



## Legislation Details (With Text)

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**Title:** CONSIDER RESOLUTION 18-044, "A RESOLUTION OF THE CITY COUNCIL OF CITY OF CARSON APPROVING A COOPERATION AGREEMENT WITH THE CARSON RECLAMATION AUTHORITY FOR THE REIMBURSEMENT OF SALES TAXES TO FUND PUBLIC INFRASTRUCTURE AND SITE DEVELOPMENT COSTS OF THE CELL 2 SURFACE LOT OF A 157-ACRE PARCEL OWNED BY THE CARSON RECLAMATION AUTHORITY, THE FORMER CAL-COMPACT LANDFILL" AND APPROVAL OF SUCH COOPERATION AGREEMENT

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**Attachments:** 1. Reso 18-044, 2. Cooperation Agreement, 3. File Summary

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| 4/3/2018 | 1    | City Council |        |        |

## Report to Mayor and City Council

Tuesday, April 03, 2018

Discussion

### SUBJECT:

**CONSIDER RESOLUTION 18-044, "A RESOLUTION OF THE CITY COUNCIL OF CITY OF CARSON APPROVING A COOPERATION AGREEMENT WITH THE CARSON RECLAMATION AUTHORITY FOR THE REIMBURSEMENT OF SALES TAXES TO FUND PUBLIC INFRASTRUCTURE AND SITE DEVELOPMENT COSTS OF THE CELL 2 SURFACE LOT OF A 157-ACRE PARCEL OWNED BY THE CARSON RECLAMATION AUTHORITY, THE FORMER CAL-COMPACT LANDFILL" AND APPROVAL OF SUCH COOPERATION AGREEMENT**

### I. SUMMARY

The City is being asked to consider entering into a Cooperation Agreement with the City of Carson for the Reimbursement of sales tax to fund public infrastructure and site development costs of the Cell 2 surface lot of a 157-Acres parcel owned by the Carson Reclamation Authority, the former Cal-Compact Landfill.

### II. RECOMMENDATION

TAKE the following actions:

1. APPROVE RESOLUTION 18-044, "A RESOLUTION OF THE CITY OF CARSON APPROVING A COOPERATION AGREEMENT WITH THE CARSON RECLAMATION AUTHORITY FOR THE REIMBURSEMENT OF SALES TAXES TO FUND PUBLIC INFRASTRUCTURE AND SITE DEVELOPMENT COSTS OF THE CELL 2 SURFACE LOT OF A 157-ACRE PARCEL OWNED BY THE CARSON RECLAMATION AUTHORITY, THE FORMER CAL-COMPACT LANDFILL"
2. AUTHORIZE Mayor to execute such Agreements subject to the approval of the City Attorney.
  - 1.

### **III. ALTERNATIVES**

Take another action deemed appropriate by the Council.

### **IV. BACKGROUND**

#### **1. General**

The Cooperation Agreement is the mechanism by which the City and Authority accomplish the following: (1) The Authority commits to construct the public infrastructure, called the "Offsite Improvements" which the City is obligated to provide under the Development Agreement to facilitate the Project and so that the City does not incur liability for working in the contaminated soil, (2) the Authority commits to construct all infrastructure in accordance with City ordinances and regulations, and prevailing wages, (3) the City commits to pay Authority for undertaking these obligations, funds equivalent to 50% of the sales taxes received by City for a period of up to 25 years in accordance with a formula in the Cooperation Agreement and identical to the formula provided in the Conveyancing Agreement, and described further herein.

A special fund, to be held separate and apart from all other funds of the City to be known as the "Cell 2 Surface Lot Revenues Fund" or by such other name as shall be designated by the City Manager of the City, into which fund shall be deposited sales tax revenues derived by the City from the Project as shall be necessary to enable the City to satisfy the City's payment obligations under the Cooperation Agreement.

