

## **REIMBURSEMENT AND INDEMNIFICATION AGREEMENT**

This AGREEMENT (AGREEMENT) is made, and entered into this \_\_\_\_ day of April, 2020, ("EFFECTIVE DATE") by and between the County of San Benito ("COUNTY") and the Thomas John McDowell and Victoria McDowell Charitable Remainder Unitrust, dated March 7, 2005, and the McDowell Family Trust, dated February 16, 2004, ("OWNERS"), record owners of property identified as Assessor Parcel Nos. 013-150-017; 013-150-018; 013-150-024; and 013-150-025 near the Betabel Road interchange ("OWNERS' PROPERTY"), located within the area identified by the 2035 General Plan as one of the highway commercial zones along U.S. Highway 101 in San Benito County, California

WHEREAS, in 2016, COUNTY adopted its new 2035 General Plan in which regional commercial nodes are identified along U.S. Highway 101 in San Benito County, including the OWNERS' PROPERTY;

WHEREAS, a zoning text amendment ordinance to establish regulations for a C-3 regional commercial zoning district was adopted by COUNTY on September 24, 2019, in order to implement and effectuate the regional commercial nodes along U.S. Highway 101 in San Benito County, as identified in the 2035 General Plan, Ordinance No. 991;

WHEREAS, COUNTY also adopted Ordinance No. 992 to amend COUNTY's zoning map to rezone a 29-acre area of OWNERS' PROPERTY from Agricultural Rangeland – Floodplain Combining District to C-3 (Regional Commercial) on September 24, 2019;

WHEREAS, the voters of the County of San Benito rescinded by referendum Ordinance 991 on March 3, 2020;

WHEREAS, Ordinance 992 was not subject to referendum and therefore a portion of OWNERS' PROPERTY is zoned as C-3 (Regional Commercial) but there are no longer any regulations governing any uses within such area;

WHEREAS, COUNTY recognizes that it is appropriate to restore the zoning for the 29 acre portion of OWNERS' PROPERTY to Agricultural Rangeland – Floodplain Combining District, as the area was zoned prior to COUNTY's adoption of Ordinance No. 991;

WHEREAS, OWNERS applied to COUNTY to rezone the same 29-acre area portion of OWNERS' PROPERTY to apply a C-1 (Commercial Thoroughfare) Combining District to allow for commercial development (the "PROJECT") consistent with the 2035 General Plan;

WHEREAS, OWNERS have reimbursed COUNTY for all costs and expenses incurred by COUNTY for outside planning consulting provided by EMC Planning Group, Inc. and legal services provided by Thomas Law Group through November 30, 2019, in the total amount of Thirty-Seven Thousand One Hundred Eighty-three and 01/100 Dollars (\$37,183.01), which amount does not include any internal staff fees, or other costs for publication of legal notices, or processing the OWNERS' application.

NOW, THEREFORE, in consideration of the foregoing promises and in order to carry out the intent and purpose of applicable codes, ordinances, resolutions and regulations, OWNERS and COUNTY agree as follows:

## SECTION 1. DEPOSITS

### 1.1 Posting the Deposit(s)

- A. **Acknowledgment of Application Fee Deposit:** COUNTY and OWNERS acknowledge receipt by the COUNTY of an application fee deposit made on behalf of OWNERS for processing OWNERS' application for a zoning map amendment in the amount of \$11,960.40 on or about October 15, 2019, charged in accordance with COUNTY's standard adopted fee schedule.
- B. **Acknowledgment of Deposits for Outside Services:** COUNTY and OWNERS acknowledge receipt by the COUNTY of Ten Thousand Dollars (\$10,000.00) on or about November 22, 2019, and Twenty Thousand Seven Hundred Seventy-two and 61/100 Dollars (\$20,772.61) on or about March 20, 2020;.
- C. **Application of Deposits Made to Date:** COUNTY shall first apply Deposits to Outside Services to payment of fees incurred for Outside Services provided by EMC Planning Group, Inc. and Thomas Law Group and shall next apply the amount necessary to satisfy the balance due, if any, from the Application Fee Deposit.
- D. **Additional Payments:** To the extent the remaining balance of the Application Fee Deposit or Deposits for Outside Services are not sufficient to fully satisfy County costs<sup>1</sup>, requests to OWNERS for additional payments may be made in writing by the Director of the Resource Management Agency ("Director") or the Director's designee, which amounts OWNERS agree to pay within thirty (30) days of COUNTY's approval of the PROJECT.
- E. **Litigation Expenses:** In the event that any legal challenge is filed as a result of the PROJECT processed under this AGREEMENT, COUNTY shall retain any unapplied balance to defray costs incurred in assembling and certifying the Administrative Record of proceedings, or in conducting the mandatory settlement meeting pursuant to Public Resources Code section 21167.8. To the extent the remaining balance of the Deposits is is not sufficient to fully satisfy County costs incurred in any litigation, requests to OWNERS for additional payments may be made in writing by the Director of the Resource Management Agency ("Director") or the Director's designee, which amounts OWNERS agree to pay within thirty (30) days of the date requested, independent of Section 7 of this Agreement.

