

RESOLUTION NO. 21-49

Resolution Of The City Council Of The City Of Emeryville Authorizing The City Manager To Execute The AHSC Implementation And Mutual Indemnity Agreement Between The City Of Emeryville And Resources For Community Development

WHEREAS, the State of California, the Strategic Growth Council (SGC) and the Department of Housing and Community Development (Department) has issued a Notice of Funding Availability dated February 26, 2021 (NOFA), under the Affordable Housing and Sustainable Communities (AHSC) Program established under Division 44, Part 1 of the Public Resources Code commencing with Section 75200; and

WHEREAS, Resources for Community Development ("RCD") has proposed a collaboration with the Bay Area Rapid Transit District ("BART") and the City of Emeryville to submit an application for approximately \$19,992,000 in AHSC funds to support (1) development of 90 units of affordable housing on its property located at 3600, 3610 and 3620 San Pablo Avenue, (2) acquisition of a new BART train car, and (3) certain bicycle and pedestrian improvements associated with the 40th and San Pablo Bus Hub Project; and

WHEREAS, Section 106(a)(12) of the 2021 AHSC Program Guidelines dated February 24, 2021 (the "Prior Experience Requirement"), dictates that applicants must demonstrate prior experience by providing evidence of at least two prior projects that are similar to the proposed AHSC project in scope and size that have been completed by the applicant during the ten years preceding the application due date; and

WHEREAS, the Prior Experience Requirement also states that the applicants may demonstrate the requisite experience by using the past experience of work completed by a non-applicant so long as the applicants can provide an executed agreement with that specific non-applicant for the completion of the related work in the AHSC Application for which funding is sought; and

WHEREAS, RCD and the City seek to enter into an agreement to allow RCD to fulfill the Prior Experience Requirement for its application for AHSC funds and memorialize the City's commitment to complete the bicycle and pedestrian improvements associated with the 40th and San Pablo Bus Hub Project as described in the proposed AHSC application; now therefore be it

RESOLVED, that the City Council of the City of Emeryville hereby authorizes the City Manager to execute the AHSC Implementation and Mutual Indemnity Agreement in substantial form as attached hereto as Exhibit A, and any related document or certification, and to execute any further revisions as may be agreed upon by the City Manager and City Attorney that do not materially increase the obligations of the City thereunder.

Resolution No. 21-49
3600 San Pablo Avenue Affordable Housing Project AHSC Implementation Agreement
City Council Meeting | June 1, 2021
Page 2 of 2

ADOPTED by the City Council of the City of Emeryville at a regular meeting held on Tuesday, June 1, 2021 by the following vote:

AYES:	<u>5</u>	Mayor Martinez, Vice Mayor Donahue, and Council Members Bauters, Medina, and Patz
NOES:	<u>0</u>	
ABSTAIN:	<u>0</u>	
ABSENT:	<u>0</u>	

DocuSigned by:

Dianne Martinez

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MAYOR

ATTEST:

DocuSigned by:

Sheri Hartz

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CITY CLERK

APPROVED AS TO FORM:

DocuSigned by:

Andrea Visveshwara

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INTERIM CITY ATTORNEY

AHSC IMPLEMENTATION AND MUTUAL INDEMNITY AGREEMENT

THIS AHSC IMPLEMENTATION AND MUTUAL INDEMNITY AGREEMENT (the “Agreement”) is made and entered into as of [REDACTED], between the City of Emeryville (“City”), and Resources for Community Development, a California nonprofit public benefit corporation (“Developer”, and collectively with the City, the “Parties”, or individually, a “Party”), upon the basis of the following facts, understanding and intentions of the parties:

A. The State of California, the Strategic Growth Council (“SGC”) and the Department of Housing and Community Development (“HCD”) issued a Notice of Funding Availability dated February 26, 2021, (the “AHSC NOFA”), under the Affordable Housing and Sustainable Communities (“AHSC”) Program established under Division 44, Part 1 of the Public Resources Code, commencing with Section 75200.

B. Developer is applying for AHSC Funds in response to the AHSC NOFA to provide funding for (A) construction of the Nellie Hannon Gateway affordable housing project in Emeryville, California (the “Housing Project”); (C) the construction of certain sustainable transportation infrastructure (the “STI Improvements”); (D) the construction of certain transportation-related amenities (the “TRA Improvements”); and (E) certain costs related to transit passes and workforce development (the “AHSC Programs”). These improvements are described in more detail in the Final Application to be submitted by June 8, 2021 (collectively, the “AHSC Application”).

