



DATE: April 20, 2020

TO: Mayor and Members of the City Council

VIA: Jeff Moneda, City Manager

FROM: Jean Savaree, City Attorney
Norm Dorais, Public Works Director/City Engineer

SUBJECT: AGREEMENT FOR SALE OF MITIGATION CREDITS TO SATISFY REGIONAL WATER QUALITY CONTROL BOARD CERTIFICATION CONDITION FOR LEVEE PROTECTION PLANNING AND IMPROVEMENTS PROJECT (CIP 301-657)

RECOMMENDATION

It is recommended that the City Council review, enter into, and approve the attached new Agreement for Sale of Mitigation Credits (Agreement) between Keech Properties, LLC (Sponsor) and the City pursuant to which the City has the right to purchase from the Sponsor 0.05 credits of Wetland Creation and 0.05 credits of Other Water Creation for the purchase price of \$170,000 until May 25, 2020, upon which date the Agreement shall become null and void if the payment is not made. It is further recommended that the City Council adopt the attached Resolution authorizing the City Manager to execute the Agreement, execute an amendment to the Agreement as may be necessary to extend the purchase deadline, make the aforementioned payment to the Sponsor, and execute the Bill of Sale in the form attached to the Agreement.

EXECUTIVE SUMMARY & BACKGROUND

On October 23, 2019, the San Francisco Bay Regional Water Quality Control Board (RWQCB) issued a Clean Water Act Section 401 Water Quality Certification and Order for the City of Foster City Levee Protection Planning and Improvements Project (Certification). Condition No. 14 of the Certification requires the City to mitigate the Project's permanent impacts to waters of the State by purchasing 0.05 acre of wetland creation mitigation credits and 0.05 acre of other waters creation mitigation credits from

the San Francisco Bay Wetland Mitigation Bank in Redwood City, San Mateo County.

To document satisfaction with this condition, the City was required to submit to the Executive Director of the RWQCB no later than November 22, 2019 an executed purchase agreement demonstrating that the City has secured the purchase of no less than 0.05 acre of wetland mitigation credits and 0.05 acre of other waters creation mitigation credits. The condition further requires the City to submit to the RWQCB Executive Director a Bill of Sale demonstrating the mitigation credits specified in the Purchase Agreement have been purchased no later than 30 days prior to the start of construction.

The Sponsor has entitlements to the San Francisco Bay Wetland Mitigation Bank in Redwood City, San Mateo County and has been authorized by the San Francisco District of the U.S. Army Corps of Engineers (USACE) and the Region 9 of the U.S. Environmental Protection Agency (USEPA) to operate as a Mitigation Bank with credits available for sale. There are no apparent regulatory restrictions on the price the Sponsor can set for purchasing the mitigation credits.

Following City Council action and approval on November 18, 2019, the City entered into a purchase agreement with the Sponsor for the purchase of the required mitigation credits for the price of \$150,000. On November 19, 2019, the fully executed purchase agreement was both mailed and e-mailed to the RWQCB in satisfaction of Condition No. 14, and was also mailed and emailed to the Sponsor on November 19, 2019. The deadline under the executed purchase agreement to complete the purchase of the mitigation credits was December 23, 2019.

Staff had been under the impression that the Sponsor would send the City an invoice for the purchase price so the Finance Department could issue a check to the Sponsor for satisfaction of the Agreement. No invoice was sent or received, unfortunately, and the December 23, 2019 deadline passed before this was brought to staff's attention by the RWQCB via the City's consultants (Huffman Broadway Group). When the City's consultants reached out to the Sponsor at the City's direction to request the invoice so payment could be initiated, the Sponsor refused on the grounds that his price for the required mitigation credits had since increased. Following the Sponsor's refusal of the City Manager's formal request that the Sponsor reconsider his position, and following consultation with the City Attorney who determined that the agreement did not require the sponsor to deliver an invoice and therefore the purchase agreement had expired on its terms on December 23, 2019 when payment had not been made, a new agreement with the Sponsor was negotiated.

The enclosed new Agreement (Attachment 2), prepared and delivered by Sponsor, increases the price of the credits to \$170,000 and extends the deadline for payment to May 25, 2020. At staff's request, the Sponsor also prepared and delivered the enclosed

invoice (Attachment 3) which will allow for the Finance Department to immediately process the payment.

ANALYSIS

The proposed Agreement (Attachment 2) between the City and the Sponsor secures the City's right to purchase the required Mitigation Bank credits until May 25, 2020, thereby satisfying the first part of Condition No. 14 of the Certification. The City will use the attached invoice in order to generate the payment. Upon the City's payment to the Sponsor of the purchase price in the amount of \$170,000 on or before May 25, 2020 (unless such deadline is extended), Sponsor will then deliver to the City a Bill of Sale in the form attached to the Agreement, thereby satisfying the second part of Condition No. 14 if delivered at least 30 days prior to the start of the levee construction.

FISCAL IMPACT

Approval of the Agreement for Sale of Mitigation Credits and associated Resolution will authorize the City Manager to purchase the mitigation banking credits required to satisfy conditions imposed by the RWQCB Certification resulting in expenditure of \$170,000 from general obligation bonds approved by the City voters for the acquisition, construction, repair, and replacement of a public levee system.

Attachments:

- Attachment 1 – Resolution
- Attachment 2 – Agreement for Sale of Mitigation Credits
- Attachment 3 – Invoice dated March 26, 2020