

RESOLUTION NO. 2013-0321

Adopted by the Sacramento City Council

September 24, 2013

AUTHORIZING THE CITY MANAGER TO EXECUTE A PREDEVELOPMENT EXPENSES AGREEMENT BETWEEN THE CITY AND SACRAMENTO BASKETBALL HOLDINGS, LLC

BACKGROUND

- A. The City Council approved a non-binding Term Sheet on March 26, 2013, in order to develop a proposed Entertainment and Sports Center (ESC) with Sacramento Basketball Holdings, LLC (SBH).
- B. The City proposes a capital contribution of \$258 million to the ESC project.
- C. To protect its interests, represent the interests of Sacramento's citizens and taxpayers, and promote the successful completion of the proposed ESC, the City must contract with third parties for various professional, non-professional, and technical services.
- D. The Term Sheet provides that SBH is responsible for ESC predevelopment expenses.
- E. The City and SBH prepared a predevelopment expenses agreement so that the City will be reimbursed for the costs associated with the preparation and due diligence needed in advance of the ESC project.
- F. The City and SBH acknowledge this agreement does not commit the City to approve the ESC project and any future legislative decision made by the Council must be in compliance with the California Environmental Quality Act.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

- Section 1. The City Manager or his designee is authorized to execute the Sacramento ESC Predevelopment Expenses Reimbursement Agreement (attached as Exhibit A) with Sacramento Basketball Holdings LLC.
- Section 2. The City Manager is authorized to adjust revenue and expenditure budgets in the ESC project (102000500) as necessary to account for all reimbursements received from Sacramento Basketball Holdings LLC.
- Section 3. Exhibit A is part of this resolution.

Table of Contents:

Exhibit A-Sacramento ESC Predevelopment Expenses Reimbursement Agreement

Adopted by the City of Sacramento City Council on September 24, 2013 by the following vote:

- Ayes: Councilmembers Ashby, Cohn, Fong, Hansen, McCarty, Pannell, Schenirer, Warren and Mayor Johnson
- Noes: None
- Abstain: None
- Absent: None

Attest:

Digitally signed by Shirley A. Concolino
DN: cn=Shirley A. Concolino, o=City of Sacramento, ou=City Clerk, email=sconcolino@cityofsacramento.org, c=US
Date: 2013.12.17 15:47:38 -08'00'

Shirley Concolino, City Clerk

SACRAMENTO ESC PREDEVELOPMENT EXPENSES REIMBURSEMENT AGREEMENT

This agreement, dated September 24, 2013 for identification purposes, is between the City of Sacramento ("**City**") and Sacramento Basketball Holdings, LLC, a Delaware Limited Liability Company ("**SBH**"). City and SBH are also referred to as the "**Parties**."

Background

The City Council approved a non-binding Term Sheet dated March 23, 2013, setting forth the City's and SBH's desire to develop a proposed Entertainment and Sports Center ("**ESC**") on certain real property located in the City of Sacramento, California. The City proposes a capital contribution of \$258 million to the ESC project. To protect its interests, represent the interests of Sacramento's citizens and taxpayers, and promote the successful completion of the proposed ESC, the City must contract with third parties for various professional, non-professional, and technical services.

The Term Sheet provides that SBH is responsible for ESC predevelopment expenses. The Parties intend by this agreement to set forth SBH's payment obligations for all expenses incurred by the City for ESC predevelopment activities, such as planning, design, development, and entitlement of the ESC.

Concurrently with this agreement, the Parties are executing a Predevelopment Process Agreement, which covers performance of predevelopment activities and cooperation of the Parties during predevelopment.

The Parties acknowledge this agreement does not commit the City to approve the ESC project. Any potential decision ultimately to approve the ESC project is a legislative decision to be made by and at the sole and exclusive discretion of the City Council in compliance with all statutory prerequisites under California law, including the California Environmental Quality Act. By entering into this agreement, the City does not limit, delegate, or assign any of its discretion to proceed with, or not proceed with, the ESC project.

With these background facts in mind, the City and SBH agree as follows:

1. Predevelopment Expenses Reimbursement

1.1. *Predevelopment Expenses.* "Predevelopment Expenses" means all expenses related to the planning, design, review, and entitlements to enable the

development, construction, and operation of the ESC incurred by City in its sole but reasonable discretion.

