

**MOORPARK CITY COUNCIL
AGENDA REPORT**

TO: The Honorable City Council

FROM: Steven Kueny, City Manager 

DATE: January 11, 2007 (CC Meeting of 01/17/07)

SUBJECT: Consider Settlement Agreement and Mutual Release Pertaining to Community Facilities District (CFD) 97-1 between City of Moorpark, City of Moorpark Community Facilities District 97-1, Simi-Conejo Construction, Inc., Simi-Moorpark Freeway Properties, Ltd., and Conejo Freeway Properties, Ltd.

BACKGROUND

Community Facilities District (CFD) 97-1 was formed as a partial financing mechanism to construct public improvements benefiting the commercial and industrial zoned properties in the Carlsberg Specific Plan. Since that time, much of these properties have been built out including the Moorpark Marketplace (Target, Kohl's, et al) and Village at Moorpark (Staples, PetCo and Chick's Sporting Goods).

DISCUSSION

The developer of the referenced properties, Simi-Conejo Construction, Inc., (Developer) contends that its costs exceeded the Budgeted Costs of the public improvements funded by the bonds issued for CFD 97-1. The Developer has requested that remaining funds in the CFD 97-1 Acquisition Account be used to reimburse them for their costs that exceeded the Budgeted Costs. There is approximately \$999,000 in the Acquisition Account. As part of this settlement, the City would receive one-third of the funds remaining in the Acquisition Account, estimated at \$333,000, plus legal costs estimated at \$5,000, related to this matter. It is intended that the funds received by the City would be used to fund undergrounding of the remaining overhead utility lines on the north side of Los Angeles Avenue across from the commercial developments in CFD 97-1.

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This agreement also addresses reimbursement of Spring Road / Tierra Rejada Road Area of Contribution (AOC) fees due to one of the other parties to the Agreement.

A copy of the subject Agreement is attached. It is recommended that the City Council approve it subject to final language approval of the City Manager and City Attorney.

STAFF RECOMMENDATION

Approve Settlement Agreement and Mutual Release subject to final language approval of the City Manager and City Attorney.

SK:db

Attachment: Settlement Agreement and Mutual Release

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SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE ("Agreement") is entered into as of the 17TH day of January, 2007, by and between the CITY OF MOORPARK, a municipal corporation and a political subdivision of the State of California (the "City"), the CITY OF MOORPARK COMMUNITY FACILITIES DISTRICT 97-1 (the "CFD"), SIMI-CONEJO CONSTRUCTION, INC., a California corporation (the "Developer") and SIMI-MOORPARK FREEWAY PROPERTIES, LTD., a California limited partnership and CONEJO FREEWAY PROPERTIES, LTD., a California limited partnership (collectively "Simi"). The City, the Developer and Simi are collectively referred to herein as the "Parties."

RECITALS

A. City and Developer entered into that certain Acquisition Agreement ("Agreement") dated as of July 1, 1997, wherein the Developer agreed to construct the Carlsberg Business Park Public Improvements (the "Discrete Components"), to be funded by the CFD (all capitalized terms are as defined in the Agreement). Simi encumbered its property within the CFD as security for the Bonds issued by the CFD. City agreed to use that portion of the Bond proceeds deposited into the "Acquisition Account" and any interest earnings thereon to acquire the Discrete Components. The Actual Cost of the Discrete Components exceeded the estimated cost of said improvements (the "Budgeted Cost"). Developer has requested payment of Actual Costs in excess of the Budgeted Cost to the extent funds remain in the Acquisition Account, but City has not paid the full Actual Cost of the Discrete Components.

B. Simi filed a lawsuit against Cypress Land Company ("Cypress"), wherein Simi seeks to recover cash, interest and legal expenses which resulted from a purported overstatement of the CFD bond obligation assumed by Cypress and an understatement by the same amount of the cash owed by Cypress in connection with the purchase price Cypress paid Simi for Lot 4 of Tract 4973.

C. Simi has incurred costs for improvements made on behalf of the City's Tierra Rejada Area of Contribution and has submitted a claim for reimbursement to the City for these costs, which claim has not been paid.

D. The Parties wish to avoid the risks, uncertainty and expense of further disputes and possible litigation and intend by this Agreement fully and finally to resolve all of their respective claims, disputes and allegations in the manner set forth in this Agreement.

NOW, THEREFORE, in reliance on the foregoing Recitals and in consideration of the mutual agreements and covenants set forth herein, the Parties hereto agree as follows:

I. Concurrently herewith, the City and the Developer shall execute Amendment No. 1 to Acquisition Agreement in form and content identical to Exhibit "A" attached hereto and incorporated herein by this reference as if set forth fully herein (the "Amendment"), pursuant to which the City and the Developer agree to amend the Budgeted Costs for Carlsberg Business Park Public Improvements and the City agrees to instruct the Fiscal Agent to pay to Developer

within thirty (30) days Nine Hundred Ninety-Nine Thousand Dollars (\$999,000.00) or the balance of the un-disbursed funds in the Acquisition Account, whichever is less.

