

DEFENSE, INDEMNITY, AND HOLD HARMLESS AGREEMENT

This Defense, Indemnity, and Hold Harmless Agreement (“Agreement”) is made and entered into this ____ day of _____, 2017, by and between the El Dorado Hills Community Services District (“District”) and the County of El Dorado, a political subdivision of the State of California (“County”).

Recitals

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

WHEREAS, The County of El Dorado passed Ordinance No. 4404, establishing “CSD and Parks and Recreation Impact Mitigation Fees,” which authorizes the 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, District 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, County first began collecting fees on behalf of the District in 1997 and dispersing those fees to the District upon request; and

WHEREAS, on or about June 7, 2005, the County and the District entered into an Agreement Pertaining to the Collection of Park and Recreation Fees whereby the County agreed to collect and administer the development impact fees for parks and recreation public facilities and the District agreed to defend, indemnify, and hold harmless the County from “any and all damages or claims that may be incurred by County’s operations” under the agreement; and

WHEREAS, the District made a request for dispersal of Five hundred fifty thousand three hundred thirty-five dollars and twelve cents (\$550,335.12) as reimbursement for Promontory lease payments, basketball courts and administration; and

WHEREAS, on or about August 2, 2016, the District and the County entered into a Settlement, Indemnity, and Hold Harmless agreement whereby the District agreed to indemnify and hold harmless the County for the transfer of the requested amount and any “future requests for reimbursement” or any other transfer of monies to the District under the Mitigation Fee Act; and

WHEREAS, on or about September 6, 2016 the District revised its request to seek Four hundred fifteen thousand three hundred thirty-five dollars and twelve cents (\$415,335.12); and

WHEREAS, in or around May of 2017 the County transferred the amount of Four hundred fifteen thousand three hundred thirty-five dollars and twelve cents (\$415,335.12) in Park and

Recreation Impact Mitigation Fees to the District; and

WHEREAS, on or about May 4, 2017 the District made a request for dispersal of Park and Recreation Impact Mitigation Fees in the amount of One million three hundred six thousand eighty-six dollars and sixty-four cents (\$1,306,086.64) as reimbursement for the prepayment of the Promontory Capital Facilities Lease; and

WHEREAS, on or about May 8, 2017 the District made an additional request for disbursement of Park and Recreation Impact Mitigation Fees in the amount of Four hundred thirty-one thousand nine hundred eighty-three dollars and forty cents (\$431,983.40); and

WHEREAS, concern has arisen as to whether the original Settlement, Indemnity and Hold Harmless Agreement is sufficiently clear that the obligations of the District were intended to and do apply to any transfer of monies from the County to the District pursuant to a request from the District for a disbursement of Park and Recreation Impact Mitigation Fees subsequent to the transfer of the Four hundred fifteen thousand three hundred thirty-five dollars and twelve cents (\$415,335.12); and

WHEREAS, further concern has arisen regarding the personal liability of the members of the County Board of Supervisors and other officers, agents and employees of the County involved in the authorization of the transfer of or disbursement of Park and Recreation Impact Mitigation Fees from the County to the District; and

WHEREAS, both parties anticipate that the District will make additional requests to the County for disbursement of Park and Recreation Impact Mitigation Fees; and

WHEREAS, both parties confirm the continuing nature of their respective rights, responsibilities and obligations under the Agreement Pertaining to the Collection of Park and Recreation Fees and the August 2, 2016, Settlement, Indemnity and Hold Harmless Agreement; and

WHEREAS, by this Defense, Indemnity, and Hold Harmless Agreement, the parties intend to confirm that the obligation of the District to defend, indemnify, and hold harmless the County, its officers, agents and employees applies to each and every transfer of monies to the District made by the County in response to a request of the District under the Mitigation Fee Act, County Ordinance Code Chapter 13.30, the Agreement Pertaining to the Collection of Park and Recreation Fees, or any other instrument or law for the disbursement of Park and Recreation Impact Mitigation Fees; and

WHEREAS, both parties wish these monetary transfers occur as soon as possible without the need for litigation among the various parties.

