

**AGREEMENT BETWEEN THE CITY OF SAN JOSE AND
ARCADIA DEVELOPMENT CO. AND
CIVIC SOUTH BAY, LLC FOR
FUNDING DISTRICT FEASIBILITY AND FORMATION FOR THE
EVERGREEN CIRCLE PROJECT**

THIS AGREEMENT is made and entered into this _____ day of _____ 2018, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California (“CITY”), and ARCADIA DEVELOPMENT CO., a California corporation and CIVIC SOUTH BAY, LLC, a Delaware limited liability company (collectively, “DEVELOPERS”).

RECITALS:

- A. DEVELOPERS have initiated the development process for its property (“Property”) in the Evergreen area of the City of San José, which is the subject of planned development permit PDC10-022 (“Permit”); and
- B. The Permit calls for the construction and maintenance of various public infrastructure improvements, including but not limited to enhanced landscape and hardscape in various locations in the public right-of-way (collectively, the “Public Improvements”); and
- C. DEVELOPERS and CITY desire to investigate the feasibility of forming a new community facilities district (the “District”) to fund the maintenance of the Public Improvements; and
- D. CITY staff time will be required to investigate the feasibility of a District and to take the initial steps required to form a new District; and
- E. CITY and DEVELOPERS desire to enter into this Agreement for DEVELOPERS to fund the CITY’s costs to investigate the feasibility of forming a new District, including engaging any necessary consultants and all other costs incurred by the CITY to conduct proceedings to form the District.

NOW, THEREFORE, in consideration of their mutual promises and subject to the terms, provisions, and conditions hereinafter set forth, the parties hereto agree as follows:

1. RESPONSIBILITIES OF DEVELOPER

DEVELOPERS shall perform the obligations to the reasonable satisfaction of CITY’s Director of Public Works (the “Director”):

- 1.1 **Payment of CITY’s Costs.** DEVELOPERS shall advance sufficient funds to pay for all CITY’s costs, direct and indirect, incurred in performing the scope of work described in Section 2.1.

1.2 Deposits.

- 1.2.1 Payment. DEVELOPERS shall make an initial deposit with CITY of THIRTY-SEVEN THOUSAND, SIX HUNDRED AND TWENTY-NINE DOLLARS (\$37,629.00), (the "Deposit") to pay for all CITY's costs related to the District formation. The Deposit shall be made within five (5) business days following execution of this Agreement by CITY and DEVELOPERS. Notwithstanding anything to the contrary in this Agreement, DEVELOPERS shall have no obligation to pay CITY any amount in excess of the Deposit without DEVELOPERS' written authorization. Nor shall CITY be obligated to perform any services in excess of the initial Deposit of \$37,629 until such time as DEVELOPERS makes an additional deposit as set forth in Section 1.2.3, below.
- 1.2.2 Accounting. CITY's Public Works Department (the "Department") will establish a billing account (the "Account") to which costs incurred pursuant to this Agreement will be charged. CITY will bill work against the Account at hourly rates based on CITY's direct and indirect costs, including but not limited to, salaries, benefits, overhead and other administrative expenses. Fees and other costs of any consultants hired by CITY in connection with the scope of work described in Section 2.1 shall be billed at the rate actually incurred by CITY.
- 1.2.3 Additional Deposits. Requests to DEVELOPERS for additional deposits will be made in writing by the Director or the Director's designee. DEVELOPERS shall make additional deposits in TEN THOUSAND DOLLAR (\$10,000.00) increments to CITY to replenish the Account as necessary pursuant to this Agreement within thirty (30) calendar days of receipt of the written request for additional funds from the Director or designee. Such requests shall be deemed received by DEVELOPERS no later than five (5) calendar days from the date of mailing by the City. If the Deposit, including interest, is wholly expended, CITY will do no further work related to the District until DEVELOPERS deposits with CITY additional funds to cover estimated remaining CITY expenses for the District as provided herein.
- 1.2.4 Relationship to Other Fees and Charges. The funds deposited with CITY pursuant to this Section 1.2 do not cover any fees or charges set by resolution or ordinance of CITY as part of the development process, including but not limited to, fees and charges collected in connection with subdivision maps, planning permits, environmental review, encroachment permits (collectively, "Development Permits"), and improvement agreements.