2. Concurrent with the receipt by Developer of the payment specified in paragraph 1 above, Simi will pay the City Three Hundred Thirty Eight Thousand Dollars (\$338,000.00) for all amounts City claims to be owed to the City by Simi and the Developer for, including but not limited to fees, reimbursements, map conditions, public improvements and legal fees incurred by the City in connection with this Agreement.

3. The City will pay Simi Forty-Eight Thousand Two Hundred Forty-One Dollars (\$48,241.00) for improvements made by Simi on behalf of the Spring Road/Tierra Rejada Area of Contribution ("AOC"). Said amount to be paid from AOC fees collected from the owners of Lot 2 of Tract 4973. The amount shall be due thirty (30) days from the execution of this Agreement.

4. Simi and Developer agree to indemnify, protect, defend and hold harmless City and CFD, and each of them, and their respective elected and appointed officials, officers, employees, agents and attorneys (collectively the "Indemnified Parties") from and against all costs, fees, liabilities, charges, claims, actions, judgments, expenses, losses and damages, including reasonable legal fees and expenses (both those legal costs incurred in connection with the defense or prosecution of the indemnifiable claim and those incurred in connection with the enforcement of this provision) incurred by the Indemnified Parties, or any of them, as a result of or arising out of or connected with (a) this Agreement or the Amendment; (b) the execution, delivery or performance of the Agreement or Amendment; or (c) the pending litigation between Simi and Cypress or any other litigation between Simi and Cypress arising out of substantially the same set of facts as the pending litigation. The City and the CFD agree to cooperate with Simi and Developer, at the expense of Simi and Developer, in the defense of any matters for which indemnification is provided hereunder. It is not a condition to the right of any Indemnified Party to indemnification that such Indemnified Party have incurred or paid any loss, cost or expense with respect to any matter for which indemnification is provided hereunder.

5. The Parties and their respective elected and appointed officials, officers, employees, agents and attorneys as applicable hereby release any and all claims they may have against one or more of the Parties related to the subject matter of this Agreement. The Parties hereto understand and acknowledge that there may exist unknown facts, unknown claims and/or unknown damages arising from the alleged acts and/or omission of one or more of the Parties and/or of other persons, and that claims based upon or arising out of any such unknown fact, unknown claims and/or unknown damages are being released by and under the terms of this Agreement, including specifically Civil Code Section 1542 which states:

A general release does not extend to claims which the creditor does not know or expect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

6. The Parties hereto agree to promptly, upon request, to execute any and all additional documents or instruments reasonably necessary to evidence, effectuate, consummate or otherwise implement the terms of this Agreement.

7. Each party executing the Agreement represents that it owns the claims and rights being settled and released under this Agreement and has not assigned or transferred to any other person, firm, corporation, or other entity any of said claims or rights. Each person executing this Agreement on a party's behalf represents and warrants that he or she is authorized to sign the Agreement on that party's behalf and, to the extent necessary, the party has been duly authorized to execute this Agreement.

8. This Agreement shall be binding upon and inure to the benefit of each of the Parties' respective successors and assigns.

9. This Agreement represents a compromise of claims, disputes and allegations which are denied and contested and is not and shall not be treated as an admission of liability for any purpose.

10. Each party has been represented by counsel of its own selection, and understands the content and effect of this Agreement. Each of the parties enters into this Agreement wholly upon the party's own judgments and knowledge and upon the advice of each party's own respective attorney(s).

11. All questions and issues concerning the validity, construction, interpretation or enforceability of this Agreement and/or of the rights or obligations of the Parties under this Agreement shall be governed by the laws of the State of California.

12. Except with the prior written consent of the other Parties to this Agreement, and to the extent permitted by law, each party to this Agreement agrees to and shall maintain as confidential (and shall cause its attorneys to so maintain) the terms and conditions of the settlement embodied in this Agreement, together with the transaction(s) herein.

13. This Agreement may be executed in counterparts, each of which when taken together shall constitute but one original. A counterpart hereof shall be deemed executed if the signed document is transmitted by facsimile to the other parties so long as the signing party sends the original to the other parties by mail or by overnight courier concurrently therewith.

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

CITY OF MOORPARK, for Itself and on Behalf of
CITY OF MOORPARK COMMUNITY
FACILITIES DISTRICT 97-1 (CARLSBERG
BUSINESS PARK PUBLIC IMPROVEMENTS)

By: _____
Mayor

SIMI-CONEJO CONSTRUCTION, INC., a
California corporation

By: _____
Paul Giuntini, President

SIMI-MOORPARK FREEWAY PROPERTIES,
LTD., a California limited partnership

By: _____
Paul Giuntini, President of Carlsberg
California Properties, LLC, a Delaware
limited liability company
Its: General Partner

CONEJO FREEWAY PROPERTIES, LTD., a
California limited partnership

By: _____
Paul Giuntini, President of Land
Researchers, Inc., a California corporation,
Its: General Partner

EXHIBIT A

AMENDMENT NO. 1 TO ACQUISITION AGREEMENT

THIS AMENDMENT NO. 1 TO ACQUISITION AGREEMENT (the "Amendment") is entered into as of the 17th day of January, 2007, by and between the City of Moorpark, a municipal corporation and a political subdivision of the State of California (the "City"), on behalf of itself and the City's Community Facilities District No. 97-1 (Carlsberg Business Park Public Improvements) (the "CFD") and Simi-Conejo Construction, Inc., a California corporation (the "Developer").