THEREFORE, County and District mutually agree as follows:

1. Transfer of Funds

- A. Within fifteen (15) days following full execution of this Agreement, the County will transfer the amount of One Million seven hundred thirty-eight thousand seventy dollars and four cents (\$1,738,070.04) from the District's Development Impact Fee account held by the County to the operating account specified by the District.
- B. As to each and every future request for a transfer or disbursement of Park and Recreation Impact Mitigation fees, the District shall submit a written request for the transfer or disbursement to the County containing information regarding the request in accordance with the Mitigation Fee Act, County Ordinance Code Chapter 13.30 and the Agreement Pertaining to the Collection of Park and Recreation Fees ("Disbursement Request") or successor agreement. The Disbursement Request will be directed to both the County Auditor Controller and the Chief Administrative Officer.
- C. The County will within fifteen (15) days of the receipt of the District's request review the Disbursement Request to determine whether it contains the information required by the Mitigation Fee Act, County Ordinance Code Chapter 13.30 and the Agreement Pertaining to the Collection of Park and Recreation Fees or successor agreement. If the County believes that the Disbursement Request requires additional information, the parties shall meet and confer in good faith to resolve any documentation issues. Within fifteen (15) days of the County's verification of the compliance of the documentation with the requirements of the Mitigation Fee Act, County Ordinance Code Chapter 13.30 and the Agreement Pertaining to the Collection of Park and Recreation Fees, County shall transfer the verified amount requested from the District's Development Impact Fee account held by the County to a District operating account to be specified by the District.

2. District's Obligation to Defend, Indemnify, and Hold County Harmless.

To the fullest extent allowed by law, District covenants and agrees to defend, indemnify, and hold County, its officers (as set forth in Government Code section 24000), agents, and employees, in their official capacity or individually as a result of actions taken in their official capacity, harmless from and against any and all liability, loss, damage, claims, judgments, costs, expenses (including but not limited to attorney's fees, expert witness fees, paralegal fees, and fees and costs of litigation, mediation, or arbitration), and any other costs of defense (collectively, "Liability"), arising out of, resulting from, or related to the disbursement or transfer of fees to the District under this Agreement, the Agreement Pertaining to the Collection of Park and Recreation Fees, the Settlement, Indemnity and Hold Harmless Agreement, any other instrument for the disbursement of Park and Recreation Impact Mitigation Fees entered into between the parties, the Mitigation Fee Act and County Ordinance Code Chapter 13.30. To the fullest extent allowed by law, this defense, indemnification, and hold harmless obligation extends to damage to or loss of property arising out of, resulting from, or related to the disbursement or transfer of fees to the District under this Agreement, the Agreement Pertaining to the Collection of Park and Recreation Fees, the Settlement, Indemnity and Hold Harmless Agreement, any other instrument for the disbursement of Park and Recreation Impact Mitigation Fees entered into between the parties, County Ordinance Code Chapter 13.30 and the Mitigation Fee Act and to any negligent or intentional act or omission by County, its officers, agents, and

employees arising out of, resulting from, or related to the disbursement or transfer of fees to the District under this Agreement, the Agreement Pertaining to the Collection of Park and Recreation Fees, the Settlement, Indemnity and Hold Harmless Agreement, any other instrument for the disbursement of Park and Recreation Impact Mitigation Fees entered into between the parties, County Ordinance Code Chapter 13.30 and the Mitigation Fee Act unless the act is fraudulent or is known by such person at the time of doing it to be unlawful.

This duty to defend, indemnify, and hold harmless the County, its officers, agents and employees, in both their official capacity or individually as a result of actions taken in their official capacity includes the duty to defend any liability, loss, damage, claims, judgments, costs, expenses (including attorneys' fees, expert witness fees, paralegal fees, and fees and costs of litigation, mediation, or arbitration), and any other costs of defense (collectively, "Liability"), arising out of, resulting from, or related to any claimed violation of Government Code section 24054 arising out of, resulting from, or related to the disbursement or transfer of fees to the District under this Agreement, the Agreement Pertaining to the Collection of Park and Recreation Fees, the Settlement, Indemnity and Hold Harmless Agreement, any other instrument for the disbursement of Park and Recreation Impact Mitigation Fees entered into between the parties, County Ordinance Code Chapter 13.30 and the Mitigation Fee Act.

