ITEM 7F

Coachella Valley Association of Governments
Executive Committee
April 24, 2017

Staff Report

Subject: **I-10/Jefferson Interchange Project**

Contact: Martin Magaña, Director of Transportation (mmagana@cvag.org)

Recommendation: Information only.

Background: During the December 5, 2016 Executive Committee meeting, questions were asked stemming from a Desert Sun newspaper article concerning an $18 million judgment against the City of Indio related to right-of-way at the I-10/Jefferson Street interchange. As CVAG staff indicated at that time, under CVAG reimbursement agreements, there had been no request by the City of Indio to seek reimbursement of some, or all, of the judgment because the judgment had not been paid and additional related legal steps, including the County's efforts to acquire the right-of-way, had still not occurred, so the matter was not ripe or ready for consideration by CVAG. On April 13, the City of Indio submitted a request to CVAG, asking for a determination that "monetary expenditures and obligations incurred by the City related to the Jefferson Street Interchange Project are reimbursable project expenses. This includes, but is not limited to, the $18 million obligation pursuant to the judgment in the matter of Jefferson Street Ventures, LLC v. City of Indio." The City recognizes that requesting this determination is uncommon and outside the normal course of CVAG's processes because the request for a determination is occurring prior to actual expenditures. However, if the determination is positive, the City will seek to utilize alternative sources of City funds to pay the project's expenses instead of issuing bonds and as such, would save the City, its residents and taxpayers in the City and elsewhere, millions of dollars related to bond financing.

The I-10/Jefferson Street Interchange Project is the sixth interchange to be reconstructed or improved as part of the Coachella Valley Corridor Improvement Project, which started in 2009. Construction of the I-10/Jefferson Street Interchange is scheduled to be complete in the summer of 2017. At the early stages of this project, the City of Indio was the lead agency.

In September 2007, the Indio City Council approved the Project Master Plan (PMP) for a shopping center development within the needed right-of-way proposed by Jefferson Street Ventures ("JSV") with certain conditions of approval. At that time, the City was still working with Caltrans on a preferred alternative to the interchange design. After approval of the PMP, the City of Indio was sued by JSV. As part of its lawsuit, JSV claimed a "de facto" taking of property for the right-of-way reserved in the proposed shopping center development, alleged inverse condemnation claims and unlawful development conditions. In December 2011, the court ruled in the City's favor. JSV appealed, and in April 2015, the court reversed the decision in favor of JSV. Future court hearings were scheduled to determine just compensation to JSV for the "taking." Prior to the trial to determine just compensation, the City settled pursuant to a Code of Civil Procedure Section 998 with an offer for $18 million. JSV accepted the offer and judgment was entered on June 24, 2016.

The City was ordered by the court to pay the judgment and is in the process of issuing judgment obligation bonds to pay JSV. As part of this process, the City has submitted its reimbursement request to CVAG. CVAG is in the process of evaluating this request to determine whether this is an eligible cost under the existing cost-sharing agreement. Since the project is funded, in part with Measure A and other state and federal funding, CVAG staff will seek input from the Riverside County Transportation Commission (RCTC) as part of the analysis.

Funding for the I-10/Jefferson Street Interchange Project is allocated through a reimbursement agreement between CVAG and the City of Indio. The I-10/Jefferson Street Interchange Project was first approved in September 2000. Like other interchanges in the Coachella Valley Corridor Improvement Project, the local costs were shared among several cities. Over the years, the Executive Committee has approved several amendments to the Reimbursement Agreement for the project. They have included an amendment, approved in April 2010, that substituted Riverside County as the lead agency instead of the City of Indio due to procedural concerns by Federal Highway Administration (FHWA) and Caltrans related to right-of-way acquisition and construction activities of the project prior to obtaining environmental clearances which resulted in physical damage to important archaeological resources and, to take advantage of the County's expertise in interchange projects since it was nearing the construction phase. The total CVAG Regional Funds commitment is now $42.16 million, and the term of the agreement extends through December 30, 2018.

If after evaluation of the City's request a determination is made that justifies reimbursement, then it will require action by the CVAG committees including, the Executive Committee.

It should be noted that in addition to the City's letter, a claim has been filed by the City of Indio against CVAG for money damages. Indio's City Manager states that this is to protect the City's legal standing should this matter go to litigation. According to the City, "The City's claim involves CVAG's obligation to reimburse 75% of a portion of the Judgment as well as the 25% local share (excluding the City's local share amount) in the Inverse Action, as set forth in the Reimbursement Agreement. The City's claim also includes the expenses to issue the Judgment Obligation Bonds less the City's local share amount. Last, the City's claim also includes unreimbursed City litigation fees less the City's local share amount."

Fiscal Analysis: CVAG staff is conducting an analysis of the City's request to determine if costs incurred by the City of Indio related to the legal settlement are reimbursable costs.

