



STAFF REPORT

Date: Tuesday, September 26, 2017

To: Bryan H. Montgomery, City Manager

From: Kevin Rohani, P.E., Public Works Director/City Engineer

Subject: Approval of Reimbursement Agreement for Pavement Repairs and Overlay of Trail along the Cypress Grove and Emerson Ranch Levees

Approved and Forwarded to City Council:


Bryan H. Montgomery, City Manager

Background and Analysis

The Cypress Grove development was constructed in the mid 2000's and the project included raising the levee along Marsh Creek and constructing new levees across the north project boundary, the north side of Emerson Ranch, and south along the west side of Sellers Avenue stopping just short of East Cypress Road. A 10' wide asphalt (AC) trail was paved from the north side of the railroad bridge at Marsh Creek, all the way to Sellers Avenue.

City staff and representatives from Brookfield Emerson Land LLC (Brookfield); the developer of the Emerson Ranch project, have inspected the entire AC trail and decided to pursue a joint effort to repair and overlay the trail. Brookfield also agreed to construct an extension of the trail south along Sellers Avenue to the intersection of Riverrock Drive and Sellers Avenue.

Brookfield provided a bid from Tom Mayo Construction, Inc. of Stockton for the entire project broken down to show the City's portion and Brookfield's portion separately. The City's portion is \$59,499 which includes \$55,519 for the overlay of the Cypress Grove levee trail and \$4,080 for patching at various locations.

Brookfield Land has agreed to pay for the entire project with the understanding that the City would reimburse them \$59,499 upon completion of the work.

Fiscal Impact

Approval of the reimbursement agreement will obligate the City to reimburse \$59,499 to Brookfield Emerson Land LLC with funds from Oakley Community Facilities District No. 1 (Cypress Grove).

Staff Recommendation

Staff recommends that the City Council adopt the Resolution authorizing the City Manager to execute the Reimbursement Agreement.

Attachments

- 1) Reimbursement Agreement with cost breakdown
- 2) Reimbursement Agreement Resolution

**REIMBURSEMENT AGREEMENT
REPAIRS AND OVERLAY OF ASPHALT TRAIL ON LEVEES AT
CYPRESS GROVE AND EMERSON RANCH**

This REIMBURSEMENT AGREEMENT ("**Agreement**"), is entered into as of this 26th day of September, 2017, by and between the CITY OF OAKLEY, a municipal corporation in the State of California ("**City**") and BROOKFIELD EMERSON LAND LLC, A Delaware Limited Liability Company, ("**Developer**"). City and Developer are individually referred to as a "**Party**" and collectively, the "**Parties**."

RECITALS

A. The Cypress Grove development was built in the mid-2000's and part of the project was to raise the levee along Marsh Creek and to build the levees from Marsh Creek to Sellers Avenue and then north nearly all the way to East Cypress Road. Once the levees were completed, a 10' asphalt (AC) trail was constructed from the railroad bridge where it crosses Marsh Creek to the north where the levee turns and goes east. The AC trail continued across the entire north side of Cypress Grove, across the entire north side of Emerson Ranch and ended at Sellers Avenue.

B. After inspecting the AC trail, the Developer and City agreed that maintenance was needed to return the trail to good condition. The Developer obtained a cost estimate (Exhibit A) to perform pavement repairs, to provide 1" AC overlay on the entire trail and to construct an extension of the trail south along Sellers Avenue to make a connection to Riverrock Drive where it will connect to Sellers Avenue.

C. The Developer and City agree that the City's portion of the work includes 68% of repairs listed as item 2 (\$4,080) and 100% of item 3 (\$55,419) for a total cost of \$59,499. The remainder of the cost will be paid by Developer.

NOW THEREFORE, in consideration of the mutual covenants and promises of the Parties herein contained, the Parties agree as follows:

AGREEMENT

1. **SCOPE OF WORK.** Subject to the terms of this Agreement, City agrees to reimburse Developer for all costs described in Paragraph C above.

2. **AMOUNT AND PAYMENT OF REIMBURSEMENT.** The total cost of the reimbursement is \$59,499 as shown in Exhibit A ("Cost Breakdown") and described in Paragraph C above. The reimbursement amount shall be paid by City to Developer in cash upon satisfactory completion of the work. **OWNERSHIP OF THE IMPROVEMENTS.** From and after the City's acceptance of the Improvements in accordance with this Agreement, ownership of the Improvements shall be vested exclusively in City.

