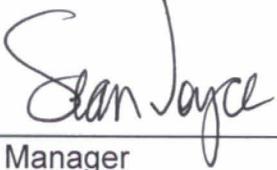




REQUEST FOR CITY COUNCIL ACTION

MEETING DATE: NOVEMBER 26, 2013

TITLE: SECOND ADJACENT LANDOWNER AGREEMENT BETWEEN CITY OF IRVINE AND HERITAGE FIELDS EL TORO, LLC



Stan Joyce
City Manager

RECOMMENDED ACTION

1. It is recommended that the City Council consider the details of the proposal before it and determine whether the City will enter into the Second Agreement with City of Irvine as Adjacent Landowner (ALA II) proposed by Five Point Communities¹, together with the associated Ground Leases and Maintenance Agreements.
2. If the City Council elects to enter into the ALA II, Ground Leases, and Maintenance Agreements, it is recommended that the City Council withdraw its prior approval of the Western Sector Phase II Capital Improvement Program (CIP #371404) and re-allocate funds to one or more Capital Improvement Programs designed to improve the Western Sector of the Orange County Great Park and fund capital projects associated with expedited development of the Orange County Great Park under the ALA II.
3. If the City Council elects to enter into the ALA II, Ground Leases, and Maintenance Agreements, it is recommended that the City determine whether the "Design Package" proposed by Heritage Fields is substantially in conformance with the Orange County Great Park Master Plan.
4. If the City Council finds that the Design Package is substantially in conformance with the Orange County Great Park Master Plan, then it is recommended that the City Council approve the Design Package as a "Park Design" in accordance with Irvine Zoning Code Section 2-22-5.
5. If the City Council finds that the Design Package is not substantially in conformance with the Orange County Great Park Master Plan, then it is recommended that the City Council direct staff to commence processing of an amendment to the Great Park Master Plan, so that such amendment will be

¹ Technically, the agreements are between the City and Heritage Fields El Toro, LLC (Heritage Fields). For ease and consistency of reference, Heritage Fields is referred to as "Five Point" throughout this staff report.

completed in accordance with City procedures and the requirements of the ALA II.

EXECUTIVE SUMMARY

This staff report supplements and updates the staff report on this item from the November 12, 2013 City Council meeting. Accordingly, this report does not attempt to duplicate all of the information presented in the earlier report. Attached to this report is a summary of the clarifications and changes made since November 12, many which have a substantive bearing on the terms of the arrangement between Five Point and the Orange County Great Park.

On November 12 the City Council directed staff to continue to work with Heritage Fields El Toro, LLC/Five Point Communities Management, Inc. (Five Point) to complete documentation of Five Point's proposal to construct, maintain, and operate approximately 688 acres of the Orange County Great Park.

The proposal from Five Point offers a unique public benefit to the local and regional community. It provides 688 acres of park amenities sooner than that land could be developed by the Orange County Great Park Corporation (Great Park). As envisioned, over the next five years the proposal would result in \$109.4 million in Sports Park improvements, \$16.7 million in Bosque improvements, \$4.9 million in Upper Bee Canyon improvements, and \$26 million in Golf Course/Agricultural Area/Trails improvements.² An additional \$15 million of Wildlife Corridor improvements would follow shortly thereafter. To ensure the high quality design and maintenance of facilities for which Irvine is known, Five Point has committed \$15.5 million to "Additional Allowance Fund" to cover (1) future City-initiated minor modifications to the design proposal, and (2) future major modifications to the design proposal (if mutually agreed upon by the City and Five Point), (3) up to \$3 million in utility connection fees, and (4) up to \$2 million toward environmental remediation costs. Once the improvements are constructed and operational, Five Point would be responsible for maintenance of the 688 acres – and operations of the sports park, golf, and agricultural areas of the park – at least through 2023, and potentially through 2026. In addition to the preceding benefits, Five Point would contribute \$2 million toward further studies to develop a Cultural Terrace, and \$2 million toward feasible and desirable terra-forming of otherwise undeveloped areas of the Orange County Great Park. Collectively, these improvements and benefits would have a gross value to the City exceeding \$200 million.

