



City of Las Cruces

City Council Action and Executive Summary

23-110

Type of Action:

☒ Resolution

☐ Ordinance

☐ TIDD Resolution

District: ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☒ 6 ☐ N/A

1st Reading: Adopted: March 20, 2023

Drafter: Tony Trevino Department: Public Works

Program: Office of the Director Line of Business: Administration

Title: **A RESOLUTION APPROVING A PRE-DEVELOPMENT AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND SIERRA NORTE LAND HOLDINGS, LLC FOR THE DEVELOPMENT, DESIGN, AND PURSUIT OF FEDERAL FUNDING FOR THE MESA GRANDE DRIVE PROJECT.**

TYPE OF ACTION: ☒ Administrative ☐ Legislative ☐ Quasi-Judicial

PURPOSE(S) OF ACTION:

To approve a pre-development agreement.

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

The City of Las Cruces (City) has been approached by Sierra Norte Land Holding, LLC (Developer) with an innovative strategy to develop and design the Mesa Grande Drive extension from Highway 70 to Lohman Avenue through a private-public partnership. Setting the Mesa Grande Drive Extension Project as a priority will provide mobility benefits and serve as a catalyst project for the East Mesa Development as depicted in the Elevate Las Cruces Comprehensive Plan. The Developer has provided the framework to City staff that would facilitate the utilization of private resources for the planning, design, pursuit of funding, and allocation of local match funding required.

The framework presented would require the City to allocate staff time and otherwise act as the grant applicant for federal resources, made available through the Infrastructure Investment and Jobs Act (IIJA). As well, as other federal mobility programs that will provide opportunities to support the funding of the project. The pre-development agreement will serve as the first step towards the implementation of the Mesa Grande Drive Extension Project in a manner that leverages an innovative public-private partnership opportunity and develops infrastructure with significant impacts on the community.

At this time, staff recommends City Council approve the pre-development agreement, as detailed in Exhibit "A".

SUPPORT INFORMATION:

[Exhibit "A" - Pre-Development Agreement](#)

PLAN(S):

Elevate Las Cruces

COMMITTEE/BOARD REVIEW:

None

DOES THIS AMEND THE BUDGET?:

☐ Yes

☒ No

Does this action amend the Capital Improvement Plan (CIP)?

☐ Yes

☒ No

Does this action align with Elevate Las Cruces?

☒ Yes

☐ No

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will approve the Pre-Development Agreement.
2. Vote "No"; this will not approve the Pre-Development Agreement.
3. Vote to "Amend"; this could delay approval of the agreement and may require direction and specific amendments from City Council.
4. Vote to "Table"; this could delay the approval of the agreement. Staff may require additional direction from City Council on how to proceed.

RESOLUTION 23-110

A RESOLUTION APPROVING A PRE-DEVELOPMENT AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND SIERRA NORTE LAND HOLDINGS, LLC FOR THE DEVELOPMENT, DESIGN, AND PURSUIT OF FEDERAL FUNDING FOR THE MESA GRANDE DRIVE PROJECT.

The City Council is informed that:

WHEREAS, the City of Las Cruces (City) has been approached by Sierra Norte Land Holding, LLC (Developer) with an innovative strategy to develop and design the Mesa Grande Drive extension from Highway 70 to Lohman Avenue through a private-public partnership; and

WHEREAS, setting the Mesa Grande Drive Extension Project as a priority will provide mobility benefits and serve as a catalyst project for the East Mesa Development as depicted in the Elevate Las Cruces Comprehensive Plan; and

WHEREAS, the Developer has provided the framework to City staff which would facilitate the utilization of private resources for the planning, design, pursuit of funding, and allocation of local match funding required; and

WHEREAS, the framework presented would require the City to allocate staff time and otherwise act as the grant applicant for federal resources, made available through the Infrastructure Investment and Jobs Act (IIJA), as well as other federal mobility programs that will provide opportunities to support the funding of the project; and

WHEREAS, the pre-development agreement will serve as the first step towards the implementation of the Mesa Grande Drive Extension Project in a manner which leverages an innovative public-private partnership opportunity and to develop infrastructure with significant impacts to the community.