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<sup>1</sup> COUNTY Costs include, but are not limited to, the Resource Management Agency (Planning & Public Works), Office of County Counsel, Environmental Health, Administration, Clerk of the Board, GIS Department, Integrated Waste, and the Clerk/Auditor/Recorder, expended on PROJECT-related activities. Such staff time includes direct labor costs as well as departmental and indirect overhead costs. COUNTY shall bill at the COUNTY's normal hourly rates, which may include overhead charges if incorporated into the hourly rate.staff time, and additional application processing costs, including but not limited to legal publication, noticing, posting, and other costs incurred by COUNTY in processing OWNERS' application.

## **1.2 Accounting**

- A. COUNTY shall return to OWNERS any unapplied funds remaining from the Deposits within one hundred and eighty (180) days after COUNTY'S approval of the Project by the Board of Supervisors, except to the extent that OWNERS have not satisfied their obligations pursuant to this AGREEMENT.
- B. **Interest on Deposits:** OWNERS acknowledge and agree that they shall not receive any interest on the Deposit or other Payments.
- C. **Late Fees / Interest on Unpaid Balance:** Accounts not paid within thirty (30) days of the date of the invoice are subject to a one percent (1%) monthly finance charge. OWNERS agree to pay collection costs, including reasonable attorneys' fees and costs of suit, in any action COUNTY may bring to recover unpaid past due amounts.

## **SECTION 2. FEES, PERMITS AND COUNTY REGULATIONS**

The limitations in this Agreement apply only to the OWNERS' application for a zoning map amendment for the PROJECT and do not apply to any other conditional use permit, building permit or other application or project that may arise with regard to OWNERS' property in the future. Additionally, notwithstanding the foregoing, OWNERS shall be responsible to pay any fee not expressly abrogated by this AGREEMENT with respect to any future development of their respective properties, including, but not limited to, any ministerial fee(s) on required permits such as building permits, grading permits, and the like, and any fees or expenses approved by the Planning Commission and/or Board of Supervisors that are made part of any future conditions of approval for future development within and subject to the applicable C-1 (Commercial Thoroughfare) overlay combining district, and any fees related to applications for other related discretionary approvals. Nothing in this AGREEMENT shall be deemed to abrogate the responsibility of OWNERS to obtain any required permit(s) or comply with any laws associated with any applications, permits, studies, or construction activities related to future building and development for commercial purposes within the PROJECT area subject to the C-1 (Commercial Thoroughfare) overlay combining district. This AGREEMENT does not apply to any fees the OWNERS are required to pay to any entity other than the COUNTY of San Benito.

## **SECTION 3. TERM**

Subject to Section 4, the term of this AGREEMENT shall commence on the Effective Date and terminate upon the later of (a) one year from the approval of the proposed zone change and/or zoning amendment by the San Benito County Board of Supervisors, or (b) six months after the completion of any related litigation arising out of the Board's approvals, whichever occurs last. Nothing herein shall be deemed to abrogate OWNERS' responsibility to pay for ongoing expenses, including litigation expenses, incurred by COUNTY as a result of PROJECT-related activities, which activities occurred during the term of this AGREEMENT. Nothing in this AGREEMENT shall be construed to vest any rights to develop the PROJECT or require COUNTY approval of the PROJECT.

## SECTION 4. TERMINATION

EITHER PARTY may, at its option, terminate this AGREEMENT at any time on thirty (30) days' prior written notice to the other party ("Termination Notice"). In the event of termination, OWNERS shall be responsible for the payment of all PROJECT Costs incurred up to and including the date of termination. COUNTY shall apply the sums maintained in the Payment to any unreimbursed PROJECT Costs through the termination date, and COUNTY shall then refund any remaining Payment funds to OWNERS within thirty (30) days of the date of termination.

## SECTION 5. NOTICES

All notices called for in this AGREEMENT shall be given in writing by personal delivery, electronic mail or facsimile (with copy of such notice sent not later than the next day by mail or overnight private courier in accordance with the provision herein) or by overnight mail or overnight private courier. Facsimile notices shall be deemed received on the day sent if sent prior to 6:00 p.m. Pacific Time or if sent after 6:00 p.m. Pacific Time, then deemed received on the next day. Overnight mail or couriered notices shall be deemed received the next business day following deposit into the U.S. mail or delivery to the private courier. First class mail, postage prepaid, shall be deemed received three days after postmark. Mailed or couriered notices shall be addressed as set forth below, but either party may change its contact information by giving written notice thereof to the other in accordance with the provisions of this Section 5.

