

**MEMORANDUM OF AGREEMENT
REGARDING FUNDING TO BE PROVIDED FOR
THE SOUTH BOUNDARY ROADWAY AND THE INTERSECTION AT GENERAL
JIM MOORE BOULEVARD IMPROVEMENTS**

This Memorandum of Agreement ("MOA") is made and entered into effective as of May 26, 2020, (the "Effective Date") by and between the Fort Ord Reuse Authority ("FORA"), a California public agency, and the City of Del Rey Oaks (the "City"), a California general law city. FORA and the City are sometimes referred to herein in the singular as a "Party" and collectively as the "Parties."

Recitals

A. The "Improvements" consist of (i) relocation and/or reconfiguration of the existing intersection of General Jim Moore Boulevard with South Boundary Road and (ii) an upgrade of that portion of South Boundary Road located between its intersection with General Jim Moore Boulevard to 200 feet east of its intersection with Rancho Saucito Road.

B. FORA entered into a professional services contract dated November 17, 2017 with Whitson Engineers, Inc. ("Whitson") for engineering services in connection with the contemplated Improvements, which contract was subsequently amended four (4) times (and as so amended may be referred to herein as the "Contract"). Whitson's work under the Contract has not yet been completed.

C. FORA is scheduled to terminate in accordance with state law on June 30, 2020 ("FORA's Termination Date"). It is not possible to complete the Improvements before FORA's Termination Date and accordingly FORA will not undertake the Improvements. However, the City wishes to undertake the Improvements following FORA's sunset and FORA is willing to make the below-described funding available to the City, each on all of the terms and conditions set forth in this MOA.

D. FORA's Capital Improvement Program for fiscal years 2018/2019 and 2019/2020 includes the Improvements. FORA's Board of Directors (the "Board") has recently approved and committed to reserving the amount of Seven Million Two Hundred Sixty-Nine Thousand Eight Hundred Thirteen Dollars (\$7,269,813) to be available to cover the currently estimated construction and related costs of the South Boundary Roadway elements of the Improvements (to be deposited into an escrow account established with Fidelity National Title, Inc. as escrow holder); One Million Fifty-Six Thousand One Hundred Sixty-Eight Dollars (\$1,056,168) to be available to cover the currently estimated construction and related costs of the Intersection at General Jim Moore Boulevard elements of the Improvements (to be deposited into a separate escrow account established with Fidelity National Title, Inc. as escrow holder); and Five Hundred Eighteen Thousand Five Hundred Sixty-Four Dollars (\$518,564) to be available to cover the combined design services estimate for the Improvements (to be transferred to the City). Accordingly, the Parties now wish to enter into this MOA to provide for the aggregate amount of Eight Million Eight Hundred Forty-Four Thousand Five Hundred Forty-Five Dollars

(\$8,844,545) to be deposited into escrow accounts and transferred to the City as outlined above (which funds may collectively be referred to as the "Improvement Funds").

E. Inasmuch as FORA will not be carrying out the Improvements, but rather will only make the Improvement Funds available to the City as provided in this MOA, responsibility for any further necessary environmental analysis, review, or approvals, implementation and supervision of any mitigation measures or monitoring program adopted in connection with any environmental approvals for the Improvements, coordination with the City of Monterey or any other governmental entities, and defense of any action brought to challenge completion of the Improvements, environmental approvals relating thereto, or any failure of the City to timely and fully carry out all responsibilities as lead agency for the Improvements in compliance with all applicable laws shall be that of the City and not of FORA.

