

RESOLUTION NO. 2013- 006

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROHNERT PARK
APPROVING A REIMBURSEMENT AGREEMENT BY AND BETWEEN
CITY OF ROHNERT PARK AND THE SPANOS CORPORATION**

WHEREAS, the City of Rohnert Park ("City") has received an application for a Conditional Use Permit and Site Plan and Architectural Review from The Spanos Corporation for a proposed multi-family project, Fiori Estates Apartments, in Rohnert Park;

WHEREAS, The Spanos Corporation entered into an informal reimbursement agreement with the City to reimburse the City for the costs it incurs in processing the applications;

WHEREAS, pursuant to its police powers and the requirements of Rohnert Park Municipal Code Section 3.32.050 - Cost recovery fees, the City and The Spanos Corporation desire to enter into a more comprehensive agreement relating to cost recovery; and

WHEREAS, The Spanos Corporation has agreed to fund the City's efforts in processing their application, including future documents and legal costs as may be required for project approval.

NOW THEREFORE BE IT RESOLVED by the City Council of the City of Rohnert Park that the City Manager is hereby authorized and directed to execute a Reimbursement Agreement with The Spanos Corporation in a form substantially similar to that attached hereto as Exhibit A and incorporated by this reference, for and on behalf of the City, including authorization for staff to make minor adjustments to this agreement subject to City Attorney review and approval.

DULY AND REGULARLY ADOPTED on this 8th day of January, 2013, by the City Council of the City of Rohnert Park.



CITY OF ROHNERT PARK

Pam Stafford
Mayor

ATTEST:

John M. Buehler
City Clerk

Ahanotu: AYE Belforte: AYE Mackenzie: AYE Callinan: ABSENT Stafford: AYE
AYES: (4) NOES: (0) ABSENT: (1) ABSTAIN: (0)

REIMBURSEMENT AGREEMENT

THIS REIMBURSEMENT AGREEMENT ("Agreement") is made and entered into as of the ____ day of _____, 2013, by and among the CITY OF ROHNERT PARK ("City"), a municipal corporation, and The Spanos Corporation ("Developer"), a California corporation.

RECITALS

- A. Developer has submitted or plans to submit an application for development of Fiori Estates Apartments ("Proposed Project") in Rohnert Park, California. Development of the Proposed Project requires or contemplates the following approvals, documents and processing activities (collectively, "Project Approvals"):
- (1) Conditional Use Permit;
 - (2) Approval of permits or waivers from U.S. Army Corps of Engineers, North Coast Regional Water Quality Control Board, California Department of Fish and Game;
 - (3) Lot line merger and/or adjustment;
 - (4) Site specific Hydrology and Drainage study, NPDES General Permit for Stormwater Runoff, and approval of storm drainage plans by the Sonoma County Water Agency and the City of Rohnert Park;
 - (5) Site Plan and Architectural Review;
 - (6) Grading permits, building permits, encroachment permits, transportation permits for approval of a construction haul route(s);
 - (7) Implementation of mitigation monitoring program;
 - (8) Fee credit reimbursement agreement;
 - (9) Any other approvals, documents, or processing reasonably necessary to develop the Proposed Project.
- B. Prior to the execution of this Agreement, City and Developer had an Informal Reimbursement Agreement ("IRA") pursuant to which City has been processing the Proposed Project and billing Developer for costs incurred therewith.
- C. Processing of the Proposed Project and processing of the Project Approvals will require City to incur various costs and expenses including staff processing, consultant costs, and legal fees and costs.
- D. In order to facilitate processing of the Project, Developer desires to reimburse City for all of its costs in connection with the Project Approvals, including but not limited to: legal fees, staff time and consultant costs incurred in connection with the Project Approvals; costs unbilled and unreimbursed

by developer in connection with Project Approvals covered by this Reimbursement Agreement; and any litigation costs incurred as a result of the processing of the Project Approvals.