All payment obligations of the City under the Cooperation Agreement shall be limited obligations of the City, payable solely from sales tax revenues derived from the Project on deposit in the special fund established.

#### **2. Terms of Cooperation Agreement**

Amongst other provisions, the Cooperation Agreement includes the following terms:

- (a) The Sales Tax Assistance will reimburse Developer for Advances to the Authority to construct the Offsite Improvements and the Site Development Improvements.

(b) Sales Tax Assistance is calculated and due only after the City receives the sales taxes from sales on the Project, but could be paid from any City funds in accordance with the formula and is paid from City to the Authority.

(c) Payments are made quarterly, and within 180 days of the end of the Quarter. Generally the State Board of Equalization (“**BOE**”) pays the City within 90 days of the end of the Quarter, the City and its consultant review the data and prepare a report which is received within 165 days from the end of the Quarter, and then the City would pay the Authority thereafter.

(d) The Authority must perform all of its work in accordance with City ordinances and regulations and provisions of State law, including prohibitions against discrimination, payment of prevailing wages, and other requirements.

### 3. Enforcement by Developer

While not a party to the Cooperation Agreement, Developer has the right as a third party beneficiary to enforce its terms against the parties, and would have all of the rights the Authority has to enforce the agreement against the City should the City not make the required payments and if the Authority fails to act to enforce the agreement.

### Fundamental Assumptions of the Agreement

Because the 157 Acre Site, including the Cell 2 Subsurface Lot, is a contaminated and poorly-compacted landfill subject to the RAP, the Parties acknowledge that development of the Project on the Cell 2 Site would be financially infeasible unless the Cell 2 Site itself were very substantially remediated and improved to address both its environmental and compaction issues. Additionally, Authority has a responsibility under the RAP to remediate the 157 Acre Site and has substantial funds to do so. Authority believes that the sales tax revenues to be generated by the Project, as well as the secondary benefits of economic development in this area of the City spurred by development of the Project, justify the expenditure of substantial funds to address those issues so as to permit such development.

The need for the Sales Tax Assistance is based upon the fact that a developer would not proceed with the Project without a reasonable assurance that it can achieve a market rate of return on its costs to build the Project, i.e., net operating income from the Project representing at least the “Required Return.” Inability to achieve the Required Return for the Project would produce a financial “Feasibility Gap.” Macerich has estimated that it will achieve the Required Return only if Authority pays the cost of the Site Development Improvements, defined below. Authority does not currently have funds to pay for the Site Development Improvements, and therefore Macerich has agreed to make the Site Development Advances as described in the Conveyancing Agreement and this Agreement. To reimburse the Site Development Advances (and Offsite Advances), the Parties have negotiated the Sales Tax Assistance Payments described herein. The Sales Tax Assistance Payments are intended to bridge the financial Feasibility Gap. The Cooperation Agreement between the City and the Authority defines the roles of the three parties, which are generally described as follows:

### Authority Responsibilities

Authority is the Seller of the Cell 2 Surface Lot to Macerich and performs specified remediation of hazardous materials on site, develops certain offsite improvements pursuant to this Agreement and the Conveyancing Agreement, and installs various subsurface improvements in order to make the site developable, described in the Conveyancing Agreement as the Site Development Improvements. Authority retains ongoing responsibility for operation and maintenance of the Remedial Systems and BPS required by DTSC. The Authority is performing certain work and improvements (i) due to its obligations to DTSC to deal with the hazardous materials on the site; (ii) due to its obligations to Developer to prepare the Cell 2 Site so that it can be developed, and so that Macerich does not work within the Cell 2 Subsurface Lot; and (iii) due to its obligations to City to construct certain public infrastructure as described below:

1. DTSC Remediation Systems and BPS Costs. The RAP requires that Remedial Systems be constructed and operated for many years to cap the landfill and remove landfill gas and groundwater contaminants. Pursuant to the Conveyancing Agreement, Authority is responsible for the full cost of constructing the Remedial Systems, and the cost of constructing the additional required Building Protection Systems (described and defined in the Conveyancing Agreement as the “BPS”) up to a cap of \$9 per square foot of foundation slab, with any additional costs of BPS subject to negotiation by the Parties. Authority’s costs for constructing Remedial Systems and BPS shall be paid from Authority funds held for such purpose. The costs of operating, maintaining, repairing and replacing the Remedial Systems to be constructed and retained by Authority shall be paid through the Community Facilities District (“CFD”) as provided in the Development Agreement. Authority will retain ownership of and responsibility for construction, maintenance, repair and replacement of above-ground BPS improvements (e.g., venting systems and gas monitoring systems), but operating and maintenance expenses can be recovered through the CFD described in the Development Agreement.
2. Site Development Improvements. The Authority shall perform work necessary to prepare the site for development, given its current poor state of compaction and environmental contamination. This work includes (i) the Stormwater Work, (ii) the Sub-Foundation Systems, (iii) the Utility Work upon Cell 2, and (iv) the Foundation Systems, all as further described in the Conveyancing Agreement (the “Site Development Improvements”). The Site Development Improvements are described in Section 3.2 and are being constructed and maintained by Authority, but all Site Development Costs, including for future maintenance and repair will be advanced or reimbursed by Macerich (the “Site Development Advances”) in accordance with Section 6 of the Conveyancing Agreement, subject to reimbursement through the Sales Tax Financing Assistance pursuant to Section 7 of the Conveyancing Agreement.
3. Construction of Public Infrastructure. City has the responsibility to provide public infrastructure and services on, over and in the 157 Acre Site, including streets, sidewalks, parkways, sewer, water, drainage, lighting, and other utilities, and must assure accessibility to the 157 Acre Site. The Infrastructure Obligations are described in Recital M to the Development Agreement. Under this Agreement, the

City contracts with Authority to construct such improvements to avoid any City liability for the remediation of the 157 Acre Site by working on the site. By this Agreement with the City, Authority will construct all such improvements outside Cell 2 and such other public offsite infrastructure, further described in the Conveyancing Agreement as the Offsite Improvements. The total estimated cost of such Offsite Improvements is approximately \$23,350,000. Macerich is making advances (the "Offsite Advances") to pay a portion of the costs of the Offsite Improvements pursuant to this Agreement. Authority is paying for the construction of the remaining portion of the Offsite Improvements with its own funding, but the Authority's resources are insufficient to undertake all costs of the Offsite Improvements, so Macerich is advancing up to \$10,000,000 for this purpose. Additionally, except for Stamps Road south of Lenardo Drive, all roads and Offsite Improvements built by Authority on the 157 Acre Site and after formal acceptance by City will be maintained by the City as public streets and improvements. City agrees to accept such improvements if properly constructed in accordance with all City standards and will (i) be responsible for all liability claims for public use not resulting from the contamination, and (ii) accept ownership of the improvements. City will maintain such roadway systems in a finished and attractive manner conducive to the success of the Project.

#### City Responsibilities

The City may exercise its land use authority providing approval to Macerich of Entitlements through a Development Agreement. Through that agreement, City has the obligation to install, own and maintain certain public improvements serving the 157 Acre Site, defined and described in the Conveyancing Agreement as the Offsite Improvements. The City by this Agreement is contracting with Authority to construct the Offsite Improvements, which are being funded with monies from City, Authority, and funds advanced by Macerich. The advances from Macerich are repaid through the Sales Tax Assistance Payments. City, by this Agreement, is agreeing to provide to Authority the funds required to make the Sales Tax Assistance Payments to reimburse the cost of the Offsite Improvements and Site Development Improvements.

