



## **AGENDA REPORT**

**TO:** Honorable Mayor and Members of City Council

**FROM:** Mark J. Brodeur, Community and Economic Development Director

**MEETING DATE:** February 17, 2016

**SUBJECT:** Authorize the City Manager to enter into a master reimbursement agreement with Domaine Hospitality Partners, LLC, proponents for Project Bella.

**CEQA:** Does not Constitute a "Project" per California Environmental Quality Act (CEQA) Guidelines

### **RECOMMENDATION**

Authorize the Interim City Manager to enter into a reimbursement agreement with Domaine Hospitality Partners, LLC, proponents for Project Bella to cover costs of the preparation and management of an Environmental Impact Report, and additional costs associated with the acceleration of City's Local Coastal Program.

### **DISCUSSION**

Domaine Hospitality Partners, LLC (Domaine) has submitted an application to develop, construct, and operate a hotel project (Project) at 125 Ocean View Boulevard in the City's coastal zone. The current zoning does not permit a hotel use. In pursuit of this project, a vote of the residents of Pacific Grove will take place on April 19th to change the zoning to permit a hotel use. If the vote to change the zoning is approved by the voters, the Project Bella proponents understand the City will be required to expend considerable staff and consultant resources. These activities include, but are not limited to, the processing of and management of an Environmental Impact Report, development applications, permits, and other entitlements.

Domaine is aware of City fiscal constraints, and want to ensure City resource limitations will not delay the necessary review steps to effect timely development of the project. Without the reimbursement agreements, an alternate timeline would be required due to other demands on City staff and resources. The proposed agreement is structured to ensure City independence throughout the effort, as the City alone decides on the scope of activities to be undertaken and the discretion to be exercised. The City shall be reimbursed for its effort, but has not delegated or impaired its judgment.

Domaine has offered to reimburse the City for the following: 1) Costs of the Consultant-Prepared Environmental Impact Report (EIR) and supplemental staff/consultant resources to manage the EIR; and 2) Additional costs incurred by the City regarding the acceleration of Pacific Grove Local Coastal Program Land Use Plan and Implementing Actions Program.

### **FISCAL IMPACT**

If the City approves the reimbursement agreements, there will be minimal fiscal impact to the City.

**ATTACHMENT**

1. Reimbursement Agreement for EIR preparation and project management by the City.

RESPECTFULLY SUBMITTED,



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Mark J. Brodeur  
Director, Community and Economic Development

REVIEWED BY;

*Ben Harvey*

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Ben Harvey  
Interim City Manager

## REIMBURSEMENT AGREEMENT

This agreement ("Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ ("Effective Date") by and between the City of Pacific Grove ("CITY") and Domaine Hospitality Partners, LLC ("DEVELOPER").

WHEREAS, DEVELOPER has submitted an application to develop, construct, and operate a hotel project at 125 Ocean View Boulevard in the coastal zone of the City of Pacific Grove in Monterey County, California. The project site is 4.88 acres (including Sloat Avenue) and the assessor's parcel numbers (APNs) for the site are 006-231-001, 006-234-004 and 006-234-005. For purposes of this Agreement, reviewing and processing DEVELOPER'S applications, including, but not limited to, all activities related to the to cover costs of the preparation and management of an Environmental Impact Report, and additional costs associated with the acceleration of City's Local Coastal Program, entitlement process, development, and construction of the above-referenced project and related uses shall be referred to as the "Project".

WHEREAS, DEVELOPER and CITY expect that the Project will require CITY to expend considerable resources in working with DEVELOPER for approval of the Project, including, but not limited to, processing of DEVELOPER'S environmental impact report, fiscal analysis, water permits, and management of the environmental impact report and any and all applications, permits, and other entitlements related to the Project.

WHEREAS, CITY and DEVELOPER have agreed that DEVELOPER shall be responsible for reimbursing CITY for all costs and expenses reasonably incurred by CITY with respect to the Project, including costs of staff time and consultants in accordance with the terms of this Agreement (collectively "Project Costs").

WHEREAS, in the event the CITY approves the Project, CITY and DEVELOPER anticipate that such approval will include a condition, among other things, that DEVELOPER indemnify and reimburse CITY for costs associated with said approval.