1.3 No Commitment by CITY.

- 1.3.1 DEVELOPERS acknowledges and understands that this Agreement is only for the purpose of allowing CITY staff and CITY consultants to perform necessary tasks connected with the feasibility investigation and initial steps toward the District formation. DEVELOPERS agrees and acknowledges that this Agreement

in no way commits CITY to approve any project proposed by DEVELOPERS, nor in any other way commits CITY regarding of the District.

1.3.2 DEVELOPERS acknowledges that, even if CITY decides not to form the District, or does not complete the work described in Section 2.1, DEVELOPERS shall remain responsible for payment of all costs incurred by CITY pursuant to this Agreement, and all other payments required of DEVELOPERS under this Agreement.

1.4 **Engineering and Architectural Work.** DEVELOPERS shall provide a description of the Public Improvements proposed to be maintained by the District, including plans, maps, and diagrams as requested by CITY. DEVELOPERS shall meet with CITY as necessary to determine the level of maintenance required for the Public Improvements to be maintained by the District. All services provided by DEVELOPERS under this section shall be collectively referred to as the “Engineering Services.”

1.5 **DEVELOPERS’ Consultants.** DEVELOPERS has hired or intends to hire the following consultants to perform the Engineering Services.

Engineering and Design:	Ruth and Going, Inc.;
	Carlson, Barbee, & Gibson, Inc.
Architectural Design:	SGPA Architecture and Planning (retail)
	KTGY Architecture + Planning (residential)
Landscape Design:	vanderToolen Associates Inc.

CITY agrees to DEVELOPERS’ use of the foregoing consultant(s) and/or subconsultants. In the event DEVELOPERS determines that additional or substitute consultants are needed, DEVELOPERS agrees to work with CITY to ensure that the most qualified consultants are selected. CITY shall have the right to reject DEVELOPERS’ consultant selections. CITY shall approve in advance any additional or substitute subconsultants retained by prime consultant to perform work pursuant to this Agreement. CITY shall have the right to review and approve the scope of the services for any additional or substitute consultants or subconsultants.

In the event this Agreement expires or is terminated as provided herein, DEVELOPERS shall provide CITY with all reports, drawings, and other work product related to the Engineering Services that DEVELOPERS owns (collectively, “Work Product”), and DEVELOPERS shall grant to the CITY an irrevocable, non-exclusive royalty-free license to use the Work Product in connection with the development of the Property.

1.6 **Insurance.** DEVELOPERS at its sole cost and expense shall maintain insurance coverage in the types and amounts set forth in Exhibit A, attached hereto and incorporated herein by this reference.

1.7 **Indemnity.** DEVELOPERS shall defend, indemnify and hold harmless CITY, its officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from the performance of DEVELOPERS’ obligations under this

Agreement due to the willful or negligent acts (active or passive) or omissions by DEVELOPERS' officers, employees or agents. DEVELOPERS' obligations to indemnify and hold harmless exclude only such claim, loss or liability to the extent due to the active negligence or willful misconduct of CITY, its officers, employees and/or agents.

DEVELOPERS shall cause and require all Consultants hired by DEVELOPERS to defend, indemnify and hold harmless CITY, its officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from the performance of its consultant's obligations to perform work in advancement of the work under this Agreement due to the willful or negligent acts (active or passive) or omissions by DEVELOPERS' consultant, its officers, its employees or its agents. DEVELOPERS shall require all its consultant's to indemnify and hold harmless CITY excluding only such claim, loss or liability to the extent due to the active negligence or willful misconduct of CITY, its officers, employees and/or agents. DEVELOPERS shall cause each of its consultants to defend, indemnify and hold harmless the CITY, its officers, employees and agents from any defect or other flaw of the Engineering Services or the Documents and services to be performed pursuant to Section 2.1.3 of this Agreement.

