigated to City of Moorpark specifications and shall be maintained by the Homeowners Association.

j. Prior to occupancy of the twentieth (20th) dwelling unit, Shea shall construct a tubular steel security fence on the south side of Majestic Court with a locked gate that provides access to the Arroyo Simi to the satisfaction of the Community Development Director.

k. Prior to occupancy of the twentieth (20th) dwelling unit, Shea shall complete Majestic Court improvements to the existing terminus of Fremont Street. The improvements shall include, at a minimum, curb, gutter and sidewalk as shown on the approved plans for Tract 5133 and on Vesting Tentative Tract 5425. Construction of a barrier to vehicular access at the southern terminus of Fremont Street may be required as part of the improvements. The precise design of the extension of Majestic Court to Fremont Street shall be subject to Community Development Director's and City Engineer's approval.

l. Prior to occupancy of the twentieth (20th) dwelling unit, Shea shall install a gate at northwest corner of property on LA Avenue. The design of the gate is subject to the approval of the Community Development Director.

m. Prior to the occupancy of the first (1<sup>st</sup>) dwelling unit, Shea shall pay a \$60,000.00 contribution toward the design and installation of a signal light at LA Avenue and Millard Street in accordance with condition six (6) of Minor Modification Number 3 of Vesting Tentative Tract 5133.

n. Prior to the occupancy of the first (1<sup>st</sup>) dwelling unit, Shea shall pay an Art in Public Places fee for homes which obtained zoning clearance after the fee became effective.

o. Prior to occupancy of the twentieth (20<sup>th</sup>) dwelling unit, Shea shall pay for ten (10) years of the Active Assessment District fees for the 51 units. The amount shall be One Hundred Eighty-Three Thousand Eight Hundred Dollars (\$183,800.00). Payment may be in the form of an irrevocable letter of credit for ten (10) years or in the form of cash. If payment is in the form of an irrevocable letter of credit City agrees to reduce the total required by seven percent (7%) per year. If the payment is in the form of cash City agrees to reduce the total required by ten percent (10%) per year and Shea agrees to allow City to retain any interest earnings on this deposit for purposes of the subject assessment district. The form of the irrevocable letter of credit shall be approved by the City Attorney and the City Treasurer.

p. Shea shall use its best efforts to work with the Ventura County Watershed Protection District (VCWPD), City and owners of other affected development projects, for VCWPD approval of a flood control improvement plan to protect the proposed residential projects and other properties along the reach of the Arroyo Simi from Spring Road to Tierra Rejada. The plan shall also include a financing agreement with VCWPD and managing with the District the completion of hydrology, design, construction documents, environmental and permitting of said improvements.

q. Within twelve (12) months of the effective date of this agreement, the soil borrow pit on the adjacent Tentative Tract 5425 shall be refilled, subject to the approval of the City Engineer.

r. Within twelve (12) months of the effective date of this agreement, all construction activity related to the twenty-six (26) dwelling units shall be completed; and all construction trailers, materials, and vehicles shall be removed from the site and the adjacent Tentative Tract 5425.

s. Shea agrees that any payments pursuant to this Agreement shall be made without reservation, and Shea expressly waives the right to payment of any such fees under protest pursuant to California Government Code section 66020 and statutes amendatory or supplementary thereto.

t. Shea agrees that if there is a conflict between the Project conditions of approval and this Agreement that it will comply with the most favorable conditions as determined by the City.

u. Shea agrees that it waives its rights relative to the vesting tentative tract map and agrees that the fees required per the conditions of approval and City Resolution No. 99-1666 shall be the then applicable fees

current at the time of building permit issuance and construction shall be pursuant to the Building Codes in effect at that time the building permit is issued, except for the requirement for fire sprinklers for residential dwellings under 5,000 square feet. The fee shall be adjusted annually commencing July 1, 2008 by the larger increase of a) or b) as follows unless otherwise indicated in the conditions of approval:

- i) The Consumer Price Index (CPI) increase shall be determined by using the information provided by the U.S. Department of Labor, Bureau of Labor Statistics, for all urban consumers within the Los Angeles /Riverside/Orange County metropolitan area during the prior year. The calculation shall be made using the month of October over the prior October.
- ii) The calculation shall be made to reflect the change in the Caltrans Highway Bid Price Index for Selected California Construction Items for the twelve (12) month period available on December 31 of the preceding year.
- iii) In the event there is a decrease in both of the referenced Indices for any annual indexing, the applicable fee shall remain at its then current amount until such time as the next subsequent annual indexing which results in an increase.

v. In addition to fees specifically mentioned in this Agreement, Shea agrees to pay all City capital improvement, development, and processing fees at the rate and amount in effect at the time the fee is required to be paid. Said fees include but are not limited to Library Facilities Fees, Police Facilities Fees, Fire Facilities Fees, drainage, entitlement processing fees, and plan check and permit fees for buildings and public improvements. Shea further agrees that unless specifically exempted by this Agreement, it is subject to all fees imposed by City at the operative date of this Agreement and such future fees imposed as determined by City in its sole discretion so long as said fee is imposed on similarly situated properties.

w. In the event any of the "referenced Index" or "CPI" referred to in any portion of this Section are discontinued or revised, such successor index with which the "CPI" and or "referenced Index" are replaced shall be used in order to obtain substantially the same result as would otherwise have been obtained if either or both the "CPI" and "referenced Index" had not been discontinued or revised.

### Section 3. Completion of Project

Nothing in this Agreement is intended by either party to in any way limit completion of the entire Tract 5133 project (i.e. development of all 77 lots) if the DFIRM issues can be resolved. All conditions of approval shall remain in full force and effect for the entire project site.

#### Section 4. Indemnification

a. Shea shall indemnify, defend with counsel approved by City, and hold harmless City, and their officers, employees, servants and agents from any claim, demand, damage, liability, loss, cost or expense for any damage whatsoever, including but not limited to death injury to any person and injury to any property, resulting from, or in any way connected with, the performance of this Agreement, except such damage as is caused by the sole negligence of City or any of their officers, employees, servants or agents.

b. Shea agrees to indemnify, hold harmless and defend at its sole expense, with counsel acceptable to City, any action brought against it or City to approve the Project, related actions under CEQA, any subsequent permits to implement/construct the Project and this Agreement. She further agrees to reimburse City for any court costs and/or attorneys' fees which City may be required by the court to pay as a result of any such action. City may, at its sole discretion, participate in the defense of any such action at City's cost, but such participation shall not relieve Shea of its obligation under this Section.

Section 5. City shall not be called upon to assume any liability for the payment of any salary, wage or other compensation to any person employed by Shea performing services contemplated by this Agreement. Shea is and shall at all times remain as to the City as wholly independent contractor. Shea shall not at any time or in any manner represent that it or any of its officers, employees or agents are in any manner employees of the city. Nothing contained in this Agreement shall be deemed, construed or represented by City or Shea to any third person to create the relationship of principal and agent, partnership, joint venture, or any other association of any kind or nature between City and Shea.

#### Section 6. General Provisions

a. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns, legal representatives, parent, subsidiary, affiliated and related entities, officers, directors, principals, agents, servants, employees, representatives, and all persons, firms, associations and/or corporations connected with them, including without limitation, their insurers, sureties and/or attorneys.

b. Attorneys' Fees. In the event that any action, suit or other proceeding is instituted to remedy, prevent or obtain relief from a breach of this Agreement, or arising out of breach of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs incurred in such action, suit or other proceeding, including any and all appeals or petitions therefrom.

c. Amendments. This Agreement may not be modified, altered, amended, or rescinded except by an instrument in writing, which is signed by all parties affected by any such modification, alteration, amendment or rescission.

d. Severability. Should any part, term or provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

e. Construction. This Agreement is the product of negotiation, drafting and preparation by and among the parties hereto and their respective attorneys. The parties hereto expressly acknowledge and agree that this Agreement shall not be deemed prepared or drafted by one party or another and its attorneys, and will be construed accordingly. Any rule of construction to the effect that ambiguities are to be resolved against the drafting parties shall not apply in the interpretation of this Agreement.

f. Notices. Unless specified elsewhere in this Agreement, all notices that are required to be delivered under this Agreement in writing and personally delivered, or sent by Federal Express, registered or certified mail, postage prepaid, or facsimile, addressed as follows:

To City: City of Moorpark  
799 Moorpark Avenue  
Moorpark, California 93021  
Attention: Steven Kueny

With a copy to:  
Burke, Williams, & Sorensen, LLP  
444 S. Flower St., Suite 2400  
Los Angeles, CA 90071  
Attention: Joseph M. Montes, Esq.