(A) *Examples.* Reimbursable Predevelopment Expenses include those for:

- (1) Start-up expenses (e.g., environmental impact report and any related environmental assessment).
- (2) Professional services (e.g., design and engineering services; architecture and related services; models and renderings; code analysis; information technology consultant; telecommunications consultant; peer reviews; commissioning consultant; sustainability (LEED) consultant; cost consultant; ADA consultant; arena development consultant; sports industry consultant; insurance consultant; historic, archaeological and cultural resources consultant; acoustic consultant; food service consultant; security consultant; life safety consultant; site surveying (boundary and topographic); site and urban design planning; transit studies including intermodal transit integration; pedestrian, traffic, and parking surveys and studies; public art consultant; specification conformance review; environmental and toxic substances studies; reviews of other sports facilities; utility investigations and relocation design; testing and inspections; quality control review; geotechnical report/ground water analysis; seismic studies; miscellaneous expenses and taxes relating to professional services; non-basketball event consultant).
- (3) Legal, governmental, and advisory services (e.g., transaction and administrative legal services except as excluded below; strategic planning and negotiation; definitive document preparation and production; insurance and risk management legal services; and construction-related legal services, document production; public outreach presentation production).
- (4) Project administration (e.g., project management; arena development review and consultation).
- (5) Construction preparation-related expenses (pre-construction fees).
- (6) Community outreach, and public relations consultant.
- (7) Extraordinary plan-check review and inspection costs, including third-party services.
- (8) Engineering services for review of structural and other systems.
- (9) Ensuring consistency between the ESC environmental impact report and the City's General Plan Update environmental impact report,

including any costs, including legal costs, for delay in issuing either as a result.

- (B) *Non-exclusive Listing.* The types of services listed in Section 1.1(A) are non-exclusive. Reimbursable Predevelopment Expenses also include other expenses consistent with this agreement that the City reasonably deems necessary for predevelopment.
- (C) *Excluded Expenses.* Notwithstanding anything to the contrary above, Predevelopment Expenses do not include:
- (1) salaries, benefits, or other costs for City employees, except as covered under subsection (A)(7), above;
 - (2) costs covered by the Parties' August 13, 2013 Property Acquisition Cost, Defense, and Indemnity Agreement;
 - (3) legal expenses solely related to the financing of the City's proposed capital contribution for the ESC;
 - (4) Fees, penalties, expenses, or other costs incurred by reason of City's failure to comply with this agreement and related agreements, or relevant laws, statutes, ordinances or other rules and regulations;
 - (5) Fees, penalties, expenses, or other costs incurred by reason of City's gross negligence or willful misconduct;
 - (6) Costs assumed by City pursuant to other binding agreements; or
 - (7) City's costs of clearing title to City-controlled property needed for the ESC.
- (D) *Cooperation.* SBH shall not be required to reimburse City for Predevelopment Expenses that the Parties have agreed are to be incurred directly and exclusively by SBH. The Parties shall meet regularly to discuss predevelopment work, and whenever possible, City shall notify and provide SBH an opportunity to confer with City prior to and during: (i) the hiring process of predevelopment consultants and staff, (ii) the consideration of cost estimates provided by such consultants, and (iii) the preparation of predevelopment expense budgets. In addition, City shall notify SBH in advance of any substantial or extraordinary Predevelopment Expenses, to the extent practicable under the circumstances.

1.2. Expenses Reimbursement. SBH shall reimburse the City for all Predevelopment Expenses incurred by the City.

1.3. Scope of Reimbursement Obligation.

(A) *Generally.* SBH agrees that its obligations are to be interpreted in a manner that ensures the City is fully reimbursed for all Predevelopment Expenses.

(B) *Time of City's Incurred Expenses.* Predevelopment Expenses include only those incurred by the City after March 23, 2013.

(C) *Success not Required.* SBH's reimbursement obligations are not contingent upon the ESC project's success or approval. SBH shall reimburse the City for all Predevelopment Expenses regardless of the City's approval (or disapproval) of the ESC project or the Parties' subsequent execution of definitive project agreements, or any other event.

