




Agenda Date: 05/13/2014
Agenda Item: 3.5

STAFF REPORT

Date: May 13, 2014
To: City Council
From: Bryan Montgomery, City Manager 
SUBJECT: **Amendment to the Parking Lot and Public Spaces Maintenance Agreement between the City of Oakley and Rogelstad Thorpe, LLC**

Background and Analysis

The attached Parking Lot and Public Spaces Maintenance Agreement was signed and recorded to the property now owned by Rogelstad Thorpe, LLC (owners of Oakley ACE Hardware) located at 3100 Main Street.

As explained in the attached memo from Special Counsel Bill Galstan, , we have been informed that one provision of the Agreement is causing some complication with the Small Business Administration (SBA) financing. The proposed Amendment will remove this complication.

Fiscal Impact

Not applicable.

Recommendation

Adopt the resolution authorizing the City Manager to sign the Amendment to the Parking Lot and Public Spaces Maintenance Agreement between the City and Rogelstad Thorpe, LLC.

Attachments

1. Parking Lot and Public Spaces Maintenance Agreement
2. Proposed Amendment to the Agreement
3. Memorandum from Special Council
4. Resolution

4-5/9

20139013776500009
CONTRA COSTA Co Recorder Office
JOSEPH CANCIAMILLA, Clerk-Recorder
DOC-2013-0137765-00
Acct 2212-E - Old Republic Title Company
Friday, MAY 31, 2013 10:56:21
FRE \$0.00|ERD \$1.00|
Ttl Pd \$0.00 Rcpt # 0001683088
kat/RC/1-9

Recorded at the Request of:
City of Oakley
And When Recorded Mail To:
Oakley City Clerk
3231 Main Street
Oakley, CA 94561

**PARKING LOT AND PUBLIC SPACES
MAINTENANCE AGREEMENT
(APN 037-200-016)**

THIS AGREEMENT is entered into this 28th day of May, 2013 by and between the City of Oakley, a municipal corporation ("CITY") and Rogelstad Thorpe, LLC, a California limited liability company, Jerry Thorpe and Anthony Rogelstad, owners of certain building improvements and undeveloped land within the "Oakley Plaza Shopping Center" particularly described in Exhibit "B" attached hereto and made a part hereof by reference ("OWNER").

Recitals

- A. The Oakley Plaza Shopping Center ("shopping center") is generally located northerly of Main Street, easterly of Vintage Parkway, southerly of the Burlington Northern railway track and westerly of the extension of the line of Norcross Avenue, being particularly described in Exhibit "A" attached hereto and made a part by reference, and is the real property subject to this Agreement.
- B. Within the shopping center is a parking lot owned by City, lighting, landscaping, signage, and a public plaza and fountain, all of which are referred to herein generally as "the improvements" and are the subject of this Agreement.
- C. The CITY owns the improvements, although they are provided substantially for the use, enjoyment and benefit of OWNER and their customers. CITY intends to continue owning and managing the improvements so that OWNER will not have any independent and private obligation to provide off-street parking for their customers. CITY also intends to retain Ownership of the improvements for the use and enjoyment of the improvements by the public in general. The plaza and fountain elements of the improvements have some general community benefit in addition to the benefits to OWNER, as well.
- D. Because of the mixture of public and private benefits to be enjoyed by the parties from the maintenance of the improvements, the parties hereto have entered into this Agreement.

WHEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. CITY will continue to own and to maintain the improvements. The term "maintain" shall generally include, but not be limited to, the following:
 - a) Keeping the paving of the parking lot and its access lanes in a safe and good condition;
 - b) Keeping the striping of the parking spaces and directional arrows and other painted surfaces in good condition;
 - c) Paying the electrical costs of providing energy to the light fixtures and repairing or replacing poles, fixtures and ancillary lighting facilities;
 - d) Keeping the landscaping provided for the improvements in a good and attractive condition, replacing dead or diseased plants, mowing, weeding, and watering same, and paying for such water;
 - e) Providing and keeping in serviceable condition security cameras and associated equipment;
 - f) Maintaining the plaza, benches and fountain in serviceable and working condition, eliminating graffiti and paying for water and electrical service to the fountain;
 - g) Towing of abandoned or illegally parked vehicles;
 - h) Picking up litter and debris;
 - i) Replacement of improvements;
 - j) Maintaining, repairing and/or replacing general shopping center identification and directional signage, although each OWNER shall have responsibility for placement, maintenance and replacement of store identification signs;
 - k) Such other maintenance efforts as the parties may, from time to time, agree to include as provided for in this Agreement.
2. CITY shall prepare an initial document which shall detail the improvements to be maintained, the cost of maintaining and servicing those improvements, the methodology for spreading those costs among the parties, and establishing a budget for the following fiscal year(s). This document shall be referred to herein as an "Engineer's Report" for simplicity of reference, but does not imply that the report will necessarily be drafted by a registered civil engineer.
3. In establishing the initial Engineer's Report, the CITY may allocate a larger share of costs for the properties in closest proximity to the plaza and fountain, and to the CITY, due to the increased benefits to those nearby properties and to the CITY itself.
4. Each year following the preparation of the initial Engineer's Report, the CITY shall prepare an annual Engineer's Report for the work to be accomplished, costs paid, and cost allocations to be spread to the various Owner. Copies of the Report

