

Mr. Grant Yates, City Manager  
130 South Main St.  
Lake Elsinore, CA 92530

RE: First Amended and Restated Development Agreement Annual Review -- Summerly

Dear Mr. Yates,

Please find attached McMillin Summerly, LLC 's ("Developer") report of its good faith compliance with the First Amended and Restated Development Agreement ("DA") between Laing-CP Lake Elsinore LLC ("Original Developer") and the City of Lake Elsinore ("City"), in connection with the City's periodic review of the DA, pursuant to Section 16 thereof.

Per Section 16 of the DA, "[s]uch periodic review shall be conducted administratively by the City Manager and any appropriate department heads designated by the City Manager to perform such periodic review. The City Manager shall report the results of such periodic review to the City Council within thirty (30) days after the conclusion thereof. No public hearing shall be held by the City Manager, Planning Commission or City Council with regard to such periodic review." Despite this language, Developer requests that the administrative review of its good faith compliance be submitted to the City Council for ratification.

The enclosed report details Developer's good faith compliance with the DA through April 28, 2016.

Sincerely,

Brian Milich

GOOD FAITH COMPLIANCE REPORT

## **I. Introduction**

On August 24, 2004 the City of Lake Elsinore (“City”) entered into the First Amended and Restated Development Agreement (“DA”) with Laing-CP Lake Elsinore (“Original Developer”), with respect to Original Developer’s development of certain property within the East Lake Specific Plan (“ELSP”), referred to as the Developer Property. The DA was adopted by Ordinance No. 1127 on August 24, 2004. Pursuant to the DA, the Initial Term of the DA would expire on or around August 24, 2014. The DA provides for two automatic five (5) year extensions to the term of the DA, provided that certain conditions are first met.

On or about June 2010, McMillin Summerly, LLC (Developer”) acquired the Developer Property from Bank of America, N.A. as successor in interest to Original Developer, including all of Original Developer’s right, title and interest in and to the DA and the Original Developer’s right title and interest in and to the Disposition and Development Agreement dated December 26, 2002 among the Redevelopment Agency of the City of Lake Elsinore (Agency”), Civic Partners-Elsinore LLC (“Master Developer”) and Original Developer (“2002 DDA”).

On or about November 23, 2010 - Recognizing that the historic economic crisis beginning in 2007 and resultant illiquidity brought “development of the Developer Property to a standstill” and recognizing that such was an “event beyond the control” of the parties, the City and Developer entered into “First Operating Agreement of Understanding” (“OMOU”), memorializing that such event tolled the expiration of the Initial Term of the DA by 30 months – from August 24, 2014 until February 24, 2017.

On or about March 8, 2011 Developer, Master Developer and the Agency entered into an Amended and Restated Disposition and Development Agreement (“2011 DDA”), among other things to (a) clarify certain rights and obligations of the parties under the 2002 DDA, (b) document the implementation of the 2002 DDA and resolve ambiguities identified in the 2002 DDA, and (c) clarify the intent of the 2002 DDA.

On or about August 13, 2013, the City Council by Ordinance No 2013-1316 duly approved SPA 10 as an amendment to the East Lake Specific Plan (“ELSP”), allowing among other things for the addition of 24 dwelling units to Parcel 27 (the former recreation center site).

On or about April 25, 2016, the City Council by Resolution No 2016-30 duly approved SPA 6-Erratum as an amendment to the ELSP allowing among other things for the addition of up to 182 dwelling units on Parcel 18 (formerly the school site).

Among other thing the DA vests certain rights in Developer with respect to the development of the Developer Property in accordance with the Development Plan, and defines the respective obligations of City and Developer.

Developer has complied in good faith with all conditions, covenants, and requirements of the DA; is ahead of schedule with respect to the development of the Developer Property as set forth in the 2011 DDA; has properly obtained all requisite permissions, permits, and approvals; has paid all required fees and charges; and in doing so has complied with all applicable laws, ordinances, and regulations relating to the development of the Developer Property included within the Development Plan and associated amenities, including, without limitation, on-site and off-site improvements contemplated by the Development Plan.

