



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Jon Cicirelli

**SUBJECT:** SEE BELOW

**DATE:** January 3, 2022

Approved

Date

01/25/22

**COUNCIL DISTRICT: 4**

**SUBJECT: FIRST AMENDMENT TO THE FLEA MARKET NORTH “TURNKEY PARKLAND AND EXCESS CREDIT AGREEMENT”**

## RECOMMENDATION

Approve the first amendment to the “Turnkey Parkland and Excess Credit Agreement”<sup>1</sup> (Agreement) to:

- (a) Allow for a one-time payment of \$4,072,599.32 to the City to fund and pursue construction of phase one improvements of Bruzzone Park and Mercado Park; and
- (b) Confirm excess credits (to be applied toward future development in the Flea Market South).

## OUTCOME

Approval of the amended Agreement will result in:

- 1. Transfer of construction responsibility associated with Bruzzone Park and Mercado Park to the City;
- 2. Transfer resources to partially develop the park sites per the approved Master Plans; and
- 3. Establish a \$5,000,000 parkland credit for future residential development in the Flea Market South project area. The credit will be applied to that proposed development’s parkland obligation.

The City will benefit from this action by allowing construction of the two parks to move forward.

<sup>1</sup> Turnkey Parkland and Excess Credit Agreement for tentative maps PT15-067 and PT15-068 with S.J. Sierra Group, LLC and BGT Development, LLC.

## **BACKGROUND**

The Flea Market project area is a residential and commercial development in northeast San José. The development site is split by Berryessa Road and is generally bounded by Coyote Creek to the west and the Berryessa BART Station and tracks to the east. The area north of Berryessa Road is commonly referred to as ‘Flea Market North’ and area to the south of Berryessa road is known as “Flea Market South.”<sup>2</sup>

During the initial planning stages for the site, it was determined that the Flea Market North area would include two neighborhood parks and improvements to the Coyote Creek Trail. The two existing undeveloped park sites are Bruzzone Park and Mercado Park. The parks were planned for through three executed Parkland Agreements.<sup>3,4,5</sup> Under these executed agreements, the parkland obligation was satisfied for the entire project development through the dedication of:

- 0.25-mile of the Coyote Creek Trail from Berryessa Road to Mercado Avenue (including trail improvements)
- 3.59-acre of parkland at Mercado Way and Bruzzone Way
- 3.60-acre of parkland at Mercado Way and Sierra Road

Parkland development for Flea Market South is planned, however development has not been formalized by the current site ownership under a development permit, Parkland Agreement, or Master Plan. As a result, the timeline for the developer to move forward with Master Planning of the Flea Market South park in coordination with the Department of Parks, Recreation, and Neighborhood Services (the Department), has yet to commence.

On February 18, 2018, the City and K.B Home South Bay Inc., BGT Development, LLC. and S.J. Sierra Group LLC. (Developer(s)) entered into a fourth agreement (the “Turnkey Parkland and Excess Credit Agreement”) approving the park designs and names and providing funding up to \$5,000,000 from the Developer voluntarily for the construction of the two Flea Market North parks. In exchange for the provision of funding, it was agreed that the Developer would receive a credit of the same amount, to be applied as parkland dedication credit toward parkland obligation for future residential development within the Flea Market South project site. Attachment A provides breakdown of historic area planning and project development.

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<sup>2</sup> City Council has approved re-zoning permits for Flea Market North (File Nos. PDC09-006 and PDC16-001), Flea Market South (File No. PDC17-051), and the Berryessa Regional Transit Urban Village Plan.

<sup>3</sup> Parkland Agreement for the Final Tract Map No. 10160 Between the City of San José and the Flea Market, Inc., Bumb & Associates, BTG Development LLC, and KB Homes South Bay Inc.

<sup>4</sup> Parkland Agreement for Tentative Map No. PT12-026 (Phase 2 Units) Between the City of San José and the Flea Market, Inc., Bumb & Associates, BTG Development LLC, and KB Homes South Bay Inc.

