

REIMBURSEMENT AND INDEMNIFICATION AGREEMENT

This Agreement (“AGREEMENT”) is made, and entered into this 29th day of May, 2020, (“EFFECTIVE DATE”) by and between the County of San Benito (“COUNTY”) and the Gregory N. Weiler and Marie W. Weiler, Trustees of the Weiler Family Trust, under that certain Trust dated November 14, 1991, as amended, and Mark H. Johnson and Susan M. Johnson, Trustees of the Johnson Family Trust, dated June 16, 1986, as amended (“OWNERS”), record owners of an approximately 195.33-acre property identified as Assessor Parcel No.012-010-021 near the Hwy. 129/Searle Road interchange (“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 2015, 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; and,

WHEREAS, a zoning text amendment ordinance to establish regulations for a C-3 regional commercial zoning district was adopted by COUNTY 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, on September 24, 2019. , the ordinance was the subject of a referendum election which was conducted on March 3, 2020, and which resulted in the rejection of the adoption of Ordinance No. 991; and,

WHEREAS, on September 24, 2019, the COUNTY also adopted Ordinance No. 993, a zoning map amendment ordinance to re-zone an approximately 21.1-acre portion of OWNERS’ PROPERTY to C-3 (Regional Commercial), which became effective on October 24, 2019, and was not subject to the aforementioned referendum; and,

WHEREAS, OWNERS have applied for a zoning map amendment ordinance to be adopted for OWNERS’ PROPERTY to rezone the 21.1-acre portion of the property to apply a C-1 (Commercial Thoroughfare) overlay together with a Vesting Parcel Map such that work and development of the OWNERS’ PROPERTY may commence consistent with the 2035 General Plan (the “PROJECT”); and,

WHEREAS, COUNTY and OWNERS have agreed that in order to complete the PROJECT in a more expeditious, efficient and economical manner for COUNTY, OWNERS shall be responsible for reimbursing COUNTY for all costs and expenses incurred by COUNTY, for outside planning consulting and legal services over and above the COUNTY’S standard planning application fee;

WHEREAS, subject to the execution of this Agreement and the payment of the Deposits specified herein, COUNTY proposes to enter into consulting contracts with EMC Planning Group, Inc. in an initial amount not to exceed \$32,500.00, to prepare the appropriate staff report, draft the CEQA EIR addendum and other documents for Planning Commission and Board of Supervisors consideration, and Thomas Law Group as necessary, to assist in the preparation and review and provide legal services for the COUNTY with respect to OWNERS’ PROJECT.

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. **Posting of the Initial Deposit:** OWNERS previously deposited with COUNTY the amount of five thousand dollars (\$5,000) on January 3, 2020, receipt of which is hereby acknowledged by COUNTY which is the total amount required by them, excepting the amount of contingency, under this Agreement (“INITIAL DEPOSIT”).
- B. **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 thirteen thousand nine-hundred and fifteen dollars (\$13,915) on or about January 3, 2020, charged in accordance with COUNTY’S standard adopted fee schedule (“APPLICATION FEE”). The APPLICATION FEE shall be applied to standard application processing COUNTY staff time, noticing, posting, and other costs incurred by COUNTY other than for outside planning consulting and legal services costs, which COUNTY costs are not subject to the limitations in this AGREEMENT.
- C. **Additional Payments:** OWNERS shall make an additional deposit in the amount of Twenty-nine Thousand and No/100 Dollars (\$29,000.00) in conjunction with the execution of this AGREEMENT toward payment of outside project consultants EMC Planning Planning Group, Inc. and Thomas Law Group. Requests to OWNERS for additional payments shall be made in writing by the Director of the Resource Management Agency (“DIRECTOR” or “RMA”) or the DIRECTOR’S designee upon the COUNTY’S receipt of invoices from EMC and/or Thomas Law Group, which OWNERS shall pay within fifteen (15) days of OWNERS’ receipt. Such requests shall be deemed received by OWNERS no later than five (5) calendar days from the date of mailing or email transmission by the COUNTY. If the Payment, and any Additional Payment(s) (collectively referred hereafter as “PAYMENT”), is wholly expended, and OWNERS have failed to replenish the PAYMENT within the fifteen days (15) after COUNTY’S request as set forth above, COUNTY shall do no further work on the project until OWNERS provide COUNTY with the agreed-upon additional funds to cover estimated remaining COUNTY Consultant Costs for the PROJECT as provided herein.

1.2 Accounting

- A. COUNTY will provide records of use of the PAYMENT to OWNERS in the form of monthly invoices detailing charges to the Account.
- B. COUNTY shall return to OWNERS any funds remaining in the PAYMENT after one hundred and eighty (180) days have passed since COUNTY’S approval of the Project by the Board of Supervisors, and the COUNTY has received from OWNERS payment of all PROJECT costs accrued, except to the extent that OWNERS have not satisfied its indemnification obligations of this AGREEMENT, or as set forth as a condition of approval.

