

INDEMNITY, HOLD HARMLESS, ESTOPPEL AND DEFENSE AGREEMENT

This Indemnity, Hold Harmless, Estoppel, and Defense Agreement (“Agreement”) is made and entered into this ____ day of _____, 2017, by and between the County of El Dorado, a political subdivision of the State of California (“County”) and Joe Harn, individually and as the Auditor-Controller of the County of El Dorado (“Auditor-Controller”). County and Auditor-Controller are hereinafter sometimes collectively referred to as the “Parties.”

RECITALS

WHEREAS, pursuant to the California Mitigation Fee Act, (Cal. Gov. Code § 66000 et seq.) Local agencies may establish fees in connection with the approval of a new development project to offset the costs of, new public facilities that become necessary as a result of new development projects; and

WHEREAS, El Dorado Hills Community Services District (EDH/CSD”) is duly organized, pursuant to Government Code section 61000 et seq., to provide parks and recreation services within its boundaries in the unincorporated area of the County; and

WHEREAS, in 1995, the County of El Dorado passed Ordinance No. 4404, establishing “CSD and Parks and Recreation Impact Mitigation Fees,” which authorizes the El Dorado County Board of Supervisors to adopt fees on behalf of community services districts within the County to offset the impacts of new development on parks and recreation services equipment and capital facilities; and,

WHEREAS, in 1997, the County began collecting fees on behalf of EDH/CSD, pursuant to Resolution 112-97, and thereafter began disbursing those fees to EDH/CSD upon request and in accordance with law; and,

WHEREAS, on June 7, 2005 the County and EDH/CSD entered into an Agreement Pertaining to the Collection of Park and Recreation Fees whereby the EDH/CSD agreed to comply with Government Code section 66001(d) every fifth year and to submit those findings and that information to the County for review and filing.

WHEREAS, on June 14, 2005, the County reviewed the mitigation fee program prepared by EDH/CSD, and by adoption of Resolution 160-2005, approved the mitigation fee program of EDH/CSD; and,

WHEREAS, on February 28, 2006, the County reviewed the mitigation fee program prepared by EDH/CSD, and by adoption of Resolution 048-2006, approved the mitigation fee program of EDH/CSD; and,

WHEREAS, on March 26, 2013, the Auditor-Controller notified EDH/CSD in writing of their obligations under the Mitigation Fee Act; and

WHEREAS, the Auditor-Controller notified the County of the statutory requirements under the Mitigation Fee Act in March of 2013, June, 2014, and June 2015; and

WHEREAS, an existing County ordinance required that on an annual basis, the Board of Supervisors shall review fees adopted by the El Dorado Hills CSD pursuant to the Fee Mitigation Act to determine whether the fee amounts are reasonably related to the impacts of development and whether the described new public facilities are still needed by said District; and

WHEREAS, in December, 2015, Thomas Austin, *et ux.*, filed suit against the County and EDH/CSD, which, among other things, challenged the legality of the collection of mitigation fees paid to EDH/CSD and demanded a refund of all moneys collected. This case is still pending in El Dorado County Superior Court and remains unresolved; and,

WHEREAS, on August 18, 2016 the County and the EDH/CSD entered into a Settlement, Indemnity, and Hold Harmless Agreement whereby the County agreed to transfer the amount of verified expenditures from the EDH/CSD Development Impact Fee account to a EDH/CSD operating account within 15 days of the County confirming the expenditures and in exchange, the EDH/CSD agreed to indemnify the County in the event a court determined that any funds so transferred were subject to refund; and

WHEREAS, on May 4, 2017 the EDH/CSD made a request for disbursement of funds in the amount of One million three hundred six thousand eighty-six dollars and sixty-four cents (\$1,306,086.64) for prepayment of the Promontory Park lease payments; and

WHEREAS, on May 8, 2017 the EDH/CSD made a request for disbursement of funds in the amount of Four hundred thirty-one thousand nine hundred eighty-three dollars and forty cents (\$431,983.40) for the November 1, 2016 and May 1, 2017 Promontory Park lease payments (\$344,800) and February 2016 to March 2017, 2% Project Administration fee (\$87,183.40); and

WHEREAS, it is anticipated that there will be other requests for reimbursement from that fund by EDH/CSD. Both County and EDH/CSD believe these transfer can be made in accordance with law, and wish the current and future monetary transfers to occur as soon as possible, and without the need for litigation; and,

WHEREAS, by Resolution 109-2016, and on June 28, 2016, the county reviewed the mitigation fee program prepared by EDH/CSD for the fiscal year 2012-13 and approved it including the making of findings in accordance with Government Code section 66001(d); and

WHEREAS, the County and the Auditor-Controller want to enter this agreement so that the Auditor-Controller can proceed to transfer the aforesaid money to the Operating Account of the El Dorado Hills CSD in accordance with law and without liability; and,

THEREFORE, County and Joe Harn, individually and as Auditor-Controller, mutually agree as follows:

1. Transfer of Funds

Within fifteen (15) days following full execution of this Agreement, County, by and through the Auditor-Controller, shall transfer the amount of \$1,738,070.04 from EDH/CSD's Development Impact Fee Account to its Operating Account, as may be specified by EDH/CSD.

2. County's obligation to defend, indemnify and hold Auditor-Controller harmless.

A. As between the Parties to this agreement, County waives any right or claim as against the Auditor Controller as to the correctness and appropriateness of all information in the EDH/CSD Impact Mitigation Fee Plan, as well as all information, calculations, and conclusions contained in any impact fee studies to date conducted by EDH/CSD or its agents, subcontractors, or consultants, and in particular, County shall take full responsibility for its decision to pay said sums from the EDH/CSD's Impact Mitigation Fee Account. Notwithstanding the foregoing, it is understood by the Parties that this provision in no way limits the ability of the County to challenge the correctness, completeness, or appropriateness of any information contained in the impact fee studies submitted by the EDH/CSD as against any party other than the Parties to this agreement.