3. **INDEMNIFICATION.** Developer shall defend, indemnify and hold City, its elected officials, officers, employees, and agents free and harmless from and against any and all claims, actions, causes of action, demands, expenses, costs, fines, penalties, fees, and/or liability, including from loss, damage, or injury to or death of persons or property in any manner, to the extent caused by Developer's intentional misconduct in connection with the construction and installation of the Improvements. Developer's indemnity obligations hereunder shall expire upon

the statute of limitations having run on any claim arising prior to the City's acceptance of the improvements. Developer's indemnity obligations hereunder shall include attorney's fees and court costs, and shall include: (i) any liability related to or arising out of the design, drawings, plans, and/or specifications for the Improvements, (ii) any costs, expenses, fees, fines, or liability for any hazardous substances or toxic material and any required remediation, (iii) any liability to the extent caused by the negligence or intentional acts or omissions of General Contractor. All of each Party's indemnity obligations hereunder shall survive expiration of this Agreement. City's indemnity obligations hereunder shall include attorney's fees and court costs, but shall exclude any liability to the extent caused by the intentional misconduct of Developer or its agents, representatives, consultants, and/or contractors.

4. **NOTICES.** Any notice to either Party shall be in writing and given by delivering the notice in person or by sending the notice by registered or certified mail or express mail, return receipt requested with postage prepaid, to the Party's mailing address, or transmitted by facsimile equipment if receipt is acknowledged. The respective mailing addresses and contact information of the Parties are, until changed, the following:

City: **City Engineer**
Attn: Kevin Rohani
City of Oakley
3231 Main Street
Oakley, CA 94561
Fax: (925) 625-9194

With a Copy to: **City Attorney**
City of Oakley
3231 Main Street
Oakley, CA 94561
Fax: (925) 625-4230

Developer: **Brookfield Emerson Land LLC**
Attn: Gonzalo Rodriguez
500 La Gonda Way, Suite 100
Danville, CA 94526

Either Party may change its mailing address at any time by giving ten (10) days notice of such change in the manner proved in this Section. All notices shall be deemed given, received, made or communicated on the date personal delivery is effected or, if mailed, on the delivery date or attempted delivery date shown on the return receipt.

5. **NON-ASSIGNMENT.** The license granted herein is personal to Developer and shall not be assignable; provided, however, Developer may, at its discretion and on terms and conditions it determines, and subject to the terms of this Agreement, contract with consultants and contractors to construct and install the Improvements. Developer's right to Reimbursement, as set forth herein, may be assignable by Developer at its discretion and with notice to the City.

6. **SEVERABILITY.** In the event any one or more of the provisions of the Agreement shall be held by a court of competent jurisdiction to be invalid, illegal or unenforceable, the remaining provisions of the Agreement shall remain in effect and the Agreement shall be read as though the offending provision had not been written or as the provision shall be determined by such court to be read.

7. **GOVERNING LAW.** This Agreement is made under, shall be governed by and construed in accordance with the laws of the State of California.

8. **CONSTRUCTION.** This Agreement has been reviewed and revised by legal counsel for both Developer and City and no presumption or rule that ambiguities shall be construed against the drafting party shall apply to the interpretation or enforcement of the Agreement.

9. **FURTHER ASSURANCES.** Each Party covenants, on behalf of itself and its successors and assigns, to take all actions and do all things, and to execute, with acknowledgment or affidavit if required, any and all documents, instruments and writings as may be necessary or proper to achieve the purposes and objectives of the Agreement.

10. **RECITALS.** All of the facts and background information set forth in the RECITALS, above, are incorporated into this Agreement and constitute a part hereof.

11. **ATTORNEY'S FEES.** In the event any action is commenced to enforce or interpret any term or condition of this Agreement, in addition to costs and any other relief, the prevailing party shall be entitled to reasonable attorney's fees. Jurisdiction and venue in the event of any legal action shall be in Contra Costa County, California.

12. **ENTIRE AGREEMENT.** This Agreement contains the entire agreement of the Parties hereto with respect to the matters contained herein.

13. **FORCE MAJEURE.** Any prevention of or delay in the performance by a party hereto of its obligations under this Agreement caused by governmental restrictions, regulations, controls, action or inaction, or other causes beyond the reasonable control of the party obligated to perform, shall excuse the performance by such party of its obligations hereunder for a period of one day for each such day of delay.