Pursuant to Section 16 of the DA, a periodic review of Developer's good faith compliance with the DA shall be undertaken by the City. "During each periodic review, Developer is required to demonstrate its good faith compliance with the terms of [the DA], and shall furnish such reasonable evidence of good faith compliance as the City, in its exercise of its reasonable discretion, may require."

In connection therewith, as well as to obtain City's confirmation of the first automatic extension of the DA's term<sup>1</sup>, Developer hereby submits this report ("Report") detailing its compliance, in good faith, with all conditions, requirements, and provisions of the DA.<sup>2</sup>

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## **II. Summary of Project Status**

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Developer has complied in good faith with all conditions of the DA required to be performed as of the date of this Review, including without limitation its compliance with:

- All applicable governmental regulations, pursuant to Section 7.1 of the DA;
- The automatic extension of the Initial Term of the DA, pursuant to Section 8 of the DA;
- All timing and phasing requirements of the 2002 DDA as amended and restated in the 2011 DDA pursuant to Section 12.2 of the DA, including without limitation:
  - the timely commencement and completion of all phases and backbone infrastructure thus far required;
  - All conditions and requirements of East Lake Specific Plan Amendment 6 ("SPA 6"), required thus far ;
  - All conditions and requirements of SPA 6-Erratum, required thus far; and
  - All conditions and requirements of SPA 10, required thus far;
- The Construction of Facilities and Provision of Public Services, thus far required, pursuant to Section 12.6.1 of the DA;
- Obtaining and implementing changes to the Project in accordance with Sections 9 and 12.4 of the DA;
- Obtaining all required approvals and permits thus far required;
- The payment of all applicable Existing Impact Fees thus far required;
- All other conditions, covenants, and/or requirements of the DA, thus far required.

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## **III. Developer's Good Faith Compliance with Section 12.2 of the DA**

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Section 12.2 of the DA provides, in pertinent part, that:

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<sup>1</sup> By its terms, the DA provides for two automatic 5 year extensions to the term of the DA provided that (1) for each extension, Developer has first obtained 500 building permits prior the end of the term, and (2) Developer is not in breach of the DA. As established in further detail below, these conditions have been met.

<sup>2</sup> Except as otherwise set forth herein, all capitalized terms shall be ascribed the meaning given to them in the First Amended and Restated Development Agreement.

*“Developer shall develop the Developer Property subject to the timing and phasing requirements established by the DDA and the Specific Plan as Amended by SPA 6 and the Existing Development Approvals. [...] Developer shall have the right to develop the Developer Property in such order, at such rate, and at such times during the Term of [the DA] as Developer deems appropriate within the reasonable exercise of its independent business judgment. Notwithstanding the foregoing or the terms and conditions of the DDA, Developer shall commence grading and construction of the Golf Course in Phase 1 of the Project and shall complete construction therefor as a condition precedent to the issuance of a certificate of occupancy for any other structure in the Project. For purposes of this Section 12.2, “completion of the Golf Course” shall mean issuance by City of a certificate of occupancy or other written acknowledgment of the satisfactory completion thereof consistent with City’s customary practice....”*

Developer has complied in full with Section 12.2.

#### **A. Developer’s Golf Course Compliance**

Developer timely graded, constructed, and otherwise completed the Golf Course as required by Section 12.2, and was thereafter issued a certificate of occupancy by City.

#### **B. Developer’s Compliance with the Timing and Phasing Requirements of the DDA**

Section 12.2 of the DA provides that Developer shall comply with the timing and phasing requirements of the DDA. Developer has complied in good faith with all conditions of the DDA required to be performed as of the date of this Report including without limitation:<sup>3</sup>

- The timely and sequential Commencement and Completion of all Phases of the Project on the Developer property thus far required, as detailed in DDA Section 501.2 and Attachment 11, and pursuant to all applicable Phase Commencement, Completion and/or Extension Protocols:
  - Attachment 11 to the DDA sets forth the Schedule of Phase Development for the Developer Property. It shows each of the 8 phases (Phase 1, and Phases A-G). Phase A (or a substitute Phase) was required to commence within 18 months after completion of Phase 1 and all other successive Phases are required to commence within 18 months after commencement of the next previous Phase.
  - As set forth below, Developer has completed all phases required to be thus far completed (Phase 1, A, and B), in each case meeting or exceeding the timetable to do so. Further, Developer has completed Phase C almost 6 months in advance of the required completion date.