Attachments:

1. Letter from City of Indio, dated April 13, 2017

Via Electronic Mail and U.S. Mail

April 13, 2017

Tom Kirk, Executive Director
Coachella Valley Association of Governments
73-710 Fred Waring Drive, Suite 200
Palm Desert, California 92260

Re: City of Indio-Jefferson Street Interchange

Dear ~~Mr. Kirk~~ Tom,

This letter follows my letter dated April 4, 2017. The City of Indio ("City") hereby requests a determination from the Coachella Valley Association of Governments ("CVAG") that monetary expenditures and obligations incurred by the City related to the Jefferson Street Interchange Project ("Interchange Project") are reimbursable project expenses. This includes, but is not limited to, the $18 million obligation pursuant to the judgment in the matter of *Jefferson Street Ventures, LLC v. City of Indio*, Riverside Superior Court Case No. INC 072101, which was entered on June 24, 2016 and includes the additional expenditures detailed in **Exhibit A**. The City's request is based on the following:

- The City was the lead agency on the Interchange Project from 2002 through December 2011. In 2007, in order to accommodate the required right of way for the Interchange Project, the City imposed two conditions on a project application, which restricted the footprint of a 26.85 acre development project. These two conditions have been the subject of litigation for the last ten years culminating in an $18 million judgment in favor of Jefferson Street Ventures, LLC ("Jefferson"). The judgment obligation is now due.

- The City's 2007 actions were made in good faith solely to further the common interest of both the City and CVAG in accommodating the required right of way for the Interchange Project and its completion.

- In 2007, the City specifically informed CVAG of the Jefferson development application, its impact on the Interchange Project, and the conditions the City intended to impose on the project to restrict development to accommodate the required right of way for the Interchange Project. The City relied on CVAG's commitment to fund seventy-five percent (75%) of the costs and expenses arising from and related to the taking of

Jefferson's property and therefore placed the two conditions on the development project with CVAG's full knowledge and support.

- The City's 2007 actions ensured that the necessary right of way for the Interchange Project was not commercially developed, which in turn resulted in a substantially lower project cost for the Interchange Project. But for the two conditions, the Jefferson property would have been a fully developed shopping center and, as of February 2014, the cost to condemn the land required for the Interchange Project would have been an "as-built" cost of $31.1 million as well as $5.7 million to demolish and site-ready Jefferson's property for the Interchange Project.

- The City's contribution of $18 million towards the total just compensation settled by both the City and County substantially reduced the amount of damages Jefferson sought from the County in the County's eminent domain proceeding. Jefferson originally sought upwards of $30 million solely from the County but expressly waived its rights to $24 million in just compensation from the County due to the City's contribution.

- The entire Coachella Valley region received a financial benefit as a result of the City's actions as the right of way area for the Interchange Project was not a fully developed shopping center in 2007 or in 2014 when the County instituted its eminent domain action. The costs incurred by the City should be subject to the same contribution spread similar to other Interchange Project costs and not solely be an obligation of the Indio taxpayers.[1]

BACKGROUND:

Relevant Written Agreements between the Parties

The City and the California Department of Transportation (Caltrans) entered into a "Cooperative Agreement" for the Interchange Project on January 10, 2006 ("2006 Cooperative Agreement"). A cooperative agreement indentifies a lead agency and the responsibilities of the various parties. Under the 2006 Cooperative Agreement, the City was designated lead agency for the Interchange Project and the City agreed to undertake certain activities in furtherance of the Project. The 2006 Cooperative Agreement included a scope of work and chart that further outlined the City's responsibilities and is attached as **Exhibit B**. The scope of work and the activities undertaken by the lead agency included, but are not limited to, right of way activities.

[1] While Indio is paying its proportionate local share of the Judgment from its budget, the City is bonding for the remaining amount of the Judgment that would have otherwise be reimbursed by CVAG, including the local share amounts.

Funding for the Interchange Project is allocated through the use of reimbursement agreements and/or sub-reimbursement agreements between CVAG and the involved public agencies. The original Interchange Project funding agreement between the City and CVAG was first entered into in January 2002. This funding agreement has been amended various times over the life of the Interchange Project. This included an amendment in 2009 ("Amendment No. 5") which authorized $9 million of additional funding for the purpose of "continuing the engineering design, for acquisition of right-of-way and for mitigation of cultural sites." The 2002 and 2009 funding agreements are attached as **Exhibit C** and **Exhibit D** respectively.