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

Brookfield Emerson Land LLC

**CITY OF OAKLEY, a Municipal Corporation
in the State of California**

By:

By:

Bryan H. Montgomery, City Manager

Name

Attest:

Libby Vreonis, City Clerk

Title

Approved as to Form:

Signature

Derek P. Cole, City Attorney

Exhibit: A – Cost Breakdown

EXHIBIT A
COST BREAKDOWN

GENERAL ENGINEERING CONTRACTOR
CA. LIC. NO. 388077



4735 E. FREMONT ST.
STOCKTON, CA 95215-4011
(209) 943-6248 FAX 943-1854

PROPOSAL

19 July 2017

Brookfield Residential

Via Email

RE: AC Paving, Emerson Ranch, Oakley, CA.

Tom Mayo Construction is pleased to quote you for the following work:

1. Grade bike trail and prep for paving, (@ 9600 sf).....	\$ 5,500.00/lb
2. Patch failed AC (@ 520 sf), various locations.....	\$ 6,000.00/lb
3. Overlay existing AC with 1" of 1/2" HMA, (BNSF RR Bridge to Emerson Ranch Property Line @ 55,419 sf).....	\$ 1.00/sf
4. Overlay existing AC with 1" of 1/2" HMA, (Emerson Ranch, @ 25,751 sf).....	\$ 1.00/sf
5. Place and compact 2" of 1/2" HMA at new bike trail, (@ 9,600 sf).	\$ 1.75/sf
Total Cost for the work.....	\$ 109,470.00

SB Number: 17916

DIR Number: 1000001583

- Water for Rollers is to be available at the site.

Exclusions:

Permits, fees, engineering, striping, surveying, compaction tests, SWPP plan, SWPP maintenance, electrical, environmental surveys, testing, permitting or removal an any hazardous, contaminated, hidden or buried material encountered, utility disconnects by others, fencing by others, if bonds are required add 1.25% and all items not specifically included will be considered excluded from the bid.

All of the work above to be completed in a substantial and workmanlike manner according to standard practices, for the sum of **One Hundred Nine Thousand Four Hundred Seventy and 00/100 Dollars, (\$ 109,470.00)**. The entire contract is to be paid upon completion. A service charge of 1 1/2 % per month will be charged on all past due accounts. Purchaser agrees to pay all reasonable collection, attorney fees and court costs.

Any alteration or deviation from the above specifications involving extra costs of material or labor will be executed upon written or verbal orders for same, and will become an extra charge over the sum mentioned in this contract.

Sincerely,

Mark McNearney
Vice President,
Tom Mayo Construction, Inc.

RESOLUTION NO. __-17

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OAKLEY AUTHORIZING THE CITY MANAGER TO EXECUTE A REIMBURSEMENT AGREEMENT WITH BROOKFIELD EMERSON LAND, LLC FOR PAVEMENT REPAIRS AND OVERLAY OF TRAIL ALONG THE CYPRESS GROVE AND EMERSON RANCH LEVEES

WHEREAS, the Cypress Grove project was constructed in the mid-2000's and part of the work include constructing a 10' asphalt (AC) trail along the levees along Marsh Creek and the north boundaries of Cypress Grove and Emerson Ranch; and

WHEREAS, City staff and members of Brookfield Emerson Land, LLC (Brookfield), the developer of the Emerson Ranch project, have inspected the AC trail and decided to pursue having repairs and an overlay performed to restore the trail to good condition; and

WHEREAS, Brookfield received a bid for the entire trail repair project which breaks the costs down between Cypress Grove and Emerson Ranch with the City's portion totaling \$59,499; and

WHEREAS, Brookfield has agreed to pay for the cost for the entire repair project with the understanding that the City would reimburse its portion at \$59,499; and

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Oakley that the City Manager is authorized to execute the reimbursement agreement, to reimburse \$59,499 in cash to Brookfield Emerson Land, LLC upon completion of the work.

PASSED AND ADOPTED by the City Council of the City of Oakley, California, this 26th day of September 2017 by the following vote:

AYES:
NOES:
ABSTENTIONS:
ABSENT:

APPROVED:

Sue Higgins, Mayor

ATTEST:

Libby Vreonis, City Clerk

Date