shall be provided to OWNER at least 45 days prior to the date established in the Report for its effectiveness for that year.

5. The OWNER shall have the opportunity to review and comment upon each Engineer's Report, and to interact with CITY staff regarding the amounts allocated for each element of maintenance, cost and work to be accomplished. The OWNER shall also have the ability to request that additional items of work or maintenance, or increased or decreased levels of maintenance, to be included in the Report(s). If any OWNER is dissatisfied with the result of such interaction with staff, such OWNER shall have the ability to appeal the issue to the City Council, which shall make the final determination. In no event shall the Council dissolve this Agreement, or remove elements of maintenance or work that are fundamental to the effective operation and use of the improvements, without approving and providing some alternative method of financing the cost of the work and maintenance.
6. The Engineer's Report may include an amount to be recovered by the CITY for its administration of the program which is the subject of this Agreement, but such amount shall not exceed three (3%) percent of the total cost to be spread among the OWNER.
7. The Engineer's Report shall identify the amount of cost to be applied for each parcel on an annual basis. Each OWNER shall have the option of making payment to CITY for its allocated portion of cost annually, quarterly or monthly and shall make written arrangements with the CITY's Finance Department accordingly. If no such arrangement is made, the annual cost identified in the Report shall be paid in one annual lump sum to the CITY within thirty (30) calendar days of the due date as indicated in the Engineer's Report. If any payment is delinquent, irrespective of whether being made on an annual, quarterly or monthly basis, such delinquency shall be subject to a penalty of ten (10%) percent of the amount due for each month that such payment remains delinquent.
8. OWNER may determine to spread the costs of their allocated portion of the cost of this program to their tenant or tenants. However, only the OWNER individually are responsible to the CITY for such payment, and the nonpayment of a tenant to an OWNER shall not excuse the OWNER's nonpayment to the CITY.
9. The CITY retains all rights and privileges for the collection and recovery of unpaid amounts due under the Engineer's Reports, including the right to sue to collect such delinquent amounts and late payment penalties.
10. This Agreement shall run with the land and shall be binding upon the successors and assigns of the OWNER and to all future Owner of said properties.

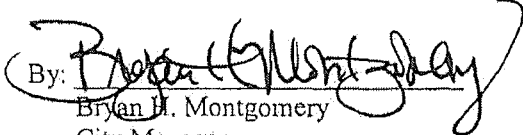
11. The parties shall indemnify, defend, and hold each other harmless from and against any and all liability, demands, claims, losses, damages, recoveries, settlements, and expenses (including without limitation reasonable attorney fees) arising from or in connection with this Agreement, unless the liability arises from the action or negligence of a specific party, who shall bear the costs and liability of the claim.
12. This Agreement constitutes the entire agreement between CITY and OWNER pertaining to the subject matter contained herein and supersedes all prior and contemporaneous agreements, representations and understandings between the parties. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by all of the parties hereto. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.
13. This Agreement shall be governed by and construed in accordance with the laws of the State of California.
14. An action at equity or law arising out of the subject matter of this Agreement shall be filed and tried in Contra Costa County, State of California.
15. The language of each and all paragraphs, terms and/or provisions of this Agreement, shall, in all cases and for any and all purposes, and in any way and all circumstances whatsoever, be construed as a whole, according to its fair meaning, and not for or against any party hereto and with no regard whatsoever to the identity or status of any person or persons who drafted all or any portion of this Agreement.
16. Should either party breach this Agreement, the non-breaching party shall be entitled to pursue any and all remedies available to it against breaching party, including, without limitation, claims for all damages attributable to the breach, and specific performance of this Agreement.
17. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.
18. Each person and party signing this Agreement warrants that he/she has the authority to execute this Agreement and that the party will be bound by such signature.

IN WITNESS WHEREOF, CITY and OWNER have executed this Agreement on the day and year first above written.

