

COPY

CITY OF VISALIA

REIMBURSEMENT AGREEMENT
FOR PRIVATELY CONSTRUCTED PUBLIC FACILITIES INCLUDED IN THE
CITY'S IMPACT FEE PROGRAMS

This Agreement, dated as of the 8th day of July, 2021, is entered into by and between the City of Visalia, a municipal corporation (the "City"), and Visalia Shirk, LLC, a California limited liability company, (the "Developer").

RECITALS:

WHEREAS, Chapter 16.44 of the City of Visalia Municipal Code (the "Code") established development fees and special funds as part of the City's Transportation Fee Program (the "Transportation Fee Program"); and

WHEREAS, Section 16.44.150 of the City of Visalia Municipal Code authorizes the City to enter into reimbursement agreements for the construction of planned transportation facilities designated in the Transportation Fee Program upon application of property developers; and

WHEREAS, Chapter 13.08 of the City of Visalia Municipal Code establishes development fees and special funds as part of the City's Sewer Service System Fee Program (the "Sewer Fee Program"); and

WHEREAS, Section 13.08.180 of the City of Visalia Municipal Code authorizes the City to oversize any sewer main as determined by the City Engineer, and in conformance with the City's Sanitary Sewer Master Plan, and shall reimburse for the additional oversizing construction costs upon application of property developers;

WHEREAS, City and Developer, as a condition for approval of **Conditional Use Permit No. 2017-08 and City of Visalia Resolution No. 2017-76**, pertaining to real property identified therein (the property and entitlements so described hereafter referred to as the Project") have entered into a Project Improvements Agreement that sets forth Developer's obligations regarding the dedication of right of way and construction of planned transportation facilities and other public improvements, according to improvement plans titled **Visalia Apartments (Building Permit No. B183281)** and approved by the City, together with such change orders as were issued by the City not included in the initial improvements plans (hereafter collectively referred to as the "Facilities"); and

WHEREAS, City and Developer desire to set forth their mutual understandings regarding the manner in which the City shall reimburse Developer for the Facilities that are non-supplemental transportation facilities and the related right-of-way under the City's Transportation Fee Program requirements but have been required as conditions of approval for Developer's private development project and City maintains no proprietary interest in the overall project except for these specified public improvements.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the City and the Developer hereby agree as follows:

Section 1. Construction of Facilities

Developer shall complete construction of the Facilities in accordance with the terms of the Project Improvements Agreement.

Section 2. Reimbursement Amounts

Attached as Exhibit 1 is the City Staff's Estimate of costs that the Developer will incur to support the completion of the planned Facilities (the "City Estimate"). The City shall reimburse the Developer, through fee credits or cash payments as provided herein, for the planned Facilities based on the actual costs incurred by the Developer, which actual costs shall be supported by the information detailed below. If the actual costs of a line item exceeds the City Estimate, the City Engineer shall review the items described above and evaluate the reasonableness and circumstances of such additional costs. The City Engineer shall review the information submitted by the Developer and approve all revisions based on actual costs that the City Engineer determines to be supported by the required submittals and reasonable under the overall circumstances. In that event, the parties shall execute an amendment to this Agreement setting forth the final confirmed actual costs.

For reimbursement based on land values, the reimbursement shall be based on the schedule of land values contained in the Traffic Impact Fee Update Nexus Study City of Visalia, dated March 16, 2015 (the "Traffic Impact Fee Nexus Study"). If Developer does not timely submit the items specified below to support its actual costs, then the City shall reimburse such items that are relevant to the street improvements based on the schedule of costs set forth in the Traffic Impact Fee Nexus Study.

The following is a list of the items that are to be provided by the Developer in support of its actual costs of completing the planned Facilities. In addition to the items listed below the City Engineer may request additional information from the Developer if reasonably required to review the costs submitted by the Developer:

- (1) Copies of the original contract with the contractor and any change orders that have been agreed to by the Developer, contractor, and the City. The portion of each change order associated with the Facilities must be itemized separately;
- (2) Copies of all invoices, with unconditional lien releases, submitted by the contractor;
- (3) Copies of all checks issued by the Developer with related invoices indicated; and
- (4) A summary tabulation of all contractor invoices and Developer payments.