AGREEMENT

In consideration of the foregoing recitals and for other good and valuable consideration, the parties hereby agree as follows:

1. **Purpose of Agreement.** The purpose of this Agreement is to provide for payment by Developer of all legal, staff and consultant costs directly or indirectly incurred by City in connection with the Project, including legal defense costs, if any.
2. **Developer Reimbursement Obligation.** Developer shall reimburse City for the following costs (collectively, "Eligible Costs") incurred in connection with the Project (including any and all staff and or legal costs incurred following approval of the Proposed Project to process the project to completion):
 - a. City staff time, processing costs, consultant costs and legal fees associated with processing and implementing all Project Approvals and Mitigation Measures including legal fees and costs incurred in connection with the legal defense of any Project Approvals;
 - b. a 7% administrative fee charged on costs of outside consultants and legal services which are included in subsections a above; and
 - c. fees and costs which City has incurred but which have either not yet been billed for reimbursement or which have not yet been reimbursed to the City.
3. **Payment of Eligible Costs.** City shall submit to Developer a copy of each invoice, bill, demand or other evidence ("Invoice") that the City has incurred Eligible Costs or other reasonable substantiation of such Eligible Costs. Each such Invoice of Eligible Costs shall be paid in full by Developer, without deduction or offset, within thirty (30) calendar days of the date of the Invoice. Developer covenants and agrees that failure to pay such Eligible Costs to City in full within thirty (30) calendar days of the date of such Invoice will result in a Late Charge in accordance with Section 4 of this Agreement, as well as in the cessation of processing the Proposed Project in accordance with Section 9 of this Agreement. Developer further covenants and agrees that, if as a result of a failure to pay Invoice of Eligible Costs, City ceases processing the Proposed Project application in accordance with Section 9, Developer shall not directly or indirectly initiate any litigation against City or its employees, agents, or volunteers for the cessation or delay in processing such applications following such failure to pay.
4. **Late Charge.** Developer acknowledges that the late payment of any Eligible Costs will cause City to incur additional costs, including administration and collection costs and processing and accounting of expenses ("Delinquency Costs"). If City has not received payment of all Eligible Costs within thirty (30) calendar days of the date of the Invoice, the Invoice is considered overdue and Developer shall

immediately be charged a late charge of five percent (5%) of the delinquent amount. The City is then authorized to pay such Late Charge from the Deposit along with the amount of the unpaid Invoice of Eligible Costs in accordance with Section 5. City and Developer recognize that the expenses that City shall suffer as a result of Developer's failure to make timely payments is difficult to ascertain and agree that said five percent (5%) late charge represents a reasonable estimate of the Delinquency Costs that would be incurred by City. City's acceptance of any such late charge does not equate with a waiver of Developer's default with respect to the overdue amount, or prevent City from exercising any rights and remedies available under this Agreement.

5. **Security Deposit.** Upon signature of this Agreement, Developer shall deposit with City the sum of Thirty Thousand Dollars (\$30,000) in cash or other immediately available funds ("Deposit"), as security for Developer's obligation to pay all Eligible Costs, as provided herein. The Deposit shall be subject to the following:
 - a. Developer agrees that if Developer does not pay when due the full amount of each Invoice of Eligible Costs as provided in Section 3 above, then the City is authorized to pay such amount from the Deposit, which may include a Late Charge in accordance with Section 4.
 - b. If the City withdraws from the Deposit, the City shall immediately notify the Developer in writing that it has used the Deposit to pay all or a portion of the bill, invoice, demand or other evidence of Eligible Costs, and the Developer shall thereafter have fourteen (14) calendar days from the date of such written notice to deposit with City, in cash, an amount necessary to restore the Deposit to its full amount of \$30,000. If the Developer fails to replenish the Deposit within said due date, City shall have no obligation to continue processing the Proposed Project or to incur any additional Eligible Costs.
 - c. If the amount of the unpaid Invoice of Eligible Costs and Late Charge exceeds the available funds in the Deposit, the City shall immediately notify the Developer in writing that it has used the Deposit to pay all or a portion of the bill, invoice, demand or other evidence of Eligible Costs, and the Developer shall have fourteen (14) calendar days from the date of such written notice to deposit with City, in cash, an amount necessary to restore the Deposit to its full amount of \$30,000, plus the full amount of the unpaid Invoice of Eligible Costs and applicable Late Charge. If the Developer fails to fully replenish the Deposit, pay the full Invoice of Eligible Costs and applicable Late Charge within said due date, City shall have no obligation to continue processing the Proposed Project or to incur any additional Eligible Costs.
 - d. Developer further covenants and agrees that, if as a result of reduction of the Deposit to zero dollars or failure to replenish, City ceases processing the Proposed Project application in accordance with Section 8, Developer shall not directly or indirectly initiate any litigation against City or its employees, agents, or volunteers for the failure to process or for delay in processing such applications following such reduction or failure to replenish.

