



CITY COUNCIL STAFF REPORT

DATE: December 14, 2011

UNFINISHED BUSINESS

SUBJECT: APPROVE (1) A PRE-DEVELOPMENT FUNDING AGREEMENT BETWEEN THE CITY OF PALM SPRINGS, WESSMAN DEVELOPMENT COMPANY AND PALM SPRINGS PROMENADE, LLC, FOR THE REDEVELOPMENT OF CERTAIN REAL PROPERTY AT 123 NORTH PALM CANYON DRIVE AND (2) A RESOLUTION OF INTENTION TO REIMBURSE EXPENDITURES FROM THE PROCEEDS OF CERTAIN OBLIGATIONS AND DIRECTING CERTAIN ACTIONS RELATING TO THE ACQUISITION OF CERTAIN REAL PROPERTY AND THE REDEVELOPMENT OF THE DESERT FASHION PLAZA.

FROM: David H. Ready, City Manager

BY: Community and Economic Development

SUMMARY

The City Council will consider approving a Pre-Development Funding Agreement for the redevelopment of the Desert Fashion Plaza. The proposed Agreement is the result of recent negotiations with Palm Springs Promenade, LLC (the "Developer") and the City, which resulted in a Project Finance Agreement approved by the City Council on September 7, 2011.

Pursuant to the Project Financing Agreement, the City will acquire the public areas and the parking structure, which will assist the Developer to provide financing for a portion of the development project. In addition, the City, through Wessman Development, shall undertake the construction of all public streets and infrastructure on the site. The acquired properties include: (1) the real property containing the above ground parking structure, as well as the surface and underground level of the parking at the southwest corner of the site; (2) the underground parking structure beneath the developed shopping center; (3) two possible "museum expansion" sites; (4) the improved streets created by the project described as the Museum Street, Andreas Road and the Belardo extension; and (5) new public restrooms.

The passage of Measure J by the voters of Palm Springs, and the certification of the election by the City Council at its December 7, 2011, meeting, allow the City to proceed with the implementation of the Project Financing Agreement and the redevelopment of the Desert Fashion Plaza property.

ITEM NO. 4C

The Schedule contained in the Project Financing Agreement provides that, if the City can identify a source of funding for the project, it will waive its financing contingency by December 22, 2011. It also provides that the City may provide an early payment into the Acquisition Escrow, which will be opened in December. That payment is anticipated to be drawn by the Developer under the terms of the Project Financing Agreement, primarily for pre-development costs such as architecture and engineering.

RECOMMENDATION:

1. Approve an agreement with Wessman Development Company and Palm Springs Promenade, LLC for the redevelopment of certain real property at 123 North Palm Canyon Drive, commonly known as the Desert Fashion Plaza.
2. Adopt Resolution No. _____, "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, DECLARING INTENTION TO REIMBURSE EXPENDITURES FROM PROCEEDS OF CERTAIN OBLIGATIONS AND DIRECTING CERTAIN ACTIONS."
3. Adopt Resolution No. _____, "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, AMENDING THE 2011-2012 FISCAL YEAR BUDGET;"
4. Authorize the City Manager to execute all necessary documents.

STAFF ANALYSIS:

The attached agreement helps to implement the terms of the Project Financing Agreement approved by the City of Palm Springs and Wessman Development in September, 2011.

The passage of Measure J by the voters has given the City an identifiable source of funding for the Agreement. Collection of sales taxes under Measure J; however, will not commence until April 1, 2012, with the revenue beginning to be received by the City in July, 2012. The City anticipates the issuance of lease revenue bonds in early 2012 to finance approximately \$43 million of capital improvements and project costs relating to the renovation of the Desert Fashion Plaza. The Schedule in the Project Financing Agreement allows for the City to pre-fund or advance certain payments to the Acquisition Escrow, which may be ultimately drawn by the Developer, in order to commence the pre-development and design work on the project in a prompt and timely manner. It is proposed that between December 2011 and April 2012 (prior to the issuance of the bonds), the City will spend approximately \$500,000 on preliminary costs for the project. This advance of funds will allow for the Developer to meet an April timetable for the submission of early plans to the City for the entitlement of the actual buildings. Funds are available in the Fund Balance of the City, and will be reimbursed to the City through the

bond issue that would fund the City's financing commitment. Therefore, this is not an additional \$500,000 from the City but an advance of a portion of the City's existing financial commitment to the project.

