

STAFF REPORT



ITEM NO. 7 CITY OF OCEANSIDE

DATE: November 18, 2009

TO: Honorable Mayor and City Councilmembers

FROM: Development Services Department

SUBJECT: **AMENDMENT 1 IN THE AMOUNT OF \$79,129.54 TO THE REIMBURSEMENT AGREEMENT WITH D.R. HORTON, DBA WESTERN PACIFIC HOUSING, INC., FOR THE DOUGLAS DRIVE STORM DRAIN**

SYNOPSIS

Staff recommends that the City Council approve Amendment 1 in the amount of \$79,129.54 to the reimbursement agreement with D.R. Horton, dba Western Pacific Housing, Inc., for the Douglas Drive Storm Drain project located in Douglas Drive between El Camino Real and Mission Road, and authorize the City Manager to execute the amendment.

BACKGROUND

On December 1, 2004, the City Council approved a reimbursement agreement with D.R. Horton, then doing business as Western Pacific Housing, Inc., for \$3,150,000 of the cost to build a storm drain in Douglas Drive between El Camino Real and Mission Road.

In June 2006, D.R. Horton's contractor completed the construction, and the City paid D.R. Horton \$3,149,893.97 under the agreement. D.R. Horton's actual costs exceeded the amount of the agreement, and they requested an additional \$569,221.51. City staff replied in the attached letter dated April 25, 2007, offering to support a request to City Council for a reimbursement of \$79,129.54. D.R. Horton did not respond until June 2009. The proposed amendment formalizes the resolution proposed by the April 25, 2007 letter.

ANALYSIS

The Douglas Drive storm drain is a facility identified in the City's Drainage Master Plan that had to be constructed prior to completion of D.R Horton's 81-unit townhouse project at the intersection of Douglas Drive and El Camino Real. The storm drain serves more land area than the townhouse project, and as a result, the developer was eligible for reimbursement from drainage fees that the City had collected from other developers.

The agreement states that "Reimbursement shall not exceed \$3,150,000 without a written amendment to the Agreement approved by the City. This limit shall apply even if the total amount of expenses otherwise eligible for reimbursement exceeds \$3,150,000."

The additional \$79,129.54 reimburses the developer's costs for relocating two City waterlines in the way of the storm drain, and increasing the size of a catch basin from the original plans.

FISCAL IMPACT

The balance in the CIP Douglas Drive at El Camino Real account (905744800511) has a current available balance of \$333,036 in carry forward from FY 2008-09; therefore, sufficient funds are available.

COMMISSION OR COMMITTEE REPORT

Does not apply.

CITY ATTORNEY'S ANALYSIS

The referenced documents have been reviewed by the City Attorney and approved as to form.

RECOMMENDATION

Staff recommends that the City Council approve Amendment 1 in the amount of \$79,129.54 to the reimbursement agreement with D.R. Horton, dba Western Pacific Housing, Inc., for the Douglas Drive Storm Drain project located in Douglas Drive between El Camino Real and Mission Road, and authorize the City Manager to execute the amendment.

PREPARED BY:



Gary Kellison
Senior Civil Engineer

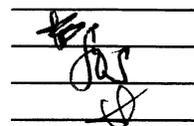
SUBMITTED BY:



Peter A. Weiss
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager
George Buell, Development Services Director
Scott O. Smith, City Engineer
Teri Ferro, Financial Services Director



Attachments:

1. Reimbursement Agreement
2. Amendment 1
3. Letter dated April 25, 2007

REIMBURSEMENT AGREEMENT

BETWEEN THE CITY OF OCEANSIDE AND WESTERN PACIFIC HOUSING, INC.

THIS AGREEMENT is made and entered into this 1st day of December, 2004, by and between the CITY OF OCEANSIDE, hereinafter referred to as "CITY" and WESTERN PACIFIC HOUSING INC., a Delaware corporation, hereinafter referred to as "Developer".