The City will derive sales tax revenues from the development of the Project and agrees to pay Authority 1/2 of the sales tax revenue City receives from operation of the completed Project on the Cell 2 Surface Lot, in exchange for Authority undertaking the Offsite Improvements and Site Development Improvements. Those sales tax proceeds shall be paid by City to Authority and Authority to Macerich to reimburse Macerich for advances made by Macerich to fund the cost of certain Offsite Improvements and Site Development Improvements.

#### Developer Responsibilities

Macerich shall develop the Project on the Cell 2 Surface Lot and make advances to Authority for a portion of the Site Development Improvements, subject to being reimbursed by the Sales Tax Assistance described below. Macerich is also advancing up to \$10,000,000 to the Authority/City to assist in the payment of the costs of the offsite improvements. The Offsite Advances and Site Development Advances (collectively the "Advances") made by Macerich, together with interest, are to be repaid to Macerich over

time via the Sales Tax Assistance Payments, subject to certain limitations.

City acknowledges that Authority's ability to make these payments will depend on City's making payments to Authority in the amounts payable by Authority to Macerich pursuant to Section 7 of the Conveyancing Agreement (the "Sales Tax Assistance Payments"), and thus Authority is relying on this Agreement in entering into the Conveyancing Agreement. In the event of any conflict between the terms of Article IV of this Agreement and Section 7 of the Conveyancing Agreement, the terms of the Conveyancing Agreement shall govern.

## **CEQA FINDINGS**

The City Council of the City of Carson previously prepared and certified a SEIR for the District at South Bay Specific Plan. The SEIR identified that implementation of the proposed modified Project would require certain approvals, including approval of the Cooperation Agreement by the City and the Reclamation Authority as a responsible agency under the California Environmental Quality Act (CEQA). The Cooperation Agreement and Conveyancing Agreement were expressly included within the scope of the project, and were environmentally assessed in the SEIR. The Cooperation Agreement does not have any changes to the environmental assessment of the SEIR. Further, the SEIR was certified on April 3, 2018. The City further finds that no subsequent review is required under CEQA Guidelines section 15162 as since that time no substantial changes have been proposed in the project which will require major revisions of the previously certified SEIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects. Likewise, no substantial changes have occurred since that time with respect to the circumstances under which the project is undertaken which will require major revisions of the SEIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects. There is also no new information, which was not known and could not have been known at the time of the SEIR that the project will have significant effect not discussed in the SEIR. As such, the City finds the Cooperation Agreement has already been fully assessed in accordance with CEQA, no subsequent review is required under CEQA Guidelines section 15162, and no further action or review is required under CEQA.

## **V. FISCAL IMPACT**

### **Reimbursement Agreement**

Upon execution of the Reimbursement Agreement and ENA in July 2016, Developer deposited \$1,000,000 for land use entitlement consultant costs. Since then the Developer has been paying its fair share for the Authority's out-of-pocket costs for preparing the Conveyancing Agreement, including attorneys' fees, economic consultants, and other costs, as well as the City's out-of-pocket costs for processing any Site Plan or development application, including the preparation and/or review of such plans, studies, permits, conditions, site plans, general plan or zoning entitlements, environmental documents, and agreements as may be required for the Project.

The Reimbursement Agreement also required the Developer to pay for 50% of the Authority's "holding costs" for Cell 2 (estimated at 27% of the whole 157 Acres) until the execution of the Development Agreement, at which point the percentage increases to 100% of Cell 2 costs, or approximately \$127,000 per month. These amounts are subject to review of the Authority's actual operating costs. The holding cost has been defined to mean all costs incurred by the environmental contractor for project management, construction management, storm water management, site security, vector control, weed abatement, perimeter gas monitoring, the operation of the landfill gas system and other such direct costs to the extent shown as line items on an agreed budget, currently approximately \$63,000 per month.