<sup>5</sup> Interim Parkland Agreement for Tentative Maps No. PT15-067 and PT15-068 (Phase 3 Units) Between the City of San José and S.J. Sierra Group, LLC, BGT Development, LLC, and KB Homes South Bay Inc.

## **ANALYSIS**

All residential development planned for Flea Market North is complete and a local community has been established, emphasizing the need for parks and public space in this area. The City and the Developer seek to open Bruzzone and Mercado parks as soon as possible. However, full buildout for both parks, consistent with the existing Master Plans, is estimated to cost upwards of \$8,500,000. The Parkland Obligation for the Flea Market North project was fully satisfied through the dedication of these park spaces, along with a short section of Coyote Creek trail; therefore, no Flea Market North parkland obligation funding is available for construction.

The developer has agreed to fund a portion of the construction in exchange future credits from residential development that is approved for the Flea Market South project area. This agreement was made in 2018 when the Turnkey Parkland and Excess Credit Agreement was executed. The agreement called for the developer to build the parks. The Agreement allows the Developer to provide \$5,000,000 to support design and construction of the parks. In exchange for the contribution, the Developer will receive a total of \$5,000,000 in parkland credits, or the equivalent of an approximately 2.54-acre parkland obligation (for up to 362 future multi-family residential units) in alignment with the current schedule of Parkland Fees<sup>6</sup>. Parkland obligations for the recent Council approved re-zoning of the Flea Market South (File No. PDC17-051) allows for the development of up to 3,350 residential units, which could generate up to \$40 million in Parkland Trust Fund fees. The future parkland obligation from residential construction in the Flea Market South area is expected to support development of the proposed Flea Market South park, as well as Phase 2 improvements to Bruzzone and Mercado Parks. The parkland credit the Developer will receive will be applied to the first 362 units constructed by the Developer. The City is not obligated to refund the value of any credits, should the Developer decline to develop additional residential units in the Flea Market South project area.

The Developer has not been able to move forward with the construction of the parks in a cost-effective and timely manner. Shortages in supplies and labor, and construction cost increases are the cause of this delay in implementing park improvements as outlined in the existing agreement. Due to the collective desire open the parks to the public as soon as possible to residents, staff and the developer agree that the City can build these parks more quickly than the developer. As such, the City and Developer wish to amend the agreement to allow a voluntary one-time funding contribution and transfer construction responsibility to the City for both parks in Flea Market North.

Under the draft amended Agreement subject to Council approval, the Developer will:

- Immediately transfer the land to the City in alignment with Parkland Dedication Ordinance<sup>7</sup> requirements and provide the City with 100% complete construction plans.
- Submit to the City a list of City approved and documented park design, City review, and construction costs to date.

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<sup>6</sup> Res. No. 78733

<sup>7</sup> SJMC 19.38

The City will:

- Subtract \$927,440.68 of approved park construction related expenses the Developer has incurred to date from the voluntary \$5,000,000 contribution.
- Receive a total of payment of \$4,072,559.32 from the Developer, to be deposited into the Park Trust Fund for the future build out of phase one improvements to Bruzzone and Mercado Park.

## **CONCLUSION**

Approval of the amended Agreement will provide a portion of the financial resources needed for the City to construct Bruzzone Park and Mercado.

## **EVALUATION AND FOLLOW-UP**

If this amendment is approved, the Department of Public Works and the Department staff will oversee the construction of the park assets. Staff will return to the City Council for award of construction contracts and seek action to establish funding appropriations for the construction of the Flea Market North parks.

## **CLIMATE SMART SAN JOSÉ**

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

## **POLICY ALTERNATIVES**

*Alternative 1: The City Council could reject the First Amendments to the Turnkey Parkland and Excess Credit Agreement and/or any of its current terms.*

**Pros:** Rejection of the amendments would result in the Developer retaining the responsibility to construct parkland improvements.

**Cons:** Would result in an extended timeline for the completion of Bruzzone and Mercado.

**Reason for not recommending:** Rejection of this amendment would delay the park construction to an unknown timeline.

*Alternative 2: The City Council could reject the First Amendments to the Turnkey Parkland and Excess Credit Agreement and/or any of its current terms and direct Staff to negotiate an agreement to direct the Developer to construct one of the parks to full build out.*

**Pros:** Would result in the full build out of either Bruzzone Park or Mercado Park.

**Cons:** Would result in an extended timeline for the completion which ever park is not selected to be constructed first.

