

RESOLUTION NO. 2015-147R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS APPROVING AN AGREEMENT WITH HIGHPOINTE TRACE, L.L.C. THAT ESTABLISHES TERMS AND CONDITIONS UNDER WHICH HIGHPOINTE TRACE, L.L.C., ITS SUCCESSORS OR ASSIGNS, SHALL DEDICATE LAND FOR AND PARTICIPATE IN THE COST OF DESIGN AND CONSTRUCTION OF A NEW FIRE STATION IN CONNECTION WITH THE TRACE PUBLIC IMPROVEMENT DISTRICT AND PLANNED DEVELOPMENT DISTRICT; AUTHORIZING THE CITY MANAGER TO EXECUTE SAID AGREEMENT ON BEHALF OF THE CITY; AND DECLARING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS:

PART 1. The attached Agreement Regarding Fire Station with Highpointe Trace, L.L.C. is hereby approved.

PART 2. The City Manager is authorized to execute said Agreement on behalf of the City.

PART 3. This Resolution shall be in full force and effect immediately from and after its passage.

ADOPTED on October 20, 2015.


Daniel Guerrero
Mayor

Attest:


Jamie Lee Pettijohn
City Clerk

AGREEMENT REGARDING FIRE STATION

This Agreement Regarding Fire Station (the “**Agreement**”), is entered into effective as of the 3rd day of November, 2015 (the “**Effective Date**”), by and between Highpointe Trace, LLC (including its successors and assigns, the “**Owner**”), and the City of San Marcos, Texas (the “**City**”).

RECITALS

WHEREAS, Owner is the owner of a 417.63 acre tract of land located in the city limits of the city of San Marcos more particularly described on Exhibit “A” attached hereto the (the “**Property**”);

WHEREAS, Owner intends to develop a master planned mixed-use community on the Property containing a mix of residential and commercial uses to be known as “Trace” (the “**Project**”);

WHEREAS, on September 1, 2015, the City council passed Resolution No. 2015-116R, which included the statutory findings for creation of the Trace Public Improvement District (the “**PID**”). The PID will provide a mechanism to fund public improvements / infrastructure for the Project;

WHEREAS, the City has determined that in order to provide adequate fire service to the Project, a new Fire Station (herein so called) is required to be built on the Property and that the Project’s pro rata share of the projected cost of the Fire Station is \$2,500,000 based on an initial estimated cost of \$4,000,000, excluding land but including equipment (the “**Owner Contribution**”); and

WHEREAS, the parties now desire to enter into this Agreement to provide the terms under which Owner will provide the Owner’s Contribution;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by both parties, the City and Owner agree as follows:

1. Conditions of Owner Contribution. Owner’s obligation to provide the Owner Contribution is contingent on the following:
 - (a) The City shall have approved an Ordinance creating the Trace Planned Development District on the Property (the “PDD”).
 - (b) The City shall have passed a Resolution creating the Trace PID and City and Owner shall have entered into that certain PID Finance Agreement providing for the terms under which the City has agreed to issue up to \$19,500,000 of bonds under the PID.
 - (c) The City shall have issued the “Major Public Improvement PID Bonds” pursuant to the terms of the PID Finance Agreement.

- (d) The City shall have provided to Owner conceptual drawings and a site layout for the Fire Station.
 - (e) The City shall have provided cost estimates in form reasonably acceptable to Owner demonstrating that the cost of the Fire Station, excluding land but including equipment, will be at least \$4,000,000.
 - (f) The City has certified to Owner in writing that (a) any funds or land provided by Owner as part of the Owner Contribution will be used only for the Fire Station, and (b) the Fire Station will be completed within 18 months after the City's receipt of the cash contribution provided under Section 2(b)(ii) below.
2. Owner's Contribution. Provided the conditions described in Section 1 above are met, Owner Contribution will be provided as follows:
- (a) Land. Owner will dedicate to the City a site that is no less than 3.0 acres, but not more than 3.3 acres, , in the approximate location shown on Exhibit "B" and identified in the PDD, that is acceptable to the City Manager. The site shall be dedicated by a metes and bounds description on or before the date of the City's issuance of the first "Major Public Improvement PID Bonds. The parties acknowledge that the deemed value of the site is \$500,000.
 - (b) Funds. Owner shall pay to the City \$1,500,000 in cash as a contribution towards the design and construction of the Fire Station. Provided the conditions in Section 1 have been met, the funds shall be paid as follows:
 - (i) \$750,000 shall be paid within 2 years after the 1st certificate of occupancy has been issued for a single family residence in the Project, and
 - (ii) \$750,000 shall be paid within 4 years after the 1st certificate of occupancy has been issued for a single family residence.
 - (c) PID Proceeds. Owner hereby agrees to set aside \$500,000 from the Major Public Improvement PID Bonds as further provided in the PID Finance Agreement for design and construction of the Fire Station.
3. Miscellaneous.
- (a) Time is of Essence. Time is of the essence with respect to this Agreement.
 - (b) Attorneys' Fees. In the event that either party seeks enforcement of this Agreement in any legal or equitable proceeding, the prevailing party in such proceeding shall be entitled to recover from the other party all expenses attributable to such proceeding, including interest, court costs and attorneys' fees.