WHEREAS, City has approved, pursuant to Developer's application, the construction of that certain public storm drain, including a quarter-mile of reinforced concrete box culvert, reinforced concrete pipe, inlets, cleanouts and maintenance vaults in Douglas Drive, as is more particularly described on Exhibit A attached hereto and incorporated herein by this reference (the "Project"); and

WHEREAS, Developer and City agree that Developer, on behalf of the City, will construct the Project; and

WHEREAS, the estimated total design, bid administration, and construction costs for the Project are Three Million, One Hundred and Fifty Thousand Dollars (\$3,150,000); and

WHEREAS, the Project shall be constructed in accordance with design specifications, procedures and standards set forth by the City, as well as pursuant to applicable Federal, State and City regulations, including but not limited to, obtaining all applicable construction permits, and subject to the approval and acceptance of the City Engineer; and

WHEREAS, City and Developer desire, at this time, to enter into a formal written agreement concerning reimbursement for the construction of the Project.

NOW, THEREFORE, in consideration of the mutual promises and obligations set forth herein, the parties hereto agree as follows:

1. City has made calculations and determinations in accordance with the Project and has determined that:
 - A. The total estimated cost of the design, administration and construction of the Project is Three Million, One Hundred and Fifty Thousand Dollars (\$3,150,000) as set forth on Exhibit A as the amount "Reimbursable to Western Pacific Housing", attached hereto and incorporated herein as the total amount reimbursable to the Developer. The City's staff time, inspection, and administrative costs, estimated at Two Hundred Thousand Dollars (\$200,000), shall be absorbed by the City and not charged to the Developer.
 - B. Any change orders, as approved by the City, shall be limited to a maximum of ten percent (10%) of the construction bid, Two Hundred Sixty-One Thousand, Two Hundred Seventy Dollars (\$261,270).

- C. Reimbursement shall not exceed Three Million, One Hundred and Fifty Thousand Dollars (\$3,150,000) without a written amendment to this Agreement approved by the City. This limit shall apply even if the total amount of expenses otherwise eligible for reimbursement exceed \$3,150,000.
2. Developer shall submit a monthly request to the City for disbursement of the reimbursement funds in accordance with a schedule agreed upon by City and Developer. Developer shall maintain a copy of the certified payroll for all construction work subject to this Agreement, and shall verify that all workers are paid no less than the wages specified in the General Prevailing Wage Determination made by the Director of Industrial Relations for the State of California that is in effect on the date that the invitation for bids is first published. The City is entitled to a copy of the certified payroll to verify compliance with State and Federal law and the requirements of this section.
 3. Prior to approving or paying a monthly disbursement for construction progress, the City shall inspect the work performed to verify that it is satisfactory, in compliance with the approved improvement plans, City of Oceanside guidelines, rules, regulations, and reference engineering standards. Substandard work or work deemed unacceptable by the City shall not be reimbursed until the Developer has replaced, reconstructed, or corrected any deficiencies in the work to the satisfaction of the City. Upon approval by the City, payments shall be made to Developer at the following address: Western Pacific Housing Inc., 5790 Fleet Street, Suite 210, Carlsbad, CA 92009. City shall disburse funds to Developer within thirty (30) days after City's receipt of disbursement request for work and work-in-progress satisfactorily completed, inspected, and completed.
 4. The City shall retain a minimum of ten percent (10%) of the Actual Project Cost until the Project is completed and accepted, and unconditional releases have been received by the City from all equipment and material suppliers and subcontractors. City shall withhold one hundred twenty-five percent (125%) of the amount of any Stop Notices filed by its contractor or subcontractor for work allegedly completed but not paid by Developer. City will have no obligation to resolve any payment disputes between Developer and its contractor or subcontractor, and it shall be Developer's responsibility to obtain a Release of Stop Notice or a judicial decision to remove the Stop Notice.
 5. This Agreement contemplates the completion of the Project to the reasonable satisfaction of the City. The Project shall be deemed complete at such time as it is finally inspected and accepted by the City Engineer, which inspection and acceptance shall not be unreasonably withheld, conditioned or delayed. Prior to the acceptance of the Project by the City, Developer shall be obligated to maintain the Project. Commencing upon and continuing after the Project is accepted by the City, the City shall be obligated to maintain the Project. The City may terminate this Agreement on thirty (30) days written notice to Developer in the event it determines that Developer is not performing the construction work in accordance with City construction standards. In the event that Developer fails to complete

any portion of the work or abandons the Project, City shall have no further obligation to pay Developer for work-in-progress or partially completed.