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<sup>3</sup> All capitalized terms used in this section shall take on the meaning ascribed to them in the DDA.

<b><i>DDA Phase</i></b>	<b><i>Commencement</i></b>	<b><i>Completion</i></b>	<b><i>Release of Covenants Recorded</i></b>
<i>I</i>	Required - March 8, 2011 Actual – March 8, 2011	Required – March 8, 2012 Actual - December 22, 2011	January 24, 2013
<i>B</i>	Required – June 22, 2013 Actual - June 17, 2013	Required – December 17, 2014 Actual - May 19, 2014	September 15, 2014
<i>A</i>	Required – December 17, 2014 Actual - December 15, 2014	Required – June 15, 2016 Actual - June 5, 2015	September 17, 2015
<i>C</i>	Required – June 15, 2016 Actual - December 15, 2014	Required – June 15, 2016 Actual – December 30, 2015	July 13, 2016

- The timely completion of the Phase Scope of Work for all Phases required thus far, pursuant to DDA Section 501.2, and as further described in Attachment 17A to the DDA, including without limitation:
  - The timely completion of Rough Grading within the boundaries of all Phases thus far required in accordance with all applicable grading plans;
  - The timely completion of all Erosion Control Improvements thus far required;
  - The timely completion of all Backbone Infrastructure Scope of Work thus far required, including without limitation the applicable work set forth in Attachment 1 to the DDA with respect to Diamond Drive, Hidden Trail and Summerly Place Roads, Village Parkway and Meadow;
  - The timely completion of all Infrastructure improvements required as a condition to the approval of SPA 6 (see *infra* at Section III C), any Tentative Tract Maps, ACOE Section 404 Permit or Other Entitlement Permits;
  - The timely completion of all modification to Backbone Infrastructure Scope of Work thus far required.
- Compliance with all Summerly Conditions of Approval thus far required as set forth on Attachment 20 to the DDA
- Obtaining all required approvals, permits, and permissions in connection with the work and development performed to date;
- All other conditions, covenants, and/or requirements of the DDA, thus far required

Developer's compliance with the DDA conditions and obligations set forth above is evidenced, with respect to Phases thus far completed, by Agency's execution of Releases of Project Development Covenants for Phases 1, A, B, C and D (pursuant to DDA Section 501.2(c) – "Phase Completion Protocol).

### **C. Developer's Compliance with SPA 6**

Developer has complied with all conditions of SPA 6 required to be performed as of the date of this Report, including without limitation:

- The building of all residential units in compliance with all conditions and requirements of SPA 6, including without limitation the design, architectural, landscaping and development regulations of SPA 6;
- The construction and completion of all streets and roads thus far required as detailed in and required by SPA 6;
- The satisfaction and/or performance of all conditions, thus far required, provided in the "Conditions of Approval" for SPA 6, including without limitation:
  - The implementation of appropriate mitigation measures as contained in the Mitigation Monitoring Programs (Condition #10);
  - Developer's participation in the Development Impact Fee Program; and the construction of all water mains and fire hydrants in accordance with Riv. County Ordinance 460 and/or 787.1 (Condition #15);
  - Compliance of all lots with the applicable standards set forth in SPA 6, as well as Municipal and Zoning Codes (Condition #18);
  - Initiation and completion of the formation of a Homeowner's Association, approved by the City, and recorded (Condition #22);
  - The payment of all requisite fees to Lake Elsinore Unified School District (Condition #42);
  - The payment of all applicable fees required thus far, including park fees (Condition #43);
  - Connection of each lot within any subdivision to a public sewer (Condition #44);
  - Compliance with City Ordinance 1105 (per Conditions #56 and #57);
- All other conditions, covenants, and/or requirements of SPA 6, thus far required.