**Reason for not recommending:** Approved master plans will only deliver phase one improvements to the parks. Additional community engagement is needed to plan phase two improvements of both parks. Rejection of this amendment and direction to construct one park would delay the second park construction to an unknown timeline and likely result in increased cost of construction.

### **PUBLIC OUTREACH**

Prior to initiating the amendment to the Turnkey Parkland and Excess Credit agreement, public outreach was conducted through the community engagement process for the Flea Market project area Rezoning Permits<sup>8</sup> and associated Planned Development Permits<sup>9</sup>.

Draft master plans for Bruzzone and Mercado parks were presented to the community for feedback on March 16, 2016. Designs and recommended park names were reviewed at the Parks and Recreation Commission, and on December 18, 2018, the Turnkey Parkland and Excess Credit agreement was approved by City Council. The associated agreement documents and memorandum were posted on the City's website for public access.

This memorandum will be posted on the City's website for the January 25, 2022 City Council Agenda.

### **COORDINATION**

This item has been coordinated with the Department of Public Works City Facilities Architectural Services Division, the City Manager's Budget Office, and the City Attorney's Office.

### **COMMISSION RECOMMENDATION/INPUT**

No commission recommendation or input is associated with this action.

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<sup>8</sup> File Nos. PDC03-108, PDC09-006, and PDC16-001

<sup>9</sup> File Nos. PD08-025, PD08-026, PD08-027, PD08-069, PD12-031, PD16-002

HONORABLE MAYOR AND CITY COUNCIL

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### **FISCAL/POLICY ALIGNMENT**

The action recommended will allow partial construction of two new public parks consistent with the City's goals for the provision of parkland per Envision San José 2040 General Plan, Activate SJ, and Berryessa Urban Village Plan.

### **COST SUMMARY/IMPLICATIONS**

Included in the agreement amendments is \$4,072,559.32 to be paid to the City to fund development of the park facilities. Funding secured through this agreement will be deposited in the Park Trust Fund for the construction of the two parks in this Flea Market North Project Area. Staff will return to City Council in 2022 to seek appropriation of the funding for construction.

The annual operating maintenance costs for Mercado Park (\$77,000) and Bruzzone Park (\$82,000) are already included in the Base Budget for the Parks, Recreation and Neighborhood Services Department. These facilities were initially anticipated to come on-line in early 2022 and were funded as part of the 2021-2022 Adopted Budget (\$92,000 in 2021-2022 and annualized to \$159,000 in 2022-2023).

### **CEQA**

Not a Project, File No. PP17-003, Agreements/Contracts (New or Amended) resulting in no physical changes to the environment.

/s/

JON CICIRELLI

Director of Parks, Recreation  
and Neighborhood Services

For questions, please contact Nicolle Burnham, Deputy Director, at [nicolle.burnham@sanjoseca.gov](mailto:nicolle.burnham@sanjoseca.gov).

Attachments:

- A. Area and Development Planning Context
- B. Draft Parkland Agreement Amendment