(D) *Other Fees, Charges, Taxes, etc.* Except as otherwise specifically set forth herein, this agreement does not cover fees, taxes, special assessments, or any other charges otherwise applicable to a development like the ESC. Nothing in this agreement limits or excuses SBH's obligations to pay amounts that would be payable to the City in the absence of this agreement, provided that this agreement is not intended to require duplicative payments of such amounts.

1.4. Reimbursement Process.

(A) *Notification of Expenses.* By the 15th day of each month, the City shall deliver a written expense report to SBH containing:

- (1) the total amount of Predevelopment Expenses billed to the City in the previous month, provided the first monthly expense report shall include Predevelopment Expenses billed after March 23, 2013;
- (2) an itemization of the Predevelopment Expenses; and
- (3) Attached copies of all invoices submitted by third parties relating to the Predevelopment Expenses.

(B) *Reimbursement Time and Method.* Within 30 days of the City's delivery of a written expense report, SBH shall pay the City all Predevelopment Expenses from the previous month; provided that SBH shall have the right, at its option, to pay the sum set forth in the first such report in three monthly pro-rated payments, so long as the entire amount is paid within 90 days following receipt of such report. Payment shall be by electronic funds transfer to an account identified by the City or as otherwise agreed by the Parties.

(C) *Final Statement.* Following completion of predevelopment activity, City shall provide a full statement of all Predevelopment Expenses and payments made thereon. The parties shall review and reconcile such statement and SBH shall pay any underpayment (or be reimbursed for any overpayment) within 30 days following such agreed-upon reconciliation.

(D) *Disputed Expenses.* If SBH believes that a particular expense included in a monthly written expense report or final statement is not a properly reimbursable Predevelopment Expense, SBH shall notify the City in writing of its specific concerns within 30 days of delivery of the written expense report. The City may then exclude the disputed expense or may request a meeting with SBH to resolve the dispute. The Parties shall use good faith efforts to resolve the dispute informally. If SBH does not timely pay reimbursable Predevelopment Expenses, the City may, in addition to its other contractual remedies, suspend indefinitely all predevelopment activities associated with the ESC. In the event of a dispute, neither payment of disputed Predevelopment Expenses by SBH nor ongoing predevelopment activity by City shall be deemed to waive either party's right to continue to dispute or seek reimbursement for Predevelopment Expenses under the terms of this agreement.

2. Records. The City, consistent with its records retention policy, shall maintain complete copies of all monthly written expense reports and supporting documentation. SBH may inspect these records during business hours and upon reasonable notice. This right of inspection does not include records that are privileged or otherwise protected by law.

3. Indemnification and Hold Harmless. Except in the case of the City's sole negligence or willful misconduct, SBH agrees to fully and completely, without reservation or

limitation, defend, indemnify, and hold the City harmless, with counsel selected by the City, from any and all potential legal or monetary claims of any nature brought whatsoever by any third party against the City arising out of, or as a result of, SBH's actions arising out of this agreement, including its failure to comply with the terms of this agreement..

4. Waiver of Claims Against City. SBH acknowledges that it is responsible for all ESC Predevelopment Expenses and that the City agrees to cooperate and collaborate on predevelopment activities. SBH expressly waives any and all claims – excepting for fraud, malice, or oppression — against the City that SBH may have related to or arising out of the City's predevelopment activities, including but not limited to any and all claims SBH may have related to any contractors the City retains to perform predevelopment services.

5. Miscellaneous Provisions

5.1 Certain Terms.

(A) "City" includes its agents, officers, consultants, contractors, and employees.

(B) "SBH" includes its corporate affiliate(s), and their successors and assigns, and their agents, officers, consultants, contractors, and employees.

(C) "ESC" means the entertainment and sports center proposed for Sacramento's Downtown Plaza, generally located between 5th and 7th Streets and J and L Streets. It includes the proposed building as well as the immediately surrounding area, including the related infrastructure.

5.2 Notices. Any notice or other communication under this agreement must be in writing and will be considered properly given and effective only when mailed or delivered in the manner provided by this section 5.2 to the persons identified below. A notice or other communication that is mailed will be effective or will be considered to have been given on the third day after it is deposited in the U.S. Mail (certified mail and return receipt requested), addressed as set forth below, with postage prepaid. A notice or other communication sent in any other manner will be effective or will be considered properly given when actually delivered. A party may change its address for these purposes by giving written notice of the change to the other party in the manner provided in this section 5.2.

