



AGENDA REPORT
SAN CLEMENTE CITY COUNCIL MEETING
 Meeting Date: January 22, 2013

Agenda Item CoF
 Approvals: [Signature]
 City Manager [Signature]
 Dept. Head [Signature]
 Attorney _____
 Finance _____

Department: Public Works / Engineering Division
Prepared By: William E. Cameron, Public Works Director/City Engineer

Subject: *APPROVAL OF AN ASSIGNMENT, ASSUMPTION, HOLD HARMLESS, AND RELEASE AGREEMENT BETWEEN THE RESERVE MAINTENANCE CORPORATION, THE RESERVE AT FORSTER HIGHLANDS LLC, AND THE RESERVE NORTH AT FORSTER HIGHLANDS LLC, RELATIVE TO TRACTS 16211 AND 16282.*

Summary: The developers for tracts 16211 (The Reserve at Forster Highlands LLC) and 16282 (The Reserve North at Forster Highlands LLC) have requested City approval of the assignment of their subdivision improvement agreements for the Reserve project. Both subdivision improvement agreements with the City were executed on March 6, 2002. Improvements were accepted as complete by the City, but the one-year warranty had not expired when concerns were raised about some of the tract's improvements. The developers and the Reserve Maintenance Corporation (the Home Owner's Association for The Reserve) have recently settled a legal dispute and both are now requesting that the City consent to allow the rights and duties contained in the subject subdivision improvement agreements to be transferred to the Reserve Maintenance Corporation. City staff and the City Attorney met with representatives of both parties to discuss possible terms of the requested assignment agreement. City staff and the Reserve Maintenance Corporation performed a walk-through of the project and developed a list of improvements to be repaired prior to the release of the surety security. The existing surety (warranty bonds) posted by the developers will be released upon receipt of the new surety to be supplied by the Reserve Maintenance Corporation to guarantee completion of the remaining warranty items that need to be addressed.

Recommended

Action: STAFF RECOMMENDS THAT the City Council authorize the Mayor to execute an Assignment, Assumption, Hold Harmless, and Release Agreement, by and between The Reserve Maintenance Corporation, The Reserve at Forster highlands LLC, and The Reserve North at Forster Highlands, approving and consenting to the assignment of the Subdivision Improvement Agreements (dated March 6, 2002), from The Reserve at Forster Highlands LLC (Assignor) and The Reserve North at Forster Highlands LLC (Assignor) to The Reserve Maintenance Corporation (Assignee), subject to the City Attorney's final approval of the agreement.