(SIGNATURES ON FOLLOWING PAGE)

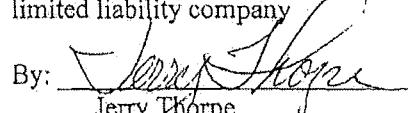
CITY


City of Oakley, a municipal corporation

By: 
Bryan H. Montgomery
City Manager


OWNER

Rogelstad Thorpe, LLC, a California
limited liability company

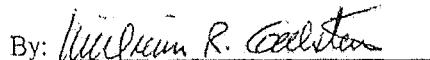
By: 
Jerry Thorpe
Member

By: 
Anthony Rogelstad
Member

Attest:

By: 
Libby Vreonis
City Clerk

Approved as to Form:

By: 
Bill Galstan
Special Counsel

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of CONTRA COSTA

On MAY 28, 2013 before me Cecelia Rose Nichols-Fritzer, Notary Public
Date Here Insert Name and Title of the Officer

personally appeared BRYAN H. MONTGOMERY
Name(s) of Signer(s)

who 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 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.

Signature Cecelia Rose Nichols-Fritzer
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Parking Lot + Public Spaces Maintenance Agreement

Document Date: May 28, 2013 Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

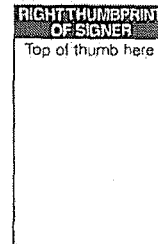
- Individual
- Corporate Officer — Title(s): _____
- Partner — Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____



Signer Is Representing: _____

Signer's Name: _____

- Individual
- Corporate Officer — Title(s): _____
- Partner — Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____



Signer Is Representing: _____

State of California

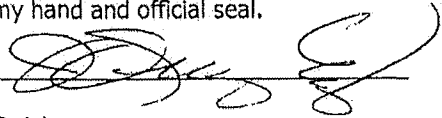
County of Contra Costa

Jerry

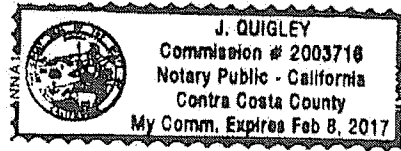
On 29th day of May, 2013 before me, J. Quigley a Notary Public, personally appeared ~~Jerry~~ Jerry Thorpe and Anthony Rogelstad, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their 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.

Signature: 

Name: J. Quigley
(typed or printed)



(Seal)

RECORDING REQUESTED BY AND WHEN RECORDED,

City of Oakley

PLEASE RETURN TO:

Oakley City Clerk
3231 Main Street
Oakley, CA 94561

FIRST AMENDMENT PARKING LOT AND PUBLIC SPACES MAINTENACE AGREEMENT

(APN 037-200-016)

THIS FIRST AMENDMENT PARKING LOT AND PUBLIC SPACES MAINTENACE AGREEMENT ("First Amendment") is entered into this _____ day of _____, 2014, by and between the City of Oakley, a municipal corporation ("CITY") and Rogelstad-Thorpe, LLC, a California limited liability company ("LANDOWNER"), and

W I T N E S S E T H:

WHEREAS, on May 28, 2013, LANDOWNER , entered into a Parking Lot and Public Spaces Maintenance Agreement with the CITY ("Original Agreement"); and

WHEREAS, the Original Agreement was recorded in the official records of Contra Costa County, California on May 31, 2013 as Document Number 2013013776500009 against the title to the real property commonly known as 3090 Main Street, Oakley, CA 94561, described more fully in Exhibit "A", attached hereto and incorporated herein by this reference; and

WHEREAS, LANDOWNER, is about to execute or has executed, a Deed of Trust and Note in the amount of \$1,529,000.00 dated _____, payable with interest, which Deed of Trust is in favor of The Mortgage Capital Development Corporation, an SBA Certified Development Company, and which Deed of Trust will be immediately assigned to the U.S. Small Business Administration, an Agency of the United States Government ("SBA"); and

WHEREAS, it is a condition precedent to obtaining said loan that the SBA be specifically excluded from and against any and all obligations imposed on LANDOWNER as set forth in the Original Agreement to the extent the incurring of such obligations by SBA would constitute a violation of the Federal Anti-Deficiency Act (USC Title 31, Subtitle II, Chapter 13, Subchapter III, Section 1341) ("Act").

NOW THEREFORE, the parties agree as follows:

1. Effect of Federal Anti-Deficiency Act. The parties desire to modify the Original Agreement, to specifically agree that SBA shall not be obligated to perform, and shall be completely relieved from, any obligation under the Original Agreement to the extent, and only to the extent, that

such performance would constitute a violation of the Act. SBA shall be deemed a third party beneficiary of this Agreement.