<p><i>If to the City:</i></p> <p>John Dangberg Assistant City Manager City of Sacramento 915 I Street, Fifth Floor Sacramento, California 95814</p> <p><i>With copies to:</i></p> <p>Matthew Ruyak Assistant City Attorney City of Sacramento 915 I Street, Fourth Floor Sacramento, California 95814</p>	<p><i>If to SBH:</i></p> <p>John Rinehart Sacramento Basketball Holdings, LLC One Sports Parkway Sacramento, CA 95834</p> <p><i>With copies to:</i></p> <p>Mark Friedman, Owner 1530 J Street, Suite 200 Sacramento, CA 95814</p> <p>Jeffrey K. Dorso, Esq. Pioneer Law Group, LLP 431 I Street, Suite 201 Sacramento, CA 95814</p>
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5.3 Assignments. A party may not assign or otherwise transfer this agreement or any interest in it without the other party’s prior written consent, which the other party may withhold in its sole discretion. An assignment or other transfer made contrary to this section 5.3 is void.

5.4 Binding effect. This agreement binds and inures to the benefit of the Parties’ successors and assigns.

5.5 Time of the Essence. Time is of the essence in the performance of this agreement.

5.6 Severability. If a court with jurisdiction rules that any nonmaterial part of this agreement is invalid, unenforceable, or contrary to law or public policy, then the rest of this agreement remains valid and fully enforceable.

5.7 Waiver. A party’s failure to insist on strict performance of this agreement or to exercise any right or remedy upon breach of this agreement will not constitute a waiver of the performance, right, or remedy. A party’s waiver of another party’s breach of any provision in this agreement will not constitute a continuing waiver or a waiver of any subsequent breach of the same or any

other provision. A waiver is binding only if set forth in a writing signed by the waiving party.

5.8 Interpretation. This agreement is to be interpreted and applied in accordance with California law, except that that the rule of interpretation in California Civil Code section 1654 will not apply.

5.9 Attorneys' fees. The Parties shall bear their own costs and attorneys' fees incurred in connection with this agreement.

5.10 No Third-Party Beneficiaries. This agreement is solely for the benefit of the City and SBH. It is not intended to benefit any third parties.

5.11 Effective date. This agreement is effective on the date both Parties have signed it, as indicated by the dates in the signature blocks below.

5.12 Counterparts. The Parties may sign this agreement in counterparts, each of which will be considered an original, but all of which will constitute the same agreement.

5.13 Integration and modification. This agreement sets forth the Parties' entire understanding regarding the matters set forth above and is intended to be their final, complete, and exclusive expression of those matters. It may be modified only by another written agreement signed by both Parties.

5.14 Relationship of the Parties. The Parties do not intend to create any agency, partnership, joint venture, trust, or other relationship with duties or incidents different from those of parties to an arm's-length contract.

5.15 Survival of Indemnification, Defense, and Waiver. SBH's indemnification, defense, hold harmless, and waiver obligations survive completion of this agreement and termination of this agreement.

5.16 Representations. Each Party hereby represents and warrants to the other that it has all necessary right, power, and authority to enter into this Agreement. Additionally, each Party represents and warrants that the execution and delivery of this Agreement and the performance and observance of all obligations and conditions to be performed or observed by

each Party hereunder have been duly authorized by all necessary action of SBH and the City. This Agreement, when fully executed and delivered by the City and SBH, shall constitute the legal, valid, and binding obligation of the City and SBH, enforceable in accordance with the terms hereof.

5.17 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California. In the event of any proceedings regarding this Agreement, the Parties agree that the venue shall be the state courts of California located in Sacramento County or the U.S. District Court for the Eastern District of California.

5.18 No Effect on Term Sheet. This agreement does not affect the Term Sheet.

<p>City of Sacramento</p> <p>By: _____ John F. Shirey City Manager</p> <p>Date: _____, 2013</p>	<p>Sacramento Basketball Holdings, LLC</p> <p>By: _____ Chris Granger President</p> <p>Date: _____, 2013</p>
<p>Approved as to Form Sacramento City Attorney</p> <p>By: _____ Matthew D. Ruyak Assistant City Attorney</p>	<p>Approved as to Legal Form</p> <p>By: _____ Jeffrey K. Dorso Attorneys for SBH</p>