

**MEASURE "C" TRANSIT-ORIENTED DEVELOPMENT PROGRAM
INFRASTRUCTURE PROJECT REIMBURSEMENT AGREEMENT
(BROADWAY-FULTON ALLEY PAVEMENT RECONSTRUCTION FROM
CALAVERAS TO SAN JOAQUIN STREET)**

THIS AGREEMENT ("Agreement") is made and entered into this ____ day of _____, 2014, between the City of Fresno, a California municipal corporation ("City") and FFDA Properties LLC ("Developer").

RECITALS

WHEREAS, on April 11, 2013, the Fresno City Council ("Council") adopted a resolution authorizing staff to apply for Measure "C" Transit-Oriented Development (TOD) funding for the the Broadway-Fulton Alley Pavement Reconstruction from Calaveras to San Joaquin Street ("Project"); and

WHEREAS, the application was approved for funding through the TOD program procedures established by the Fresno Council of Governments ("COG") and Fresno County Transportation Authority ("FCTA"); and

WHEREAS, the City and FCTA have entered into a cooperative agreement for the Project, as executed on February 12, 2014; and

WHEREAS, the City conditioned approval of Conditional Use Permit Application No. C-11-163, C-12-002, and Tract No. 6015 on required developer construction of alley improvements in the Broadway-Fulton Alley from Calaveras to San Joaquin Streets as per Public Works Standards; and

WHEREAS, City applied the same condition of approval on Vesting Tentative Tract Map No. 6015 Condition of Approval "General Conditions" 27, (as incorporated); and

WHEREAS, the costs of constructing the improvements required by Condition of Approval for Conditional Use Permit No. C-11-163, C-12-002, and Condition of Approval for Vesting Tentative Tract Map No. 6015, Condition 27 which required the developer to construct alley improvements in the Broadway-Fulton Alley from Calaveras to San Joaquin Streets as per Public Works Standards. Alley ("Improvements") will be reimbursed in accordance with this Agreement; and

WHEREAS, prior to execution of this Agreement, the Developer has installed the Improvements; and

WHEREAS, City and Developer now wish to set forth the obligations of the Developer associated with the Improvements and the conditions for reimbursement of the Developer for such work.

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 Developer shall construct the Improvements, which will be installed and accepted by the City upon completion.

1.2 This Agreement is intended to define the City's obligation to reimburse the Developer for the cost of constructing the Improvements, subject to the terms and limitations set forth in this Agreement. Nothing in this Agreement shall 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 Improvements, 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.). Nothing in this Agreement shall alter or waive any Condition of Approval or requirement for Conditional Use Permit No. C-11-163, C-12-002 and Vesting Tentative Tract Map No. 6015.

1.3 As City is reimbursing Developer for the Eligible Costs of Actual Construction (ECAC), the Improvement is a "Public Work" as defined by California Labor Code, Section 1720(a). Developer agrees and warrants it has (a) paid, and caused its contractors and subcontractors to pay, prevailing wages for the construction of the Improvement and (b) complied 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 has, or has caused 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.

1.4 Developer shall maintain written documentation evidencing the ECAC Costs the Developer incurred in constructing 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 will result in the City not reimbursing the Developer for those otherwise eligible construction costs. Acceptable documentation of ECAC includes invoices for construction materials used to construct the Improvement and invoices from contractors and subcontractors clearly identifying the labor and materials expended to construct the Improvement.

1.5 Developer shall submit to City's Department of Public Works – Construction Management Division all documentation evidencing the eligible costs of constructing the Improvements. If the Developer fails to submit the documentation evidencing the eligible construction costs, City shall have the option of refusing to reimburse Developer for any of the otherwise eligible costs of construction.

1.6 Developer shall not assert or be entitled to a fee credit or offset toward a UGM or development impact fee from City for any portion of the Improvements for which reimbursement was paid under this Agreement.

1.7 To the furthest extent allowed by law, including Civil Code Section 2782, Developer shall indemnify, hold harmless and defend (with legal counsel reasonably acceptable to City) 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 attorneys' fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of performance of this Agreement or the performance of any or all work to be done by Developer or its contractors, subcontractors, agents, successors and assigns pursuant to this Agreement. Developer's obligations under the preceding sentence shall apply regardless of whether City or any of its officers, officials, employees or agents are passively negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused solely by the active negligence, or the willful misconduct of City or any of its officers, officials, employees, agents, or volunteers.

2. City's Obligations

2.1 The Engineer's Estimate of the ECAC (including an allocation for Eligible Professional Services) of constructing the Improvement is \$453,250.00. An itemization of the individual Eligible Construction Costs is attached hereto as Exhibit "A." Upon Developer's compliance with Section 1.5 to the reasonable satisfaction of the Director of the Department of Public Works ("Director"), and upon confirmation of the ECAC, the City shall reimburse the Developer for ECAC up to, but not more than, the amount of the Engineer's Estimate.

2.2 Subject to staffing limitations, City shall use its best efforts to review the documentation of eligible construction costs and inform Developer of any insufficiencies in the documentation within 15 days of receipt or execution of this Agreement, whichever is later. If the documentation is determined to be sufficient, issue the reimbursement within 30 days of receiving from Developer all of the documentation of eligible construction costs required by City. If Developer has submitted documentation prior to the execution of this Agreement, no obligation to issue a reimbursement shall arise prior to 30 days from the date of the last Party to execute this Agreement.

3. Additional Terms

3.1 **Binding upon Successors.** This Agreement shall be binding upon and 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 this Agreement. This Agreement supersedes all prior or contemporaneous negotiations, promises, covenants, agreements, and representations of every nature whatsoever with respect to the subject matters referred to in this Agreement, all of which have become merged and finally integrated into this Agreement.