NOW, THEREFORE, in consideration of the foregoing promises and in order to carry on the intent and purpose of applicable codes, ordinances, resolutions and regulations, DEVELOPER and CITY agree as follows:

### SECTION 1. THE DEVELOPER DEPOSITS

(a) Deposit. Within five (5) business days of execution of this Agreement, DEVELOPER shall deposit with CITY in a manner reasonably satisfactory to CITY the total amount of Fifty Thousand Dollars (\$50,000), hereafter referred to as the "Deposit."

(b) Additional Deposits. DEVELOPER shall make five additional deposits of Fifty Thousand Dollars (\$50,000) (“Quarterly Deposits”) to reimburse CITY for Project Costs. The Quarterly Deposit shall be due and payable on March 31, 2016, June 31, 2016, September 31, 2016, and December 31, 2016, and March 31, 2017 respectively. If the CITY reasonably determines that the Deposit and Quarterly Deposits are insufficient to reimburse CITY for Project Costs, which determination shall be based on a good faith reasonable estimate of costs and expenses in consultation with DEVELOPER, then DEVELOPER and CITY will negotiate in good faith the amount and timing of further deposits to cover the additional Project Costs (“Supplemental Deposits”).

(c) Maintenance of Deposit. CITY shall maintain the Deposit, Quarterly Deposits, and any Supplemental Deposits (collectively “Developer Deposits”) in an interest-bearing dedicated account for the benefit of DEVELOPER. DEVELOPER acknowledges and agrees that in lieu of paying staff costs for maintenance and tracking of interest, DEVELOPER elects to waive any interest on the Developer Deposits. CITY shall at all times maintain records as to the expenditure of the Developer Deposits; provided, however, CITY may use the Developer Deposits only as set forth herein.

(d) Withdrawal of Funds. CITY may draw upon the Developer Deposits to pay for Project costs (as defined in SECTION 2 below) as such costs are incurred in accordance with the terms of this Agreement.

(e) Estimate of CITY’s Use of DOMAINE Quarterly Deposits. At least ten (10) prior to the due date of each Quarterly Deposit, CITY shall provide DOMAINE with an estimate of expected expenditures from each future Quarterly Deposit for each of the allowable Project Cost categories set forth in Section 2.

## SECTION 2. PROJECT COSTS TO BE REIMBURSED

DEVELOPER shall be responsible for payment of all direct costs incurred by CITY as a result of the Project (“Project Costs”). During the term of this Agreement, so long as DEVELOPER is fulfilling its obligations hereunder, CITY shall process DEVELOPER’S application(s) for the Project until such time as CITY approves or denies such application(s). Project Costs shall include:

(a) All actual costs of any outside consultants hired to assist CITY with Project-related activities, including, but not limited to, planning consultants, CEQA consultants, attorney’s fees, and other technical and professional consultants as deemed necessary by CITY to process DEVELOPER’S application. CITY shall notify and consult with DEVELOPER regarding any decision to retain such persons, but shall have sole discretion in the selection and tasking of outside consultants.

(b) All actual costs, not specified in SECTION 2(a) above, expended on Project-related activities (e.g., costs of telephone, mileage, supplies, postage, office space, etc.).

(c) Permit fees normally collected by the CITY to process discretionary permit applications for a proposed project. DEVELOPER shall be responsible to pay any fee not expressly abrogated by this Agreement, including, but not limited to, any ministerial fee(s) on required Project permits such as building permits, grading permits, and the like. This Agreement also does not apply to any fees the DEVELOPER is required to pay to any entity other than the CITY, any state or federal agency, or on any new application or project.

(d) CITY is required by law to process DEVELOPER's Project application. DEVELOPER desires that such Project application processing proceed in an efficient and expeditious manner and will voluntarily reimburse CITY for its expenses in so doing. Therefore CITY will set forth a timeline and it will use all reasonable efforts to maintain, and a budget for its staff and consultants to satisfy milestones on, such timeline. This timeline and budget can be submitted to DEVELOPER in the same document, and updated from time to time.