#### Other Deposits and Economic Terms

Pursuant to the MOU, the Developer deposited \$4,000,000 with the Authority on June 28, 2017, for purposes of securing the Developer's performance. Thirty-three percent of the Deposit shall be refunded upon the grand opening of Phase I of the Project, and 17% of the deposit shall be refunded only upon the Grand Opening of Phase II. The other half of the Deposit is nonrefundable except in the case of an Authority Default giving the Developer the right to terminate this Agreement, and then only if Developer does terminate this Agreement.

Also, in the event of a failure to complete the project timely (subject to allowable delay such as force majeure), the Developer shall pay an additional \$11,000,000 to the Authority as consideration for lost opportunity.

Developer will also indemnify the Authority against any loss of the Authority's \$5.6 million CALReUSE grant to the extent such loss results from Developer's failure to diligently pursue the Project.

Because the entire 157 Acre Site, including the Cell 2 Subsurface Lot, is a contaminated landfill, the parties acknowledge that the cost to develop the Project on the Cell 2 Surface Lot could greatly exceed the cost to develop the Project on an uncontaminated parcel of native soil, and that therefore development of the Project on the Cell 2 Surface Lot may be financially infeasible without substantial financial assistance from the Authority. However, the Authority believes that the sales tax revenues to be generated by the Project and the benefits of economic development justify such financial assistance.

Part of the subsidy will come from a land write-down: the Authority will sell the Cell 2 Surface Lot to Developer for \$1.00, free and clear of encumbrances other than the CFD and the effectiveness of the environmental covenants. The Authority shall retain the Cell 2 Subsurface Lot, right of way for Lenardo Road, and the Embankment.

Based on Developer's projections of Project costs and anticipated net operating income from the Project, Developer has determined that it can achieve the Required Return only if the Authority pays these actual additional development costs, provides the Offsite Improvements described above, constructs the Remedial System and BPS, and performs the Site Preparation Work at its expense. However, the Authority does not currently have funds to pay all of the additional development costs.

The Authority will undertake its own obligations at its own cost and will also perform certain subsurface Work for the Developer, with the Developer funding the latter. To offset these costs in order to make the Project feasible, the parties contemplated a sales tax assistance package based on 50% of the 1% share of sales taxes paid to City from the Project. The need for the sales tax assistance is based upon the fact that a developer would not proceed with the Project without a reasonable assurance that it can achieve a reasonable rate of return on its costs, i.e., net operating income from the Project represents an 8% return on its total cost of developing the Project, to increase by 4% thereof each year in the first stabilized decade or so of operation of the Project (the "Required Return"). Failure to achieve the Required Return for the Project would produce a Project Feasibility Gap. In many instances where the Developer will cover the Authority's costs, these costs will be reimbursed from sales tax paid from the Project. These extra development costs are those that result from the environmental condition of the 157 Acre Site in excess of costs normally incurred with non-contaminated sites. Partly due to these costs, there may be a Feasibility Gap in the Project, based on a Project pro forma.

The Authority shall prepare a final total actual summary showing all costs incurred by Developer to develop the Project upon the conclusion of the construction and opening of the Project. A Feasibility Gap is the difference between the capitalized value of the net operating income of the Project capitalized at the Required Return, and a Project which would not achieve the Required Return (the "Acceptable Project Development Cost"). Based upon estimated Project revenues, an Acceptable Project Development Cost can be derived, and the Feasibility Gap is the difference between Acceptable Project Development Costs and Actual Project Development Cost. If the Actual Costs are higher than the Acceptable Costs, there is a Feasibility Gap which is to be offset with the Sales Tax Assistance.

However, if construction has not commenced on Phase II by the seventh anniversary of the Grand Opening of Phase I of the Project, then, from and after the date of such seventh anniversary, the foregoing payment rate of 50% of the sales taxes received by the City accruing from the Project shall be changed to 45% percent of the sales taxes received by the City accruing from the Project from and after such seventh anniversary. If by the tenth anniversary of the Grand Opening of Phase I of the Project Developer commences construction on Phase II, then such payment rate shall be adjusted back to 50% of the sales taxes received by the City accruing from the Project from and after the Grand Opening of such Phase II.