C. The AHSC Application seeks an award to the Developer in an aggregate approximate amount of \$19,992,000 in AHSC Funds consisting of: (A) approximately \$10,140,000 of AHSC loan Funds for a permanent loan (“AHSC Loan”) which will be disbursed to Evoy, L.P. or its successor (the “Partnership”), for construction of the Housing Project; (B) approximately \$8,570,000 of the AHSC grant funds for the purpose of reimbursing the cost of the STI Improvements; (C) approximately \$1,015,000 of AHSC grant funds for the purpose of reimbursing the cost of the TRA Improvements; and (D) approximately \$267,000 of AHSC grant funds for reimbursing the costs of the AHSC Programs. The AHSC grants shall be referred to collectively as the “AHSC Grants.” The AHSC Loan and the AHSC Grants are collectively referred to herein as the “AHSC Financing.”

D. The City and Developer are required to enter into this Agreement in order to comply with the specific AHSC Program Threshold Requirement stated in Section 106(a)(12) of the 2021 AHSC Program Guidelines dated February 24, 2021, (the “Transportation Agency Prior Experience Threshold Requirement”). This section of the guidelines dictates that applicants must demonstrate prior experience by providing evidence of at least two prior projects that are similar to the proposed AHSC project in scope and size, which have been completed by the applicant, or joint applicant, during the ten (10) years preceding the application due date. This section of the guidelines also states that the applicants may demonstrate the requisite experience by using the past experience of work completed of a non-applicant so long as the applicants can provide an executed agreement with that specific non-applicant for the completion of the related work in the AHSC Application for which funding is sought. The purpose of this Agreement is to, amongst other things, comply with the Transportation Agency Prior Experience Threshold Requirement.

E. The City owns the majority of the property that the Transportation Obligations will be constructed on, and the portion of the property that is not owned by the City is owned by the City of Oakland and is subject to that certain Bay/Shellmound Street Project Memorandum of Understanding between the City of Emeryville and the City of Oakland dated March 1, 1993, thus the City has sufficient “site control” as that term is defined in the AHSC Program Guidelines.

F. The City is a non-applicant, but, as set forth herein, will have obligations to perform the following specific STI Improvements and TRA Improvements totaling \$3,800,000.00, included in the AHSC Application (collectively, the “Transportation Obligations”):

1. Bike and pedestrian improvements on 40th Street and certain intersecting streets between IKEA and Hollis

2. Urban greening along 40th Street

G. The City can demonstrate prior experience and provide evidence of at least two prior projects that are similar in scope and size which have been completed during the ten (10) years preceding June 8, 2021. Below is a list of these projects:

1. ATP Greenway Crossing Improvements At 65th, 66th, And 67th Streets, Project No. EPW-18106
2. The Bay Trail Bicycle And Pedestrian Improvements on Christie Avenue Between Shellmound Street And Powell Street, Project No. EPW 105-14

H. The City shall be responsible for developing and constructing the Transportation Obligations, and for all costs expenses related thereto subject to receipt of the AHSC Grant funds associated with the Transportation Obligations, and Developer shall be responsible for constructing and developing the Housing Project and implementing the AHSC Programs (the “Developer Obligations”), and for all costs and expenses related thereto. In connection with the AHSC Grants and AHSC Loan, Developer is required to enter into standard agreements, disbursement agreements, and regulatory agreements with HCD where Developer will be liable for the full and timely performance by the parties to complete the obligations set forth therein, including completion of the Housing Project, completion of the STI and TRA Improvements, and funding of the AHSC Programs, as described in the AHSC Application. The AHSC Application and all standard agreements, disbursement agreements, regulatory agreements and any other agreements required by HCD in connection with the AHSC Financing shall be collectively referred to herein as the “AHSC Documents”.

I. The City and Developer each acknowledge and agree that the inability or failure by either party to fully and timely complete each party’s respective improvements required by the AHSC Documents may affect the timing and right of the other party to receive disbursement of AHSC funds due the other party notwithstanding the other party’s full and timely performance of its obligations.

NOW, THEREFORE, in consideration of the recitals, covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

AGREEMENT

1. Obligations. The City shall, in its sole responsibility, complete the Transportation Obligations in accordance with the terms of the AHSC Documents and the approved design and construction documents. The Developer shall, in its sole responsibility, complete the Developer Obligations in accordance with the terms of the AHSC Documents and the approved design and construction documents. Each Party will provide the other Party with copies of all requisitions for work related to their respective work, the notice of completion, and other documents related to their respective work that another party may reasonably request.