The U.S. Tax Code allows the City to reimburse itself from the bond proceeds for any qualifying expenditures made within 60 days prior to the adoption of a resolution stating the City Council's intention to reimburse the expenditures, and continuing through the date of the issuance of the bonds. In order to ensure the City would be able to recapture this commitment through the bond issue, a Resolution of Intent for the bond issue is attached. The ability to reimburse such expenditures will allow the City to replenish its operating and capital reserves to the extent it was necessary during this fiscal year to draw from the reserves to fund payments for the project prior to the issuance of the bonds.

FISCAL IMPACT:

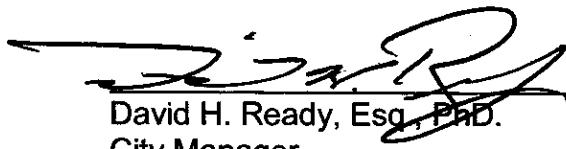
Funds for this agreement are available in the Unallocated Fund Balance of the General Fund, and shall be reimbursed to the General Fund from the bond issue.



John Raymond, Director
Community and Economic Development



Thomas J. Wilson
Assistant City Manager



David H. Ready, Esq., Ph.D.
City Manager

Attached Documents:

1. Resolution of Intent
2. Pre-Development Funding Agreement
3. Resolution Amending the Budget

RESOLUTION NO. _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, DECLARING INTENTION TO REIMBURSE EXPENDITURES FROM THE PROCEEDS OF CERTAIN OBLIGATIONS AND DIRECTING CERTAIN ACTIONS

RESOLVED, by the City Council of the City of Palm Springs, California:

WHEREAS, the City Council of the City of Palm Springs (the "City") proposes to undertake the project referenced below, to issue debt for such project and to use a portion of the proceeds of such debt to reimburse expenditures made for the project prior to the issuance of the debt;

WHEREAS, United States Income Tax Regulations section 1.150-2 provides generally that proceeds of tax-exempt debt are not deemed to be expended when such proceeds are used for reimbursement of expenditures made prior to the date of issuance of such debt unless certain procedures are followed, one of which is a requirement that (with certain exceptions), prior to the payment of any such expenditure, the issuer declare an intention to reimburse such expenditure; and

WHEREAS, it is in the public interest and for the public benefit that the City declare its official intent to reimburse the expenditures referenced herein;

NOW, THEREFORE, it is hereby DECLARED and ORDERED, as follows:

Section 1. The City intends to issue or to cause to be issued on its behalf, obligations (the "Obligations") for the purpose of financing the costs of acquisition of certain land and the construction and refurbishment of public improvements related to the Desert Fashion Plaza (the "Project").

Section 2. The City hereby declares that it reasonably expects (i) to pay certain costs of the Project prior to the date of issuance of the Obligations and (ii) to use, or to cause to be used, a portion of the proceeds of the Obligations for reimbursement of expenditures for the Project that are paid before the date of issuance of the Obligations.

Section 3. The approximate principal amount of the Obligations is \$48,000,000.

ADOPTED THIS ___th day of _____, 201__.

AYES: Members

NOES: None

ABSENT: None

ATTEST:

CITY OF PALM SPRINGS

By _____
City Clerk City Manager

REVIEWED AND APPROVED AS TO FORM _____

REIMBURSEMENT AGREEMENT

PRE-FUNDING DESIGN COSTS

This REIMBURSEMENT AGREEMENT for Pre-Funding Design Costs ("Agreement") is entered into as of this _____ day of _____, 2011, by and between the CITY OF PALM SPRINGS, a California public entity ("City"), and PALM SPRINGS PROMENADE, LLC, a California limited liability company (the "Owner").

R E C I T A L S

A. Owner is the owner of the Desert Fashion Plaza. Owner and City have entered into a Project Financing Agreement ("PFA"), dated September 29, 2011, for the revitalization of the Desert Fashion Plaza ("Project"). Pursuant to the terms of the PFA, the City is obligated to deposit certain funds in an Acquisition Escrow when the City completes the issuance of certain bonds to fund the City obligations under the PFA. It is anticipated that such deposit of funds will not occur until approximately April 15, 2012. Upon close of the Acquisition Escrow, the a portion of the funds in the Acquisition Escrow will be deposited in Private Improvement Escrow and a portion of the funds in the Acquisition Escrow will be deposited in the Public Improvement Escrow. The funds will subsequently be used in a manner consistent with the specific requirements of the PFA and applicable implementing agreements contemplated in the PFA.