History of Interchange Project and Jefferson Street Ventures[2]

Beginning in 1998, Congress appropriated federal funds for interchanges in the Coachella Valley, of which $990,000 was allocated for engineering work on the Interchange Project in 2002. Since 2001, the Federal Highway Administration ("FHWA"), Caltrans, CVAG, the County of Riverside (County), the City and neighboring cities studied and planned improvements along the I-10, including the proposed Interchange Project. As stated above, the City was designated lead agency for the Interchange Project and retained RBF, an engineering consultant, to conduct environmental studies among other things.

The Interchange Project was in the planning stage from at least 2001 while Caltrans debated three alternative freeway configurations. Since 2003, the environmental studies pointed to Alternative 1. But in November 2005, the City believed a preference for Alternative No. 3 should be made to avoid environmentally sensitive issues based on cultural studies. However, RBF found no significant issues after conducting a preliminary environmental study and on March 7, 2007 the City Council approved Alternative 1 as its local preferred configuration for the Interchange Project. Jefferson, through Charles Ellis, one its managing partners, testified at the City Council hearing and also supported Alternative 1 as the preferred configuration for the Interchange Project.

Background on Jefferson Street Ventures, LLC's Development Project

While the Interchange Project was undergoing review and the alternative interchange designs were being debated, Jefferson acquired during 2003 and 2004 several parcels comprising the approximate vacant 26.85-acre Property at the southeast corner of Jefferson Street and Varner Road ("Property"), right where the Interchange Project improvements were planned. In 2005, after having gone through a city staff level review in 2004, Jefferson formally submitted an application for City approval of Project Master Plan No. 05-12-46 ("PMP"), to build a retail

[2] This matter including the Project and the litigation has a history extending more than 15 years. We have attempted to provide the facts we believe are relevant to this matter but not all nuances can be encapsulated in this letter. If you have any specific questions, we invite you to submit those to us so we may provide you with any information you need to make your determination.

shopping center on its Property (the "Project"). The proposed Project consisted of 248,600 square feet of retail and 1,153 parking spaces, with an approximately 1-acre area at the tapered southeast end of the Property designated as a retention basin for flood control. The site plan and other schematics placed the largest buildings, including the "anchor" building, along the I-10 right where the on/off-ramps would have been under any of the three alternative freeway configurations. Smaller buildings were placed along the perimeter of the Property next to realigned Varner Road and the large expanse in the middle was designated for parking.

The PMP discussed the interchange alternatives and included a revised site plan designed around Alternative 3. As discussed below, Jefferson submitted a revised site plan on 17.5 acres of the Property with 156,650 square feet of buildings and 658 parking spaces. Jefferson did so after extensive discussions with the City to accommodate the Interchange Project. **Exhibit E** contains a depiction of the Jefferson project. The Interchange Project required approximately one third of Jefferson's Property that was closest to the freeway.

The Planning Commission held a series of hearings from May 2006 through March 2007 while Staff worked with Jefferson on various environmental and other issues, including pressing Caltrans to make a decision on freeway alignment. The work behind the scenes included attendance by Jefferson at Caltrans' "Project Development Team"[3] ("PDT") meetings regarding the Interchange Project starting in 2006 and continuing past Project approval (August 2007) into 2008. At these PDT meetings, Mr. Ellis extensively discussed the Interchange Project's impact on Jefferson's Property and Caltrans was very much aware of the dilemma the City was in vis-à-vis Jefferson's Project. Other topics discussed at meetings attended by Jefferson included the debate regarding the three freeway configuration alternatives and the status of the environmental studies. (See, the agendas and minutes of the PDT meetings in **Exhibit F**). Throughout the City proceedings Jefferson complained about the delay in approving the PMP and the City explained that the delays were caused by the environmental studies that were required for the Interchange Project over which the City had no control as FHWA and Caltrans directed the environmental process. Although some progress was made with the environmental studies for the Interchange Project, the studies were not completed at the time action was taken on Jefferson's Project.

After working with staff and holding numerous Planning Commission meetings, a tentative agreement was worked out whereby Jefferson would agree to a smaller project on roughly *17 acres of the 26.85-acre Property* in return for compensation for taking what was described as approximately 9 acres, in the future. The smaller project approved by the Planning Commission took into consideration the Alternative 1 alignment that was approved by the City Council in

[3] The PDT is an important group as they advise and assist the Caltrans project manager in directing the course of studies required for the project, they make recommendations to the Caltrans project manager and they work to carry out the project work plan.

March 2007, noted above. The Planning Commission adopted a proposed resolution, recommending that the City Council approve Jefferson's Project subject to conditions of approval consistent with the reduced 17-acre project.