3.3 **Incorporation of Attachments.** All recitals and attachments to this Agreement, including all Exhibit(s) referenced herein, and all subparts thereto, are incorporated herein by this reference.

3.4 **Modification.** Any modification of this 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.

3.5 **No Assignment.** No assignment of this Agreement or of any duty or obligation of performance hereunder shall be made in whole or in part by Developer without the written consent of City.

3.6 **Ambiguities or Uncertainties.** Any ambiguities or uncertainties herein shall be equally and fairly interpreted and construed without reference to the identity of the Party or Parties preparing this Agreement, on the express understanding and agreement the Parties participated equally in the negotiation and preparation of the Agreement, or have had equal opportunity to do so. Accordingly, the Parties hereby waive the benefit of California Civil Code §1654 and any successor or amended statute, providing that in cases of uncertainty, language of a contract should be interpreted most strongly against the Party who caused the uncertainty to exist.

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

3.8 **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 one original agreement. Any executed copy shall not be binding upon any party until all parties have duly executed a copy of this Agreement.

3.9 **Attorneys Fees.** If either party is required to commence any proceeding or legal action to enforce or interpret any term or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney's fees and legal expenses. For the purposes of this Agreement, "attorneys' fees" and "legal expenses" include, without limitation, paralegals' fees and expenses, attorneys, consultants fees and expenses, expert witness fees and expenses, and all other expenses incurred by the prevailing party's attorneys in the course of the representation of the prevailing party in anticipation of and/or during the course of litigation, whether or not otherwise recoverable as "attorneys' fees" or as "costs" under California law, and the same may be sought and awarded in accordance with California procedure as pertaining to an award of contractual attorneys' fees.

3.10 **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 on the day and year first above written.

CITY OF FRESNO,
a Municipal Corporation

Public Works Department
Scott L. Mozier, Director

By: _____
Scott L. Mozier, Director

Date: _____

ATTEST:

Yvonne Spence, CMC
City Clerk

By: _____
Deputy

APPROVED AS TO FORM:

Douglas Sloan
City Attorney

By: _____
Deputy

Date: _____

DEVELOPER,
FFDA Properties LLC

By: _____

Print Name: _____

Title: _____

(Attach Notary Acknowledgment(s))

APPROVED AS TO FORM:
DEVELOPER ATTORNEY

By: _____

Print Name: _____

Title: _____

Exhibit A: Eligible Construction Costs

EXHIBIT A

Construction Costs

COST ESTIMATE

BROADWAY / FULTON ALLEY PAVEMENT RECONSTRUCTION
BETWEEN CALAVERAS AND SAN JOAQUIN STREETS

<u>ITEM DESCRIPTION</u>	<u>QUANTITY</u>	<u>\$ UNIT COST</u>	<u>\$ EXTENSION</u>
<u>STREET CONSTRUCTION</u>			
1. Mobilization		LUMP SUM	\$ 2,500.00
2. Traffic Control		LUMP SUM	2,000.00
3. Excavation and Grading		LUMP SUM	8,000.00
4. Valley Gutter	400 LF	\$ 22.00	8,800.00
5. Valley Approach	2 Ea	2,000.00	4,000.00
6. Asphalt Pavement	6,400 SF	3.50	22,400.00
		SUBTOTAL ESTIMATED COSTS	\$ 47,700.00

MISCELLANEOUS

1. Engineering		\$	4,800.00
2. Plan Check and Inspection			8,300.00
3. Contract Administration and Supervision			4,800.00
		TOTAL MISCELLANEOUS	\$ 17,900.00

SUMMARY

STREET CONSTRUCTION		\$	47,700.00
MISCELLANEOUS			17,900.00
		TOTAL ESTIMATED COSTS	\$ 65,600.00

EXHIBIT A

Construction Costs

COST ESTIMATE
 UNDERGROUNDING OVERHEAD UTILITIES
 BROADWAY / FULTON ALLEY

BETWEEN CALAVERAS AND SAN JOAQUIN STREETS

ITEM DESCRIPTION	QUANTITY	\$ UNIT COST	\$ EXTENSION
<u>JOINT TRENCH</u>			
1. Trench	500 LF	\$ 10.00	\$ 5,000.00
2. 2" BD120	200 LF	2.25	450.00
3. 3" BD120	300 LF	2.75	825.00
4. 4" BD120	1,800 LF	3.00	5,400.00
5. 6" BD120	500 LF	4.25	2,125.00
6. Transformer Pad	2 Ea	1,600.00	3,200.00
7. #7 Vault	2 Ea	7,200.00	14,400.00
8. PMH #9 Pad	1 Ea	2,000.00	2,000.00
9. Switch Over	1 Ea	1,500.00	1,500.00
10. Tie to Riser Pole	1 Ea	500.00	500.00
11. 4" Telephone	1,800 LF	4.25	7,650.00
12. 3x5 Telephone Vault	2 Ea	3,800.00	7,600.00
13. House Panel Conversions	5 Ea	4,000.00	20,000.00
SUBTOTAL ESTIMATED COSTS			\$ 70,650.00
<u>PG&E</u>			
1. PG&E Wire Pull		LUMP SUM	\$ 160,000.00
2. PG&E Fees		LUMP SUM	160,000.00
SUBTOTAL PG&E COST			\$ 320,000.00
CITY OF FRESNO ADMINISTRATIVE COSTS			\$ (3,000.00)
STREET CONSTRUCTION (PAGE 1)			\$ 47,700.00
MISCELLANEOUS (PAGE 1)			17,900.00
 TOTAL REIMBURSABLE COSTS			 \$ 453,250.00