# Attachment A

## Area and Development Planning Context

<b>Flea Market Area Re-zoning 2009 &amp; 2016</b>	
<p>City Council approved re-zoning permits for the Flea Market area (File Nos. PDC09-006 and PDC16-001). The approved rezoning allowed for the development:</p> <ul style="list-style-type: none"> <li>• Up to 2,818 residential units (up to 1,000 north and 1,818 south)</li> <li>• Commercial (Retail, R&amp;D, Office) and/or Industrial uses</li> <li>• Public parkland</li> <li>• Public trails (Coyote Creek Trail and Penitencia Creek Trail)</li> </ul>	
<b>Flea Market North Development 2008-2012</b>	
<i>Project File Number</i>	PT08-019 & PT12-026
<i>Project Description</i>	Approval of tentative map to reconfigure property on the north side of Berryessa Road from three lots into 144 lots; and authorize construction of 737 residential units in three phases. Phase 1 authorizes 242 units (44 single family attached, 78 single family detached, and 120 multifamily units,) and another 495 units in phase 2 and 3.
<b>Parkland Agreement History 2013-2018</b>	
<i>Agreement #1:</i> Parkland Agreement for the Final Tract Map No. 10160 Between the City of San José and the Flea Market, Inc., Bumb & Associates, BTG Development LLC, and KB Homes South Bay Inc.	
<i>Agreement Recorded</i>	June 2013
<i>Parkland Obligation Conditions</i>	Project obligation for all residential development satisfied through dedication of: <ul style="list-style-type: none"> <li>• 0.25-mile of the Coyote Creek Trail (from Berryessa Road to Mercado Avenue)</li> <li>• 3.60-acre of parkland at Mercado Way and Sierra Road</li> </ul>
<i>Agreement #2:</i> Parkland Agreement for Tentative Map No. PT12-026 (Phase 2 Units) Between the City of San José and the Flea Market, Inc., Bumb & Associates, BTG Development LLC, and KB Homes South Bay Inc.	
<i>Agreement Recorded</i>	October 2015
<i>Parkland Obligation Conditions</i>	Obligation met through previous agreements.
<i>Agreement #3:</i> Interim Parkland Agreement for Tentative Maps No. PT15-067 and PT15-068 (Phase 3 Units) Between the City of San José and S.J. Sierra Group, LLC, BGT Development, LLC, and KB Homes South Bay Inc	
<i>Agreement Recorded</i>	October 2016

<i>Parkland Obligation Conditions</i>	Interim parkland obligation for Phase 3 units. Project obligation for all residential development satisfied through additional dedication of: <ul style="list-style-type: none"> <li>• 3.59-acre of parkland at Mercado Way and Bruzzone Way</li> </ul> Parkland agreement established funding for initial park construction based on a \$5,000,000 contribution furnished by the developer in exchange for future parkland obligation credits.
<i>Agreement #4: Turnkey Parkland and Excess Credit Agreement for Tentative Maps No. PT15-067 and PT15-068 (Phase 3 Units) Between The City of San José and S.J. Sierra Group LLC, BGT Development LLC, and KB Homes South Bay Inc.</i>	
<i>Agreement Recorded</i>	February 2018
<i>Parkland Obligation Conditions</i>	Finalized details outlined in the third parkland agreement (interim agreement), approved names and initial designs for both park sites in the project area.

**Berryessa Urban Village Planning 2018-2020**

Planning, Building, and Code Enforcement (PBCE) staff completed coordination on the Berryessa Urban Village Plan, approved by Council on June 22, 2021. Department staff coordinated with planning staff and community members to work toward a regional vision that integrates parks, recreation, and trails into this unique transportation-oriented high-density community. The urban village allows for:

- Up to 3,450 residential units
- 3.4 million square feet of commercial uses
- 1.4-acres of new parkland
- Public Trails (Coyote Creek Trail and Penitencia Creek Trail)
- A central market, and other public spaces.

**Flea Market South Re-zoning 2017-2020**

Planned Development Rezoning (File No. PDC17-051) was approved by Council on June 29, 2021 for the Flea Market South Project. The proposed development outlined in the rezoning allows for the max capacities and land uses indicated in the approved Berryessa Urban Village Plan.



RECORDING REQUESTED  
BY CITY OF SAN JOSE:

When Recorded, Return To:  
City of San José  
200 East Santa Clara Street  
San José, CA 95113  
Attn: City Clerk, 2<sup>nd</sup> Floor West Wing