On July 18, 2007, the PMP came before the City Council but Mr. Ellis unexpectedly announced that he would not accept the 17-acre Project. He sought approval to build on the entire Property or have the City immediately condemn and pay for the land needed for the Interchange Project. In reliance upon a commitment from CVAG, Staff assured Mr. Ellis that he would be compensated for the land at fair market value, once the environmental process was complete. The matter was continued and at the August 15, 2007 meeting, the City Council adopted Ordinance No. 1511 ("Ordinance 1511") approving Jefferson's development, subject to certain conditions of approval consistent with the reduced 17-acre project. The sole reason the City imposed the two conditions of approval to restrict the scope of Jefferson's Project was to further the Interchange Project. The Jefferson Project otherwise presented no CEQA or other impediments to approving the Project, as originally designed, on the entire 26.85-acre Property. Ordinance 1511 is attached as **Exhibit G.**

Background on the Writ of Mandate/Inverse Condemnation Litigation

A. Proceedings in the trial court

On November 7, 2007, Jefferson filed a petition for writ of mandate (cause of action 1) and a complaint for damages. Causes of action 2-6 alleged state law inverse condemnation claims and the seventh cause of action alleged unlawful development conditions. (*Jefferson Street Ventures, LLC v. City of Indio*, Riverside County Superior Court Case No. INC 072101 ("Inverse Action")). The damages causes of actions were stayed pending determination on the writ. The Inverse Action alleged various theories including that the following two conditions of Ordinance 1511 effected a *de facto* taking of the entire Property:

- Condition 6, which required submission of revised plans to provide "for a building envelop as permitted for the site under the provisions of the Jefferson Street Interchange Alternative 1"; and

- Condition 9, which stated than an "approximate 2.1-acre Temporary No Build Area shall be reserved in the southeastern portion of the site . . . until completion of the Jefferson Street Interchange Project. Upon completion of the interchange project this area may be developed."

On June 15, 2009, the trial court denied Jefferson's petition for writ of mandate. Thereafter, the City filed a motion for judgment on the pleadings for the remaining causes of action. On September 20, 2011, the trial court denied the City's motion without prejudice and requested

briefing on the limited issue of whether Jefferson's writ petition encompassed its takings claims and if so, how the trial court should proceed. On December 12, 2011, the trial court on its own initiative, reconsidered and vacated its prior September ruling and granted the City's motion for judgment on the pleadings. The trial court explained that all causes of action, including the writ, were based upon the same argument—that the project condition restricting development on the nine acres for the freeway interchange was an improper taking. Because the trial court previously found the City's actions did not constitute a taking, there was no merit to the second through seventh causes of action. (See, **Exhibit H**).

Judgment was entered in favor of the City. Jefferson timely appealed.

B. Proceedings in the court of appeal

The City was the lead agency for the Interchange Project at the time it adopted Ordinance 1511. During this litigation, CVAG continued to work with the City on the Interchange Project by executing various agreements in furtherance of the Interchange Project including funding for the right-of-way acquisition. See, **Exhibit I** for examples of the continuing relationship between the parties during the litigation.

Seven years after the initial complaint and after years of waiting on appeal, in April 2015, the Court of Appeal issued its published decision, *Jefferson Street Ventures, LLC, v. City of Indio,* 236 Cal.App.4th 1175 (2015). The Court of Appeal reversed the trial court decision because, in sum, the Court of Appeal ruled that the City was land banking for the Interchange Project: "We agree with Jefferson the conditions were imposed to '"bank"' the otherwise developable property so it could potentially be condemned at some unknown time in the future **'in an undeveloped (and, consequently, less costly) condition**.'" *Id.* at 1201-1202 (emphasis added). The Court of Appeal held that the two challenged conditions effected an uncompensated *de facto* taking of the Alternative 1 Acreage and the Temporary No Build Area. *Id.* at 1203. The Court of Appeal, however, expressly rejected Jefferson's claim that the challenged conditions effected a *de facto* taking of its entire 26.85-acre property. *Id*. at 1203-1204.

Having made that determination, the Court of Appeal then had to address the appellate remedy. The normal remedy, prescribed by the California Supreme Court in *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994), *cert. denied,* 513 U.S. 1184 (1995), would be to allow the City Council to rescind the conditions, thereby avoiding payment of just compensation for the land taken. *Id.* at 1204. But the Court of Appeal recognized the normal remedy was no longer possible due to the County's subsequent filing of the eminent domain proceeding ("County Action") for the Alternative 1 Acreage and Temporary Construction Easement required for the Interchange

Project.[4] Given these intervening events, the Court of Appeal stated: "That requires us to turn back to *Hensler, supra*, 8 Cal.4th 1, and face the elephant in the room: the pending County Condemnation Action." *Id.* The Court of Appeal concluded: the "County Condemnation Action has effectively taken the former [*Hensler*] option off the table, leaving only the issue of determining just compensation for the Alternative 1 Acreage and the Temporary No-Build Area." *Id.* at 1204.