The design proposed by Five Point for the subject 688 acres is depicted in a Design Package proposed by Five Point (most recently updated on November 20, 2013 and included here as Attachment 2). That Design Package would serve as the starting point for the development of the 688 acres, and would take on greater detail as Five Point

² Up to \$40 million in improvements costs will be funded with Community Facilities District (CFD) proceeds.

and the City proceed through the construction drawing process. Five Point requests that, during that process, the features be permitted to "Logically Evolve" at the request of both Five Point and the City. The specifics of the "Logical Evolution" process, which are similar to the City's traditional substantial conformance process, are discussed below.

To document the construction, and operations and maintenance plan and process, Five Point has proposed the following: (1) the ALA II (Attachment 3), (2) form Ground Lease (Ground Lease) that would apply to the Sports Park/Golf Course, and the Agricultural Area, (3) form Maintenance Agreements (Maintenance Agreement) that would apply to the Bosque, Upper Bee, and Wildlife Corridor areas, and (4) the aforementioned Design Package.

City staff has evaluated this proposal from policy, fiscal, design, operations and maintenance, and legal perspectives. The balance of this staff report discusses the results of that analysis.

Policy Issues

1. **Design**: To capitalize on the opportunity provided by the Five Point proposal, the City would have to first accept the Design Package as the foundational plan for park development over the next five years. The determination as to whether the Design Package is consistent with the City Council's vision for the near-term development of the Orange County Great Park is a policy determination. To aid in that judgment, the Great Park Design Team (including WRNS Studio) compared the existing Great Park Master Plan and the Design Package. In general, the Great Park Design Team found the two to be compatible, but not equivalent. A complete analysis of the two plans was included in the staff report for the November 12, 2013 meeting agenda packet.

Under the ALA II, if the City Council finds that the Design Package is consistent with its vision for the development of the Orange County Great Park, the City Council has two options. The first option would be to make a finding that the Design Package substantially conforms to the existing Great Park Master Plan, and constitutes a "Park Design" within the meaning of the Irvine Zoning Ordinance (See excerpt at Attachment 4). Alternatively, the City Council could direct staff to process an amendment to the Great Park Master Plan to ensure consistency between the Design Package and the Great Park Master Plan. Once that amendment is completed, the City Council could then approve the Design Package as a Park Design within the meaning of the Irvine Zoning Code.

In addition, Five Point has proposed revisions to the ALA II that would allow the City to indicate, prior to March 15, 2014, that it intends to make changes to the Design Package that affect sand volleyball, parking, and sports courts within the Sports Park, or the dog park and mini-amphitheater within the Bosque. So long

as the costs of those changes do not exceed the amount available in the Additional Allowance Fund, the changes will be implemented.³

2. **Process:** Five Point has proposed a “Logical Evolution” process for advancing the Design Package to construction drawings. It has requested that the City Council find all future “Logical Evolutions” to the Design Package deemed consistent with the Park Design. In developing other parks throughout the City, staff routinely makes “substantial conformance” determinations when reviewing park construction drawings for consistency with Park Designs approved by the Community Services Commission. The “Logical Evolution” concept is largely consistent with the substantial conformance process. The two concepts differ, however, when it comes to the movement of park features. Under the “Logical Evolution” process, features may be moved as necessary to accommodate site conditions, utility constraints, easements, rights-of-way, or other property restrictions. Those actions would not normally be considered “substantial conformance” on other projects. However, given the scope of this project, and the real possibility of encountering unforeseen development constraints, a modest relaxation of the substantial conformance process is justifiable.

The “Logical Evolution” process will also serve an important purpose for the City. Following the November 12, 2013 City Council meeting Five Point agreed to amend the ALA II document to specify that the City may initiate “Logical Evolutions,” and through that device exercise continuing control over the implementation of the Great Park when it desires a different or higher quality of design or improvement installed.

