

FIRST AMENDMENT TO REIMBURSEMENT AND INDEMNIFICATION AGREEMENT

This FIRST AMENDMENT TO REIMBURSEMENT AND INDEMNIFICATION AGREEMENT (FIRST AMENDMENT) is made, and entered into this 19th day of May, 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, on April 7, 2020, the Parties entered into a Reimbursement and Indemnification Agreement (AGREEMENT) in conjunction with the adoption of Ordinance No. 1008 by the County to rezone a 29-acre portion of OWNERS' PROPERTY with a Thoroughfare Commercial (C-1) combining district (the PROJECT); and,

WHEREAS, Section 7 of the AGREEMENT provided that the Parties would enter into an indemnification agreement within thirty (30) days of the initiation of litigation related to the PROJECT; and,

WHEREAS, litigation was initiated on April 22, 2020, in San Benito County Superior Court Case No. CU-20-00053, by Protect Our Rural Communities (PORC), Plaintiff and Petitioner, vs. COUNTY, and the San Benito County Board of Supervisors, Defendants and Respondents, and the Thomas John McDowell and Victoria McDowell Charitable Remainder Unitrust, Real Parties in Interest; and,

WHEREAS, the Parties desire to set forth the initial terms of an indemnification agreement for purposes of defending an application for a preliminary injunction now set for hearing on May 19, 2020;

NOW, THEREFORE, in consideration of the foregoing, OWNERS and COUNTY agree to this FIRST AMENDMENT, to amend Paragraph 7 of the AGREEMENT on the following terms and conditions, to read as follows:

Section 7. INDEMNIFICATION:

OWNERS shall defend, indemnify, and hold COUNTY free and harmless from any and all suits, fees, claims, demands, causes of action, proceedings (hereinafter collectively referred to as "LEGAL ACTIONS"), costs, losses, damages, liabilities and expenses (including, but not limited to, an award of attorneys' fees, expert witness fees, and court costs) (collectively, "LITIGATION COSTS") directly incurred by COUNTY arising or resulting from the review, processing, consideration, or from the approval of OWNERS' PROJECT or action taken by COUNTY thereon.

COUNTY acknowledges that OWNERS' counsel and COUNTY counsel shall defend the PROJECT and coordinate and cooperate with each other in connection with any Legal Actions. OWNERS and COUNTY shall enter into a separate joint defense agreement, on terms that are agreeable to both parties, provided that OWNERS shall remain responsible for payment of COUNTY's LITIGATION COSTS. OWNERS' obligations pursuant to this section are subject to the following:

- A. OWNERS and COUNTY shall seek a stay of all Legal Actions if the Superior Court of California, County of San Benito (“COURT”), grants a preliminary injunction on the first claim (“FIRST CLAIM”) for relief by plaintiff and petitioner Preserve Our Rural Communities (“PORC”) in Case No. CU-20-0053, subject to COUNTY’s determination if PORC has collected sufficient signatures within the time provided by the injunction to subject COUNTY Ordinance No. 1008 to a referendum. The stay shall remain in effect if PORC has collected sufficient signatures. OWNERS’s indemnification obligation shall apply to COUNTY’s LITIGATION COSTS up to the grant of any such stay.
- B. OWNERS may desire to stay all LEGAL ACTIONS notwithstanding the Court’s denial of PORC’s FIRST CLAIM or if PORC fails to collect sufficient signatures to subject COUNTY Ordinance 1008 to a referendum. COUNTY agrees that it will support a stay of LEGAL ACTIONS under either circumstance. OWNERS’s indemnification obligation shall apply to COUNTY’s LITIGATION COSTS up to the Court’s grant of any such stay.
- C. OWNERS and COUNTY shall amend this Agreement to their mutual satisfaction with regard to OWNERS’ obligation to indemnify COUNTY for additional LITIGATION COSTS within thirty (30) days of the COURT’s denial of PORC’s FIRST CLAIM, denial of a motion for a stay, or the dissolution of any stay that may be in effect, or within five (5) days prior to the required filing date of any responsive pleadings that may be required of COUNTY, whichever is sooner.
- D. COUNTY may, in its sole discretion, continue to defend Legal Actions or rescind any and all approvals it granted with respect to OWNERS’ PROJECT, and stipulate to entry of judgment on terms it determines are appropriate, subject to approval by the Court, if the parties do not amend this Agreement to their mutual satisfaction or OWNERS decline to defend Legal Actions.
- E. OWNERS shall provide security to pay LITIGATION COSTS, including attorney fees and costs which may be awarded by the Court to PORC and its attorneys, for which OWNERS and COUNTY may be jointly and severally liable, concerning PORC’s FIRST CLAIM in the form of a cash deposit in the amount of Fifty Thousand and No/100 Dollars (\$50,000.00) to be held in a separate subaccount established for this purpose by COUNTY, to be made as a condition of execution of this FIRST AMENDMENT by COUNTY. OWNER shall provide adequate security to pay LITIGATION COSTS, including attorney fees and costs, for which OWNERS and COUNTY may be jointly and severally liable, within thirty (30) days of the COURT’s denial PORC’s FIRST CLAIM, denial of a motion for stay, or the dissolution of any stay that may be in effect, unless OWNERS decline to defend LEGAL ACTIONS but COUNTY continues to do so.

All other provisions, terms, and conditions of the AGREEMENT shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this FIRST AMENDMENT 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: _____

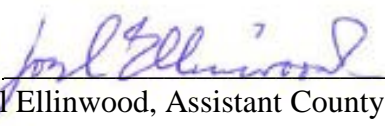
ATTEST:

Clerk of the Board

By: _____

Date: _____

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

By: 
Joel Ellinwood, Assistant County Counsel

Date: May 19, 2020

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: _____

San Benito County Board of Supervisors

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

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: _____

By: _____
Thomas John McDowell, Trustee

Date: 5/14/2020

By: _____
Victoria McDowell, Trustee

Date: 5/14/2020
McDowell Family Trust, Dated
February 16, 2004

By: _____
Thomas John McDowell, Trustee

Date: 5/14/2020

By: _____
Victoria Knight McDowell, Trustee

Date: 5/14/2020