



CITY OF BANNING STAFF REPORT

TO: CITY COUNCIL

FROM: Douglas Schulze, City Manager

PREPARED BY: Emery Papp, Senior Planner

MEETING DATE: July 9, 2024

SUBJECT: Consideration of Resolution 2024-121, Approving a Deposit/Reimbursement Agreement with NP Banning Industrial, LLC

RECOMMENDATION:

Approve Resolution 2024-121.

BACKGROUND:

NP Banning Industrial, LLC is proposing to develop an approximately 533.8-acre property in the City and partially within the City's Sphere of Influence commonly known as the Sunset Crossroads Project (the "Project").

The proposed Project envisions the development of industrial and commercial uses on a 533.8-acre site through adoption of a proposed Sunset Crossroads Specific Plan (the "Specific Plan"), including up to 268,400 square feet of medical office, professional office, education, recreation, and commercial uses, a travel center with refueling uses, and a 125-room hotel on 47.9-acres; and up to 5,545,000 square feet of industrial uses (including up to 330,000 square feet of cold storage uses) on 392.0 acres. The proposed Project will also seek approval of a Development Agreement and a General Plan Amendment and Zone Changes amending the land use designations within the Specific Plan area to General Commercial (GC), Industrial (I), Open Space – Parks (OS-P), and Open Space – Resources (OS-R). Approximately 65.6 acres of the Project site would be retained as Open Space - Resources (OS-R) and/or Open Space – Parks (OS-P) use, including a five-acre passive park. Approximately 253.7 acres of the Project site are located outside the current City boundaries within the City's Sphere of Influence (SOI); therefore, the Project envisions annexation of this area into the City. The City, in its role as Lead Agency, has also prepared a draft Environmental Impact Report (Draft EIR) analyzing the environmental impacts of the proposed Project.

Chapter 3.36 of the Banning Municipal Code provides for reasonable recovery of costs borne by the City for expenses relating to land development. The Developer has agreed to fund and be solely responsible for all third party consulting costs and the City's legal costs associated with the preparation of plans, studies, and agreements for the Project. Moreover, the Developer has agreed to terms set forth in the Deposit/Reimbursement Agreement for the Project, which include deposits, reimbursements, eligible expenses, deposit administration, and other provisions related to the cost of processing the entitlement applications.

The following is a summary of the Agreement between the City and the Developer:

- City's Control Over Employees and Contractors. With regard to the applications for the Project, the City has sole discretion to select its employees and contractors assigned to work on the applications; to direct work and evaluate performance, terminate, and replace such employees and contractors; and to

pay employees and contractors from a City account.