When a City-initiated “Logical Evolution” is proposed, the following process will apply. Five Point will be provided an opportunity to identify “value engineering” solutions that will offset the incremental additional costs of the “Logical Evolution.” Then, if the City is not satisfied with those value engineering solutions, it may require that the additional costs be deducted from the \$15.5 million Additional Allowance Fund. Lastly, when the Additional Allowance Fund for a given sub-area (e.g. Sports Park, Bosque, etc.) is exhausted, value engineering solutions must be identified (or the City may withdraw the request) before a City-initiated “Logical Evolution” can be implemented.⁴

3. **Selection of Contractors:** Under Five Point’s proposal, it will have the sole ability to select designers, engineers, and contractors to implement the Design Package. While this process differs from what has been envisioned for development of the Great Park, it is generally consistent with the process the City

³ After March 15, 2014, both the City (and Heritage Fields) can request additions or deletions to fundamental program elements (“Program Changes”), but those changes will require the mutual consent of the parties before they may be implemented. Costs of Program Changes are deductions from the Additional Allocation Allowance.

⁴ Five Point has agreed that once a subarea development is complete, any balance in the Additional Allowance Funding for that sub area may be transferred to other sub areas.

has historically used for other parks built by private developers within the City. For example, in the development of Cypress Community Park, the City (1) approved a park master plan, (2) approved a park design, (3) allowed the developer to then hire professionals to carry out the design, engineering, and construction of the park. With regard to the selection of designers, engineers, and contractors, the process described in the ALA II is substantially similar to the process described above. If the City Council finds consistency with the Great Park Master Plan, and if the City approves the Design Package as a Park Design under the City's Zoning Code, then Five Point will hire all of the professionals and contractors, and the City will exercise its regulatory authority to approve construction drawings and accept the finished improvements.

4. **Operations and Maintenance:** The City has historically envisioned that it would operate and maintain the Orange County Great Park. Under the Five Point proposal, those functions would be assumed by Five Point or an affiliate of Five Point. That entity would be charged with maintaining and operating the park subject to park rules, park maintenance standards, and park operating plans that the City can modify only with the consent of Five Point. Five Point would also be solely responsible for hiring maintenance service providers, park operators, concessionaires, and others working at the property. In exchange for giving up the flexibility in setting rules and procedures, and in hiring contractors, that the City would have if it were the park operator, the City will avoid potential operating and maintenance costs through 2023. In addition, if the City does not receive supplemental Community Facilities District funding (Secondary Maintenance Amount) by 2023, Five Point has agreed that it will extend its operations and maintenance obligations, at the City's option, for three additional one year periods.

Fiscal Issues

The most notable feature of the Five Point proposal is the provision of more than \$200 million in public benefits to the City. With this public benefit comes significant long term and short term responsibilities. From a long term responsibilities standpoint, the City must ensure it will have sufficient resources available to operate and maintain the park when it is turned over in 2024. From a short term standpoint, the City must ensure it has the resources available to pay utility connection fees, fund removal of hazardous and non-recyclable material, pay applicable taxes (if any), and to meet any other cash flow obligations emanating from the accelerated development of the Great Park. Long-term and short-term fiscal analyses of the Five Point proposal are summarized immediately below.

Long Term Fiscal Analysis

Orange County Great Park Staff, Administrative Services department staff, and outside consultants have spent considerable time with Five Point representatives reviewing the revenue and expense assumptions associated with operations of the Great Park when Five Point's operations and maintenance obligations expire in 2024. Through these discussions, City and Five Point staff reached a point where their revenue assumptions are 7% apart, and expense assumptions were 14% apart. These differences are reasonable, given that the assumptions are projected 11 years into the future. The more conservative set of assumptions indicate that the City will have approximately \$23 million to operate the Orange County Great Park in 2024, while the annual expenses of operating the new improvements proposed by Five Point will be approximately \$16 million. This calculation assumes only operational revenue generated by the new facilities and the "Guaranteed Maintenance Amount" of \$12 million projected in fiscal year 2023-24.

A broader forecast of Orange County Great Park cash flows was prepared assuming the continuance of existing programs and operational structure. The results of the analysis indicate the operation of existing and newly proposed facilities can be sustained nearly twenty years into the future. Recognizing that no projections twenty years into the future can or should be relied upon with any degree of certainty, the same model that suggests self-sustainability through that date also indicates that a potential shortfall could exist by the end of Fiscal Year 2032-33 if, for whatever reason the "Secondary Maintenance Amount" is not realized at the date projected. If "Secondary Maintenance" funding is not available, the City may extend Five Point's operation and maintenance obligation for the new facilities for up to three years beyond 2024. However, if the "Secondary Maintenance Amount" becomes available to the City in Fiscal Year 2022-23, as projected by Five Point, then the potential shortfall in Fiscal Year 2032-33 is eliminated by an additional inflow of more than \$20 million per year. It is also important to note that the projections assume \$135 million in positive cash flow from the City's Purchase and Sale Financing Agreement (PSFA) loan. The most conservative interest rate assumption was utilized when calculating the annual loan repayment amount.