### SECTION 3. PROCESS FOR REIMBURSEMENT OF PROJECT COSTS

(a) Twenty (20) days prior to expiration of each quarter, CITY shall prepare and provide DEVELOPER (by regular mail, electronic mail, or facsimile) a written, quarterly summary of all Project Costs charged by CITY against the Developer Deposits. The written summary shall be supported by appropriate documentation such as timesheets, invoices, and receipts; provided, however, that CITY shall have the right to redact from such documentation any information that the CITY reasonably determines is privileged, confidential, or not otherwise subject to release pursuant to the California Public Records Act (Gov't Code § 54950 *et seq.*). DEVELOPER shall approve or disapprove CITY'S reimbursement of all costs set forth in each such summary within fifteen (15) business days of receipt. If CITY does not receive a response from DEVELOPER within this fifteen-day timeframe, the requested reimbursement shall be deemed approved and CITY shall draw on the Developer Deposits to cover said Project Costs. In the event DEVELOPER notifies CITY in writing within this fifteen-business day timeframe that it does not approve said reimbursement, CITY shall not draw on the Developer Deposits to cover said Project Costs until there is resolution of this dispute in accordance with SECTION 10 below.

(b) CITY will review billing statements from outside consultants, or may delegate this duty to DEVELOPER to assure accuracy and appropriateness of entries. In addition, CITY shall provide DEVELOPER on a quarterly basis (by regular mail, electronic mail or facsimile) a copy of any and all consultant invoices paid directly by CITY during the preceding quarter.

(c) City will require prompt, monthly billings from any consultants retained or hired hereunder with itemization of services rendered, time spent and billing rates clearly described. If

consultant billings include items in excess of sixty days from date of billing statement, DEVELOPER will not be required to reimburse CITY.

#### SECTION 4. TERM

The term of this Agreement shall commence on the Effective Date and terminate upon the later of: (a) one (1) year from the issuance of a certificate of completion for the last of the Project-related improvements; or (b) one (1) year from the last date that DEVELOPER is required to maintain Project-related improvement(s) set forth in any applicable improvement or development agreements related to the Project. Nothing herein shall be deemed to abrogate DEVELOPER'S responsibility to pay for ongoing expenses, including mediation/arbitration/litigation expenses, incurred by CITY 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 CITY approval of the PROJECT.

#### SECTION 5. TERMINATION

DEVELOPER may, at its option, terminate this Agreement at any time on thirty (30) days' prior written notice to CITY ("Termination Notice") if DEVELOPER determines not to proceed with the Project. In the event of termination, DEVELOPER shall be responsible for the payment of all Project Costs incurred up to and including the date of termination, including any costs that have been irrevocably contracted for. CITY shall apply the Developer Deposits to any unreimbursed Project Costs through the termination date, and CITY shall then refund any remaining Developer Deposits funds (including any interest earned thereon) to DEVELOPER within thirty (30) days of the date of termination.

#### SECTION 6. INDEMNIFICATION

In addition to Project Costs, DEVELOPER shall defend, indemnify, and hold CITY free and harmless from any and all suits, fees, claims, demands, causes of action, costs, losses, damages, liabilities and expenses (including, but not limited to, an award of attorneys' fees, expert witness fees, and court costs) incurred by CITY for any damage(s) arising (directly or indirectly) or resulting from the review, processing, consideration, or from the approval of DEVELOPER'S development application(s) or action taken by CITY thereon. This obligation shall not prevent the City from engaging counsel in any such action. DEVELOPER will reimburse CITY for any costs or fees it may incur in any court or administrative action related to the Project, and shall reimburse the City for all adverse fees or costs awarded pursuant to any judgment against the City. DEVELOPER'S obligations pursuant to this SECTION 6 shall survive suspension or termination of this Agreement.

#### SECTION 7. TIME IS OF THE ESSENCE

For the purpose of this Agreement and of each provision of this Agreement, time is of the essence. CITY shall make all reasonable efforts to provide timely budgeting and scheduling to DEVELOPER, provide consultant statements to DEVELOPER, and process Project pursuant to the schedule.