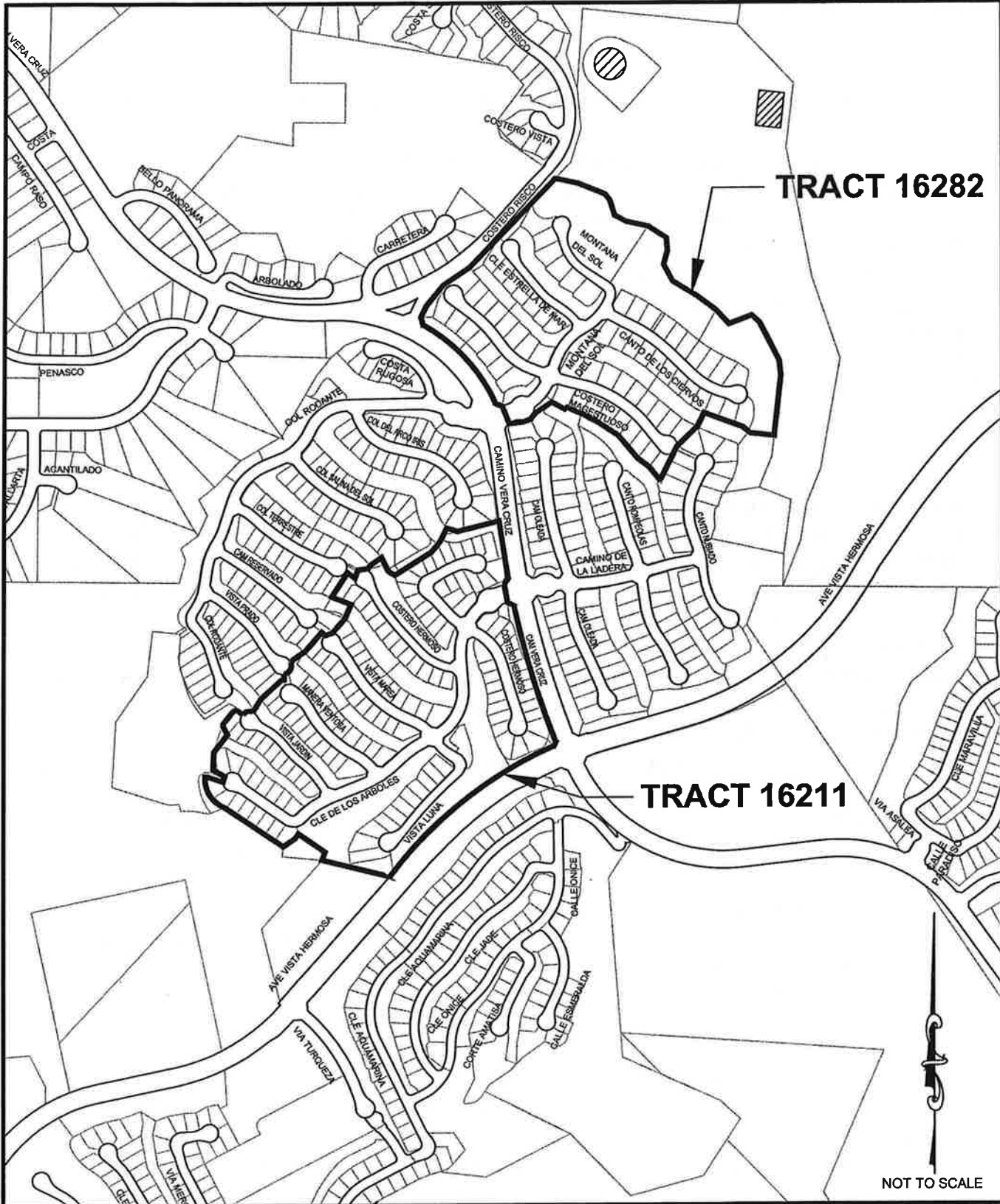
Fiscal Impact: None.

Attachments: Location Map
 Draft Assignment, Assumption, Hold Harmless, and Release Agreement

Notification: None

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City of San Clemente

910 Calle Negocio, Suite 100
 San Clemente, CA 92673
 Tel (949) 361-6100
 Fax (949) 361-8316

LOCATION MAP

TRACTS 16211 & 16282

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ASSIGNMENT, ASSUMPTION, HOLD HARMLESS, AND RELEASE AGREEMENT

THIS ASSIGNMENT, ASSUMPTION, HOLD HARMLESS AND RELEASE AGREEMENT (the "Agreement") is made and entered into as of _____, 2013, by and between The Reserve Maintenance Corporation, a California non-profit mutual benefit corporation, ("Assignee"), The Reserve South at Forster Highlands LLC, a Delaware limited liability company ("Tract 16211 Assignor"), The Reserve North at Forster Highlands LLC, a Delaware limited liability company ("Tract 16282 Assignor;" Tract 16211 Assignor and Tract 16282 Assignor are collectively referred to herein as "Assignors"), and the City of San Clemente, a California general law city ("City") with reference to the following Recitals.

Recitals

A. Tract No. 16211 Assignor, as "Subdivider," and the City have entered into that certain subdivision improvement agreement dated as of March 6, 2002, which agreement sets forth the terms and conditions for Assignor's subdivision and improvement of certain property identified therein as the "Property," and more commonly referred to as Tract No. 16211, which is located in the City of San Clemente, State of California, as more particularly described in the Agreement (the "Tract 16212 Agreement"). Tract No. 16282 Assignor, as "Subdivider," and the City have entered into and that certain subdivision improvement agreement dated as of March 6, 2002, which agreement sets forth the terms and conditions for Assignor's subdivision and improvement of certain property identified therein as the "Property," and more commonly referred to as Tract No. 16282, which is located in the City of San Clemente, State of California, as more particularly described in the Agreement (the "Tract 16282 Agreement"), which subdivision improvement agreements are collectively referred to herein as the "Subdivision Improvement Agreements." Capitalized terms used without definition in this Agreement shall have the meaning ascribed to such terms in the Subdivision Improvement Agreements.