- Initial and Supplemental Deposits. The Developer is required to deposit \$50,000 with the City within 3 business days following execution of the Agreement to be allocated as follows: (i) \$25,000.00 to apply for and process a Development Agreement; (ii) \$5,000.00 for reoccurring meetings with City staff, (iii) \$10,000.00 for engineering and other consultant costs; and (iv) \$10,000.00 for the City's legal (non-litigation) costs. The City may request additional funds whenever it believes, in good faith, that the deposit balance is insufficient to cover 90 days' worth of eligible expenses. The Developer must make the additional deposit within 5 business days of the City's written request. The deposit must generally maintain a minimum balance of \$5,00 and will not accrue interest.
- Eligible Expenses. The deposit shall be used to pay for the costs incurred by the City in connection with the following: (i) preparing necessary CEQA reports and documents, and additional supporting documentation, as necessary and appropriate in accordance with CEQA; (ii) distributing such documentation to responsible agencies and others; (iii) noticing and holding public hearings and considering public comments on such CEQA documents and reports; (iv) considering certification of such CEQA documents and reports and other documentation through a City Council resolution in accordance with CEQA; (v) preparing, negotiating, and approving the permits, entitlements, and conditions of the Project, including without limitation, the environmental documents; (vi) preparing and negotiating all further legal documents in connection with the transaction, including without limitation, technical reports, reclamation plans, development agreements, owner participation agreements, leases, franchise agreements, waste hauling agreements, franchise ordinances, and similar agreements and instruments; (vii) litigation and other legal costs associated with the Project; (viii) the fees and expenses of any consultants employed by the City in connection with the Project, including without limitation, the Draft EIR and Final EIR, all Project applications submitted by Developer (and all aspects associated therein), Development Agreement, and the Fiscal Impact Analysis; (ix) studies, reports and design services related to development of any Project-related infrastructure; and (x) any and all other actions reasonably taken by the City in connection with development of the Project.
- Administration of the Deposit. The City will administer the deposit and maintain accounting records of the expenditures at all times. The City will provide the Developer with monthly cost reports. The City will return any unexpended portion of the deposit to the Developer, without interest, less an amount equal to any unpaid eligible expenses previously incurred by the City upon approval of all entitlements, the expiration of all applicable appeal periods, and if a legal or administrative challenge is made to the entitlements, then upon the resolution of such challenge.
- CEQA Consultant. CEQA requires independent judgment by the lead agency. Therefore, any consultant hired by the City to prepare the EIR for the Project must be under contract with and directed by the City. The Developer may not attempt to direct, influence, or otherwise control the CEQA consultant in the performance of the work.
- No Obligation by City to Approve the Project; No Debt or Liability. The Agreement does not obligate the City to certify the EIR or take any action approving the Project. Moreover, the Agreement is not a debt or liability of the City and the City is not liable under the Agreement other than to return the unexpended and uncommitted portions of the deposit.
- Indemnification and Indemnification Deposit. The Developer must indemnify and hold the City harmless from any and all actions arising from or related to the proposed entitlements. The City may require the Developer to deposit funds to cover its indemnification obligations or provide other security. If the Developer fails to timely pay the deposit or provide the required security, the City may abandon the action without liability to the Developer and may recover from the Developer any attorneys' fees and other costs for which the City may be liable for abandonment of the action. Additionally, if the Developer fails to timely pay the deposit or provide the required security, the City may also defend the action and the Developer will be liable to the City for such defense costs.
- Indemnification for Developer's Construction. The Developer must indemnify and hold the City harmless from damages, personal injury or death that may arise from the Developer's, its agents', contractors', subcontractors', or employees' operations under the Agreement. The Developer's indemnification obligations do not apply to the City's gross negligence or willful misconduct.

JUSTIFICATION:

The primary reasons to support authorization of a Deposit/Reimbursement Agreement between the City of Banning and NP Banning Industrial, LLC are threefold.

First, the proposed Agreement allows the City to recover costs for processing the Developer's entitlement applications related to the proposed Project. The Project entitlements include a General Plan Amendment, the Sunset Crossroads Specific Plan, Zone Changes, Development Agreement, annexation, and an EIR analyzing the environmental impacts of the Project. The Banning Municipal Code provides authority to recover expenses from the Developer for third party consulting costs and any potential for City's legal costs associated with the processing of plans, studies, agreements, and entitlements for the Project.

Second, the Agreement gives the City discretion and control in hiring and managing contractors and consultants for their work on the Project. This includes environmental consultants, which allow the City to have independent judgement over the environmental studies, technical studies, and preparation of the EIR.

Lastly, the proposed Agreement further supports that the City is under no obligation to take any action to approve the Project. It also provides that the proposed Agreement or any other agreement between the City and the Developer does not create a debt or a liability other than to return un-expended or uncommitted portions of the deposit to the Developer. The Agreement also provides that the Developer must indemnify and hold harmless the City, its officials, officers, employees and agents from any and all actions arising from or related to the proposed entitlements. The Developer may be required to deposit funds to cover its indemnification obligations or to provide other forms of security. The proposed Agreement also specifies that the deposit account must not fall below the amounts specified in the Agreement.

FISCAL IMPACT:

All costs shall be borne by the Developer. There is no Fiscal Impact to the City.

ALTERNATIVES:

1. Adopt Resolution 2024-121, as recommended.
2. Do not adopt Resolution 2024-121, and provide alternative direction to staff.

ATTACHMENTS:

1. [Resolution 2024-121, Deposit Agreement NP Banning Industrial.docx](#)
2. [Deposit Reimbursement Agreement NP Banning LLC.doc](#)