**SECTION 8. NOTICES**

All notices called for in this Agreement shall be given in writing by personal delivery, or by first-class mail, postage fully prepaid, return receipt requested, or by overnight mail or overnight private courier. Notice given by personal delivery shall be deemed to be completed upon delivery. Notice given by first-class mail shall be deemed completed five (5) days after deposit into the U.S. Mail. Overnight mail or couriered notices shall be deemed completed the next business day following deposit into the U.S. mail or delivery to the private courier. 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 8.

To the CITY: Mark Brodeur  
Department Director  
Community & Economic Development  
City of Pacific Grove  
300 Forest Ave  
Pacific Grove, CA 95950

With a copy to:  
David Laredo, Esq.  
City Attorney  
City of Pacific Grove  
606 Forest Ave.  
Pacific Grove, CA 93950

To DEVELOPER: Ronald Meer  
Domaine Hospitality Partners, LLC  
20101 SW Birch St. Suite 150K  
Newport Beach, CA 92660

With a copy to:  
Jason S. Retterer  
L+G, LLP  
318 Cayuga St.  
Salinas, CA 93901

**SECTION 9. DEFAULT BY DEVELOPER**

If DEVELOPER defaults in its obligations to provide and maintain the Developer Deposits required by this Agreement or to timely pay for any Project Costs as required under this Agreement, then CITY, at CITY's option, may suspend consultant activities related to the Project. CITY shall give DEVELOPER written notice of such default at least thirty (30) days prior to any suspension of consultant activities to allow DEVELOPER time to remedy the default. Subject to SECTION 12 below, CITY may terminate this Agreement and institute legal proceedings, with no further notice to DEVELOPER, if such default is not remedied by DEVELOPER within thirty (30) days after such notice is given by CITY to DEVELOPER. Upon such termination, CITY shall not be obligated to expend any additional funds on Project-related matters; however, CITY may, in its discretion, expend funds after termination of this Agreement

as necessary to complete Project-related activities already commenced or for which monetary obligations have already been incurred.

In the event of DEVELOPER'S default, DEVELOPER waives any permit review timelines otherwise applicable under any applicable laws with respect to any discretionary approval that may be delayed as a result of DEVELOPER'S failure to provide CITY with funds as required under this Agreement to complete environmental review as necessitated by state and federal statutes.

#### SECTION 10. DISPUTE RESOLUTION

If a dispute arises related to the interpretation or enforcement of, or compliance with, the terms and provisions of this Agreement, CITY and DEVELOPER shall first attempt to resolve it through informal discussions. In the event a dispute cannot be resolved in this manner within twenty-one (21) days after the dispute arises, then the CITY and DEVELOPER shall engage in the following Alternative Dispute Resolution procedures:

Mediation. The CITY and DEVELOPER agree that any and all disputes, claims, or controversies arising out of or related to this Agreement shall be submitted to the San Jose, CA office of Judicial Arbitration and Mediation Services, Inc ("JAMS") for mediation, and if the matter is not resolved through mediation, then it shall be submitted to JAMS for final binding arbitration pursuant to the arbitration clause set forth below. Either CITY or DEVELOPER may commence mediation by providing to JAMS and the other party a written request for mediation setting forth the subject of the dispute and the relief requested. The CITY and DEVELOPER will cooperate with JAMS and with one another in selecting a mediator from JAMS's panel of neutrals and in scheduling the mediation proceedings. If the parties cannot agree on the appointment of the mediator or the date of the mediation within thirty (30) days after the written request for mediation, then JAMS shall appoint the mediator at its discretion and/or set a mediation date. The CITY and DEVELOPER covenant that they will participate in the mediation in good faith, and that they will share equally in its costs. All offers, promises, conduct, and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator and any JAMS employees, are confidential, privileged, and inadmissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. Either party may seek equitable relief prior to the mediation to preserve the status quo pending the completion of that process. Except for an action to obtain equitable relief, neither party may commence civil litigation. Either CITY or DEVELOPER may initiate arbitration with respect to matters submitted to mediation by filing a written demand for arbitration at any time following completion of the initial mediation session or sixty (60) days after the date of the written request for mediation, whichever occurs last. Mediation may continue after the commencement of arbitration, if the CITY and DEVELOPER so desire.