Agreement

In consideration of the mutual terms, covenants and conditions contained herein the Parties agree as follows:

1. **Recitals.** The Recitals set forth above are true and correct and are incorporated into this MOA by this reference.
2. **FORA's Obligations.** Within seven (7) calendar days of the full signing of this MOA, FORA will deposit Seven Million Two Hundred Sixty-Nine Thousand Eight Hundred Thirteen Dollars (\$7,269,813) and One Million Fifty-Six Thousand One Hundred Sixty-Eight Dollars (\$1,056,168) into the escrow accounts described above and transfer and pay to the order of the City Five Hundred Eighteen Thousand Five Hundred Sixty-Four Dollars (\$518,564). The City agrees to accept from FORA, the aggregate amount of Eight Million Eight Hundred Forty-Four Thousand Five Hundred Forty-Five Dollars (\$8,844,545), as so deposited into escrow accounts and paid to the City in full satisfaction of any obligation of FORA to provide funding for the Improvements. With the consent of Whitson, FORA will assign the Contract to the City.
3. **City's Obligations.** With the consent of Whitson, the City will accept assignment of the Contract from FORA. The City may in its discretion use the Improvement Funds to complete the Improvements or any portion thereof; provided, however, that the City may not use the Improvement Funds for any other purpose. If the City enters into any agreements for the completion of the Improvements or any portion thereof and uses any of the Improvement Funds to pay for such work, those agreements shall include requirements to pay prevailing wages in accordance with state law and the FORA Master Resolution. To the extent that the Improvement Funds are insufficient to fully cover completion of the Improvements, the City will be responsible for paying or arranging for the payment of any excess costs. From and after the full signing of this MOA, the City shall timely and fully carry out all responsibilities as lead agency for the Improvements in compliance with all applicable laws.

4. **Notification to State Clearinghouse.** Promptly following the full signing of this MOA, the Parties shall cooperate in providing appropriate notification to the California Office of Planning and Research's State Clearinghouse that FORA is not carrying out the Improvements and that the City has assumed the role of lead agency for the Improvements.
5. **Term.** The term of this MOA shall begin on the Effective Date and continue until FORA's Termination Date, unless terminated earlier as provided herein; provided, however, that the City's obligations to (a) use the Improvement Funds solely for completion of the Improvements or a portion thereof, as set forth in Section 3 above and (b) distribute unexpended funds in accordance with the terms of this MOA if the Improvements are not timely completed, as set forth in Section 10 below shall remain in full force and effect until final completion of the Improvements as evidenced by the recording of Notices of Completion in the Official Records of Monterey County.
6. **Accounting and Records.** FORA (until FORA's Termination Date) and the City shall each maintain and account for the funds related to the Improvements. Promptly following the full signing of this MOA, FORA will coordinate with the City to identify goals and needs with respect to information transfer and to develop a program to implement the same before FORA's Termination Date. FORA will exercise good faith and commercially reasonable efforts to provide the City with copies of available and appropriate documents and records pertaining to the Improvements which have reasonably been requested by the City in writing.
7. **Parties' Representatives.** This MOA shall be coordinated between the Parties through the City's Manager and FORA's Executive Officer.
8. **Reserved.**
9. **Indemnification.** Each party shall indemnify, defend, protect, hold harmless, and release the other, its officers, agents, and employees, from and against any and all claims, loss, proceedings, damages, causes of action, liability, costs, or expense (including attorneys' fees) arising from or in connection with, or caused by any act, omission, or negligence of such indemnifying party or its agents, employees, contractors, subcontractors, or invitees.
10. **Termination.** If through any cause either Party fails to fulfill in a timely and proper manner its obligations under this MOA, or violates any of the terms or conditions of this MOA or applicable Federal or State laws and regulations, the non-breaching Party may terminate this MOA upon seven (7) calendar days written notice to the breaching Party. In the event that the Improvements have not been completed within ten (10) years after the Effective Date of this MOA, then any funds remaining unexpended as of that date shall be distributed as follows: Twenty percent (20%) may be retained by the City and twenty percent (20%) shall be distributed to each of the County of Monterey and the Cities of Marina, Monterey, and Seaside.
11. **Applicable Law.** This MOA shall be construed and interpreted under the laws of the State of California.