### To the COUNTY:

Harry Mavrogenes  
Director, Resource Management  
Department  
County of San Benito  
2301 Technology Parkway  
Hollister, CA 95023-2513  
Email: [hmavrogenes@cosb.us](mailto:hmavrogenes@cosb.us)  
Fax: 831.637.5334

### With a copy to:

Barbara Thompson  
County Counsel  
  
County of San Benito  
481 Fourth Street, 2<sup>nd</sup> Floor  
Hollister, CA 95023  
Email: [bthompson@cosb.us](mailto:bthompson@cosb.us)  
Fax: 831.636.4044

### To OWNERS:

Rider McDowell  
200 Clock Tower Pl. Suite E212  
Carmel, CA 93923-8772  
Email: [cutstinger@gmail.com](mailto:cutstinger@gmail.com)

### With a copy to:

Zachary Walton  
SSL Law Firm LLP  
505 Montgomery St., Suite 620  
San Francisco, CA 94111  
Email: [zack@sslfirm.com](mailto:zack@sslfirm.com)  
Fax: 415.814.6401

## SECTION 6. DEFAULT BY OWNER

**6.1 Default.** If OWNERS default on any of the terms and/or conditions of this AGREEMENT, the Director will give written notice of such default ("Default Notice") to OWNERS. If OWNERS do not remedy such default within thirty (30) calendar days of

OWNERS' receipt of such Default Notice, the Director may terminate this AGREEMENT by delivering written notice of such termination to OWNERS.

**6.2** During the pendency of any notice period, whether for monetary or non-monetary default(s), COUNTY, at COUNTY'S option, may suspend processing and/or consultant activities related to the PROJECT until such default is cured by OWNERS.

## **SECTION 7: IDEMNIFICATION**

OWNERS and COUNTY shall enter into an indemnification agreement within thirty (30) days of the initiation of litigation related to the PROJECT. COUNTY acknowledges that OWNERS may hire counsel to defend the PROJECT approvals pursuant to such agreement. If the parties do not enter into such agreement to COUNTY's reasonable satisfaction, in COUNTY's sole discretion, it may abandon the litigation and rescind the PROJECT approvals and stipulate to the entry of judgment on such terms as the COUNTY determines to be appropriate, in the sole discretion of the COUNTY, subject only to approval by the Court. OWNER shall be responsible for, indemnify, and hold COUNTY harmless for any fees or costs awarded by the Court to petitioner or plaintiff in the action. If COUNTY elects to defend litigation related to the PROJECT despite the parties not entering into an indemnification agreement, all future expenses and costs shall be at the sole cost of COUNTY.

OWNERS' obligations pursuant to this SECTION 7 shall survive suspension or termination of this AGREEMENT. Costs incurred under this Section shall be the actual costs resulting from the litigation, including any attorneys fees incurred by COUNTY prior to any election by the COUNTY to defend litigation related to the PROJECT despite the parties not entering into an indemnification agreement, as well as any judgment or award of attorneys fees to an opposing prevailing party or parties.

## **SECTION 8. NO WAIVER OF IMMUNITIES**

Nothing in this AGREEMENT shall be construed as a waiver by COUNTY of any of the immunities granted to it under Federal, State or local law, including the provisions of Sections 818.6, 830.6 and 831.3 of the California Government Code.

## **SECTION 9. COMPLETE AGREEMENT**

Except as may otherwise be explicitly set forth herein, this AGREEMENT constitutes the final, complete, and exclusive statement of the terms hereof between COUNTY and OWNERS related to the subject matter set forth herein. Neither party is relying on any representation or warranty outside those expressly set forth in this AGREEMENT. Any and all amendments to this AGREEMENT shall be in writing, shall be stated as an amendment to this AGREEMENT and shall be executed by both parties.

## **SECTION 10. UNENFORCEABILITY; SEVERABILITY**

If a court of competent jurisdiction holds any clause or portion of this AGREEMENT to be invalid or unenforceable in whole or in part for any reason, the validity and enforceability of the remaining clauses, or portions of them, shall not be affected unless an essential purpose of this AGREEMENT would be defeated by loss of the invalid or unenforceable provision. To that end, this

AGREEMENT shall be construed as not containing such clause and the provisions of this AGREEMENT are declared to be severable.

#### **SECTION 11.           SUCCESSORS AND ASSIGNS**

This AGREEMENT shall bind and benefit OWNERS and COUNTY and their successors-in-interest, whether voluntary or involuntary. OWNERS agrees to require any successor to assume all duties and obligations set forth herein. OWNERS shall provide COUNTY with notice of any transfer of ownership interest in the PROJECT or subject property.

#### **SECTION 12.           APPLICABLE LAW**

This AGREEMENT shall be construed and enforced in accordance with the laws of the State of California. All references to statutes and regulations shall include all amendments, replacements, and enactments on the subject as of the Effective Date and any later changes which do not materially and substantially alter the positions of COUNTY and OWNERS.