Near Term Fiscal Impacts

Consideration has been given to a number of potential financial impacts associated with near-term park development associated with the proposal, including (1) runway removal, (2) relocation of existing park infrastructure, (3) utility connection fees (IRWD, SCE, and others), (4) the removal of potential hazardous and non-recyclable material, (5) removal of development constraints, including the Farm and Food Lab, Farmers Market and OCGP operations facilities, and (6) permitting and inspections. These are costs that would be borne by the City if it were to proceed on its own in developing the park but it is important to evaluate the timing of the expenditures for consistency with the City's projected cash resources. The results of the analysis indicate that the City is

expected to have sufficient resources to pay these costs on the accelerated construction schedule contemplated by Five Points. The projection assumes the reprioritization of existing OCGP capital improvement project funding and furthermore makes assumptions regarding the timing of Quimby fee payments and other cash flows. Because these features are not among those proposed by Five Point the analysis does not include additional City contributions for construction enhancements, such as storm water capture and reuse features, beyond the \$15.5 million Design Allowance.

Operations and Maintenance

As noted, Five Point's proposal includes a commitment that it operate the 688 acres of park features through 2023 (and potentially through 2026, as discussed above). The controlling documents for the operations and maintenance activities will be a series of ground leases (for the Sports Park/Golf Course, and for the Agricultural Area) and maintenance agreements (for Upper Bee, Bosque, and Wildlife Corridor). The forms of those agreements are attached as Exhibit F for the ALA II. Those agreements fundamentally require that the park be open for public use and that it be maintained "in a condition recognized as among the finest public open spaces in the City."

The details for how the operations and maintenance will occur are embedded in Park Rules, Park Maintenance Standards, and Park Programming Plans (for the Sports Park, Golf Course, and Agricultural Area) that are included as exhibits to the agreements. Orange County Great Park Corporation, Community Services, and Community Development department staff, and a golf course consultant have reviewed those rules, standards, and plans, and have found them to be, with exceptions noted below, appropriate and generally consistent with what the City would require of itself, were it to operate and maintain the improvements.

The exceptions to the foregoing finding of general consistency are as follows. First, Five Point has proposed that it and the Great Park CEO explore opportunities to create "blanket" special events permits for similar types of events. For example, rather than seeking a separate special event permit for every soccer tournament at the Sports Park, Five Point would obtain a single permit that would apply each time such a tournament is held. The parties recognize that further discussion, and input from interested agencies such as the City's Public Safety department and the Orange County Fire Authority, will need to occur before a conclusion on this issue is reached. If the parties cannot agree on a "blanket" permit (or permits), then separate permits will be required for each event.

Second, Five Point has proposed that it be permitted to generate a set of policies and procedures for the Sports Park and Golf Course that would include (i) general regulations, and (ii) permit issuance procedures for the use of athletic fields and courts. Because these activities will impact the character of Park operations, Great Park Corporation staff suggested, and Five Point agreed, that the City (through the Great Park CEO) have approval authority over the policies and procedures.

Third, and finally, Five Point has proposed that it have the ability to make minor modifications to the Park Maintenance Standards and the Park Programming Plan without the City's consent. This is a departure from the level of control that the City Council would have were it to operate and maintain the park on its own, but the restriction of changes to "minor" matters ensures that significant changes do not occur, while also allowing Five Point the ability to exercise reasonable flexibility in carrying out its obligations. In staff's view, this position appears reasonable.

Legal Issues

Since the publication of the staff report for the November 12, 2013 City Council meeting, Five Point's attorneys and the City Attorney's office have had multiple meetings and discussions to resolve several legal and technical matters. The key "legal issues" fall into three categories, which are separately discussed below: (1) legality of agreements, (2) ability to ensure contract performance, and (3) insulation from potential liabilities.