12. **Severability.** In the event any part of this MOA is declared by a court of competent jurisdiction to be invalid, void or unenforceable, such part shall be deemed severed from the remainder of the MOA and the remaining provisions shall continue in full force without being impaired or invalidated in any way.

13. **Assignment.** Neither Party may assign this MOA or any part hereof, without written consent and prior approval of the other Party and any assignment without said consent shall be void and unenforceable.

14. **Amendment.** No amendment, modification, alteration, or variation of the terms of this MOA shall be valid unless made in writing and signed by authorized representatives for the Parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the Parties thereto.

15. **Time of the Essence.** Time is of the essence for each and every provision of this MOA.

16. **Notices.** Any notice required or permitted under this MOA, shall be in writing and shall be deemed served on the date personally delivered or three (3) business days after being sent by certified mail, return receipt requested, addressed as follows, unless otherwise notified in writing of a change of address:

To the City: City Manager
City of Del Rey Oaks
650 Canyon Del Rey Boulevard
Del Rey Oaks, CA 93940

To FORA: Executive Officer
Fort Ord Reuse Authority
920 2nd Avenue, Suite A
Marina, CA 93933

17. **Authority.** Each Party represents and warrants to the other Party that it is authorized to execute, deliver and perform this MOA, and the terms and conditions hereof are valid and binding obligations of the Party making this representation.

18. **Compliance with Laws.** The Parties agree to comply with all applicable local, state and federal laws and regulations. The City further agrees to comply with all applicable public works contracting requirements.

19. **Venue.** Both Parties hereby agree and consent to the exclusive jurisdiction of the courts of the State of California and that the venue of any action brought thereunder shall be Monterey County, California.

20. **Survival.** All rights and obligations hereunder that by their nature are to be performed after any expiration or termination of this MOA shall survive any such expiration or termination.

21. **Relationship of the Parties.** It is understood that this MOA is entered into by and between two public entities and is not intended to, and shall not be construed to, create the relationship of agent, servant, employee, partnership, joint venture, or any other similar association.

22. **Third-Party Beneficiaries.** In order to provide a mechanism for enforcement of the City's obligations set forth in clauses (a) and (b) of Section 5 above after FORA's Termination Date, the County of Monterey and the Cities of Marina, Monterey and Seaside are each hereby made an intended third-party beneficiary of this MOA.

23. **Reserved.**

24. **Interpretation.** This MOA, as well as its individual provisions, shall be deemed to have been prepared equally by both of the Parties hereto, and shall not be construed or interpreted more favorably for one Party on the basis that the other Party prepared it.

25. **Counterparts.** This MOA may be signed in counterparts, each of which shall constitute an original, but all of which shall constitute one and the same agreement. The signature page of this MOA or any Amendment may be executed by way of a manual or authorized signature. Delivery of an executed counterpart of a signature page to this MOA or an Amendment by electronic transmission scanned pages shall be deemed effective as a delivery of a manually or digitally executed counterpart to this MOA or any Amendment.

26. **Reserved.**

27. **Entire Agreement.** This MOA contains the entire understanding between the Parties and supersedes any prior written or oral understandings and agreements regarding the subject matter of this MOA. There are no representations, agreements, arrangements or understandings, or written, between the Parties relating to the subject matter of this MOA which are not fully expressed herein.

The Parties have executed this MOA on the date(s) written below:

FORT ORD REUSE AUTHORITY

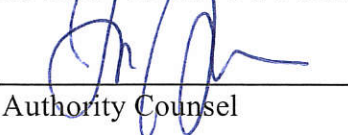

Joshua Metz
Executive Officer

Date: June 10, 2020

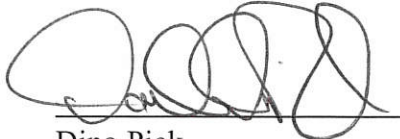
ATTEST:


Clerk of the Board

APPROVED AS TO FORM:


Authority Counsel

CITY OF DEL REY OAKS


Dino Pick
City Manager

Date: June 5, 2020


City Clerk


City Attorney