6. It is expressly and specifically agreed that this Agreement comprises the entire integrated understanding of the parties concerning the reimbursement for the Project, and supercedes all prior negotiations, representations or agreements. There are no promises, representations, agreements or inducements either expressed orally or implied by the parties hereto, except as fully set forth herein; and further, that this Agreement cannot be enlarged, modified or changed in any respect whatsoever except by a written agreement duly executed by and between the parties hereto.
7. The interpretation, validity and enforcement of this Agreement shall be governed and construed by the laws of the State of California.
8. This Agreement and any portion thereof shall not be assigned or transferred, nor shall any of the duties expressed herein be delegated, without the express written consent of the City.
9. All notices, demands, requests, consents or other communications which this Agreement contemplates or authorizes, or requires or permits either party to give to the other, shall be in writing and shall be personally delivered or mailed to the respective party as follows:

To the City:

City of Oceanside
Marla Doyle, City Engineer
300 North Coast Highway
Oceanside, CA 92054

To the Developer:

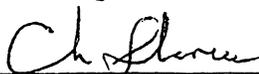
Western Pacific Housing, Inc.
David Dietterle, Administrator
5970 Fleet Street, Suite 210
Carlsbad, CA 92009

IN WITNESS WHEREOF, City and Developer have caused this Agreement to be executed by their duly authorized officers.

DEVELOPER

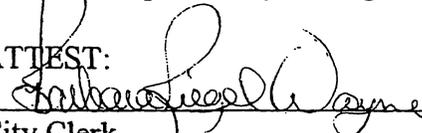
WESTERN PACIFIC HOUSING, INC., a
Delaware corporation

By: 
Anthony J. Wyman, Senior Vice
President
Planning and Land Acquisition

By: 
Chris Stanicek, Vice President
Division Controller

~~CITY OF OCEANSIDE~~

Steven R. Jepsen, City Manager

ATTEST:

City Clerk

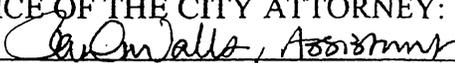
APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:
By: 
City Attorney