Section 3. Right to Reimbursement

Developer shall be reimbursed the final amount of the Facilities in the manner as set forth in Section 5 below. Reimbursements payments by the City will not be made until all of the following requirements are met:

- (1) All Facilities are completed and formally accepted by the City as shown by the issuance of a Notice of Completion by the City; and

(2) A reimbursement request is submitted to the City. The Developer must apply for reimbursement within four (4) years after the City has accepted the Facilities. The Developer waives all right to reimbursement from the City if it does not request reimbursement within this four-year limitation; and

(3) Thirty (30) days have passed since the City accepted the Facilities and no claims of nonpayment have been filed with the city. If such claims have been filed, then the City will not reimburse the Developer until the claims are resolved.

Section 4. Reimbursement Method

Upon issuance of a Notice of Completion for the Facilities, Developer shall be reimbursed the amounts determined pursuant to Section 2 in the following manner(s):

- 4.1 **Credit Applied Towards Future Fees.** The Developer shall be credited with a total fee credit of \$864,276.63 ("Fee Credit"). Such Fee Credit shall be available for offsetting impact fees listed on Exhibit 1 under the heading "Credit to be Applied" (the "Creditable Fees"), that are assessed for development of the Project. Notwithstanding the foregoing, the amount of the Fee Credit shall be adjusted based on provisions of Section 2. The Fee Credit shall be recognized at the time of building permit issuance, but only if a Notice of Completion has been issued for the Facilities. The Fee Credit shall be available only to offset the Creditable Fees indicated in Exhibit 1, as they shall be determined at that time. The Credit Total shall be deemed to attach to property constituting the Project as identified herein, and should Developer transfer such property or any portion thereof, the credit or appropriate portion thereof shall transfer automatically with such property. In the event the indicated credit is not taken at time of building permit issuance because a Notice of Completion for the Facilities has not been issued, then the fee shall be paid in full without credit. If any Fee Credit remains unused upon completion of the Project, the amount of the unused Fee Credit shall be paid to Developer as a cash reimbursement within thirty (30) days of issuance of the Notice of Completion and upon the City receiving all the required final reimbursement items listed in Section 2.
- 4.2 **Cash Reimbursement from Development Fees Collected City Wide.** City shall pay \$145,157, of the costs of the Facilities designated on Exhibit 1 under the heading "Cash Reimbursement", within 2 years of the date of Notice of Completion for the Project. The City shall establish respective priorities to payments from such fund by reference to the date of issuance of a Notice of Completion. The City will reimburse the Programmed Costs to the Developer without interest.

Section 5. Transfer of Reimbursement Rights

Rights to cash payment reimbursements or Fee Credit granted to Developer pursuant to this Agreement may be transferred to other owners, builders, or developers only with the written consent of City. The notice must be signed by the Developer and the City, and an executed copy of the form shall be kept on file at the City.

Section 6. Limited City Obligation

The obligations arising from this Agreement are neither a debt of the City nor a legal or equitable pledge, charge, lien, or encumbrance upon any of its property or upon any of its income, receipts, or revenues, except the fees collected for the Facilities. Neither the General Fund nor any other

fund of the City, except the applicable fund(s) associated with the Transportation Impact Fee Program or the City's Sewer Service System Fee Program, shall be liable for the payment of any obligations arising from this Agreement. The credit or taxing power of the City is not pledged for the payment of any obligation arising from this Agreement. No Developer shall compel the forfeiture of any of the City's property to satisfy any obligations arising from this Agreement.

Section 7. Liens, Claims, and Encumbrances

Prior to final acceptance and issuance of Notice of Completion for any Facilities by the City, the constructing Developer shall provide a written guarantee and assurance to the City that there are no liens, claims, or encumbrances on those Facilities, together with unconditional final releases from all contractors and material suppliers, and with copies of invoices and corresponding checks issued by the Developer for all items for which reimbursement is requested under this Agreement for the Facilities. Notwithstanding any other provision or term of this Agreement, the City shall have no obligation to make any reimbursement payments until the constructing Developer has cleared any and all liens, claims and encumbrances from the Improvements and provided the required documentation, guarantee and assurance in writing, to the satisfaction of the City.

Section 8. No Third Party Beneficiary

City does not assume any liability, duty or obligation to Developer's contractors, subcontractors or agents by execution or performance of this Agreement and no contractors, subcontractors, agents or any parties are third party beneficiaries of this Agreement.