County shall promptly notify District of any claim, action, or proceeding, and the County shall not object to any application or motion by the District seeking to intervene in any such action. The District shall, with the consent of County, select and retain counsel for representation of the County as set forth in the Agreement. County's consent to the selection of counsel shall not be unreasonably withheld. The District and County shall confer in good faith as to the selection of any counsel, litigation strategy, and any settlement decisions.

If it is determined by a court, settlement agreement, or other binding decision that monies transferred by County to District are subject to refund pursuant to any provision of the Mitigation Fee Act, including but not limited to Government Code section 66001, or for any other reason, District covenants and agrees that it shall hold County, its officers, agents and employees harmless in regards to any such sums, including any interest required to be paid. District agrees that it shall reimburse County for the refund amount including any interest, provided for in the order or agreement requiring the refund and that such reimbursement by District to County, and the District shall either: (1) indemnify the County for the amount to refunded through direct payment to the County within thirty (30) days of written notice from the County of the amount due or (2) through the withholding of property tax revenue due the District or (3) any combination of the foregoing.

This duty to defend, indemnify, and hold harmless the County, its officers, agents and employees is expressly not applicable to any suit, action or claim brought by the District against the County, its officers, agents and employees arising out of, resulting from, or related to the disbursement or transfer of fees to the District under this Agreement, the Agreement Pertaining to the Collection of Park and Recreation Fees, the Settlement, Indemnity and Hold Harmless Agreement, any other instrument for the disbursement of Park and Recreation Impact Mitigation Fees entered into between the parties, and the Mitigation Fee Act.

This duty by the District to indemnify, hold harmless and defend also expressly excludes any obligation by the District to indemnify, hold harmless or defend the County Auditor based upon the case of *El Dorado Hills Community Services District v. Harn*, El Dorado County Superior Court Case No. PC20170166.

The duty by the District to indemnify, hold harmless and defend created under this agreement also expressly excludes any claim asserted against the County, its officers, directors, employees or agents in the pending case of *Thomas Austin and Helen Austin v. The County of El Dorado, et al.*, El Dorado Superior Court Case No. PC20150633, which is not based upon a disbursement by the County to the District pursuant to this Agreement. Nothing herein is intended to enhance, restrict or otherwise affect any responsibility of the District to defend, indemnify, and hold harmless the County pursuant to the Agreement Pertaining to the Collection of Park and Recreation Fees as related to the pending case of *Thomas Austin et al. v. The County of El Dorado et al.*, El Dorado County Superior Court Case No. PC20150633.

3. General Provisions.

A. Governing Law. This Agreement shall be governed by and construed with the laws of the State of California. Any action to interpret or enforce this Agreement shall be brought and maintained exclusively in the courts of and for El Dorado County. No such action may be instituted by either party until they have met and conferred over any disputed issues.

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. The duties, obligations, rights, and responsibilities of the parties set forth in the Agreement are in addition to such duties, obligations, rights, and responsibilities of the parties as set forth in the Agreement Pertaining to the Collection of Park and Recreation Fees; the Settlement, Indemnity and Hold Harmless Agreement; and the County Ordinance Chapter 13.30. This Agreement supersedes all prior negotiations, understandings, or agreements except as provided for in the preceding sentence. 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 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:

Don Ashton, Chief Administrative
Officer or successor.
330 Fair Lane
Placerville, CA 95667

DISTRICT:

Kevin Loewen, General Manager
1021 Harvard Way
El Dorado Hills, CA 95762

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. 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.

J. 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.

K. Termination. Either party may terminate this Agreement with at least sixty (60) days' written notice to the other party at any point in time after at least two (2) years from the execution of this Agreement or the conclusion of the *Thomas Austin and Helen Austin v. The County of El Dorado, et al.* matter referenced in paragraph 2, whichever occurs later.

L. 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 except for the obligations expressly set forth herein. 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.

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

County of El Dorado

Dated: _____

By: _____
Shiva Frentzen, Chairman, Board of
Supervisors

ATTEST: James S. Mitrison, Clerk of the Board

By: _____
Deputy Clerk

**El Dorado Hills Community Services
District**

Date: _____

By: _____
Allan Priest,
President, Board of Directors