### **D. Developer's Compliance with SPA 6-Erratum**

Existing Development Approvals, as defined by the DA, includes SPA 6-Erratum.

Developer has complied with all conditions of SPA 6-Erratum required to be performed as of the date of this Report, including without limitation:

- Landscaping, as required, consistent with the guidelines and regulations set forth by the Elsinore Valley Municipal Water District ("EVMWD");
- The building of all residential units required thus far on Parcel 18 of Tentative Tract Map 31920 as detailed in and required by SPA 6-Erratum;
- All other conditions, covenants, and/or requirements of SPA 6-Erratum, thus far required.

<b>E. Developer's Compliance with SPA 10</b>
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Existing Development Approvals, as defined by the DA, includes SPA 10.

Developer has complied with all conditions of SPA 10 required to be performed as of the date of this Report, including without limitation:

- The building of all residential units required thus far on Parcel 27 of Tentative Tract Map 31920 as detailed in and required by SPA 10;
- All other conditions, covenants, and/or requirements of SPA 10, thus far required.

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**III. Developer's Good Faith Compliance in Constructing Public Facilities (DA §12.6.1)**

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Section 12.6.1 of the DA provides, in pertinent part, that:

*“As provided by the Specific Plan, the Project provides for an integrated roadway system, public facilities including water and sewer facilities, parks, a potential elementary school and storm drains. The construction and installation of such facilities and infrastructure improvements by the Developer and the phasing thereof shall be subject to City review and approval at the time that tentative tract maps are submitted for applicable areas of the Project. Construction and installation of infrastructure and other public improvements shall be phased with the development of the Project pursuant to the phasing plan contained in the Specific Plan as amended by SPA 6 and the DDA. In addition to constructing and installing the infrastructure improvements necessary to the Project, Developer shall also participate in and pay Existing Impact Fees”*

Developer has complied with all conditions of Section 12.6.1 thus far required, including the construction and installation of infrastructure and other public improvements pursuant to the phasing plan set forth in the DDA, and has paid all required Existing Impact Fees (see *infra* at Section VI).

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**IV. Developer's Compliance Regarding Changes in the Project (DA §§9 and §12.4)**

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As amendments to the ELSP, the changes implemented by SPA 6-Erratum and SPA 10 are considered part of the “Project” covered by the DA. Specifically, the DA defines “Project” to mean:

*“...the proposed development of the Developer Property included within the Development Plan and associated amenities, including without limitation, on-site and off-site improvements contemplated by the Development Plan”*

And the DA defines “Development Plan” to mean:

*“...the Existing Land Use Regulations and the Existing Development Approvals. Specifically, but without limitation, such Development Plan includes the East Lake Specific Plan as amended by SPA 6 covering the Developer Property, and all subsequent amendments thereto ....”*

Because the term “Project” as defined by the DA includes “all subsequent amendments” to ELSP, SPA 10 and SPA 6-Erratum, constitute part of the Project and Development Plan under the DA.

Further, there have been no changes which would constitute or require a substantive amendment to the DA as set forth in Section 12.4. In respect of the Project, there has been no alteration of the permitted uses, no increase in the density or intensity or the number of lots, no increase in the maximum height and size of permitted buildings, no deletion of a requirement for the reservation or dedication of land for public purposes, except for minor boundary adjustments approved by the City Manager, and no amendment or change requiring a subsequent environmental impact report pursuant to Public Resources Code Section 21166.

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#### **V. Developer’s Compliance In Obtaining All Required Approvals**

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Developer has obtained all required approvals, permits, and permissions required under the DA, DDA, Tentative Tract Map 31920, SPA 6, SPA 6-Erratum, and SPA 10, required as of the date of this report, including without limitation: all required Implementing Approvals<sup>4</sup>, and Subsequent Development Approvals<sup>5</sup>.