C. **Interest on Deposits:** OWNERS acknowledge and agree that they shall not receive any interest on the Deposit or other Payments.

SECTION 2. PROJECT COSTS TO BE REIMBURSED

2.1 Use of Funds.

COUNTY may deduct funds from PAYMENT to pay for expenses charged by consultants for the PROJECT ("PROJECT CONSULTANT COSTS"). PROJECT CONSULTANT COSTS will therefore be the fees and other costs of the consultants hired by COUNTY which shall be billed at the rate actually incurred by COUNTY. The DIRECTOR or RMA will keep records of all funds charged to and paid by OWNERS pursuant to this AGREEMENT and of all expenditures of such funds pursuant to Section 1.2(A), above.

PROJECT CONSULTANT COSTS shall not include any actual COUNTY staff time, including, but not limited to, the RMA (Planning & Public Works), Environmental Health, Administration, Clerk of the Board, GIS Department, Integrated Waste, and the Clerk/Auditor/Recorder, expended on PROJECT-related activities and/or litigation. 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, and charges for said COUNTY staff time shall be compensated from the INITIAL DEPOSIT and/or APPLICATION FEE set forth above, with any additional charges for COUNTY staff time not covered by the INITIAL DEPOSIT and/or APPLICATION FEE to be invoiced. Notwithstanding the foregoing, County Counsel staff time shall be compensated pursuant to this AGREEMENT at its normal hourly rates, billed based on actual time incurred.

In addition, in light of the payment by OWNERS of forty-seven thousand, nine-hundred and fifteen dollars (\$47,915.00) in conjunction with this AGREEMENT, and the March 19, 2020, estimate provided by EMC Planners of thirty-two thousand five-hundred dollars (\$32,500), and the fact that a surplus therefore exists of seventeen thousand five-hundred dollars (\$17,500), the PARTIES agree to meet and confer if and when the COUNTY ever becomes aware that the total expense and cost of the AGREEMENT might approach or exceed sixty thousand dollars (\$60,000). The PARTIES realize and agree that costs often exceed the initial estimates due to unforeseen circumstances. When costs reach the aforementioned amount, the PARTIES therefore agree to meet and discuss the costs of the PROJECT if it is expected to exceed this amount. If additional funds are needed to cover costs of the COUNTY, and are not deposited with the county pursuant to this AGREEMENT within fifteen (15) days of the OWNERS' receiving a request for same pursuant to paragraph 1.1(C), above, the project shall not be processed further.

SECTION 3. FEES, PERMITS AND COUNTY REGULATIONS

The limitations in this Agreement apply only to the OWNERS' application for a zoning map amendment 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 encompassed 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 one of the applicable commercial areas, and any fees related to applications for other 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 of the areas covered by this AGREEMENT. This AGREEMENT does not apply to any fees the OWNERS are required to pay to any entity other than the COUNTY of San Benito, any state or federal agency, or on any new application or PROJECT.

SECTION 4. TERM

Subject to Section 5, 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. 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 5. TERMINATION

OWNERS or COUNTY may, at their option, terminate this AGREEMENT at any time on written notice to the other party ("TERMINATION NOTICE"). In the event of termination, OWNERS shall be responsible for the payment of all PROJECT CONSULTANT COSTS incurred up to and including the date of the TERMINATION NOTICE, only. COUNTY shall apply the sums maintained in the PAYMENT to any unreimbursed PROJECT costs through the date of the TERMINATION NOTICE, and COUNTY shall then refund any remaining PAYMENT funds to OWNERS within thirty (30) days of the date of the TERMINATION NOTICE, except as necessary to fulfill indemnification obligation. Any funds maintained to fulfill indemnification obligations shall be returned within 30 days of the completion of any litigation, including the satisfaction of any judgment or award of attorneys' fees. Upon termination of this AGREEMENT the COUNTY shall be under no obligation to further process any pending application in relation to OWNERS' PROJECT.

SECTION 6. 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 6.

To the **COUNTY**:

Harry Mavrogenes
Director, Resource Management
Department
County of San Benito
2301 Technology Parkway
Hollister, CA 95023-2513
Email: jguertin@cosb.us
Fax: 831.637.5334

With a copy to:

Barbara Thompson
County Counsel

County of San Benito
481 Fourth Street, 2nd Floor
Hollister, CA 95023
Email: bthompson@cosb.us
Fax: 831.636.4044

To **OWNERS**:

Daniel J. De Vries, Esq.
DE VRIES LAW GROUP
Post Office Box 996
San Juan Bautista, CA 95045
djd@devrieslawgroup.com
Fax: 831.623-4100

SECTION 7. DEFAULT BY OWNER

7.1 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.

7.2 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.

