

## **WATER INFRASTRUCTURE REIMBURSEMENT AGREEMENT**

THIS AGREEMENT ("Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2015 between the City of Fresno, a California municipal corporation ("City) and Baltara Enterprises, L.P., a California Limited Partnership ("Developer").

### **RECITALS**

WHEREAS, City approved Developer's application for Conditional Use Permit Application No. C-09-166 that will permit the development of an underutilized site on 1.02 acres to construct approximately 140,000 square feet of usable space in a multistory office building, with intended use of large private and government offices located on the east side of "P" Street between Inyo Street and Kern Street ("Project"); and,

WHEREAS, City conditioned approval of Conditional Use Permit Application No. C-09-166, Section E(4)(b)-1 (as incorporated) as follows:

"The existing water distribution system serving the project was constructed in year 1930 and is not adequate to support the proposed development. The development shall construct replacement water mains within Inyo Street between Sante Fe Avenue and P Street and within Sante Fe Avenue between Inyo Street and the existing water main north of Ventura Street. The size of the water mains will be based upon the results of a fire flow test conducted by the City. Sixty-eight percent (68%) of the cost for the construction of the water mains (including fire hydrants) shall be reimbursed through progress payments under a separate reimbursement agreement setting forth the scope for the construction of the water main (including fire hydrants), to be approved by the Fresno City Council. Included in the agreement will be the provision for progress payments to be made within thirty (30) days of an approved invoice."

WHEREAS, the City's Department of Public Utilities ("DPU") Water Division staff supports the reimbursement of the Developer, out of enterprise funds, the cost of constructing that portion of the 8-inch main that is replacing the existing 8-inch main in Santa Fe Avenue between Inyo Street and Kern Street ("the Improvement"), because it has been determined that the existing 8-inch main is located within the limits of the proposed Project, and no longer meets DPU-Water Division's minimum specifications and standards.

## **AGREEMENT**

In consideration of the foregoing recitals and the obligations undertaken by the parties as hereinafter set forth, the parties agree as follows:

### **1. Obligations of the Developer**

1.1 The Scope of this Agreement is the City's obligation to reimburse the Developer for the cost of constructing the Improvement, subject to the terms and limitations set for in this Agreement. Nothing in this Agreement is intended to alter or waive any obligations or duties of the Developer to comply with existing City ordinances, policies, procedures, plans and specifications related to the construction of the Improvement, including any requirements to obtain approval of construction plans or obtain necessary building, street-work, encroachment or other permits or to comply with any requirements or conditions placed on the issuance of those permits (e.g. insurance, improvement security, etc.). Furthermore, if the Developer decides to seek the City Council's approval of a Final Map for all or a part of the property covered by Conditional Use Permit C-09-166 prior to constructing this Improvement, Developer shall obtain all necessary improvement security required by the Subdivision Map Act and the Fresno Municipal Code to ensure completion of the construction of this Improvement.

1.2 As the City is reimbursing the Developer the Eligible Construction Costs to construct the Improvement, the Improvement is a "Public Work" as defined by California Labor Code, section 1720(a). Developer agrees (a) to pay, and shall cause its contractors and subcontractors to pay, prevailing wages for the construction of the Improvement and (b) comply with the other applicable provisions of Labor Code, section 1720 et seq., and implementing regulations of the Department of Industrial Relations, necessary to determine that prevailing wages have been paid as required by law. During the construction of the Improvement, Developer shall, or shall cause its contractor, to post at the Project area the applicable prevailing rates of per diem wages. Developer shall indemnify, hold harmless and defend (with legal counsel reasonably acceptable to the City) the City against any claim for damages, compensation, fines,

penalties or other amounts arising out of the failure or alleged failure of any person or entity (including Developer, its contractors and subcontractors) to pay prevailing wages as required by law or to comply with the other applicable provisions of Labor Code sections 1720 et seq., and/or the implementing regulations of the Department of Industrial Relations in connection with construction of the Improvement.

1.3 Developer shall maintain written documentation evidencing the Eligible Construction Costs the Developer incurred in constructing of the Improvement for submittal to the City at the time Developer seeks reimbursement for the eligible costs of constructing the Improvement. Developer's failure to provide the necessary documentation evidencing certain eligible construction costs.

"Eligible Costs" or "Eligible Construction Costs" means those activities described in Exhibit A. Acceptable documentation of Eligible Construction Costs includes invoices for construction materials used to construct the Improvement and invoices from contractors clearly identifying the labor and materials expended to construct the Improvement.

1.4 Within 60 days of the City's acceptance of the Improvement, Developer shall submit to DPU, Water Division all documentation evidencing the eligible costs of constructing the Improvement. If the Developer fails to submit the documentation evidencing the eligible construction costs by this deadline, City shall have the option of refusing to reimburse Developer for any of the otherwise eligible costs of construction.