NOW, THEREFORE, Be it Resolved by the Governing Body of the City of Las Cruces:

(I)

THAT the pre-development agreement is approved, as detailed in Exhibit "A", attached hereto and made part of this resolution.

(II)

THAT City staff is hereby authorized to do all deeds as necessary in the accomplishment of the herein above.

DONE AND APPROVED this 20 day of March 2023

APPROVED

Mayor

ATTEST:

City Clerk

Moved by: Tessa Abeyta

Seconded by: Becky Corran

AYES Ken Miyagishima, Johana Bencomo, Becki Graham, Becky Corran, Tessa Abeyta

NAYS Kasandra Gandara

ARTICLE I – GENERAL PROVISIONS

Section 1.1 Purpose and Term of Agreement

A. Purpose of Agreement and Background:

The purpose of this Agreement is to establish a public-private partnership between the Parties to facilitate the planning, design, and pursuit of federal grant funding necessary to fund the construction of the Mesa Grande Drive project (hereinafter referred to as "the Project"). If federal funding is obtained, via a grant award or grant agreement, the Developer and the City will further define roles and responsibilities as part of a Development Agreement. This Agreement is pertinent to activities leading up to the Development Agreement.

B. Agreement Term:

The pre-development period is for three (3) years from the date of execution of this Agreement. At or before that time, the project will, either enter into a development agreement phase, be terminated, or will be extended, for a duration set mutually by the parties.

C. Project Description:

The Project consists of the extension of Mesa Grande Drive from Highway 70 to Lohman Avenue, inclusive of connecting roadway facilities, as generally consistent with Exhibit "A" attached hereto and made a part of this Agreement. The project scope and limits may be modified after execution of this Agreement, as consistent with mutually agreed upon changes through the Project's planning and design process. The ultimate project scope and limits will be determined in the Development Agreement.

The proposed project is consistent with the City's Active Transportation Plan, is reflective of the goals and objectives of the City's Complete Streets design criteria and is contained within the Mesilla Valley MPO's Thoroughfare Plan.

ARTICLE II – GENERAL REQUIREMENTS OF THE DEVELOPER

2.1 General

- A. The Developer shall comply with any applicable licensing requirements in the jurisdiction where the Project is located.
- B. The Developer shall designate in writing a representative who is authorized to act on the Developer's behalf with respect to the Project.
- C. The Developer shall perform the planning, design, engineering and other Project-related activities in compliance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.



- D. The Developer shall perform all the services required by this Agreement at its sole expense. The Developer acknowledges that neither it, its officers, its employees, its agents, nor any persons it may hire to assist in carrying out its obligations under this Agreement, or any subsequent Development Agreement that may arise therefrom, will receive any payment or reimbursement of funds from the City, including from any grant funds the City may obtain for the funding of the Project. The obligations of the City to the Developer are limited to those contained within this Agreement.**

2.2 General Consultation

- A. When applicable law requires that services be performed by licensed professionals, the Developer shall provide those services through qualified, licensed professionals in accordance with all applicable legal standards.
- B. The Developer shall prepare, and file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project.

2.3 Progress Reports

- A. The Developer shall keep the City informed of the progress and quality of the work on the Project. On a monthly basis, or otherwise as agreed to by the City and Developer, the Developer shall submit written progress reports to the City, showing estimated percentages of completion and other information identified below:
- a. Work completed for the period;
 - b. Project schedule status;
 - c. Submittal schedule and status report; and,
 - d. Additional information as agreed to by the City and Developer.

2.4 Developer's Schedules

- A. The Developer, promptly after execution of this Agreement, shall prepare and submit an updated schedule for the work, for the City's information and approval. The schedule, including the time required for planning, design, and funding pursuit for construction, shall not exceed the time limits under the Agreement. The schedule shall be updated regularly as applicable.