Exhibit A -- Douglas Drive Storm Drain

Beador Construction

| ITEM NO. | DESCRIPTION | UNIT | QTY | Unit Cost | Total |
|----------|---|------|-----|--------------|---------------|
| 1 | Mobilization and Demobilization | LS | 1 | \$225,000 | \$ 225,000.00 |
| 2 | Insurance | LS | 1 | \$10,000 | \$ 10,000.00 |
| 3 | Construction Bonds | LS | 1 | \$50,000 | \$ 50,000.00 |
| 4 | Sheeting, Shoring, and Bracing | LS | 1 | \$20,000 | \$ 20,000.00 |
| 5 | Erosion Control | LS | 1 | \$12,500 | \$ 12,500.00 |
| 6 | 18" RCP Storm Drain | LS | 1 | \$20,000 | \$ 20,000.00 |
| 7 | 24" RCP Storm Drain | LS | 1 | \$15,000 | \$ 15,000.00 |
| 8 | 48" RCP Storm Drain | LS | 1 | \$225,000 | \$ 225,000.00 |
| 9 | 5' W X 3' H RCB Storm Drain | LS | 1 | \$12,500 | \$ 12,500.00 |
| 9A | 5' W X 3' H RCB Storm Drain Material | LS | 1 | \$5,926.25 | \$ 5,926.25 |
| 10 | 10' W X 3' H RCB Storm Drain | LS | 1 | \$275,000.00 | \$ 275,000.00 |
| 10A | 10' W X 3' H RCB Storm Drain Material | LS | 1 | \$739,163.94 | \$ 739,163.94 |
| 11 | 6' W X 2' H RCB Storm Drain | LS | 1 | \$20,000 | \$ 20,000.00 |
| 11A | 6' W X 2' H RCB Storm Drain Material | LS | 1 | \$8,081.25 | \$ 8,081.25 |
| 12 | MOD TYPE A Storm Drain Cleanout X=5'; Y=10' - Detail 5 | EA | 3 | \$7,000 | \$ 21,000.00 |
| 12A | MOD TYPE A Storm Drain Cleanout X=5'; Y=10' - Detail 5 - Material | EA | 3 | \$5,700.00 | \$ 17,100.00 |
| 13 | MOD TYPE A Storm Drain Cleanout X=5'; Y=10' - Detail 8 | EA | 1 | \$6,500 | \$ 6,500.00 |
| 13A | MOD TYPE A Storm Drain Cleanout X=5'; Y=10' - Detail 8 - Material | EA | 1 | \$6,180.00 | \$ 6,180.00 |
| 14 | TYPE A-4 Storm Drain Cleanout | EA | 1 | \$4,500 | \$ 4,500.00 |
| 14A | TYPE A-4 Storm Drain Cleanout - Material | EA | 1 | \$3,900.00 | \$ 3,900.00 |
| 15 | TYPE B-8 Storm Drain Cleanout | EA | 1 | \$8,000 | \$ 8,000.00 |
| 15A | TYPE B-8 Storm Drain Cleanout - Material | EA | 1 | \$12,345.00 | \$ 12,345.00 |

| | | | | | |
|-----|---|----|---|-------------|---------------|
| 16 | MOD TYPE B Storm Drain Cleanout X=5'; Y=12' - Detail 6 | EA | 1 | \$8,000 | \$ 8,000.00 |
| 16A | MOD TYPE B Storm Drain Cleanout X=5'; Y=12' - Detail 6 - Material | EA | 1 | \$10,600.00 | \$ 10,600.00 |
| 17 | MOD TYPE B Storm Drain Cleanout X=9'; Y=12' - Detail 7 | EA | 1 | \$8,500 | \$ 8,500.00 |
| 17A | MOD TYPE B Storm Drain Cleanout X=9'; Y=12' - Detail 7 - Material | EA | 1 | \$11,925.00 | \$ 11,925.00 |
| 18 | TYPE B-1 Curb Inlet L=8' | EA | 3 | \$9,000 | \$ 27,000.00 |
| 19 | Storm Drain Maintenance Box (10'W X 18'L) - Detail 3 | EA | 1 | \$76,500.00 | \$ 76,500.00 |
| 20 | Storm Drain Maintenance Box (12'W X 18'L) - Detail 4 | EA | 1 | \$98,500.00 | \$ 98,500.00 |
| 21 | TYPE G-2 Inlet | EA | 1 | \$5,000 | \$ 5,000.00 |
| 22 | Install 20A Conversion Electrical Conduit - Per Utility Plan | LS | 1 | \$150,000 | \$ 150,000.00 |
| 23 | SBC Conduit Relocation - Per Utility Plan | LS | 1 | \$75,000 | \$ 75,000.00 |
| 24 | 8-inch Watermain Relocation - Detail 2 | LS | 1 | \$35,000 | \$ 35,000.00 |
| 25 | Water Valve Relocation - Detail 9 | LS | 1 | \$20,000 | \$ 20,000.00 |
| 26 | 16-inch Well Line Relocation - Detail 12 | LS | 1 | \$65,000 | \$ 65,000.00 |
| 27 | Trench Pavement Repair | LS | 1 | \$170,000 | \$ 170,000.00 |
| 28 | Traffic Striping | LS | 1 | \$13,000 | \$ 13,000.00 |
| 29 | Traffic Control | LS | 1 | \$120,979 | \$ 120,978.56 |

Construction Bid

\$ 2,612,700.00

Construction Change Order Contingency (10%)

\$ 261,270.00

Civil, Structural, and Landscape Design

\$ 120,000.00

Field Construction Administration

\$ 100,000.00

Construction Bid Administration

\$ 56,030.00

Reimbursable to Western Pacific Housing

\$ 3,150,000.00

City Staff Time, Inspection, and Admin.