1.5 To the furthest extent allowed by law including California Civil Code section 2782, Developer shall indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by City, Developer or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of performance of this Contract. Developer's obligations under the preceding sentence shall apply regardless of whether City or any of its officers, officials, employees, agents or volunteers are passively negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or

damages caused by the active or sole negligence, or the willful misconduct, of City or any of its officers, officials, employees, agents or volunteers.

If Developer should subcontract all or any portion of the work to be performed under this Contract, Developer shall require each subcontractor to indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers in accordance with the terms of the preceding paragraph.

This section shall survive termination or expiration of this Contract.

## **2. City's Obligations**

2.1 The Engineer's Estimate of the Eligible Construction Costs (including an allocation for Eligible Professional Services) of constructing the Improvement is \$63,282.78. An itemization of the individual Eligible Construction Costs is attached hereto as Exhibit "A." Upon Developer's compliance with Section 1.4 to the reasonable satisfaction of the Director of Public Utilities ("Director"), and upon confirmation of the Eligible Construction Costs, the City shall reimburse the Developer for Eligible Construction Costs up the amount of the Engineer's Estimate.

2.2 If the amount of the Eligible Construction Costs exceeds the Engineers Estimate by an amount less than or equal to 10 percent, the Director may authorize payment of all or a portion of the excess amount upon Developer demonstrating to the reasonable satisfaction of the Director that the amount incurred in excess of the engineers Estimate resulted from circumstances not caused by the Developer, its contractors or subcontractors and beyond their control.

2.3 Reimbursement of any Eligible Construction Costs in excess of 10 percent of the Engineers Estimate shall require the approval of the City council.

2.4 City shall use its best efforts to review the documentation of eligible construction costs and, if the documentation is determined to be sufficient, issue the reimbursement check within 30 days of receiving from the Developer all of the documentation of eligible construction costs required by the City.

## **3. Miscellaneous Terms**

3.1 **Binding upon Successors.** This Agreement shall be binding upon the inure to the benefit of the parties hereto and their predecessors; successors; assigns;

past, present, or future affiliated and related entities; officers; members; agents; employees; and representatives.

3.2 **Integration.** This Agreement constitutes the complete and final agreement of the parties with respect to the subject matters referred to in the Agreement.

3.3 **Modification.** Any modifications of the Agreement must be in writing and signed by all parties. No oral modifications shall be effective to vary or alter the terms of this Agreement.

3.4 **Severability.** If any provision or any part of any provision of the Agreement shall, for any reason, be held invalid, unenforceable, or contrary to public policy or law, the remainder of the Agreement shall not be affected thereby, and shall continue to be value and enforceable.

3.5 **Counterparts.** This Agreement may be executed in counterparts, including true and accurate copies of the original, all of which, when taken together, shall be deemed on original agreement. Any executed copy shall not be binding upon any party until all parties have duly executed a copy of this Agreement.

3.6 **Attorneys Fees.** If either party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the party its reasonable attorney's fees and legal expenses.

3.7 **Waiver of Terms.** The waiver by either party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement. No provisions of this Agreement may be waived unless in writing and signed by all parties to this Agreement. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.

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The parties have executed this Agreement at Fresno, California, on the day and year first above written.

**CITY OF FRESNO,**  
A Municipal Corporation

Department of Public Utilities  
Thomas C. Esqueda, Director

By: \_\_\_\_\_  
Thomas C. Esqueda  
Director of Public Utilities

**DEVELOPER**

Baltara Enterprises, L.P., a California  
Limited Partnership

By: \_\_\_\_\_  
Print Name: William Dyck  
Title: General Partner  
(if corporation or LLC, Board Chair, Pres.  
or Vice Pres.)

**ATTEST:**

Yvonne Spence, CMC  
City Clerk

By: \_\_\_\_\_  
Deputy

**APPROVED AS TO FORM:**

DOUGLAS T. SLOAN  
City Attorney

By: \_\_\_\_\_  
Mary Rafterman-Doidge Deputy

Date: 7/30/15

### Exhibit A – Eligible Construction Costs

- I. Eligible Professional Services – These costs shall not exceed the percentages of the Eligible Costs of Actual Construction (“ECAC”) set forth below.

<u>Description</u>	<u>% of ECAC</u>
A. Planning and Scoping	0.5%
B. B. Design Development	5.0%
C. Design Survey	0.5%
D. Design Administration	1.5%
E. Construction Survey	2.0%
F. Construction Management	2.0%
G. <u>Project Closure</u>	<u>0.1%</u>
Total Maximum % Recoverable	11.6%

### II. Eligible Costs of Actual Construction

- Trenching
- Pipe Installation and testing
- Backfill and compaction
- Jack and bore pits
- Traffic control
- Dust control
- Construction of all appurtenances as determined necessary by City
- Road Surfacing as determined necessary by City
- Frontage improvements and landscaping as approved by City on final plans
- Clean up of construction site
- Obtaining, and paying for, street work permit from City
- Coordination of work with any other City contractor
- Construction pursuant to City of Fresno, Department of Public Works, Standard Specifications and Drawings, dated August 2010.