The reimbursement term ("Reimbursement Term") commences on the date of Developer's first receipt of sales tax reimbursements from the Project and ends on the twenty-fifth anniversary of such date, subject, however, to certain adjustments contained in the Agreement. If the payments are insufficient to fully repay the Total Recovery Amount, the portion of the balance unpaid at the expiration of the Reimbursement Term shall be forgiven.

#### The "Look Back" Provision

The payoff of the Total Recovery Amount through sales taxes projected is based on estimates, but the Project may exceed expectations if either (i) the overall cost of the Project is less than estimated, or (ii) sales taxes generated exceed projections and thus



cause the Total Recovery Amount to be paid off prior to the Loan Term. The Authority doesn't want to provide financial assistance if such assistance is not required to produce the Required Return, or the Total Recovery Amount could be repaid in less than 25 years, as Developer would then receive a windfall. Therefore, the parties have negotiated a "look back" provision to determine if the Project is being over-subsidized and make adjustments for the future. The terms in the "look back" have been simplified since the MOU.

1. Aggregate Development Cost. Upon the conclusion of the construction and opening of Phase I of the Project, Authority shall provide a final accounting of the Site Development Advances. Such accounting shall be updated, if necessary, at the time of determination of the Feasibility Gap as described below. The actual development cost of the entire Project, including tenant improvements, shall be determined based on the costs reported by the Developer's parent, The Macerich Company, in its SEC filings, or, if not reported in such filings, then on another financial report that has been audited by a "Big Four" accounting firm. The actual development cost of the entire Project, plus the total amount of Offsite Advances and Site Development Advances, shall be the "Aggregate Development Cost."
2. Actual NOI. The actual Project real estate net operating income shall be determined for the full calendar year before the Calculation Date, excluding any Sales Tax Assistance Payments received by Developer and its affiliates (the "Actual NOI"). The Actual NOI shall be based on a financial report that has been audited by a "Big Four" accounting firm, unless there is a pending legal or regulatory challenge to such financial reporting, in which case the Actual NOI can be audited by a "Big Four" accounting firm retained by Authority. Additionally, if Developer has represented to any third Party in connection with an acquisition or loan transaction in the six months prior to the date of determination that the Actual NOI is higher than that contained in such financial report, then such higher Actual NOI shall be utilized.
3. Acceptable Development Cost. The "Acceptable Development Cost" shall be determined by dividing the Actual NOI by the return on cost that Macerich needs to achieve in order to move forward with the Project (the "Required Return"), which is an amount equal to (i) 8%, increased at a rate of (ii) 4% per annum from the first anniversary of the Grand Opening of the Project to the date of determination.
4. Feasibility Gap. If the Aggregate Development Cost is greater than the Acceptable Development Cost, then the difference shall be the "Feasibility Gap". If there is a Feasibility Gap, Authority shall be required to reimburse on account of Macerich Site Development Advances the lesser of (i) the aggregate amount of such advances, and (ii) the Feasibility Gap. Sales Tax Assistance payments made prior to the date of such determination shall be credited to reimbursement of advances for the Authority Work in accordance with the Recovery Terms. If the Acceptable Development Cost is equal to or greater than the Aggregate Development Cost then Authority shall not be required to reimburse the Site Development Advances.
5. Sample Calculation. A "Sample Calculation of Total Recovery Amount Payments" illustrating the application of the foregoing is attached in the Exhibits.
6. Payments Pending Determination of Feasibility Gap. Until the Feasibility Gap has been determined, all payments on account of the Total Recovery Amount shall

be made in accordance with Section 7.2, with Sales Tax Assistance Payments credited first towards the Offsite Advances.

## VI. EXHIBITS

1. Resolution No. 18-044, pps 12-20
2. Cooperation Agreement pps 21 - 50

1.

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