B. City and Owner desire to provide a mechanism, contemplated in the PFA, that would allow the City to pre-fund a portion of its obligations under the PFA by reimbursing Owner for design and other soft costs necessary to prepare submittal and application documents to the City for entitlement review and approval. Such reimbursements shall be paid directly to Developer and will not be deposited in the Acquisition Escrow; however, such payments will be deemed a credit towards the City obligation under the PFA to deposit funds in the Acquisition Escrow. City shall also be entitled to secure reimbursement of any payments to Developer in advance of the close of the Acquisition Escrow from the proceeds of any bond program initiated and approved by the City to fund its obligations under the PFA.

A G R E E M E N T

Based upon the foregoing Recitals and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by both parties, City and Owner hereby agree as follows:

1. **Pre-Closing Period.** The City and Owner acknowledge that time is of the essence and agree, for the Pre-Closing Period (the time between the date of this Agreement and the date the Acquisition Escrow closes), to work diligently and in good faith to pursue the Project, and cause preparation of plans, designs, drawings, and schematics in sufficient detail to submit an application for the City of Palm Springs to process and review development entitlements related to the Project.

2. Owner's Responsibility for Design. Owner shall be solely responsible for design of the Project, consisting of the preparation of plans, drawings, and schematics as described in Section 1. Owner shall submit all design documents to the City, conforming to all applicable legal authority and standards, in accord with established City policies and procedures and compliance with all applicable authority, and City shall receive and expeditiously review and process same. The adequacy of "work product" with respect to design documents shall be subject to the City's reasonable satisfaction. All parties acknowledge that the City shall have, with respect to any formal applications submitted by Owner, normal discretionary approval rights as provided under State law and City Ordinances.

3. City Reimbursement. City shall promptly, within 30 days after receipt from Owner of bills and reasonable supporting information, reimburse Owner for Owner's Pre-Closing Costs, as from time to time incurred; provided, however, the total reimbursement obligation of City shall not exceed Five Hundred Thousand Dollars (\$500,000.00).

4. Compliance With Laws. All work performed under the terms of this Agreement shall be in strict conformity with all laws, ordinances, rules, regulations applicable to the Project and shall require the design professionals retained to prepare the design documents to comply with all such requirements.

5. Insurance.

5.1 Owner's and Contractor's Insurance.

5.1.1 At all relevant times during this Agreement and until the City has accepted the work, the Owner shall, if requested by City, require each design professional to maintain at least \$1,000,000 in errors and omissions (professional liability) insurance applicable to his/its design work, and to defend, indemnify and hold harmless the City and its respective officers, employees, and agents, from any and all claims due to the design professional's negligent acts or omissions or intentional wrongful conduct in its performance of design work. Such insurance shall be in form and substance as reasonably acceptable to City.

5.1.2 Design professionals shall also provide the following insurance for its work on the Project:

(a) Workers' compensation insurance in at least the minimum amounts required under California Law.

(b) Comprehensive general liability insurance, for injuries to persons and property, and automobile liability insurance, each with limits not less than \$1,000,000 combined single limit, per occurrence and \$2,000,000 in the aggregate.

5.1.3 Each insurance policy required to be maintained pursuant to this Section 5.1 shall be issued by a company admitted in California and having an A.M. Best's Guide Rating of "A-", Class VII or better. The Owner shall, if requested by City, require its design professionals to obtain and provide to City an endorsement for each of the policies providing the above insurance (except for worker's compensation insurance and errors and omissions

insurance) naming the City and its respective officers, employees and agents as additional insureds. Each policy shall be endorsed to require 30 days advance notice to the City of cancellation or material modification of the policy. Each worker's compensation policy shall be endorsed to waive any right of subrogation against the City.

6. Indemnification. To the maximum extent authorized by law and except for claims arising out of the negligence of the City, its officers, employees, or agents, or the violation of any obligation of the City under the terms of this Agreement, including, without limitation, the failure of the City to make any reimbursement due pursuant to this Agreement, the Owner agrees to protect, defend, indemnify and hold harmless the City and the City and its elected and appointed boards, officers, agents and employees (1) from any and all claims, liabilities, expenses, stop notices, or damages of any nature, including attorneys' fees and expert costs, for injury to, or death of, any person, for injury to any property, and for any other monetary damage of any nature resulting from, arising out of or in any way connected with the breach of this Agreement by or on behalf of the Owner, and (2) from violation of any statute, law, regulation or other legal requirement applicable to the design of improvements. The obligations set forth in this Section 6 shall survive the termination of this Agreement until all such obligations are fully and finally resolved.