- e. If this Agreement is terminated as provided in Section 8 below and all activities related to Project Approvals have ceased and the City is not continuing to incur costs related to the project, City shall return to Developer within ninety (90) calendar days following the effective date of termination that portion of the Deposit that has not been expended or committed by City as provided herein, if any.
6. **No Commitment as to Future Approvals.** Nothing in this Agreement shall be construed as a commitment to grant or issue any Project Approvals or any other preliminary or formal approvals in connection with the Proposed Project or to enter into the proposed agreements. Developer acknowledges and agrees that nothing in this Agreement limits City's discretion, in any manner, with respect to any aspect of the Proposed Project or the proposed real estate transaction and fee credit agreements. Developer agrees that it shall remain obligated to pay all Eligible Costs, regardless of whether any aspect of the Proposed Project is approved and regardless of whether City and Developer enter into the proposed agreements. Notwithstanding the aforementioned, City shall in good faith expeditiously and with all diligence process the Project Approvals.
7. **Indemnity.** Developer shall defend (with counsel approved by City, which approval shall not be unreasonably withheld), indemnify, and hold harmless the City, its officials, employees, volunteers and agents from and against any and all loss, liability, expenses, claims, costs (including reasonable attorneys fees), suits and damages of every kind nature, and description, directly or indirectly arising from any third party legal challenge to the Project Approvals, or the implementation of this Agreement. Developer may defend against any such third party legal challenge as a Real Party in Interest using counsel of Developer's choice, and Developer and City agree to cooperate in the joint defense of the Project Approvals or the implementation of this Agreement. Developer's indemnity obligations under this Section 7 shall survive the expiration or termination of this Agreement but cease in the event City denies the Proposed Project.
8. **Termination.** Developer may terminate this Agreement by providing thirty (30) calendar days written notice to City. If Developer is in default of any of its obligations under this Agreement and fails to cure such default within fourteen (14) calendar days following written notice from City, then City may terminate this Agreement by notice to Developer and, thereafter, City shall have no further obligation to process Project Approvals for the Proposed Project or to continue with negotiation and drafting of the proposed agreements. Developer shall be responsible for the payment of Eligible Costs incurred by City up to and including the date of termination regardless of which party terminates this agreement.
9. **Cessation of Processing.** Developer acknowledges and agrees that City may, in its sole discretion, cease processing the Project Approvals , if
- a. this Agreement is terminated by either party following notice and expiration of any applicable cure periods as provided herein; or
 - b. failure to pay such Eligible Costs to City in full within thirty (30) calendar days of the date of such Invoice; or

- c. the Deposit amount is reduced to zero and Developer fails to replenish the Deposit upon request by City.

Developer further covenants and agrees that if City ceases processing the Project Approvals for any of the foregoing reasons, Developer shall not directly or indirectly initiate any litigation against City or its employees, agents, or volunteer for the failure to process or for delay in processing such applications following such Agreement termination.