B. On or about April 12, 2008, Assignee filed an action entitled *The Reserve Maintenance Corporation v. WE-Homes, LLC et.al.* (OCSC No. 30-2008-00062855, herein the "Action"), alleging causes of action against Assignors for incomplete or improperly completed improvements and soils and construction deficiencies in the common areas of the above referenced tracts.

C. The parties to the above referenced Action have entered into a Global Settlement Agreement and Mutual Release (the "Settlement Agreement") which in part provides that Assignors shall pay Assignee funds to complete or repair certain improvements) in exchange for Assignee's release of Assignor from the "claims arising from any alleged, potential, or actual defect or damage related to the design, construction, repair, maintenance, or establishment of Plaintiff's [Assignee's] reserve and operating funds and budgets for the Common Area." In addition, Assignee and Assignors have both requested that the City: (1) permit the assignment of the above referenced Subdivision Improvement Agreements from

Assignors to Assignee, and (2) that such assignment be effective upon the latter to occur of the execution of this Agreement or the acceptance by the City Engineer of all substitute bonds proffered by Assignee and the release of Assignors' corresponding bonds as more specifically provided in this Agreement.

D. City is amenable to such assignment and substitution of bonds on the terms and conditions provided for herein.

E. Assignors now desire to assign certain rights, title, obligations and interest in and to the Subdivision Improvement Agreements to Assignee, and Assignee desires to accept such assignment on, and subject to, the terms and conditions set forth in this Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

Agreement

1. Assignment. Assignors hereby assign, convey, transfer and deliver to Assignee certain rights, title, obligations and interest in and to the Subdivision Improvement Agreements, as identified on Exhibit "A" attached hereto, and Assignee hereby accepts such assignment and agrees to assume performance of all applicable terms, covenants and conditions occurring or arising under the Subdivision Improvement Agreements on or after the date of this Agreement. This assignment shall be effective upon the latter to occur of the execution of this Agreement or the acceptance by the City Engineer of all substitute bonds proffered by Assignee and the release of Assignors' corresponding bonds as more specifically provided in this Agreement.

2. Assumption of Obligations. By acceptance of this Agreement, and except as expressly provided below, Assignee hereby agrees to assume all of Assignors' right, title, obligations and interest in and to the Subdivision Improvement Agreements as they pertain to street, storm drain, water and sewer improvements, and street repair and monumentation obligations. Assignee agrees to timely discharge, perform or cause to be performed and to be bound by all of the liabilities, duties and obligations imposed in connection with the Subdivision Improvement Agreements from and after the date of this Agreement to the same extent as if Assignee had been the original party thereto.

3. Modified Works of Improvement. Assignee has requested, and City has exercised its discretion to reconsider the work necessary to complete the improvements required for Tracts 16211 and 16282. Assignee shall perform that certain work referenced in the Engineer's Review/Verification of Repairs Cost Estimate for Above Referenced Project [Tract 16211] and Engineer's Review/Verification of Repairs Cost Estimate for Above Referenced Project [Tract 16282] both of which are collectively referred to as the "Scope of Work" and are attached hereto as Exhibit "___." To the extent there is any inconsistency regarding the improvements necessary to obtain the release of any Performance or Warranty Bonds posted

by Assignee between the Subdivision Improvement Agreements for Tracts 16211 and 16282 and the Scope of Work, the Scope of Work shall control.

4. Substitution and Release of Bonds. Assignor has previously posted or caused to be posted with City the following Warranty Bonds which have not been released:

For Tract 16211

Warranty Bond No. 00-286-320A in the amount of \$129,609.50

Warranty Bond No. 00-286-312A in the amount of \$105,870.50

For Tract 16282

Warranty Bond No. 00-286-313A in the amount of \$87,691.25

Warranty Bond No. 00-286-321A in the amount of \$49,223.75

Assignee shall provide to City substitute Warranty Bonds, or other security acceptable to the City Engineer, in his sole and absolute discretion, and consistent with the Subdivision Act, in an amount equal to 150% of the estimated value of the work to be performed in the Scope of Work. The security shall serve as both performance and labor and materials security. City shall release Assignors' Warranty Bonds referenced above upon City Engineer's acceptance of Assignee's substitute security. Assignee's substitute security shall be released in the manner provided for by law.