The Court of Appeal's conclusion is significant. If the City had imposed the two conditions of appeal for some reason unrelated to the Interchange Project, it could simply have removed the conditions and avoided paying just compensation. But the only reason for the two conditions was to preserve the land needed for the required right of way for the Interchange Project in a vacant condition and to reduce the amount of money CVAG, and the participating entities, would ultimately need to pay to acquire it - **as in fact occurred in 2017**.

Alternatively, if the City had remained the lead agency when the Court of Appeal decision issued in 2015, and the eminent domain proceeding had been filed by the City rather than the County as originally contemplated, the Inverse Action would have been remanded and just compensation would have been decided in a single action - the eminent domain proceeding - as occurred in *People ex rel. Dept. of Transportation v. Diversified Properties Co. III*, 14 Cal.App.4th 429, 439 (1993) (property owner dismissed its inverse condemnation action in conjunction with the State's filing of the direct condemnation action, and a single judgment in condemnation was entered, addressing just compensation for the *de facto* taking and related just compensation).

But because the County, rather than the City, filed the eminent domain proceeding to condemn the land needed to the Interchange Project, the Court of Appeal recognized that the City could not simply rescind the conditions. The Court of Appeal was also mindful of the City's concern about the grave risk of "double dipping" whereby Jefferson would seek maximum just compensation from the City and the County in the two separate cases for the same land. The Court of Appeal emphasized: "although the County is not before [the Court] in this action, it has stepped into the City's shoes to become the responsible agency for constructing Interchange Project responsible for all eminent domain activities—which as a practical matter limits the City's options on remand—and Jefferson has already sought consolidation of the County Condemnation and the City Condemnation Action bringing all the parties before the same court in those actions as well." *Id.* at 1206 (emphasis added).

[4] In December 2011, the Caltrans Cooperative Agreement was amended and the County took responsibility for the Interchange Project as lead agency. Three years later, on February 10, 2014, the County filed its condemnation proceeding to acquire the Caltrans approved Alternative 1 acreage (6.522 acres) and related temporary construction easement (3.46 acres).

Accordingly, the Court of Appeal remanded the case for the sole purpose of determining just compensation for the *de facto* taking of the Alternative 1 Acreage and the Temporary No-Build Area as of the August 15, 2007 date of the City Council's hearing approving Ordinance 1511. A trial date on the matter of just compensation for the *de facto* taking was set for May 9, 2016.

C. Proceedings after remand to the trial court

Prior to the trial on just compensation in the Inverse Action, in April 2016, the City settled all claims in the Inverse Action pursuant to a Code of Civil Procedure § 998 offer for $18 million and judgment was entered on June 24, 2016. Based upon the appraisals obtained and exchanged in preparation for trial, and recognizing the substantial attorney fees, costs, interest and other elements of just compensation that Jefferson would have sought at trial (as confirmed by Jefferson declarations), the City has no doubt that resolving the Inverse Action for $18 million eliminated a significant risk of a much higher just compensation award at trial. At all times leading up to the 998 offer, all parties understood that once just compensation for the *de facto* take was resolved (by settlement or trial), very little remained to be resolved in the County Acton.

However, after Jefferson accepted the City's 998 offer and before judgment was entered (and at all times since then), Jefferson claimed the $18 million judgment only compensated Jefferson for "temporary taking" damages, which it never alleged. Jefferson through its counsel numerous times in open court insisted that they expected to obtain an additional $20-$30 million from the County. At one hearing in December 2016, Jefferson's counsel stated unequivocally that the "numbers that have been on the board for damages" if the County case is tried will be "over 40 million dollars." That was in addition to the $18 million judgment from the City.

To counter Jefferson's attempt to seek double recovery, the City sought and obtained leave to file an answer and cross-complaint in the County's direct condemnation action. The City brought a legal issues motion to address the impacts of the $18 million judgment in the County eminent domain action. Although the court did not rule that the City had an equitable interest,[5] it did rule that Jefferson would have to prove an entitlement to any "additional damages" it sought in the County eminent domain action. Immediately after that ruling, Jefferson retooled its damages claims against the County to essentially credit the $18 million judgment against the sums it had been seeking from the County.

[5] The City disagrees with the Court's ruling that it had no equitable interest in title, but decided to settle claims with Jefferson so that a larger settlement with the county could be effectuated for the good of the region.

SUMMARY OF CITY'S BASIS FOR REIMBURSEMENT OF THE INTERCHANGE PROJECT COSTS:

A. The City Acted in Good Faith and in Reliance on CVAG's Commitment to Fund the Costs and Expenses related to Jefferson's Property for the Interchange Project

From the time Jefferson submitted its PMP application to the City in 2005 through its approval in 2007, the City attempted to diligently work through numerous environmental issues related to the Interchange Project as well as issues related to the preferred freeway configuration. After agreeing to the reduced 17-acre project at the end of the Planning Commission hearing process, Jefferson reversed course and demanded that its 26.85 acre project be approved or that the City provide an "unequivocal commitment" that it would receive just compensation at the July 2007 City Council hearing. Mr. Ellis even stated that he would be happy if the City took the Property and paid fair market value. A dilemma faced the City and Jefferson because Caltrans had yet to finalize environmental review, which was required in order to make a final determination on the interchange alignment.