2. RESPONSIBILITIES OF CITY

2.1 Scope of Work

- 2.1.1 District Feasibility & Formation. CITY will conduct a preliminary investigation of the feasibility of District formation, including, without limitation, investigating the following: District boundaries; facilities and/or services to be provided by the District; rate, method of apportionment and manner of collection of the special tax; and the cost of providing the facilities and/or services to be included in the District. If the CITY determines that District formation is feasible, the CITY will initiate the process to form the District.
- 2.1.2 Engineering & Architectural Work. CITY will perform necessary engineering and other work required pursuant to Chapter 14.27 of the City of San José Municipal Code, which incorporates and modifies the Mello Roos Community Facilities Act of 1982, as amended, Chapter 2.5 of Part 1 of Division 2 of Title 5, commencing at Section 53311, of the California Government Code.
- 2.1.3 Review and Approval of Documents. At appropriate intervals during the development process, DEVELOPERS shall submit to CITY for review and approval all engineering plans, maps, diagrams, architectural drawings, cost estimates and other documents (collectively, "Documents") required to be prepared by DEVELOPERS or DEVELOPERS' consultants pursuant to Section 1.4. CITY will review each submittal and provide DEVELOPERS its review comments. DEVELOPERS shall address CITY's comments and incorporate them into the Documents as necessary.

2.1.4 Meetings. CITY staff will attend meetings with the DEVELOPERS and DEVELOPERS' consultants as needed to implement the purposes of this Agreement.

2.2 Consultants. CITY, in its sole discretion, may engage outside consultants to assist CITY in its performance of this Agreement, for which DEVELOPERS shall be obligated to pay subject to the provisions of Section 1.2.1.

2.3 Deposit.

2.3.1 Accounting.

- a. The Department will establish the Account as described in Section 1.2.2. The Department will keep records of all funds advanced by DEVELOPERS pursuant to this Agreement and of all expenditures of such funds.
- b. At any time during normal business hours, but upon no less than forty-eight (48) hours notice, and not more than once every three (3) months, DEVELOPERS may request, and CITY will make available to DEVELOPERS for examination, all records, contracts, invoices, materials, conditions of employment and other data relating to all matters covered by this Agreement.

2.3.2 Refunds. If, following the expiration or earlier termination of this Agreement, a portion of the amount(s) deposited by DEVELOPERS remain unexpended and unencumbered, CITY will return such amount(s) to DEVELOPERS within thirty (30) calendar days of the final accounting.

2.3.3 Interest. CITY will provide quarterly reports to DEVELOPERS reporting interest accrued on any unspent portion of the Deposit or any additional deposits (collectively, the "Deposits"). Interest shall be accrued at CITY's rate of return on investments net of investment costs. Interest on the Deposits shall be used for the purposes of the Deposits if and when the funds in the Deposit Account have been expended. If, following the expiration or earlier termination of this Agreement, all or a portion of the interest on either of the Deposits remains unexpended and unencumbered, CITY will return such amount to DEVELOPERS within thirty (30) calendar days of the final accounting.

3. OBLIGATIONS OF BOTH PARTIES

3.1 Termination and Expiration. Either DEVELOPERS or CITY may terminate this Agreement by delivering to the other party ten (10) calendar days advance written notice of election to terminate. In addition, this Agreement may be terminated for default as provided in Section 3.2. If not subject to earlier termination, as provided herein, this Agreement shall expire upon the later to occur of: (1) a determination by CITY not to proceed with District formation; or (2) the date that the District is formed.

To DEVELOPERS: **Mail**
c/o Eli Reinhard
Arcadia Development Co.
P.O. Box 5368
San Jose, CA 95150

Deliveries
c/o Eli Reinhard
Arcadia Development Co.
5185 Cherry Ave, Suite 10
San Jose, CA 95118

Mail and Deliveries
c/o Mike Evans
Civic South Bay, LLC
1500 Willow Pass Court
Concord, CA 94520

The effective date of such written notice shall be the date of personal delivery or the date of receipt by certified mail or three calendar days after mailing in the United States Mail.