\$ 200,000.00

Total Project Appropriation

\$ 3,350,000.00

ALL-PURPOSE ACKNOWLEDGMENT

State of California }
County of SAN DIEGO } ss.

On November 18, 2004 before me, JAI ME TEETER,
(DATE) (NOTARY)
personally appeared ANTHONY J. WYMAN & CHRIS STANICK
SIGNER(S)

personally known to me - OR - 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 signatures(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Jaime Teeter
NOTARY'S SIGNATURE

OPTIONAL INFORMATION

The information below is not required by law. However, it could prevent fraudulent attachment of this acknowledgment to an unauthorized document.

CAPACITY CLAIMED BY SIGNER (PRINCIPAL)

- INDIVIDUAL
- CORPORATE OFFICER
Senior VP, VP
TITLE(S)
- PARTNER(S)
- ATTORNEY-IN-FACT
- TRUSTEE(S)
- GUARDIAN/CONSERVATOR
- OTHER: _____

DESCRIPTION OF ATTACHED DOCUMENT

Reimbursement Agreement
TITLE OR TYPE OF DOCUMENT

1
NUMBER OF PAGES

11/18/2004
DATE OF DOCUMENT

OTHER _____

SIGNER IS REPRESENTING:
NAME OF PERSON(S) OR ENTITY(IES)
Western Pacific Housing, Inc.

RIGHT THUMBPRINT
OF
SIGNER



**CITY OF OCEANSIDE
AMENDMENT 1 TO
REIMBURSEMENT AGREEMENT**

**PROJECT: DOUGLAS DRIVE STORM DRAIN
905744800511**

THIS AMENDMENT 1 TO THE REIMBURSEMENT AGREEMENT (hereinafter "Amendment") is made and entered into this 18th day of November, 2009, by and between the CITY OF OCEANSIDE, a municipal corporation, hereinafter designated as "CITY", and WESTERN PACIFIC HOUSING, INC., a Delaware corporation, hereinafter designated as "DEVELOPER".

RECITALS

WHEREAS, CITY and DEVELOPER are the parties to the original Reimbursement Agreement dated December 1, 2004.

WHEREAS, DEVELOPER has completed all work required by the Reimbursement Agreement, and has incurred costs in excess of the \$3,150,000 sum specified as being reimbursable under the terms of the Reimbursement Agreement.

WHEREAS, DEVELOPER has provided CITY satisfactory evidence that the DEVELOPER has incurred cost of \$79,129.54 for items of work not anticipated by the Reimbursement Agreement, and which were constructed by the DEVELOPER as part of a Master Plan of Drainage facility and therefore eligible for reimbursement.

WHEREAS, CITY has sufficient Drainage Fee funds available to provide for an additional \$79,129.54 reimbursement.

AMENDMENT

NOW, THEREFORE, as set forth herein, the parties do mutually agree that the Reimbursement Agreement shall be amended as follows:

1. Within 30 days from City of Oceanside City Council approval, the CITY shall reimburse DEVELOPER an additional \$79,129.54 for costs incurred by DEVELOPER in construction of the Douglas Drive storm drain.

2. Upon receipt of the payment, the DEVELOPER shall release the CITY from any claim for any additional costs for its construction of the Douglas Drive storm drain, even if incurred and otherwise payable under the Reimbursement Agreement.

CALIFORNIA ALL-PURPOSE CERTIFICATE OF ACKNOWLEDGMENT

State of California

County of San Diego

On 11/4/09 before me, Kimberly N. Molina, Notary Public,
(Here insert name and title of the officer)

personally appeared DAVID STEARN

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) (s) 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.