10. **Attorneys Fees.** If any legal action is brought by either party to interpret or enforce any terms or provisions of this Agreement, the prevailing party shall be entitled to its reasonable attorneys' fees and costs.
11. **Entire Agreement.** This Agreement constitutes the entire agreement of the parties with respect to the matters set forth herein. Any amendments, modifications, or changes to this Agreement shall be in writing and signed by both parties.
12. **Waivers.** Waiver of a breach or default under this Agreement shall not constitute a continuing waiver or a waiver of a subsequent breach of the same or any other provision of this Agreement.
13. **Severability.** If any provision of this Agreement or the application of any such provision shall be held by a court of competent jurisdiction to be invalid, void or unenforceable to any extent, the remaining provisions of this Agreement and the application thereof shall remain in full force and effect and shall not be affected, impaired or invalidated.
14. **CEQA Processing.** Developer acknowledges and agrees that the City is the lead agency under CEQA, that the Stadium Area Master Plan Environmental Impact Report (State Clearinghouse # 2005042111) must reflect City's independent judgment and that City retains full discretion with respect to all findings to be made in connection therewith.
15. **Successors and Assigns.** This Agreement shall be binding upon the parties hereto and their respective heirs, legal representatives, successors and assigns.
16. **Jurisdiction.** This Agreement shall be administered and interpreted under the laws of the State of California without regard to its choice of law rules. Jurisdiction and venue of litigation arising from this Agreement shall be in the County of Sonoma, State of California.
17. **Notices.** Notices required by this Agreement shall be personally delivered, mailed, postage prepaid, or mailed via nationally recognized overnight courier as follows:

To the Developer:

The Spanos Corporation
10100 Trinity Parkway, 5th Floor
Stockton, CA 95219
Attn: Rick Wood
Tel: (209) 955-2503
Fax: (209) 955-2588

To the City:
City of Rohnert Park
130 Avram Avenue
Rohnert Park, CA 94928
Attn: City Manager
Tel: (707) 588-2226
Fax: (707)792-1876

with a copy to:

Burke, Williams & Sorensen, LLP
1901 Harrison Street, 9th Floor
Oakland, CA 94612
Attn: Michelle Marchetta Kenyon
Tel: (510) 273-8780
Fax: (510) 839-9104

Notices given by personal delivery shall be effective immediately. Notices given by overnight courier shall be effective upon the date of delivery. Notices given by mail shall be deemed to have been delivered five days after having been deposited in the United States mail. Any party may change its address for notice by written notice to the other party in the manner provided in this paragraph 17.

18. **Interpretation.** The titles to the sections of this Agreement are not a part of this Agreement and shall have no effect upon the construction or interpretation of any part of this Agreement. As used in this Agreement, masculine, feminine or neuter gender and the singular or plural number shall each be deemed to include the others where and when the context so dictates. The word "including" shall be construed as if followed by the words "without limitation." This Agreement is the product of negotiations among the parties, and it shall not be construed as if it had been prepared by one of the parties, but rather as if all of the parties have prepared the same. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement.
19. **Authority.** Each person executing this Agreement covenants and warrants that (i) the party on whose behalf he or she is signing is duly incorporated or otherwise established or formed and validly existing under the laws of its state of incorporation, establishment or formation, (ii) the party has and is duly qualified to do business in California, (iii) the party has full corporate, partnership, trust, association or other power and authority to enter into this Agreement and to perform all of its obligations hereunder, and (iv) each person (and all of the persons if more than one signs) signing this Agreement is duly and validly authorized to do so.
20. **Counterparts.** This Agreement may be executed in counterparts.
21. **Assignment of Claims.** To the extent City determines that it may have Claims against any Project Consultant in connection with the Proposed Project, City may, upon written request by Developer, assign such Claims to Developer. As used herein, "Project Consultant" means any consultant,

contractor, or other third party whose work product gives rise to any Eligible Cost or who is hired by City in connection with the Project Approvals; and “Claims” means any and all claims, potential claims, causes of action, and potential causes of action for breach of contract and/or professional negligence, regardless of whether such claims or causes of action accrue prior to or after the effective date of this Agreement.

[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK]

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

CITY:

CITY OF ROHNERT PARK,
a municipal corporation

City Manager

Per Resolution No. _____ adopted by the Rohnert Park City Council
at its meeting of _____.

APPROVED AS TO FORM:

City Attorney

ATTEST:

City Clerk

DEVELOPER:

The Spanos Corporation,
a California corporation

Rick Wood
Division Manager