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#### **VI. Payment of All Required Assessments and Fees (DA §12.9)**

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Section 12.9, of the DA provides, in pertinent part, that:

*“Other than the Existing Impact Fees and except as provided in Section 13.1, the City shall not, without the prior written consent of the Developer, impose any assessment or fee applicable to the development of the Project on the Developer Property or any portion thereof.”*

As defined by the DA “Existing Impact Fees” means:

*“...any fee, charge, dedication or other requirement which is levied, imposed or assessed on development occurring on the Developer Property as of the Agreement Date.”*

Developer has paid all Existing Impact Fees and those under Section 13.1 which are required to be paid as of the date of this Report and is in good faith compliance with the DA. Specifically, Developer has paid:

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<sup>4</sup> "Implementing Approvals means those procedures, reviews, permits and approvals necessary to implement the Existing Development Approvals and this First Amended Agreement, including, but not limited to, grading plan check, grading permits, building plan check, building permits, encroachment permits, sign review, sign permits, landscape plan review, engineering plan check, and encroachment permits."

<sup>5</sup> "Subsequent Development Approvals means any land-use development permit and/or approval obtained after the Effective Date that substantially modifies the Project as provided for under the Existing Development Approvals, or that seeks to, or will have the legal effect of, substantially amending any one or more of the Existing Development Approvals, or this First Amended Agreement."

1. All required DAG Fees, including the Initial DAG Fee. Developer currently has earned DAG credits which exceed any required DAG Fees;<sup>6</sup>
2. All required Affordable Housing “In Lieu Fees” (Section 12.10);
3. All required TUMF Fees;
4. All required EVMWD Fees.
5. All required library fees
6. All required traffic infrastructure fees
7. All required Quimby fees
8. All required drainage fees
9. All other required permit fees, approval fees, filing fees, and related charges levied, imposed or assessed on development occurring on the Developer Property as of the Date of the DA.
10. Developer is exempt from paying MSHCP fees with respect to all of the 1955 units of the Project – which units are vested under the DA. The MSHCP fee was not “*levied, imposed or assessed on development occurring on the Developer Property as of the Agreement Date*”. Accordingly it is not an “Existing Impact Fee.”

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## **VI. Developer’s Compliance with the Law and Other Requirements (DA §7.1, 12.13)**

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Pursuant to Sections 7.1, and 12.13, of the DA, and the DA generally, in connection with its development of the Developer Property Developer complied in good faith with all applicable Governmental Requirements, Development Agreement Law, Existing Land Use Regulations, City and Municipal Codes, as well as required conditions of approval and mitigation measures.

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## **VI. Extension of the Term of the DA (§5)**

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As described in the Introduction section of this Report, through the OMOU, the City memorialized that the Initial term of the DA was tolled by 30 months (from August 24, 2014 until February 24, 2017) in recognition of the impact of the unprecedented economic crisis on the development of the Developer Property. The OMOU did not constitute a substantive amendment to the DA or its term, under Government Code Section 65868, or under the provisions of the DA itself.

Pursuant to Section 8 of the DA and the Section 1 of the OMOU (attached hereto as Exhibit “F”), the Initial Term of the DA is to be automatically extended from February 24, 2017 to February 24, 2022, “if prior to the expiration of the Initial Term (a) Developer has obtained 500 building permits for residential

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<sup>6</sup> Developer has completed the following Open Space Improvements described in Section 12.8.2 of the DA: the Golf Course, as well as improvements to the San Jacinto River and Bioswale, entitling Developer to the DAG fee credits of \$7,550,000 detailed in Section 12.8.2. Upon completion of the improvements to the Open Space Buffer and Wetlands, Developer shall be entitled to the remaining balance of DAG fee credits in the amount of \$805,000. None of Developer’s DAG fee credits are duplicative of items financed through CFD’s or Extraordinary Infrastructure tax increment payments.

dwelling units within the Project which permits shall not have expired or pursuant to which Developer shall have commenced or completed the permitted residential dwelling units and (2) Developer is not in breach of the [DA]”.

As set forth above, Developer is in compliance with the DA, and not in breach. Further, Developer obtained the requisite 500 building permits prior to the expiration of the Initial Term of the DA. Accordingly, the term of the DA has been automatically extended in accordance with its terms to February 14, 2022.