- 3.5 **Entire Agreement.** This Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, arrangements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Agreement, which are not fully expressed herein. This Agreement may not be amended except pursuant to a written instrument signed by all parties.
- 3.6 **Assignment.** DEVELOPERS shall not assign any interest in this Agreement and shall not transfer any interest in the same (whether by assignment or novation), without the prior written approval of CITY; provided that DEVELOPERS may assign any interest in this Agreement to any entity that is a member of DEVELOPERS or to any successor owner of the Property without CITY's consent.
- 3.7 **Waiver.** The parties agree that waiver by either party of any breach of one or more of the terms, covenants or conditions under this Agreement or any default in the performance of any obligations under this Agreement shall not be construed as waiver by that party of any other term, covenant, condition or obligation, nor shall a waiver of any incident of breach or default constitute a continuing waiver of same.
- 3.8 **Applicable Law and Venue.** This Agreement shall be governed by and interpreted in accordance with the laws of the State of California. In the event that suit shall be brought by either party to enforce or interpret the terms of this Agreement, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

3.9 **No Third Party Beneficiaries.** This Agreement shall not be construed as, or deemed to be an Agreement for the benefit of any third party or parties, and no third party or parties shall have any right or action hereunder for any cause whatsoever.

APPROVED AS TO FORM:

“CITY”

CITY OF SAN JOSE,
a municipal corporation

TOM MURTHA
Senior Deputy City Attorney

By _____
TONI J. TABER, CMC
City Clerk

“DEVELOPERS”

ARCADIA DEVELOPMENT CO,
a California corporation

By _____
Title:

CIVIC SOUTH BAY, LLC,
a Delaware limited liability company

By _____
Title:

EXHIBIT A

INSURANCE REQUIREMENTS

DEVELOPER, and each of its consultants authorized by Section 1.6 of this Agreement (collectively referred to in this Exhibit A as “DEVELOPER”), shall at its sole cost and expense, shall procure and maintain for the duration of this AGREEMENT insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by DEVELOPER, its agents, representatives, employees consultants or subcontractors.

A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage described in Insurance Services Office Form Commercial General Liability coverage (“occurrence”) Form Number CG 0001, including products and completed operations, X. C. U. (Explosion, Collapse & Underground) coverage; and
2. The coverage provided in Insurance Services Office Form Number CA 0001 covering Automobile Liability, coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers’ Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors and Omissions.

B. Minimum Limits of Insurance

DEVELOPER shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers’ Compensation and Employers’ Liability: Workers’ Compensation limits as required by the California Labor and Employers Liability limits of \$1,000,000 per accident; and
4. Professional Liability Errors and Omissions \$1,000,000 Aggregate Limit.

C. **Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by CITY. At the option of CITY, either; the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officials, employees, agents and contractors; or DEVELOPER shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY'S Risk Manager.

D. **Other Insurance Provisions**

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverages

- a. The City of San Jose, its officials, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, DEVELOPER; products and completed operations of DEVELOPER; premises owned, leased or used by DEVELOPER; and automobiles owned, leased, hired or borrowed by DEVELOPER. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and contractors.
- b. DEVELOPER'S insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents and contractors. Any insurance or self- insurance maintained by CITY, its officials, employees, agents or contractors shall be excess of DEVELOPER'S insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by DEVELOPER shall not affect coverage provided the CITY, its officials, employees, agents, or contractors.
- d. Coverage shall state that DEVELOPER'S insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. All Coverages

Each insurance policy required by this AGREEMENT shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days prior written notice has been given to CITY.

E. **Acceptability of Insurers**

Insurance is to be placed with insurers acceptable to CITY'S Risk Manager.

F. **Verification of Coverage**

DEVELOPER shall furnish CITY with certificates of insurance and with original endorsements affecting coverage required by this AGREEMENT. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager or Risk Manager's designee:

CITY OF SAN JOSE
Department of Public Works
Development Services Division
Attn: Thomas M. Borden
200 East Santa Clara Street, 3rd Floor
San José, CA 95113

G. **Subcontractors**

DEVELOPER shall include all subconsultants and subcontractors as insured under its policies or shall obtain separate certificates and endorsements for each subconsultant and subcontractor.