7.3 In the event of OWNERS' default, OWNERS waive any permit review timelines otherwise applicable under the Permit Streamlining Act, the Subdivision Map Act, or any other applicable laws with respect to each and every map, permit, or discretionary approval that may be delayed as a result of OWNERS' failure to provide COUNTY with funds as required under this AGREEMENT. In the event of OWNERS' default, no such map, permit or other approval shall be deemed approved by operation of law in connection with the PROJECT.

SECTION 8: INDEMNIFICATION

A. Security Agreement to Cover Litigation Exposure: In the event that any legal challenge is filed as a result of the PROJECT processed under this AGREEMENT, then within twenty one (21) days of such commencement, OWNERS and COUNTY shall enter into an

agreement, either as an amendment to this AGREEMENT or as a separate agreement for the OWNERS to post security in an amount and in a form satisfactory to COUNTY which may include one or more cash deposit installments, a letter of credit, or first deed of trust on land with a current appraised value in excess of One Hundred Twenty percent (120%) of the amount of security required, to ensure that the OWNERS' obligation to indemnify COUNTY for the potential liability for legal expenses or judgments described in subsection B., below, are paid. In addition to any duty to indemnify and defend COUNTY under Section 8 of this Agreement, OWNERS shall also provide a joint defense of the COUNTY action as the real party in interest pursuant to a joint defense agreement executed by the parties as provided in Section 8 below. In the event that the Parties are unable to reach an agreement on the terms of such security, COUNTY may, in its sole discretion decline to defend the action, rescind any and all approvals granted with respect to OWNERS' PROJECT, 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.

- B. Owners' Duty to Indemnify:** 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) incurred by COUNTY arising or resulting (directly or indirectly) from the review, processing, consideration, or the approval of OWNERS' PROJECT or action taken by COUNTY thereon. In the event of such litigation, COUNTY shall tender defense of COUNTY'S entitlement approvals to the OWNERS as the real party in interest for hiring counsel to defend such litigation, at OWNERS' sole cost and expense. The selection of any counsel chosen to defend any such Legal Actions shall be mutually agreed upon by OWNERS and COUNTY. OWNERS and COUNTY shall enter into a separate joint defense agreement, on terms that are agreeable to both parties prior to assuming the responsibility for such defense, provided that OWNERS shall remain responsible for payment of COUNTY's costs of defense.
- C. Owners' Determination Not to Defend:** Upon receipt of a demand by COUNTY to defend and indemnify pursuant to this Section 8, OWNERS shall have the option of abandoning the litigation and any related COUNTY approvals which form the basis of the litigation in order to provide an end to same, so that the OWNERS' duty to defend and indemnify as provided for herein shall cease and be at no further expense to OWNERS. In such an event, OWNERS shall provide to COUNTY a written Notice of Election to Abandon Litigation. If the COUNTY continues with any litigation efforts following the date of OWNERS' Notice of Election to Abandon Litigation, any expenses and costs which accrue past the date of said notice shall be at the sole cost of COUNTY. COUNTY may also, in its sole discretion, and upon receipt of OWNERS' Notice of Election to Abandon Litigation, decline to defend the action, rescind any and all approvals granted with respect to OWNERS' PROJECT, 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.

- D.** In the event OWNERS fail or refuse to pay for the costs of such defense, as provided in Section 8 B., above, the COUNTY may terminate the defense of the action, and rescind any and all approvals granted with respect to OWNERS' PROJECT, and stipulate to the entry of judgment or otherwise settle the action on such terms as the COUNTY determines to be appropriate, in the sole discretion of the COUNTY, subject only to the approval by the Court. OWNERS will reimburse COUNTY for any damages, costs, or fees awarded pursuant to any default judgment or other judgment taken against the COUNTY as a result of its decision not to defend any legal action. The failure of OWNERS to promptly reimburse the COUNTY for any damages, costs or fees, due and owing under this Section shall entitle the COUNTY to draw upon any sums deposited by OWNERS in accordance with Section 1.1.
- E.** In the absence of OWNERS' Notice of Termination, and/or Notice of Election to Abandon Litigation, obligations pursuant to this SECTION 8 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, as well as any judgment or award of attorneys fees to an opposing prevailing party or parties.

SECTION 9. 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 10. 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 11. 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 12. 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 13. 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 14. 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 15. 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 16. 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 17. TIME IS OF THE ESSENCE

For the purpose of this AGREEMENT and of each provision of this AGREEMENT, time is of the essence.

SECTION 18. 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 19. 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 20. 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 21. 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 22. 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.

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

[Signatures on Following Page]

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: _____
Barbara Thompson, County Counsel

Date: _____

OWNERS

Weiler Family Trust, under that certain Trust
dated November 14, 1991, as amended

By: _____
Gregory N. Weiler, Trustee

Date: _____

By: _____
Marie W. Weiler, Trustee

Date: _____

Johnson Family Trust, dated June 16, 1986

By: _____
Mark H. Johnson, Trustee

Date: _____

By: _____
Susan M. Johnson, Trustee

Date: _____