- (c) Specific Performance. Each party hereto acknowledges and agrees that the other parties hereto would be damaged irreparably if any provision of this Agreement is not performed in accordance with its specific terms or is otherwise breached. Accordingly, each party hereto agrees that the other parties hereto will be entitled to an injunction or injunctions to prevent breaches of the provisions of this Agreement and to enforce specifically this Agreement and its terms and provisions, in addition to any other remedy to which they may be entitled, at law or in equity.
- (d) Entire Agreement. This Agreement, the documents to be executed hereunder, and each Exhibit attached hereto and thereto constitute the entire agreement between the parties pertaining to the subject matter hereof and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, of the parties pertaining to the subject matter hereof.
- (e) Amendments. No supplement, amendment, alteration, modification, waiver or termination of this Agreement shall be binding unless executed in writing by the parties hereto.
- (f) Severability. The invalidity or unenforceability of any term or provision of this Agreement or any document to be executed hereunder in any situation or jurisdiction shall not affect the validity or enforceability of the other terms or provisions in this Agreement or any document to be executed hereunder or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction, and the remaining terms and provisions of this Agreement and each document to be executed hereunder shall remain in full force and effect.
- (g) Waiver. No waiver of any of the provisions of this Agreement will be deemed or shall constitute a waiver of any other provisions hereof (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise expressly provided in writing.
- (h) Captions. The captions in this Agreement are for convenience only and may not be considered a part of or as affecting the construction or interpretation of any provision of this Agreement.
- (i) Binding Effect; Assignment. Owner may, in its sole and absolute discretion, transfer or assign its rights or obligations under this Agreement from time to time to an affiliate (as defined in the PID Financing Agreement), without the consent of the City. Prior to the completion of the Major Public Improvements, (as defined in the PID Finance Agreement), however, Owner shall not transfer or assign its rights or obligations under this Agreement to a non-affiliated entity without the prior consent of the City. After the completion of the Major Public Improvements, the Owner may transfer or assign its rights or obligations under this Agreement to any party without the City's consent. Owner

shall provide the City thirty (30) days prior written notice of any such assignment. Upon any assignment, Owner shall be fully released from any and all future obligations under this Agreement and shall have no liability for such obligations with respect to this Agreement.

- (i) Any sale of the Property shall not be deemed an assignment of this Agreement unless the conveyance or transfer instrument effecting such sale expressly states that the sale assigns Owner's its rights under this Agreement.
- (j) APPLICABLE LAW. THIS AGREEMENT, OTHER DOCUMENTS DELIVERED PURSUANT HERETO AND THE LEGAL RELATIONS BETWEEN THE PARTIES SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS. THE VALIDITY OF THE VARIOUS CONVEYANCES AFFECTING THE TITLE TO REAL PROPERTY SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED. THIS AGREEMENT IS PERFORMABLE IN AND VENUE SHALL LIE IN HAYS COUNTY, TEXAS TO THE EXCLUSION OF OTHER VENUES.
- (k) Notices. Any notice, communication, request, instruction or other document required or permitted hereunder shall be given in writing by certified mail, return receipt requested, postage prepaid, or by overnight courier, prepaid telegram, or personal delivery to following address, unless written notice of an alternate address is delivered to the sending party prior to its dispatch of the notice or communication:

If to Owner:

Highpointe Trace, LLC
Attn: Timothy D. England
2 Venture Suite 350
Irvine, California 92618
Facsimile: 949.472.0198

With a copy to:

Metcalf Wolff Stuart & Williams, LLP
Attn: Steven C. Metcalfe
221 W. 6th, Suite 1300
Austin, Texas 78701
Facsimile: 512.404.2244

If to the City:

City of San Marcos
Attn: City Manager
630 E. Hopkins
San Marcos, Texas 78666
Facsimile: 855.759.2844

or to such other address of which, or such other person of whom, any party notifies the other for such purpose in accordance with this Section 3(k).

- (1) Counterparts/Facsimile Signatures. This Agreement may be executed in counterpart originals, each of which shall be treated as a fully executed original hereof when all parties hereto have executed such a counterpart. A facsimile signature shall be treated as an original signature unless an original signature is required by law.

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IN WITNESS WHEREOF, Owner and the City, intending to legally bind themselves, have executed this Agreement Regarding Fire Station as of the date first written above.

OWNER:

HIGHPOINTE TRACE, LLC,
a California limited liability company

By: Highpointe Posey, L.P., a California
limited partnership, Its Managing
Member

By: Highpointe Investments, Inc.,
a California corporation, Its
General Partner

By: 
Timothy D. England, SVP

By: _____
Name: _____
Title: _____

CITY:

San Marcos, Texas,
a Texas Municipal corporation

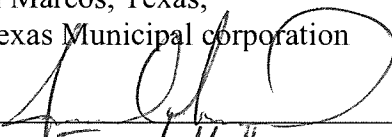
By: 
Name: Jared Miller
Title: City Manager

EXHIBIT A
PROPERTY

[illegible]