Kimberly N. Molina
Signature of Notary Public

(Notary Seal)



ADDITIONAL OPTIONAL INFORMATION

INSTRUCTIONS FOR COMPLETING THIS FORM

Any acknowledgment completed in California must contain verbiage exactly as appears above in the notary section or a separate acknowledgment form must be properly completed and attached to that document. The only exception is if a document is to be recorded outside of California. In such instances, any alternative acknowledgment verbiage as may be printed on such a document so long as the verbiage does not require the notary to do something that is illegal for a notary in California (i.e. certifying the authorized capacity of the signer). Please check the document carefully for proper notarial wording and attach this form if required.

- State and County information must be the State and County where the document signer(s) personally appeared before the notary public for acknowledgment.
- Date of notarization must be the date that the signer(s) personally appeared which must also be the same date the acknowledgment is completed.
- The notary public must print his or her name as it appears within his or her commission followed by a comma and then your title (notary public).
- Print the name(s) of document signer(s) who personally appear at the time of notarization.
- Indicate the correct singular or plural forms by crossing off incorrect forms (i.e. ~~he/she/they~~, is /are) or circling the correct forms. Failure to correctly indicate this information may lead to rejection of document recording.
- The notary seal impression must be clear and photographically reproducible. Impression must not cover text or lines. If seal impression smudges, re-seal if a sufficient area permits, otherwise complete a different acknowledgment form.
- Signature of the notary public must match the signature on file with the office of the county clerk.
 - ❖ Additional information is not required but could help to ensure this acknowledgment is not misused or attached to a different document.
 - ❖ Indicate title or type of attached document, number of pages and date.
 - ❖ Indicate the capacity claimed by the signer. If the claimed capacity is a corporate officer, indicate the title (i.e. CEO, CFO, Secretary).
- Securely attach this document to the signed document

DESCRIPTION OF THE ATTACHED DOCUMENT

(Title or description of attached document)

(Title or description of attached document continued)

Number of Pages _____ Document Date _____

(Additional information)

CAPACITY CLAIMED BY THE SIGNER

Individual (s)

Corporate Officer
V.P.
(Title)

Partner(s)

Attorney-in-Fact

Trustee(s)

Other _____



CITY OF OCEANSIDE

PUBLIC WORKS DEPARTMENT

April 25, 2007

D.R. Horton, dba Western Pacific Housing, Inc.
5790 Fleet Street, Suite 210
Carlsbad, CA 92009

Attention: Rezlyn Palmer

Subject: Reimbursement Agreement for Douglas Drive Storm Drain

The City of Oceanside staff has reviewed D.R. Horton's request for a payment of \$569,221.51 submitted on September 15, 2006. The reimbursement agreement provided for a maximum payment of \$3,150,000. In January 2007, the City paid D.R. Horton \$34,654.02, which brings the sum of all City of Oceanside payments to \$3,149,893.97.

The reimbursement agreement states, "Reimbursement shall not exceed \$3,150,000 without a written amendment to this Agreement approved by the City. This limit shall apply even if the total amount of expenses otherwise eligible for reimbursement exceeds \$3,150,000."

To be reimbursed for costs exceeding \$3,150,000, the Agreement seems clear that costs, even if reasonable and necessary, will not automatically be reimbursed. This is especially true for costs which could have been foreseen or anticipated by D.R. Horton when the cost estimate on which the Agreement was based was prepared.

However, other costs, to the extent that they may have been unforeseeable and caused by the City, may be supported by staff in a request to the City Council to increase the reimbursement amount.

After reviewing D.R. Horton's submitted invoices and change order summary table, staff is supportive of increasing the reimbursement by \$79,129.54.

This amount is the sum of change orders 6 and 8 in the attached D.R. Horton table.

Please let me know whether this amount is acceptable or whether you would like to meet with City staff to discuss the matter further. I can be contacted at gkellison@ci.oceanside.ca.us or (760) 435-5112.

Sincerely,

Gary Kellison
Senior Civil Engineer

Attachments

cc: Scott Smith, Acting City Engineer