Accordingly, City staff explained that its approval on the PMP anticipated two potential outcomes—If Caltrans decided not to proceed with the Interchange Project, Jefferson could develop the entire property; but if the Interchange Project goes forward, Jefferson's project would be built on the 17 acres; again the issue was timing because the final configuration had not be determined and funds could not be released until the environmental studies were completed.[6] At all times, however, the City clearly told Mr. Ellis that he would receive just compensation for his Property. Accordingly, the City, with the support of CVAG, placed the two conditions on the Property to accommodate the Interchange Project.

CVAG knew that the City placed the conditions on the Property. CVAG received a copy of a letter dated July 6, 2007 sent to Mr. Ellis from the City (**Exhibit J**). In that letter, the City provided CVAG with information concerning Jefferson's development application, the impact of the Interchange Project on Jefferson's development and the conditions the City intended to impose on Jefferson's Project to accommodate the right of way necessary for the Interchange Project. CVAG supported the City's course of action by providing assurances to the City that

[6] Also from a practical perspective, the City did not want (and we suspect its funding partners for the Interchange Project agreed) to have a developed shopping center only to turn-around and demolish the shopping center right after it was built. It is important to know that in the fall of 2007, the environmental reports were being completed and testimony at the City Council hearing anticipated a certified environmental document in early 2008 with construction to begin sometime shortly thereafter. In fact, the original environmental assessment for the Interchange Project was circulated for review in October 2008 and a final mitigated negative declaration was published in January 2009. Caltrans was very well aware of this situation as Jefferson, and in particular Mr. Ellis, attended various Project Development Team meetings where the Interchange Project alignment was discussed vis-à-vis his development project.

CVAG would fund 75% of the costs and expenses related to acquisition. Specifically, the letter to Jefferson states:

> "the **City has secured a "commitment" from the Executive Director of the Coachella Valley Association of Governments** ("CVAG") that upon drafting of an appropriate agreement, **CVAG will fund seventy-five percent ("75 %") of the costs and expenses** arising from and related to the acquisition of the right-of-way for the Interchange Project." (Emphasis added).

The record is clear that the City moved forward with CVAG's support and more importantly in reliance on CVAG's commitment of financial support.[7] Following the first City Council hearing on July 18, 2007 at which the July 6, 2007 letter was extensively discussed and referenced, Mr. Ellis emailed the then City Attorney on July 19, 2007 seeking a meeting with the City and CVAG representatives "to attempt to resolve the taking and just compensation issues" arising from the Interchange Project.

In response, the City stated that its letter dated July 6, 2007, combined with the conditions on the Project recommended during the Council meeting, was "as far as Indio can come." Such statements were only made because CVAG had made a commitment of financial support to the City and supported the City's actions on the Project which would, and did, substantially reduce the costs of the acquisition some ten years later.[8]

Now the time has come to fund the $18 million Interchange Project costs the City is fronting. It would be manifestly unjust for CVAG to walk away from the City and not find a means to reimburse monies Indio is to pay for the Interchange Project right of way. CVAG was willing to commit to funding in July of 2007 and CVAG should be willing to do the same in 2017.

B. The City's Action Resulted in the Acquisition of Vacant Land at a Substantially Reduced Cost

The City's actions to prevent development in the right of way for the Interchange Project saved CVAG and the region millions of dollars – plain and simple. At the time the County ultimately

[7] In addition to CVAG's oral promises, the costs attributed to the City's actions in 2007 are also reimbursable under the funding agreements with CVAG.

[8] We understand that CVAG believes that the City should have pursued early acquisition from Caltrans. The July 6, 2007 letter indicates that this was being reviewed. However, one of the requirements for a protective acquisition was a "high probability that a negotiated settlement would be successful." Given that here we are more than 12 years after Jefferson filed its development application, we think it would have been unlikely, if not impossible, that Caltrans or the City would have been able to meet this requirement. (See, Caltrans Right of Way Manual, Chapter 5). Moreover, Caltrans also had knowledge of the situation and could have at any time started the protective acquisition process on behalf of the City.

instituted an eminent domain action, it sought to condemn what was then approximately 6.2 acres of vacant, barren land.[9] Had the City not imposed development conditions, Jefferson would have built its proposed shopping center and the County would have been forced to break up a commercial project for partial acquisition, increasing (among others) the costs of taking the project as built, increasing the cost of demolition, and increasing the direct and indirect costs associated with the commercial leases that would have been in place.