Section 9. Attorney's Fee

If any suit, action or proceeding in law or equity is brought to enforce the provisions of this Agreement, the prevailing party shall be entitled to reasonable costs and attorneys' fees.

Section 10. Notices

Any notices, requests, demands or other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given on the date of service if served personally (FedEx and similar services, each of which is hereinafter called an "Express Courier," shall be considered to be personal service) or by telephone facsimile or other electronic transmission (provided that the sender of a telephone facsimile or other electronic transmission has received confirmation of successful transmission by the sending fax machine), and upon receipt, if mailed to the party to whom notice is to be given, by first-class mail, registered or certified, postage prepaid, return receipt requested, and properly addressed as follows:

City:

City of Visalia
Community Development Department
315 E. Acequia Ave.
Visalia, CA 93291
Attn: City Engineer

With a copy to:

City of Visalia
Finance Department
707 W. Acequia Ave.
Visalia, CA 93291
Attn: Finance Administrator

Developer:

Visalia Shirk, LLC
Attn: Paul Owahdi
29350 Pacific Coast Highway Suite 12
Malibu, CA 90265

Either party may change its mailing address at any time by giving written notice of such changes to the other party in the manner provided herein.

Section 11. Term

The term of this Agreement shall start on the day and year duly executed by all parties and shall remain in effect until all the terms and conditions contained in this Agreement have been satisfied.

Section 12. Severability

If any portion of this Agreement is declared by a court of competent jurisdiction to be invalid or unenforceable, such portion shall be deemed severed from this Agreement and the remaining parts shall remain in full effect as though such invalid or unenforceable provision had not been a part of this Agreement.

Section 13. Binding on Successors and Assigns

Each and every provision of this Agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto, in the same manner as if such parties had been expressly named herein.

Section 14. Governing Law; Venue

This Agreement is made under, and shall in all respects be interpreted, enforced, and governed by, the laws of the State of California. In the event of a dispute concerning the terms of this Agreement, the venue for any legal action shall be with the appropriate court in the County of Tulare, State of California.

Section 15. Exhibits

The Exhibits attached hereto are hereby incorporated herein by this reference.

Section 16. Entire Agreement

This Agreement contains the entire agreement between the parties with respect to the matters contained herein and may be amended only by subsequent written agreement signed by all parties.

Section 17. Compliance with State Law.

Developer is aware of the requirements of California Labor Code Section 1720, et seq., 1770, et. seq., and California Code of Regulations, Title 8, Section 1600, et seq., ("Prevailing Wage Laws"), which require the payment of prevailing wage rates and the performance of other requirements for work considered "public works" as that term is defined under Prevailing Wage Laws. Developer agrees that it shall comply with Prevailing Wage Laws and it is Developer's sole responsibility to confirm whether Prevailing Wage Laws are applicable. City shall provide Developer with a copy of the prevailing rates of per diem wages in effect at the commencing of this Agreement upon request by the Developer. Developer agrees to hold the City harmless and to indemnify and defend the City, with legal counsel reasonably acceptable to City, from all claims arising from the potential application of Prevailing Wage Laws under this Agreement.

[signatures set forth on following page]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and the year first written above.

CITY OF VISALIA,
A municipal corporation

Visalia Shirk LLC

Acting
Leslie B. Lavaglia 7/8/21
~~Randy Groom~~ *Leslie B. Lavaglia*
City Manager/City Clerk Date

[Signature] 4/29/2021
Paul Owahdi, Manager Date

ATTEST:

Chief
Michelle Nicholson 7/9/21
Deputy City Clerk Date

APPROVED AS TO FORM:

[Signature] 7-6-21
City Attorney Date

EXHIBIT 1

EXHIBIT 1

	<u>Item</u>	<u>Quantity</u>	<u>Units</u>	<u>Unit Cost</u>	<u>Total</u>
Programmed Costs					
A.	Shirk St - Arterial Improvements (Non-Supplemental)				
1	Roadway Grading & Compaction	44,420	SF	\$ 1.00	\$ 44,420.00
2	Concrete Median Curb	2,111	LF	\$ 12.00	\$ 25,332.00
3	Aggregate Base Class II (8")	44,420	SF	\$ 1.75	\$ 77,735.00
4	AC Pavement (6")	44,420	SF	\$ 3.75	\$ 166,575.00
5	Signing & Striping	1	LS	\$ 2,000.00	\$ 2,000.00
6	Signing & Striping (Developer Share @ 32.7%)	1	LS	\$ (654.00)	\$ (654.00)
7	Dual Head Median Street Lights	4	EA	\$ 5,000.00	\$ 20,000.00
8	Drain Inlet	2	EA	\$ 3,900.00	\$ 7,800.00
9	Drain Inlet (Developer Share @ 32.7%)	2	EA	\$ (1,275.30)	\$ (2,550.60)
10	18" SD Pipe	91	LF	\$ 52.92	\$ 4,815.72
11	18" SD Pipe (Developer Share @ 32.7%)	91	LF	\$ (17.30)	\$ (1,574.74)
12	Subtotal				\$ 343,898.38
13	Design & Construction Management	12%			\$ 41,267.81
B.	Doe Ave - Collector Improvements (Non-Supplemental)				
1	Roadway Grading & Compaction	50,290	SF	\$ 1.00	\$ 50,290.00
2	Aggregate Base Class II (8")	50,290	SF	\$ 1.50	\$ 75,435.00
3	AC Pavement (5")	50,290	SF	\$ 2.70	\$ 135,783.00
4	Signing & Striping	1	LS	\$ 18,725.00	\$ 18,725.00
5	Signing & Striping (Developer Share @ 42.9%)	1	LS	\$ (8,030.00)	\$ (8,030.00)
6	Drain Inlet	4	EA	\$ 3,900.00	\$ 15,600.00
7	Drain Inlet (Developer Share @ 42.9%)	4	EA	\$ (1,673.10)	\$ (6,692.40)
8	18" SD Pipe	27	LF	\$ 52.92	\$ 1,428.84
9	18" SD Pipe (Developer Share @ 42.9%)	27	LF	\$ (22.70)	\$ (612.97)
10	Raise MH to Grade	5	EA	\$ 500.00	\$ 2,500.00
11	Raise MH to Grade (Developer Share @ 42.9%)	5	EA	\$ (214.50)	\$ (1,072.50)
12	Subtotal				\$ 283,353.97
13	Design & Construction Management	12%			\$ 34,002.48
C.	Shirk St - Master Sewer Trunk Line (Supplemental)				
1	48" Sewer Main	1,177	LF	\$ 200.00	\$ 235,400.00
2	Additional 72" Manhole	1	EA	\$ 15,110.00	\$ 15,110.00
3	72" SS Manhole	4	EA	\$ 6,500.00	\$ 26,000.00
4	Sewer Tie-In	1	EA	\$ 2,500.00	\$ 2,500.00
5	Sewer Tie-In (Developer Share @ 50%)	1	EA	\$ (1,250.00)	\$ (1,250.00)
6	Sewer Main Plug	1	EA	\$ 2,500	\$ 2,500.00
7	Sewer Main Plug (Developer Share @ 50%)	1	EA	\$ (1,250)	\$ (1,250.00)
8	Subtotal				\$ 279,010.00
9	Design & Construction Management	15%			\$ 41,851.50

10	City Administration Retention	5%			\$ (13,950.50)
Total Costs					
A-B	Transportation Improvements				\$ 702,522.63
C	Storm Sewer Master Plan Improvements				\$ 306,911.00
Total Amount Estimated for Reimbursement					\$ 1,009,433.63
Credit to be Applied					
	<i>Ocean Point Apartments - NEC Shirk & Doe (200 Unit Complex)</i>				
	Sewer Trunk Line Capacity Fee	200	DU	\$ (448.00)	\$ (89,600.00)
	Sewer Front Foot Fee	1,678	LF	\$ (43.00)	\$ (72,154.00)
	Transportation Impact Fee	169	DU	\$ (4,148.00)	\$ (701,012.00)
		1	DU	\$ (1,510.63)	\$ (1,510.63)
	Subtotal				\$ (864,276.63)
Cash Reimbursement					
	Transportation Improvements				\$ -
	Storm Sewer Master Plan Improvements				\$ 145,157.00
Credit + Cash Total					\$ 1,009,433.63