2. City Indemnity. City is responsible for carrying out the Transportation Obligations using AHSC grant proceeds in accordance with the AHSC Documents, including, but not limited to, any disbursement deadlines contained therein. City shall indemnify, defend, protect, and hold harmless Developer, and its affiliates, directors, officers, partners, members, agents and employees (each, an “**Developer Indemnified Party**”) against any and all claims, actions, suits, causes of action, losses, liabilities, injuries, costs, damages, or expenses (collectively, “**Claims**”), including, without limitation, any direct, indirect or consequential loss, liability, damage, or expense, court costs and attorneys’ fees, arising out of or in connection with the City’s performance of or failure to perform its obligations to complete the Transportation Obligations, in the manner and within the time periods, and to otherwise perform any covenants constituting City obligations, set forth in the AHSC Documents, including any claims, losses or liabilities of the Partnership caused by a breach or default under the AHSC Documents that triggers a default under the AHSC Loan. However, in no event shall the Developer Indemnified Party be indemnified hereunder for any Claims resulting from such party’s sole negligence or willful misconduct. City agrees to pay all of the Developer Indemnified Party’s costs and expenses, including attorneys’ fees, which may be incurred in any effort to enforce any term of this Agreement, including, but not limited to, all such costs and expenses which may be incurred by any Developer Indemnified Party in any legal action, reference or arbitration proceeding brought by HCD or other third party.

3. Developer Indemnity. Developer is responsible for carrying out the Developer Obligations using AHSC grant proceeds and AHSC Loan funds in accordance with the AHSC Documents, including, but not limited to, any disbursement deadlines contained therein. Developer shall indemnify, defend, protect, and hold harmless the City and its affiliates, council members, directors, officers, consultants, contractors, , agents and employees (each, an “**City Indemnified Party**”) against any and all Claims, including, without limitation, any direct, indirect or consequential loss, liability, damage, or expense, court costs and attorneys’ fees, arising out of or in connection with Developer’s performance of or failure to perform its Developer Obligations, in the manner and within the time periods, and to otherwise perform any covenants, set forth in the AHSC Documents. However, in no event shall the City Indemnified Party be indemnified hereunder for any Claims resulting from such party’s sole negligence or willful misconduct. Developer agrees to pay all of the costs and expenses of the City

Indemnified Party, including attorneys' fees, which may be incurred in any effort to enforce any term of this Agreement, including, but not limited to, all such costs and expenses which may be incurred by any City Indemnified Party in any legal action, reference or arbitration proceeding brought by HCD or other third party.

4. Schedule of Performance; Progress Reports. Developer and City shall comply with the schedule of performance forth in Exhibit A attached hereto for the completion of their respective obligations hereunder (the "Schedule of Performance") as such schedule may be modified by the AHSC Documents. The City and Developer agree to give the other party a written quarterly status report on the progress toward the milestones listed in Exhibit A, i.e., the Developer will report on the Developer's progress on the Housing Project and the City will report on the City's progress on the Transportation Obligations. If any Party anticipates not meeting the targeted construction and grant disbursement milestones as established in the AHSC Documents, that Party will promptly notify the other parties in writing and will meet with the other Party to discuss the reasons why the milestone dates may not be met and what actions the delayed party intends to take to meet the milestones or otherwise rectify the work schedule in order to maintain good standing with the terms and conditions established in the AHSC Documents.

5. Delegation. Notwithstanding the obligations of each party under this Agreement, each party shall be entitled to enter into sub-agreements with each other or with other parties to provide any assistance or services needed for each party to perform its obligations under this Agreement and the AHSC Documents.

6. Cost Overruns. Developer shall be responsible for paying all costs required to complete the Housing Project, irrespective of whether such costs exceeds the AHSC Loan. City shall be responsible for paying all costs required for the Transportation Obligations irrespective of whether such costs exceed the portion of the AHSC Grant designated for the Transportation Obligations.

7. INTENTIONALLY OMITTED

8. Disbursement of AHSC Grant Funds. Developer and City agree that the AHSC Grants for the Transportation Obligations shall be reimbursed directly to City. The parties further agree that all of the AHSC Loan funds shall be disbursed directly to the Partnership. Notwithstanding the foregoing, if required by the AHSC Documents, the City shall submit to Developer all draw requests for AHSC Grant funds for the costs associated with the Transportation Obligations and Developer shall submit such requests to HCD and disburse to the City any such funds received from HCD. City shall apply any such proceeds received to pay the invoices submitted in connection with the draw request.

9. Implementation Agreements. In the event a grant award is received from AHSC, Developer and City recognize that each Party will need additional assurances from the other Parties (including assurances for the Project's lenders and investors) regarding the specific grant award before commencement of construction of the Project. The Parties agree to cooperate in

amending this Agreement and/or entering into an implementation agreements or other documents necessary to provide reasonable assurances and indemnifications related to the disbursement of AHSC Grant funds. The Parties recognize that any such amendments to this Agreement or execution of additional agreements may require approval of the Emeryville City Council and the Developer's Board of Directors.