With regard to agreement legality, the City and Five Point focused their attention on whether using a lease structure to carry out the operations and maintenance of the proposed improvements was compliant with the CFD law. This issue is complicated, and involves the analysis of legislative history. However, resolution of this issue is not necessary to proceed with a decision on the ALA II, because the parties have agreed that if a lease structure is unworkable, they will enter into an alternative arrangement (e.g., management contract) that accomplishes the same fundamental ends.

With regard to ensuring contract performance, the ALA II uses the same enforcement procedures as the City has used in its prior agreements with Five Points. As an initial matter, the ALA II has a notice and opportunity to cure provision that allows the parties to work through disputes over perceived (or actual) noncompliance. If that process fails, then each party has the same remedies – it may commence an action that will be subject to expedited resolution through a "judicial reference" procedure. In that process, neither party has the ability to recover damages from the other. However, if either party has failed to perform a financial obligation – e.g., the payment of money to contractors – then it may be sued to "specifically perform" that obligation. On a more practical level, the ALA II document requires (as did the original Adjacent Landowner Agreement) that the party serving as the master developer of the Great Park Neighborhoods development and the party obligated under the ALA II document are one and the same. This provision was added to ensure that the party developing the 688 acres has a continuing interest in seeing the completion of that development.

With regard to liabilities, the City has ensured that its protections are at least as robust as those available to it in connection with the development of other City parks. During construction, Five Point has an obligation to defend and indemnify the City for any personal injury in any way caused by Five Point or its agents. In addition, Five Point and is required to carry \$5,000,000 in commercial general liability insurance. The City will carry additional insurance, over and above that provided by Five Point, in an amount deemed appropriate by the City's risk management division.

Post-construction, the City will receive a 1 year defect bond on all improvements. It will also be named as a third party beneficiary to all construction contracts, and all contractors will be required to defend and indemnify the City for any injuries caused by or resulting from their work. These protections, in addition to the City's probable eligibility for design immunity under the Government Code, will provide a level of protection to the City that meets and exceeds the protection that is available on other City parks.

In this area, a discussion of hazardous materials liability merits separate discussion. The City carries \$80 million in insurance (\$60 million of which is shared with Five Point) to address unknown hazardous conditions on the Orange County Great Park property. This coverage, and the coverage limits, was secured with the development of the Orange County Great Park, pursuant to the Great Park Master Plan, in mind. The Five Point proposal accelerates the schedule for a significant portion of that development, but does not inherently increase the potential hazardous materials liability. Nevertheless, in an effort to ensure that hazardous materials issues are properly addressed, and do not slow down the improvement of the 688 acres, Five Point has proposed that \$2 million in City funds, plus \$2 million in the Additional Allowance Fund, be set aside to address environmental remediation costs.

Miscellaneous Features of the Proposal

In addition to the components noted above, the Five Point proposal has several other features that merit brief discussion in the staff report. Those features include:

1. **Costs of Future Changes in Construction Codes.** Five Point is responsible for delivering code-compliant plans subject to one nuance: The cost of compliance with modifications to the City's codes that are adopted after January 1, 2014, and are not mandated by state or federal law, must be paid from the Additional Allowance Fund. Code updates are done every three years and are within the City's discretion. The next Code update is anticipated in late 2017.
2. **Phasing Commitments:** The parties have agreed to work collaboratively to minimize the disruption to existing Great Park features during construction.
3. **Meetings with Permitting Authorities:** Five Point will advise the City of, and include the City in, any significant meetings with other regulatory agencies (e.g. IRWD).
4. **Easements and Rights of Way and Temporary Rights of Entry:** The City will grant all such easements and rights of way as are required to accomplish the construction. This includes easements and rights of way over all of the Great Park Property.
5. **Easement Acquisition And Relocation:** The engineers that put together the Design Package were mindful of easements, utility lines, and other encumbrances and development constraints on the property. However, if

additional constraints are identified, the City is responsible to remove and/or relocate leases, license agreements, easements, encumbrances, rights and/or rights of way. If the constraints cannot be removed, then the parties must collaborate on a plan to re-design features to avoid the constraint. Construction may be delayed as necessary to identify an acceptable alternative solution.