The facts in the preceding paragraph are based upon evidence under oath, not speculation.[10] As detailed in the sworn declaration of Charles Ellis,[11] Jefferson was created in 2003 for the purpose of acquiring, entitling and developing the property located northeast of the intersection of the I-10 freeway and Jefferson Street. Mr. Ellis states under oath that **if the City had not imposed the conditions on development, the Jefferson Street Commercial Plaza would have been developed on the entire parcel and therefore in 2014 the property to be acquired for the Interchange Project would have been a fully developed commercial site rather than vacant land**. (**Exhibit K**, ¶¶ 25-26). Plainly, it would have cost more to "take" the developed property than the vacant property. Equally plainly, the City saved CVAG a great deal of money by imposing conditions on the development of the property; conditions that CVAG had full knowledge of.

As Mr. Ellis declared, the 26.85 acre property was strategically situated adjacent to the freeway as well as a new residential development and there were no competing commercial centers. The property was an ideal location for a pedestrian friendly lifestyle center. Jefferson had in-hand a letter of intent with an anchor tenant and was in the process of negotiating lease terms with other potential tenants. Because Jefferson owned the 26.85 acre property free and clear without any debt secured against the Property, and because it had an anchor tenant, Jefferson could easily obtain construction financing for its Project. Furthermore, Jefferson was in a financial position to accelerate development of Phase 1 and Phase 2 of the Project and was prepared to do so. (**Exhibit K**, ¶¶ 8-10, 13.) As noted above, Jefferson was shrewd and placed the building for the anchor tenant along the perimeter of the I-10 freeway to maximize its damages, with the

[9] The County also was required to obtain the temporary construction easement area and for purposes of this memorandum reference to Jefferson's property includes the temporary construction easement.

[10] It is common for developers and land speculators to seek out properties to buy anticipating their value will escalate with a public project, engaging in what may be termed "entitlements speculation." Notably, Jefferson's peculiar project design–with the anchor building right next to the existing freeway and parking hidden from street traffic rather than adjacent to adjoining streets–strongly suggests that Jefferson's goal was to maximize the "impact" of the Interchange Project and thus maximize the compensation taxpayers would have to bear in a condemnation case.

[11] Charles Ellis is one of the managing members of Jefferson and his declaration is attached as **Exhibit K**.

understanding that the City (then lead agency) would need to acquire that portion of the Property for the Interchange Project.

Assuming a fully occupied commercial development with tenants and long-term ground leases, the City's experts believe that the just compensation due to Jefferson would have been approximately **$31.1 million**. In addition, there would be an additional cost of $5.7 million to demolish and site ready the Property for the Interchange Project.[12] This amount did not include attorney fees, costs and interests—all of which Jefferson is legally entitled to request and obtain. Thus, a more conservative estimate of $46 million for a built-out Project and all just compensation certainly is not unreasonable.

The City's action prevented the unnecessary expenditure of public funds in having to take a fully developed commercial center. Instead, the property acquisition costs for the Interchange Project were $23,716,185 million[13]—a substantial reduction from what would have been a range of $36 to $46 million. CVAG should focus heavily on this substantial savings when considering the City's reimbursement request.

C. The City's Contribution of $18 Million Towards the Total Just Compensation Caused Jefferson to Reduce the Amount of Damages it Was Seeking from the County

It is important for CVAG to recognize that the County's acquisition cost of $5.5 million cannot be isolated from all other factors that impact the just compensation due and paid to Jefferson. There is absolutely no question that Jefferson would never have accepted $5.5 million from the County had it not been for the City's contribution of $18 million towards the total amount of just compensation.

Throughout the last year and a half, Jefferson through its counsel insisted numerous times in open court that it expected to obtain an additional $20-$30 million in damages from the County. At one hearing in December 2016, Jefferson counsel stated unequivocally the "numbers that

[12] The City retained the services of services of Oris Group Consulting, Inc., a forensic consulting firm specializing in building and development, to provide an analysis of what it would have cost to develop the Jefferson Street Commercial Plaza as proposed by Jefferson in two phases— the first phase commencing in the second half of 2009 and the second phase commencing in the second quarter of 2010. Utilizing the cost analysis from the Oris Group, the City requested Mason & Mason, a well known real estate appraisal firm, to determine the amount of just compensation that would have been due to Jefferson as a result of the 2014 eminent domain action assuming the Jefferson Street Commercial Plaza had been fully constructed, leased and occupied. The cost analysis is attached as **Exhibit L** and the Mason & Mason summary is attached as **Exhibit M**.