To Shea: Shea Homes, Inc.  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_

Such addresses may be changed from time to time by the addressee by serving notice as heretofore provided. Service of such notice or demand shall be deemed complete on the date of actual delivery as shown by the addressee's registry or certification receipt or at the expiration of the third day after the date of mailing (whether or not actually received by the addressee), whichever is earlier in time.

g. Governing Law. This Agreement is made and entered into in the State of California and shall, in all respects, be interpreted, governed and enforced in accordance with the laws of the State of California applicable to contracts entered into and fully to be performed therein.

h. Further Assurances. Each Party hereto shall from and after the date hereof execute, acknowledge and deliver such further instruments and perform such additional acts as any other Party may reasonably request to effectuate the intent of this Agreement.

i. Time of Essence. The Parties hereby acknowledge and agree that time is strictly of the essence with respect to each and every term, condition, obligation and provision hereof and that failure to timely perform any of the terms, conditions, obligations or provisions hereof by either Party shall constitute a material breach of and a non-curable (but waivable) default under this Agreement by the Party so failing to perform.

j. Third Party Beneficiaries. No term or provision of this Agreement or the exhibits hereto is intended to or shall be for the benefit of any person or entity not a party hereto, and no such other person or entity shall have any right or cause of action hereunder.

k. Assistance of Counsel. Shea and City each acknowledge that: (i) they have been represented by independent counsel in connection with this Agreement; (ii) they have executed this Agreement with the advice of such counsel; and (iii) this Agreement is the result of negotiations between the parties hereto and the advice and assistance of their respective counsel. Each of the Parties has equally participated in the drafting and preparation of this Agreement, and it is the intention of the Parties that the construction or interpretation of this Agreement shall be made without reference to the party who drafted any portion or particular provision of this Agreement or the relative size and or bargaining power of the Parties.

l. Recordation. City may, at its expense, record this Agreement against title to the Property.

m. Default and Cure. Failure or delay by either party to perform any term or provision of this Agreement constitutes a default under this Agreement. A party claiming a default (claimant) shall give written notice of default to the other party, specifying the default complained of. The claimant shall not terminate this Agreement, institute proceedings against the other party nor be entitled to damages if the other party within thirty (30) days from receipt of such notice immediately, with due diligence, commences to cure, correct or remedy such failure or delay and shall complete such cure, correction or remedy within thirty (30) days from the date of receipt of such notice, or if such cure, correction or remedy by its nature cannot be effected within such thirty (30) day period, such cure, correction or remedy is diligently and continuously prosecuted until

completion thereof. Such cure, correction and remedy shall include payment of any costs, expenses or damages incurred by the non-defaulting party resulting from the default or during the period of default. A failure to cure after notice and opportunity to cure shall be grounds for termination of this Agreement.

IN WITNESS WHEREOF, the undersigned each has executed this Agreement as of the date first above written.

**CITY OF MOORPARK**

**SHEA HOMES, INC.**

By \_\_\_\_\_  
**Patrick Hunter, Mayor**

By \_\_\_\_\_  
\_\_\_\_\_

**Attest:**

By \_\_\_\_\_  
**Deborah S. Traffenstedt,**  
**City Clerk**

**[NOTE--SIGNATURES MUST BE NOTARIZED IF THIS AGREEMENT IS TO BE RECORDED]**

Exhibit A: Legal Description  
Exhibit B: Site Plan

EXHIBIT A  
LEGAL DESCRIPTION

EXHIBIT B  
SITE PLAN