#### **SECTION 13.           NO THIRD PARTY RIGHTS**

This AGREEMENT is not intended to be, and shall not be, construed to create any third-party beneficiary rights in any person or entity who is not a party, unless expressly provided herein.

#### **SECTION 14.           NO JOINT VENTURE OR PARTNERSHIP**

The parties specifically acknowledge that each party is an independent entity with respect to the terms contained in this AGREEMENT. None of the terms of this AGREEMENT shall be deemed to create a partnership between the parties in the businesses of OWNERS or the affairs of COUNTY, or otherwise, or cause them to be considered joint venturers or members of any joint enterprise.

#### **SECTION 15.           CONSTRUCTION**

Each party hereto declares and represents that in entering into this AGREEMENT, it has relied and is relying solely upon its own judgment, belief, and knowledge of the nature, extent, effect, and consequence relating thereto. Each party further declares and represents that this AGREEMENT is made without reliance upon any statement or representation not contained herein of any other party or any representative, agent, or attorney of the other party. The parties agree that they are aware they have the right to be advised by counsel with respect to the negotiations, terms, and conditions of this AGREEMENT and that the decision of whether or not to seek the advice of counsel with respect to this AGREEMENT is a decision which is the sole responsibility of each of the parties. Accordingly, no party shall be deemed to have been the drafter hereof, and the principle of law set forth in Civil Code § 1654 that contracts are construed against the drafter shall not apply.

## **SECTION 16. COOPERATION**

OWNERS and COUNTY shall cooperate fully in the execution of any and all other documents and in the completion of any additional actions that may be necessary or appropriate to give full force and effect to the terms and intent of this AGREEMENT. The parties shall act in good faith toward each other and shall act in a fair, diligent, and reasonable manner, and neither party shall take any action that will prohibit, impair, or impede the other party's exercise of enjoyment of its rights and obligations secured through this AGREEMENT.

## **SECTION 17. JURISDICTION AND VENUE**

This AGREEMENT is executed and is to be performed in the County of San Benito, California, and any action or proceeding brought relative to this AGREEMENT shall be heard in San Benito County Superior Court. COUNTY and OWNERS each consent to the personal jurisdiction of the court in any such action or proceeding.

## **SECTION 18. REPRESENTATIONS OF AUTHORITY**

Each party signing this AGREEMENT represents and warrants to the other party that all necessary legal prerequisites to that party's execution of this AGREEMENT have been satisfied and that the signatory has been authorized to sign this AGREEMENT and bind the party on whose behalf the signatory signs.

## **SECTION 19. NO PROMISE OR REPRESENTATION**

OWNERS and COUNTY agree that nothing in this AGREEMENT is to be construed as a representation, promise, or commitment on the part of COUNTY to give special treatment to, or exercise its discretion favorably for, the PROJECT or OWNERS.

## **SECTION 20. JOINT AND SEVERAL OBLIGATIONS OF OWNERS**

OWNERS acknowledge, represent, warrant and agree, that although each is an independent and separate entity which maintains an ownership interest in regional commercial nodes which comprise the PROJECT area, respectively, they each shall be equally, jointly and severally responsible for any and all of the obligations (financial and otherwise) as set forth in this AGREEMENT, as regards indemnity only as to any OWNER who has not provided notice of opting out or abandonment of the litigation.

## **SECTION 21: ENFORCEMENT OF CONTRACT**

The Parties acknowledge that the County would not enter into this Agreement if it might expose its assets to the risk of damages arising from failed expectations in the development of the Project and, for that reason, agree that the sole remedies for any breach of this Agreement shall be specific performance, reformation and rescission. Nothing in this section shall excuse any Party from its obligations under the California Government Claims Act, Government Code sections 810 *et seq.*, or Government Code section 65860 (b).

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be duly executed as of the date first above written.

COUNTY

San Benito County Board of Supervisors

By: \_\_\_\_\_  
Jaime De La Cruz, Chair

Date: \_\_\_\_\_

ATTEST:

Clerk of the Board

By: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO LEGAL FORM  
San Benito County Counsel's Office

By: \_\_\_\_\_  
Joel Ellinwood, Assistant County Counsel

Date: \_\_\_\_\_

OWNERS

Thomas John McDowell and Victoria  
McDowell Charitable Remainder Unitrust,  
Dated March 7, 2005

By: \_\_\_\_\_  
Thomas John McDowell, Trustee

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Victoria McDowell, Trustee

Date: \_\_\_\_\_

McDowell Family Trust, Dated  
February 16, 2004

By: \_\_\_\_\_  
Thomas John McDowell, Trustee

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Victoria Knight McDowell, Trustee

Date: \_\_\_\_\_