**FIRST AMENDMENT TO TURNKEY PARKLAND AND EXCESS CREDIT AGREEMENT**

**FOR**

**TENTATIVE MAPS NO.**

**PT15-067 and PT15-068 (PHASE 3 UNITS)**

**BETWEEN**

**THE CITY OF SAN JOSE**

**AND**

**S.J. SIERRA GROUP LLC, BGT DEVELOPMENT, LLC**

**AND KB HOME SOUTH BAY INC.**

**(Chapter 19.38 of SJMC)**

This First Amendment to Turnkey Parkland and Excess Credit Agreement (“First Turnkey Amendment”) is made and entered into by and between the CITY OF SAN JOSE, a municipal corporation of the State of California (“City”), and S.J. SIERRA GROUP LLC, a Delaware limited liability company (successor in interest to THE FLEA MARKET, INC., a California corporation and BUMB & ASSOCIATES, a California general partnership); and BGT DEVELOPMENT, LLC, a California limited liability company (collectively "Owner1"), and KB HOME SOUTH BAY INC., a California corporation ("Owner2") as of the date of City’s execution ("Effective Date"). Owner1 and Owner2 are collectively referred to in this Agreement as "Owner" or “Developer”; each of City and Owner are sometimes hereinafter referred to as a “Party” and collectively as the “Parties.”

## RECITALS

- A. The Parties previously entered into that certain Turnkey Parkland Agreement dated January 9, 2019 (the “Agreement”) regarding the development of real property located at the north side of Berryessa Road, between Union Pacific Railroad Right of the Way to the east and the Coyote Creek to the West also known generally as 1590 Berryessa Road and associated with the Flea Market Development (“Project”) in the City of San Jose, California (Tract 10160).
- B. The Agreement (which augmented the Original Parkland Agreement and the Interim Parkland Agreement, both defined in the Agreement) provided in part for the provision of up to \$5,000,000 of Park Improvements by Developer for Reunion Park and Mercado Park, to be constructed by Developer and thereafter accepted by City.
- C. The Parties now wish to amend the Agreement as hereafter provided.

NOW, THEREFORE, in consideration of the mutual covenants set forth in this First Turnkey Amendment and for valuable consideration, receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Definitions.

Defined terms in this First Turnkey Amendment shall have the same meaning as in the Agreement unless otherwise indicated.

2. Modified and/or Additional Provisions.

- a. In lieu of Developer’s obligations described in Sections 2.D (including Exhibit E), 2.G, 2.H, 2.I, 2.J, 2.L, 2.M, 3, 4 (including Exhibit F), 5, 6, 13 and 14 of the Agreement, Developer shall pay to City the voluntary contribution of \$5,000,000 for the construction of all Park Improvements, provided, however, that Developer shall receive a credit toward that voluntary contribution for Developer’s documented Park Improvement expenses (the “Contribution Credit”). The amount of the Contribution Credit equals \$927,440.68, as provided in Exhibit A to this First Turnkey Amendment, attached hereto and incorporated herein by this reference. At the close of escrow, Developer shall pay to City \$4,072,559.32, being the \$5,000,000 voluntary contribution less the Contribution Credit. Upon City’s receipt of said payment, any design modifications of, and the construction of the Park Improvements shall be the sole obligation of City and for purposes of the Agreement, Developer will be deemed to have constructed all Park Improvements and had the Park

Improvements accepted by City, and Developer shall receive all benefits provided in the Agreement for completion of the Park Improvements, including but not limited to accumulation of Excess Parkland Credits and New Excess Parkland Credits.

- b. Prior to Developer's payment to City pursuant to Section 2.a of this First Turnkey Amendment, Developer shall comply with Section 2 of the Original Parkland Agreement as modified by its First Amendment, including Exhibit D of the Original Parkland Agreement which provides the Park Site Requirements for Bruzzone Park, and shall comply with Section 2 of the Interim Parkland Agreement, including Exhibit D thereto which provides the Transfer of Real Property Requirements for Mercado Park.
- c. Concurrent with Developer's payment to City pursuant to Section 2.a of this First Turnkey Amendment, Developer shall convey Bruzzone Park to the City by grant deed as required by the Original Parkland Agreement as modified by its First Amendment, and shall convey Mercado Park to the City by grant deed as required by the Interim Parkland Agreement.
- d. Upon City's receipt of the payment described in Section 2.a. of this First Turnkey Amendment, the Parties shall be deemed to have waived their respective rights to terminate the Agreement pursuant to Section 2.N of the Agreement.
- e. Upon City's receipt of the payment described in Section 2.a. of this First Turnkey Amendment, City shall release Developer's securities as described in Section 4.C of the Agreement.