Unless otherwise agreed to by the CITY and DEVELOPER, the mediator shall be disqualified from serving as the arbitrator in the case. The provisions of this clause may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees, and expenses, including attorneys' fees, to be paid by the party against whom enforcement is ordered.

Arbitration: Any dispute, claim, or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, not resolved by the mediation process set forth above, shall be determined by arbitration to be held in Monterey County before one arbitrator. Neither party may request an arbitration hearing in conformity with this arbitration clause until after the matter has been submitted to mediation in conformity with the mediation clause set forth above **and** the initial mediation session has been completed or sixty (60) days has passed since the date of the initial written request for mediation, whichever occurs last. The arbitration shall be administered by the San Jose, CA office of Judicial Arbitration and Mediation Services, Inc ("JAMS") pursuant to its Streamlined Arbitration Rules and Procedures, which rules shall govern the commencement of arbitration and the selection of the arbitrator among other things. Judgment on the Arbitrator's Award may be entered in the Monterey County Superior Court or any court having jurisdiction. This clause shall not preclude the CITY or DEVELOPER from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

The costs and fees of arbitration (including those fees and expenses set forth in JAMS' fee schedule in effect at the time of commencement of the arbitration) shall be borne equally by the CITY and DEVELOPER, and each side shall be responsible for its own attorney(s) and expert(s) witness fees.

This dispute resolution process shall be undertaken in good faith. A mediator or arbitrator other than JAMS may be agreed to by the CITY and DEVELOPER in writing. By agreeing to this dispute resolution process, neither CITY nor DEVELOPER hereby loses or waives its right to assert the operation of any applicable statute of limitations as an affirmative defense. The arbitration award shall be final and binding upon the CITY and DEVELOPER and each agrees that it will accept such decision and award as binding and conclusive and will abide thereby.

#### SECTION 11. NO WAIVER OF IMMUNITIES

Nothing in this Agreement shall be construed as a waiver by CITY 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 12. 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 CITY and DEVELOPER 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 13. UNENFORCEABILITY; SEVERABILITY

If a court of competent jurisdiction holds any Agreement clause 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 14. SUCCESSORS AND ASSIGNS

This Agreement shall bind and benefit CITY and DEVELOPER and its heirs, executors, representatives, assigns, and successors-in-interest, whether voluntary or involuntary. DEVELOPER agrees to require any such heirs, executors, representatives, assigns and successors to assume all duties and obligations set forth herein. The DEVELOPER shall provide CITY with notice of any transfer of ownership interests in the project or the subject property.

#### SECTION 15. APPLICABLE LAW

This Agreement shall be construed and enforced in accordance with the laws of the State of California. Every provision of law and clause required by law to be inserted in this Agreement shall be deemed to be inserted, and this Agreement shall be read and enforced as though it were included, and if through mistake or otherwise any provision is not inserted or is not correctly inserted, upon application of either party this Agreement shall be amended to make the insertion or correction. 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 that do not materially and substantially alter the positions of CITY and DEVELOPER.

#### SECTION 16. 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 17. 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 DEVELOPER or the affairs of CITY, or otherwise, or cause them to be considered joint venturers or members of any joint enterprise.

#### SECTION 18. 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 19. COOPERATION

DEVELOPER and CITY 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 or enjoyment of its rights and obligations secured through this Agreement. The parties will endeavor to make their principals, staff and consultants available to meet where appropriate to facilitate the efficient processing and review of project application and associated environmental review.

#### 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

DEVELOPER and CITY agree that nothing in this Agreement is to be construed as a representation, promise, or commitment on the part of CITY to give special treatment to, or exercise its discretion favorably for, the Project or DEVELOPER.

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

CITY

DEVELOPER

City Council

Domaine Hospitality Partners, LLC  
By: Domaine Hospitality Partners, LLC

By: \_\_\_\_\_  
Bill Kampe, Mayor

By: \_\_\_\_\_  
Ronald Meer

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

ATTEST

, City Clerk

By: \_\_\_\_\_

Date: \_\_\_\_\_  
APPROVED AS TO LEGAL FORM

David Laredo, City Attorney

By: \_\_\_\_\_

Date: \_\_\_\_\_