10. Notices. Formal notices, demands, and communications between the parties shall be sufficiently given if, and shall not be deemed given unless, dispatched by registered or certified mail, postage prepaid, return receipt requested, or delivered by express delivery service, return receipt requested, or delivered personally, to the principal office of the parties as follows:

City: City of Emeryville
1333 Park Avenue
Emeryville, CA 94608

Developer: Resources for Community Development
2220 Oxford Street
Berkeley, CA 94704

11. Events of Default. The occurrence of any of the following events shall constitute an Event of Default under this Agreement:

(a) A Party fails to perform any of its obligations under this Agreement, and does not cure such failure within 30 days after written notice of such failure has been delivered to the defaulting party in accordance with Section 3 above; or

(b) A Party purports to revoke this Agreement or this Agreement becomes ineffective for any reason.

12. Termination. This Agreement shall terminate upon the earlier of: (i) Developer fails to receive an award of AHSC Grant and Loan Funds; (ii) completion of the all obligations under the AHSC Documents; or (iii) mutual agreement of the parties hereto.

13. Third Party Beneficiary. The Partnership shall be a third party beneficiary of this Agreement and shall be entitled to the rights and benefits hereunder and may enforce the provisions hereof as if it were a party to this Agreement.

14. Assignment. City hereby acknowledges and approves the assignment by Developer and the Partnership to the Housing Project's senior lender ("Construction Lender") of all of their respective right, title and interest in, to and under the Agreement (the "Collateral") as collateral security for the Partnership's obligations to Construction Lender under, and in connection with Construction Lender's loan to the Partnership. In the event Construction Lender forecloses upon the Collateral, City hereby agrees that Construction Lender shall have all of Developer's rights and interests under the Agreement. Construction Lender is hereby made an express third party beneficiary of this Section 14, and the parties hereto shall not amend, modify or terminate the Agreement without Construction Lender's express written consent.

15. Miscellaneous.

(a) Nothing in this Agreement shall be construed to limit any claim or right which any party may otherwise have at any time against an Indemnitor or any other person arising from any source other than this Agreement, including any claim for fraud, misrepresentation, waste, or breach of contract other than this Agreement, and any rights of contribution or indemnity under any federal or state environmental law or any other applicable law, regulation, or ordinance.

(b) If any party delays in exercising or fails to exercise any right or remedy against a Party, that alone shall not be construed as a waiver of such right or remedy. All remedies of any Party against the other Party are cumulative.

(c) This Agreement shall be binding upon and inure to the benefit of each of the parties hereto and their respective representatives, heirs, executor, administrators, successors, and assigns. This Agreement may not be amended except by a written instrument executed by the parties hereto.

(d) This Agreement shall be deemed to have been delivered and accepted in the State of California and governed exclusively by the internal substantive laws of the State of California as the same may exist at the date hereof. The parties hereto hereby agree that any action hereon between the parties hereto and their successors in interest may be maintained in a court of competent jurisdiction located in the County of Alameda, State of California, and consent to the jurisdiction of any such California court for the purposes connected herewith.

(e) Each party hereto intends that this Agreement shall not benefit or create any right or cause of action in or on behalf of any person other than the parties hereto.

(f) This Agreement may be executed in multiple counterpart copies, any one of which when duly executed, with all formalities hereof, shall be fully binding and effective as the original of this Agreement.

(g) This Agreement shall be effective as of the date first written above, provided however that in the event that the Developer does not receive an award of the AHSC Financing, this Agreement shall automatically terminate and be of no further force or effect.

[Signatures on following page]

Each of the undersigned hereby executes this Agreement in the spaces provided below to evidence their respective agreement to the terms of this Agreement.

City:

By: _____

Name: Christine Daniel

Its: City Manager

APPROVED AS TO FORM:

DocuSigned by:
By: Andrea Visveshwara as Interim
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City Attorney

Developer:

Resources for Community Development

DocuSigned by:
By: Daniel Sawislak
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Name: Daniel Sawislak
Its: Executive Director

EXHIBIT A**Schedule of Performance****Transportation Obligations:**

Performance Milestone	Date
Begin construction	November 30, 2024
Complete construction	November 30, 2027
All funds fully disbursed	November 30, 2027

Housing Project:

Performance Milestone	Date
Begin construction	November 30, 2024
Complete construction and obtain Certificate of Occupancy	November 30, 2027
All funds fully disbursed	November 30, 2027