6. **Backbone Infrastructure Cap**: In its original ARMIA with the City, Five Point capped its backbone infrastructure obligation to the City at \$40 million over the first five years. Five Point has revised the ALA II to clarify that that cap will not apply to runway removal activities necessary to proceed with development of the 688 acres.
7. **Right Of First Opportunity For Soccer Fields**: Five Point proposes that it receive a right of first refusal for use of the City's existing multi-use and soccer fields. The provision is structured so that the parties will periodically meet to discuss reservations for the period between six and twelve months following the meeting.
8. **Wildlife Corridor Land Swap and Plan**: The ALA II provides that the City will convey to Five Point the existing Wildlife Corridor property (approximately 178 acres), and that Five Point will convey to the City an identical amount of property along the new alignment of for the Wildlife Corridor. The property that the City will receive will be deed restricted in perpetuity for the use of a Wildlife Corridor. Five Point will be permitted to reserve certain easements for roads and utilities over the Wildlife Corridor property. The City will be required to maintain the property in accordance with the Wildlife Corridor Plan attached to the ALA II.
9. **Wildlife Corridor Operation**: At the conclusion of the Five Point maintenance agreement for the Wildlife Corridor, the City will be obliged to maintain the Wildlife Corridor in perpetuity in accordance with the Wildlife Corridor Plan. The City will not be permitted to pursue mitigation banking from the Wildlife Corridor without the consent of Five Point.
10. **Additional Land Swap**: The ALA II contemplates an additional potential 3.2 acre land swap to add more property to the Great Park in the area near the intersection of Upper Bee and the Bosque. The property to be conveyed to Five Point has not yet been identified. If the land swap does not occur, the Upper Bee and Bosque areas may need to be redesigned (because the Design Package contemplates that the land swap will occur).
11. **Roadway Network**: If in the future a subdivision map for development adjacent to the Great Park requires a portion of the road network to be located on Great Park Property, then the City will grant Five Point that right free of charge.
12. **Asphalt and Non-Recyclable Material**: Five Point has agreed that asphaltic concrete, which makes up a majority of the runways, is material that Five Point

will have the responsibility to remove under the ALA II. The City will have responsibility to remove other materials such as trash, wood, metal, and macadam, and petroleum based products, which will be deemed "non-recyclable" materials under the ALA II.

13. **Force Majeure**: As with many agreements, Five Point's obligations may be delayed on account of regulatory issues, labor disputes, acts of God, or other unanticipated issues. The Force Majeure may be utilized by the City if unforeseen hazardous materials are detected during the course of construction, which would result in unanticipated costs to the City.
14. **Taxes**: The City will be responsible for the payment of $\frac{1}{2}$ of any possessory interest taxes attributable to the Ground Lease agreement.
15. **Property Transfer Taxes**: Five Point has agreed to pay the property transfer taxes associated with the Wildlife Corridor land swap and the additional 3.2 acre land swap discussed above.
16. **Sign Program**: Five Point and the City must mutually agree on the establishment of, and any amendments to, a sign program for the operation of the Sports Park/Golf Course and the Agricultural Area.
17. **Sponsorship Opportunities**: Five Point and the City must mutually agree on any sponsorship opportunities at the Great Park.
18. **Alterations or Additions**: During the term of the Leases, Five Point and the City may choose to mutually agree on additions or modifications to the capital improvements.
19. **Removal and Restoration**: Five Point shall be obliged to spend up to \$5,000 per six month period on repair resulting from damage, destruction, and vandalism. Additional costs will be borne by the City in its insurance pool. If the City elects not to pay those costs, then Five Point may install grass or other hardscape or landscape in the place of the damaged or destroyed feature.
20. **Release of Hazardous Materials**: As it did in the ARMIA, Five Point has agreed to use "commercially reasonable efforts" to ensure that contractors indemnify the City from liabilities arising from the release of hazardous materials.
21. **Cross Termination**: If the City terminates any lease or maintenance agreement, then all leases and maintenance agreements terminate.

ATTACHMENTS

1. Summary of Post-November 12, 2013 Draft ALA II Revisions

2. Orange County Great Park Improvement Area Concept Plan and Programming Booklet
3. Proposed Second Agreement with City of Irvine as Adjacent Landowner
4. Irvine Zoning Ordinance