5. Indemnification by Assignee. Assignee hereby agrees that it shall defend, with counsel of City's choosing, indemnify and hold harmless City, its officers, and employees, from and against any and all claims, liabilities, damages, losses, suits, costs and expenses of every kind, nature and type (including reasonable attorneys' fees) asserted by any person, entity or party resulting directly or indirectly from: (1) City's actions in approving the assignment provided for herein; (2) City's acceptance of the Scope of Work in place of the works of improvement referenced in the Subdivision Improvement Agreements; (3) any decision to release such bonds and/or approve or disapprove any inspection and/or approve any works of improvement required by either of the Subdivision Improvement Agreements or the Scope of Work; and (4) Assignee's performance or failure to perform, or manner in which Assignee performs the construction and installation of any the Works of Improvement in accordance with the requirements contained or referenced in the Subdivision Improvement Agreements or the Scope of Work.

6. Release. Assignors and Assignee and each of them and their respective heirs, assigns, executors, administrators, and agents, past or present hereby do and shall be deemed to have fully, finally, and forever released, relinquished and discharged City and its officers, agents and employees of and from any and all claims, whether known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law, or rule, without regard to the subsequent discovery or existence of such different or additional facts for any act of City, its officers, agents

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and employees relating to the retention or release of any bond Assignor posted, or caused to be posted, or was posted on Assignor's behalf (individually or collectively) with the City for either of Tract 16211 or 16282.

With regard to the above release as well as the promise and covenant of indemnification and defense, Assignors and Assignee hereby expressly waive all rights with respect to such unknown and unexpected consequences or results, and acknowledge that they individually have had the benefit or opportunity to consult with counsel, understand the provisions of California Civil Code section 1542, and expressly waive the provision of Civil Code section 1542, which provides as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE WHICH, IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

Each Party is aware of said code section, expressly waives any and all rights he, she or it may have thereunder, as well as under any other statute or common law principle of similar effect, with respect to any of the matters released herein and subject to the limitations set forth in this Agreement. The releases set forth above shall act as a release of all included Claims, rights and causes of action, whether such Claims are currently known, unknown, foreseen or unforeseen and regardless of any present lack of knowledge as to such claims, subject to the limitations set forth in this Agreement. The Parties each understand and acknowledge the significance and consequence of this waiver of California Civil Code section 1542, and hereby assume full responsibility for any injuries, damages, losses or liabilities released herein.

Assignors and Assignee represent, covenant, and warrant that they each individually have not directly or indirectly assigned, transferred, encumbered or purported to assign, transfer, or encumber to any person or entity any portion of any liability, claim, demand, action, cause of action, or rights herein released and discharged, except as set forth herein.

7. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto.

8. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

9. Further Assurances. The parties covenant and agree that they will execute such other and further instruments and documents as are or may become necessary or convenient to effectuate and carry out this Agreement.

10. Authority of Signatories to Bind Principals. The persons executing this Agreement on behalf of their respective principals represent that (i) they have been authorized

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to do so and that they thereby bind the principals to the terms and conditions of this Agreement, and (ii) their respective principals are properly and duly organized and existing under the laws of, and permitted to do business in, the State of California.

11. Interpretation. The paragraph headings of this Agreement are for reference and convenience only and are not part of this Agreement. They have no effect upon the construction or interpretation of any part hereof. The provisions of this Agreement shall be construed in a reasonable manner to affect the purposes of the parties and of this Agreement.

12. Counterparts. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument.

IN WITNESS WHEREOF, this Agreement has been executed by the parties as of the date set forth above.

TRACT 16211 ASSIGNOR:
THE RESERVE SOUTH AT FORSTER
HIGHLANDS, LLC, A Delaware limited
liability company

By: _____
Name: _____
Title: General Manager

ASSIGNEE:
THE RESERVE MAINTENANCE CORP. LLC,
A California non-profit mutual benefit
corporation

By: _____
Name: _____
Title: General Manager

TRACT 16282 ASSIGNOR:
THE RESERVE NORTH AT FORSTER
HIGHLANDS, LLC, A Delaware limited
liability company

Name: _____
Title: General Manager

By: _____

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CITY OF SAN CLEMENTE:

By: _____
Its: _____

ATTEST:

CITY CLERK of the City of
San Clemente, California

Dated: _____, 20__

Approved as to form:
RUTAN & TUCKER, LLP

City Attorney

DRAFT