7. Termination. City may terminate this Agreement upon giving Owner thirty (30) days written notice, in the event of substantial failure by the Owner to fulfill its obligations under this Agreement, through no fault of the City; provided, however, Owner shall have fifteen (15) days to commence any cure of any such substantial failure, and the Agreement shall not be terminated so long as Owner commences and diligently pursues such cure. Upon any final termination, the Owner shall (1) promptly cause all design contractors to discontinue all affected work (unless the notice directs otherwise), and (2) deliver or otherwise make available to the City copies of all data, drawings, specifications, reports, estimates, summaries and such other information and materials as may have been accumulated by the Owner in performing this Agreement whether completed or in progress. Owner shall be entitled to reimbursement for all reimbursable expenses incurred through the date of final termination in accordance with Section 3, above.

8. Credit Towards City's Obligations. The amount of all funds paid to Owner under the provisions of this Agreement shall be deemed a credit towards the City's obligations to deposit certain funds in the Acquisition Escrow as provided in the PFA. The Parties agree that City shall reimburse itself in an amount equal to the total amount of payments made to Owner under the terms of this Agreement from the proceeds of any public financing or bonds approved, issued, or sold, to finance the City's obligations under the PFA.

9. Miscellaneous.

9.1 Entire Agreement, Waivers, and Amendments. This Agreement is separate and distinct from any prior reimbursement agreement between the parties, constitutes the entire understanding and agreement of the parties with respect to the subject matter set forth herein, and supersedes all previous negotiations, discussions, and agreements between the parties with respect to all or the subject matter hereof. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the party to be charged. A waiver

of the breach of the covenants, conditions or obligations under this Agreement by any party shall not be construed as a waiver of any succeeding breach of the same or other covenants, conditions or obligations of this Agreement. Any amendment or modification to this Agreement must be in writing and executed by the appropriate authorities of City and Owner.

9.2 Successors and Assigns. This Agreement shall be binding upon the parties and shall inure to all successors in interest of City and to all successors in interest and assigns of Owner in and to the Property.

9.3 Attorneys' Fees and Costs. If either party to this Agreement commences an action against the other party to this Agreement arising out of or in connection with this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees, expert fees, costs of investigation, and costs of suit from the losing party.

9.4 Interpretation; Governing Law. This Agreement shall be construed according to its fair meaning and as if prepared by both of the parties hereto. This Agreement shall be construed in accordance with the internal laws of the State of California without regard to conflict of law principles.

9.5 Severability. If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of this Agreement shall not be affected thereby to the extent such remaining provisions are not rendered impractical to perform taking into consideration the purposes of this Agreement.

9.6 Non-Liability of Officials and Employees of the City. No official or employee of City or the City shall be personally liable to Owner in the event of any default or breach by City, or for any amount that will become due to Owner, or any obligation under the terms of this Agreement.

9.7 No Third-Party Beneficiaries. This Agreement is made only for the benefit of the parties hereto; it is not intended that any rights under this Agreement shall accrue to any third person.

9.8 Independent Contractor. It is expressly understood and agreed by the Parties that the Owner, while engaged in carrying out the terms and conditions of this Agreement, is an independent contractors and not an employee of the City.

9.9 Authority to Execute. The persons executing this Agreement warrant and represent that they have the authority to execute this Agreement and represent that they have the authority to bind the parties for which they are signing to the performance of the obligations hereunder.

9.10 Execution in Counterpart. This Agreement may be executed in several counterparts, and all so executed shall constitute one agreement binding on both parties hereto, notwithstanding that both parties are not signatories to the original or the same counterpart.

9.11 Cooperation. Subject to the City's discretionary approval rights as set forth in Section 2 above, each party agrees to do and perform such other and further acts, and execute and deliver such other and further acts as may be reasonably necessary to effectuate the intents and purposes of this Agreement.

(signatures on next page)

IN WITNESS WHEREOF, City and Owner have entered into this Agreement as of the date set forth above.

“CITY”

CITY OF PALM SPRINGS

By: _____
Its: _____

ATTEST:

APPROVED AS TO FORM:

“OWNER”

By: _____
Its: _____