B. County agrees to immediately defend, indemnify and hold Joe Harn, individually and as Auditor-Controller, harmless against and from any and all claims, suits, losses, demands, judgments, damages and liability for damages of every name, kind and description, including attorney's fees and costs incurred, brought for, or on account of damage to property, or any economic or consequential losses of any kind and nature including but not limited to the amount of any refunds which are claimed or in any way arise out of, are connected to or implicate the Auditor-Controller's transfer of funds on behalf of the County, as provided herein, except as expressly prohibited by law.

C. County further agrees that to the extent any court determines that the amounts transferred herein must be refunded pursuant to the Mitigation Fee Act in any action filed by or on behalf of any person, or individual, County agrees to hold Joe Harn, individually and as Auditor-Controller, harmless in regards to such sums. As part of its obligation to hold Joe Harn harmless, the County agrees to either (1) pay the amount to be refunded to those entitled to the refund; or (2) indemnify Joe Harn, individually and as the Auditor-Controller, for the amount to be refunded through a direct payment from the County to the Auditor-Controller within 30 days; or (3) indemnify the Auditor-Controller through the withholding of property tax revenues due EDH/CSD to the extent provided for in the Settlement, Indemnity, and Hold Harmless Agreement entered into between the EDH/CSD and the County or as otherwise provided for by law.

D. This duty to indemnify and save Joe Harn, individually and as the Auditor-Controller, harmless includes the duties to defend set forth in California Civil Code section 2778, including without limitation the duty to defend against any alleged active negligence of any other party to this indemnity agreement.

E. Estoppel: The County is hereby estopped from asserting or claiming that any payments under Section 1., above, constitutes a violation of Government Code Section 24054, and is further estopped from asserting that any payment hereunder is unconscionable or contrary to public policy in any way, or that this estoppel provision itself is against public policy. In the event that a court of law ultimately and finally determines that this estoppel proviso is contrary to law or public policy, County will nevertheless, remain obligated to perform all of its remaining obligations hereunder on the basis of justifiable reliance on County's representations as herein set forth, and on prejudicial change of position by Joe Harn, individually, and as the El Dorado

County Auditor-Controller as well as under the doctrine of Promissory Estoppel.

3. General Provisions.

A. Governing Law. This Agreement shall be governed by and construed with the laws of the State of California. No such action may be instituted by either party until they have met and conferred over any disputed issues, and made a good faith effort to resolve their disagreements thereon.

B. Severance. Any provision of this Agreement which proves to be invalid or illegal shall in no way affect, impair or invalidate any other provisions of this Agreement, and such other provisions shall remain in full force and effect.

C. Entire Agreement; Amendment. This Agreement contains the entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings or agreements. This Agreement may only be modified in writing signed by both parties. This Agreement shall be interpreted as if jointly prepared by the parties. No presumption shall arise from the identity of the drafter.

D. Authority. Each party warrants to each other that the individual signing this Agreement on behalf of such party is fully authorized to bind such party and agrees to be bound by this Agreement as of the effective date of this Agreement.

E. Administrator. The County employee with responsibility for administering this Agreement is Don Ashton, Chief Administrative Officer, or successor.

F. No Third Party Rights. This Agreement has been created exclusively for the benefit of the signatory parties and no rights are created in any third party by entry into this Agreement.

G. Effective Date: The effective date of this indemnity agreement shall be upon execution by the parties.

H. Notices. All notices permitted or required under this Agreement shall be deemed made when delivered to the applicable party's representative as provided in this Agreement. Additionally, such notices may be given to the respective parties at the following address, or at such other address as the respective parties may provide in writing for this purpose:

COUNTY:

Michael Ciccozzi,
County Counsel or successor
County Counsel Office
330 Fair Lane
Placerville, CA 95667

AUDITOR-CONTROLLER:

Joe Harn, or successor
Office of the Auditor-Controller
330 Fair Lane
Placerville, CA 95667

Such notice shall be deemed made when personally delivered or when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid, return receipt requested and addressed to the party at its applicable address.

I. Settlement: This Agreement is the result of a compromise and settlement of claims which are potentially contested, and shall never, at any time, for any purpose, either in whole or in part, be construed as an admission or acknowledgment of liability, or an admission or acknowledgment of responsibility, or an admission or acknowledgment of fact or evidence of such fact on the part of any Party. This Agreement, and all negotiations associated with it, is intended to affect a compromise that is subject to the protections of Section 1152 of the Evidence Code of the State of California.

J. Time of the Essence: The parties shall act promptly and in good faith to do all such acts, including, but not limited to, execution of any necessary documents, required effectuate the terms of this Agreement.

K. Enforcement of Agreement: In the event of litigation, including but not limited to the filing of a petition for writ of mandate to enforce any of the terms and conditions of this Agreement, the prevailing party shall be entitled to attorney's fees and costs.

IN WITNESS WHEREOF, the parties hereto have executed this Indemnity, Hold Harmless Estoppel and Defense Agreement on the dates set forth below.

ATTEST:
James S. Mitrison,
Clerk of the Board:

Dated: _____

COUNTY OF EL DORADO

By: _____
Deputy Clerk

By: _____
Chairman, Board of Supervisors

Dated: _____

Dated: _____

Approved As To Form:

**EL DORADO COUNTY
AUDITOR - CONTROLLER**

Michael Ciccozzi,
County Counsel

By: _____
Joe Harn

JOE HARN, An Individual