3. Inconsistency

In the event of any inconsistency between the terms of this First Turnkey Amendment and the terms of the Agreement, the terms of this First Turnkey Amendment shall control as to the matters which are the subject of this First Turnkey Amendment.

4. Ratification.

Except as amended by this First Turnkey Amendment, the terms and provisions of the Agreement are hereby ratified, confirmed and shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties have executed this First Turnkey Amendment as the day and year hereinafter written by City.

APPROVED AS TO FORM:

CITY OF SAN JOSE,  
a municipal corporation

\_\_\_\_\_  
JON CALEGARI  
Deputy City Attorney

\_\_\_\_\_  
MATT CANO  
Director of Public Works

\_\_\_\_\_  
Date

200 East Santa Clara Street  
San Jose, CA 95113

"OWNER1"

"OWNER1"

S.J. Sierra Group LLC,  
a Delaware limited liability company

BGT DEVELOPMENT, LLC,  
a California limited liability company

By: T&B Management Group LLC,  
a Delaware limited liability company,  
Manager

By: \_\_\_\_\_  
Brian Bumb, Managing Member

By: \_\_\_\_\_  
Timothy Bumb, Manager

By: \_\_\_\_\_  
Brian Bumb, Manager

1590 Berryessa Road  
San Jose, CA 95131

1590 Berryessa Road  
San Jose, CA 95131

"OWNER2"

KB HOME SOUTH BAY INC.

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

Name: Jeffrey B. McMullen

Title: Senior Vice President

Address: 5000 Executive Parkway, #125  
San Ramon, CA 94583

\* All Developer/Owner's signatures must be accompanied by an attached notary acknowledgement.

\* Proof of authorization for Developer's/Owner's signatures is required to be submitted concurrently with this Agreement.

EXHIBIT A TO FIRST TURNKEY AMENDMENT

Contribution Credit Accounting as of December 21, 2021

## Exhibit A

### Development Costs to Date for Turnkey Parkland and Excess Credit Agreement

<b>Cost Type</b>	<b>Description</b>	<b>Debit</b>	<b>Credit</b>	<b>Balance</b>
<i>Developer Contribution</i>				
	Developer contribution of \$5M to support development of FMN Parks		\$ 5,000,000.00	\$ 5,000,000.00
<i>City Review</i>				
	Nov 2018 - Fees for parks tract 10264 per Interim PA - Tentative Map PT15-067;PT15-068	\$ 435,486.00		\$ 4,564,514.00
	Nov 2018 - Fees for parks tract 10264 per Interim PA - Tentative Map PT15-067;PT15-068	\$ 264,514.00		\$ 4,300,000.00
<i>Site Fencing</i>				
	Mercado Park fence replacement	\$ 1,000.00		\$ 4,299,000.00
	Mercado park fencing cost 2022 to 2023	\$ 6,000.00		\$ 4,293,000.00
	Bruzzone Park fence repair	\$ 845.00		\$ 4,292,155.00
	Bruzzone Park ongoing fencing cost February 2022 to August 2022 @ \$427 per month (Seven Months)	\$ 2,989.00		\$ 4,289,166.00
<i>HMH Design</i>				
	Design cost-to-date through 10/31/2020 (consulting, materials, site preperation/maintenance)	\$ 165,401.68		\$ 4,123,764.32
	Design cost-to-date 10/31/2020 through close of escrow	\$ 51,205.00		\$ 4,072,559.32
<b>Total</b>		<b>\$ 927,440.68</b>		<b>\$ 4,072,559.32</b>

STATE OF CALIFORNIA             )  
   )       SS  
COUNTY OF SANTA CLARA       )

On \_\_\_\_\_ before me \_\_\_\_\_,  
**(Name, Title of officer – e.g. Jane Doe, Notary Public)**

personally appeared \_\_\_\_\_ 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.

\_\_\_\_\_ (Seal)  
**(Signature of Notary)**