2. Recordation. This Agreement shall be recorded in the official records of Contra Costa County, California, prior to the recording of the aforementioned Deed of Trust.
3. Covenants Run with the Land. The parties agree that all agreements and obligations contained in the Original Agreement are covenants which benefit and run with the Property described in Exhibit "A", in accordance with Section 1468 of the California Civil Code, and such agreements and obligations shall be binding upon subsequent purchasers, constituents, transferees, successors and assigns, as provided in the Original Agreement; provided that, to the extent of and consistent with the modifications of the Original Agreement set forth above, such agreements and obligations shall not be binding on SBA.
4. Counterparts. This Agreement may be executed in counterparts.
5. Remainder of Original Agreement Unchanged. Except as modified herein, all terms of the Original Agreement shall remain unchanged and shall remain in full force and effect.

IN WITNESS WHEREOF, the City of Oakley, a municipal corporation, has caused this Agreement to be executed in duplicate by its City Manager and attested to by its City and LANDOWNER has caused this Agreement to be executed.

LANDOWNER

Rogelstad-Thorpe LLC, a California limited liability company

By: _____

Jerry Thorpe, Member

By: _____

Anthony Rogelstad, Member

CITY OF OAKLEY, a municipal corporation

By: _____

Bryan H. Montgomery, City Manager

ATTEST:

APPROVED AS TO FORM:

By: _____

Libby Vreonis, City Clerk

By: _____

William R. Galstan, Special Counsel

Exhibit "A"- Description of Real Property



MEMORANDUM
Office of the City Attorney

Date: April 23, 2014
To: Bryan Montgomery, City Manager
Cc: Derek P. Cole, City Attorney
From: William R. Galstan, Special Counsel
Subject: Ace Hardware Request for Amendment, Parking Agreement

This responds to your recent inquiry. As you know, I drafted the original Parking Lot and Public Space Maintenance Agreement. In this case, as I typically do, I drafted the Agreement with maximum possible protections to the City.

There is a provision in the Agreement that the Ace Hardware business and its owners will hold the City harmless and indemnify us for any liability caused by them in the parking lot area.

Typically in shopping centers, the parking lot is privately owned. When thinking about the types of things that might cause a claim or lawsuit, one thinks about potholes in the asphalt that might cause customer tire damage, perhaps lights out that encourage a robbery, etc.

However, here, the parking lot is publicly owned by the City, and thus we will be responsible for all maintenance, including resurfacing and keeping the lights functioning. Thus, in retrospect, it is a bit of a stretch to contemplate what the Ace Hardware business might do in the parking lot that would create a liability situation. Perhaps they would have an outside sales event and someone would trip over some merchandise, but this seems to be a stretch and not much of an exposure in any event.

The Small Business Administration is asked to provide a loan and wishes to be excluded from the liability requirement in the Parking Lot Agreement. I think this is reasonable and does not subject us to any significant liability.

The first target if the Ace business ever were to incur a liability in the parking lot (rare as that might be) would be the business' liability insurance carrier. If the Small Business Administration takes over the loan, the insurance carrier is still liable for the acts of the hardware business while it

was still conducting business. I would not see going after the lender in any event for an operational liability of the underlying business.

If the SBA does in fact take over, it could lease or convey the property to another business, and that business would still be liable in the same manner as is Ace, since it is only the SBA that is being released from liability. If the SBA were to leave the building vacant, then it is extremely unlikely that any exposure to liability would arise, as there are no business operations being conducted in the public parking lot area.

Thus I have no objection to the requested amendment to the Parking Lot Agreement. Please advise if you have any questions.

RESOLUTION NO. _____

**RESOLUTION APPROVING AN AMENDMENT TO THE PARKING LOT
AND PUBLIC SPACES MAINTENANCE AGREEMENT BETWEEN THE CITY
OF OAKLEY AND ROGELSTAD THORPE, LLC**

BE IT RESOLVED by the City Council of the City of Oakley that the City Manager is hereby authorized and directed to sign on behalf an Amendment to the Parking Lot and Public Spaces Maintenance Agreement with Rogelstad Thorpe, LLC, that is attached hereto.

The foregoing resolution was adopted at a regular meeting of the City Council of the City of Oakley held on the 13th day of May, 2014, by Councilmember _____, who moved its adoption, which motion being duly seconded by Councilmember _____, was upon voice vote carried and the resolution adopted by the following vote:

AYES:
NOES:
ABSTENTIONS:
ABSENT:

APPROVED:

Randy Pope, Mayor

ATTEST:

Libby Veronis, City Clerk

Date