RECITALS

A. City and Developer entered into that certain Acquisition Agreement dated as of July 1, 1997 (the "Agreement").

B. Developer has incurred "Actual Costs" (as defined in the Agreement) of Seven Million Seven Hundred Fifty-Eight Thousand Nine Hundred Thirty Dollars (\$7,758,930.00) in connection with the construction of the Carlsberg Business Park Public Improvements.

C. The estimated cost (the "Budgeted Cost", as defined in the Agreement) of the Carlsberg Business Park Public Improvements and as set forth in Exhibit B of the Agreement was Six Million Six Hundred Ninety-Eight Thousand Seven Hundred Forty-Eight Dollars (\$6,698,748.00).

D. Developer has received payments to date from the CFD in the amount of Six Million Six Hundred Ninety-Eight Thousand Seven Hundred Forty-Eight Dollars (\$6,698,748.00).

E. As of November 30, 2006, the "Acquisition Account" of the "Improvement Fund" (as defined in the Agreement) established by the Fiscal Agent Agreement for the CFD contained un-disbursed funds of Nine Hundred Ninety-Nine Thousand Dollars (\$999,000.00). This amount represents accumulated interest earnings from investment of the funds in the Acquisition Account from its inception to November 30, 2006.

F. Developer submitted Payment Request No. 24 in the amount of Seven Hundred Forty-Four Thousand Fifty Dollars and Seventy-Seven Cents (\$744,050.77) to the CFD on May 11, 2004, and Payment Request No. 25 in the amount of Ninety Thousand Dollars (\$90,000.00) to the CFD on September 29, 2004. Developer is concurrently submitting a revised Payment Request No. 25 for a new amount of Two Hundred Fifty Four Thousand Nine Hundred Forty Nine Dollars and Twenty Three Cents (\$254,949.23) which, when combined with Payment Request No. 24, aggregates the total of the un-disbursed funds in the Acquisition Account (the "Unpaid Amounts"). All supporting documents have been submitted in accordance with the Agreement, and the City and CFD acknowledge the receipt of the supporting documents and agree that Payment Requests are for bona fide public improvements to benefit the CFD.

G. By this Amendment, the parties hereto desire to amend Exhibit B of the Agreement in order to allow for payment of the Unpaid Amounts to Developer and to provide for certain other matters as described below.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Unless otherwise defined herein, all capitalized terms used in the Amendment shall have the same meaning as provided in the Agreement.

2. In accordance with the provisions of Sections 2.03 and 10.13 of the Agreement, Exhibit B is hereby amended as set forth in the Exhibit B dated January 19, 2005 attached hereto as Exhibit 1 and incorporated herein by reference. The amended Actual Cost and Purchase Price of the Discrete Component(s) is Seven Million Seven Hundred Fifty-Eight Thousand Nine Hundred Thirty Dollars (\$7,758,930.00).

3. City has received an opinion letter dated January 26, 2006 from Quint & Thimmig, LLP, its bond counsel for the CFD opining that this Amendment: (a) does not require the approval of bondholders; and (b) that the Amendment will not result in the CFD Bonds losing their tax-exempt status, which opinion letter is attached hereto as Exhibit 2 and incorporated herein by reference.

4. Concurrent with the execution of this Amendment, the City shall cause the Fiscal Agent to pay Payment Request No. 24 and revised Payment Request No. 25 in the aggregate amount of Nine Hundred Ninety-Nine Thousand Dollars (\$999,000.00) or the balance of the un-disbursed funds in the Acquisition Account, whichever is less, to the Developer. Such amounts are due and payable thirty (30) days following the date this Amendment is fully executed.

5. In all other respects, the terms and conditions of the Agreement shall remain in full force and effect and are hereby reaffirmed. In the event of any conflict between the provisions of this Amendment and the terms of the Agreement, the provisions of this Amendment shall control.

6. Each party covenants that it is duly authorized to execute this Amendment, and that upon its execution, it will be binding upon the parties and their successors and assigns.

7. This Amendment may be executed in counterparts, each of which when taken together shall constitute but one original. A counterpart hereof shall be deemed executed if the signed document is transmitted by facsimile to the other party so long as the signing party sends the original to the other party by mail or by overnight courier concurrently therewith.

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

CITY OF MOORPARK, for itself and on
Behalf of CITY OF MOORPARK COMMUNITY
FACILITIES DISTRICT 97-1 (CARLSBERG
BUSINESS PARK PUBLIC IMPROVEMENTS)

By: _____
Mayor

SIMI-CONEJO CONSTRUCTION, INC., a
California corporation

By: _____
Paul J. Giuntini, President