[13] This amount does not include the additional sums the City is requesting as Reimbursable Project costs detailed in **Exhibit A**.

have been on the board for damages" if the County case is tried will be "over 40 million dollars."[14]

For all the reasons discussed above, the actions of the City—from the 2007 Ordinance 1511 which prevented Jefferson from building out the Property, the City's oft-repeated concerns about Jefferson's "double dipping" expressed to the Court of Appeal and the trial court, which ultimately led to the important admonition by the trial court judge that Jefferson "will still have to prove any additional damages it is seeking in the eminent domain action" beyond the $18 million judgment in the Inverse Action—all contributed and led directly to the County being able to settle with Jefferson for only $5.5 million. If the County had joined forces with the City to present a united front against Jefferson, it would likely have been possible to have obtained the right of way necessary for the Interchange Project without any further compensation from the County.[15]

In sum, **the City has saved millions of dollars for CVAG and the participating entities**.

In particular, as Mr. Ellis declared, Jefferson intended to seek damages against the County "for the long delay in compensating Jefferson for its losses" and Jefferson was entitled to claim an additional $24,080,000 in just compensation for such delay. Instead, because of the City's $18 million contribution, Mr. Ellis directed his attorney not to seek pre-condemnation damages. (See, Ellis Declaration at **Exhibit K**). Mr. Ellis was clear:

> "[W]hat the Lead Agencies have committed to pay, cumulatively, constitutes, in my opinion, an amount less than just compensation, in all of its forms, owed to Jefferson for the taking caused by the Interstate Project which amount was accepted by Jefferson to end further litigation and which, therefore, shall be labeled 'just compensation.' I also confirm that, having been assured that a significant portion of the compensation would be advanced by the City in the Jefferson Action via the Judgment for $18 million, Jefferson waived and did not seek any pre-condemnation damages in the County Action for the taking of Jefferson's property for the Interstate Project." (**Exhibit K**, ¶ 5.)

[14] Jefferson's statements were not mere bluster and its claims for such damages were supported by Jefferson's two experts who are well known appraisers (Stephen Roach and Michael Waldron). There is no debate regarding the credibility of Jefferson's experts because the County's own special counsel on this matter utilizes those same experts for their private (not public entity) clients in eminent domain actions.

[15] There was a slight difference in the County's fee take area and the City's de facto Alternative 1 take area. The County's area was .017 acres greater than the City's de facto Alternative 1 take area and as such the County would have been responsible for the minor amount attributed to this differential.

Accordingly, Mr. Ellis concluded by stating that Jefferson would have sought in the County action just compensation of $7,383,161 (for the cost of the take) plus $24,080,000 for a total of $31,453,161 plus one-third of that amount for contingency attorney fees. (**Exhibit K**, ¶¶ 23.)

The City's contribution of $18 million was the sole reason why the County was able to pay only $5.5 million. We request CVAG to recognize the City's monetary contribution to the Interchange Project and reimburse the City accordingly.

D. The Region is Receiving a Financial Windfall at the Expense of Indio's Taxpayers

There is no dispute that the County and CVAG received a financial windfall due to the City's actions in 2007. The City relied on CVAG's 2007 commitment that it would fund 75% of the costs and expenses incurred in acquiring Jefferson's property for the Interchange Project in addition to CVAG's contractual commitment to do the same. More importantly, CVAG and its member agencies cannot deny that the City's actions in 2007 saved the region many millions of dollars. The County was not required to condemn a fully developed shopping center; it was only required to take 6.5 acres of vacant land.

Moreover, Jefferson expressly relinquished its legal ability to seek more than $30 million in damages from the County based on the City's contribution towards the taking for the Interchange Project.

In conclusion, we respectfully request that CVAG determine that the monetary expenditures and obligations discussed herein are reimbursable project expenses or in the alternative, are reimbursable from other CVAG unrestricted funds.

By submission of this letter, the City is not waiving any of its legal rights or remedies against CVAG.

Sincerely,

Dan Martinez
City Manager

cc: Martin Magana, Director of Transportation

List of Exhibits

Exhibit A	City of Indio – Calculation of Total Amount of Reimbursable Project Costs
Exhibit B	2006 Cooperative Agreement between City and Caltrans
Exhibit C	2002 Interchange Project funding agreement between City and CVAG
Exhibit D	2009 Interchange Project funding agreement between City and CVAG
Exhibit E	Depiction of Jefferson Project
Exhibit F	Project Development Team – agendas, sign-in sheets and minutes
Exhibit G	Ordinance No. 1511
Exhibit H	Trial court order dated June 15, 2009 and December 12, 2011
Exhibit I	Various Agreements in furtherance of Interchange Project after Litigation Filed
Exhibit J	Letter from City to Mr. Ellis/Jefferson dated July 6, 2007
Exhibit K	Declaration of Charles Ellis dated March 27, 2017
Exhibit L	Cost analysis by Oris Group Consulting, Inc.,
Exhibit M	Summary analysis by Mason & Mason