2.5 Developer's Responsibilities

- A. The Developer, at its sole expense, will retain and fund engineering and other qualified consultant firms to complete the Project's design phase activities. The City will retain absolute authority to accept or reject Project designs prepared by the Developer or its agents.
- B. The Developer will coordinate with the City at the onset of design to identify and define City design requirements.
- C. The Developer will provide plans, specifications, and estimates for the

project limits with submittal to the City at milestones consistent for City Public Works Projects, as determined by the City Public Works Director.

- D. The Developer will complete a traffic analysis which is considerate of best practices and tools available, to evaluate traffic impacts and benefits on surrounding facilities.
- E. The Developer will provide information describing and quantifying the benefits of the Project and how it serves a public purpose and meets community needs.
- F. The Developer will secure rights-of-way on existing private property required to deliver the project.
- G. The Developer will provide technical support for City-led acquisition of rights-of-way from the State Land Office and will also cover costs associated with securing rights-of-way from the State Land Office.
- H. The Developer will proactively identify funding opportunities, present them to the City for consideration, and will fund the development of grant application documents when mutually agreed upon.
- I. The Developer acknowledges that the City does not presently have funds available to satisfy the expected local share commitment associated with a federal grant funding the construction phase of the Project. Developer therefore agrees to provide the required local share commitment for the pursuit of mutually agreed upon discretionary federal funding opportunities and will seek and encourage additional participation from partners to meet cost share requirements. This provision shall not prevent the City, at its sole discretion, from agreeing to allocate non-federal resources towards the project in the future.
- J. The Developer will quantify costs for and include construction management and materials testing as eligible costs to be included within proposed federal grant budgets.
- K. The Developer will, upon notification of award of federal funding, work with the City on a Development Agreement which further details the roles and responsibilities of the Parties, through the construction phase. Developer responsibilities, to be included in the Agreement are as follows:
 - a. The dedication of Developer's financial resources to enable construction phase design services by the engineer of record.
 - b. The dedication of Developer's financial resources to provide consultant support for grant management, federal compliance, and National Environmental Policy Act (NEPA) documentation required for the Project.



- c. Timing, sequence, and amounts of payment necessary to convey local match requirements to the City, associated with federal funding.

ARTICLE III – GENERAL REQUIREMENTS OF THE CITY

3.1 City Responsibilities

- A. The City will work with the Developer to review planning and design submittals, provide comments, and process the submittals for approval. The City retains exclusive authority to approve or reject all submittals.
- B. The City will prioritize and expedite plan reviews, permitting, and approvals related to the Project.
- C. The City will waive any fees associated with plan submittal and review processes.
- D. The City will prioritize the Mesa Grande Drive Project for future federal funding pursuit.
- E. The City will work to advance the Project through advocacy with local, regional, state, and federal partners.
- F. The City will request and coordinate meetings with other local, regional, state, and federal units of government which may be important to Project funding pursuit and overall Project development.
- G. The City will act as the applicant for federal grants—as identified and mutually agreed upon for pursuit—which will fund the construction phase of the Project, and will secure relevant City Council resolutions and approvals necessary to apply for and obtain such grants.
- H. The City will act as the applicant for, and will provide staff support, and assistance to the Developer to secure applicable rights-of-way from the State Land Office.
- I. If a grant award or agreement is achieved, the City will work with the Developer to expedite and draft a Development Agreement which will outline the roles and responsibilities of the parties through the construction phase of the Project. City responsibilities to be included in the Development Agreement include:
 - a. Entering into grant agreements with federal funding partners and other relevant public agencies.
 - b. Procuring, consistent with applicable law, the construction and grant-administration services necessary to carry out the

construction phase of the Project and otherwise holding the construction contract.

- c. Providing inspection services to ensure quality and enable final acceptance by the City as consistent with other City projects.
- d. Coordination with Developer-funded consultants to manage contract compliance, complete grant management activities, and meet project delivery schedule requirements; and
- e. Waiving any construction related permit fees.

ARTICLE IV – AGREEMENT TIME AND COMPLETION

4.1 General

- A. Time is of the essence of the Development Agreement. By executing the Agreement, both parties confirm that the term is a reasonable period for performing the Work.
- B. The Developer shall not, except by agreement of the City in writing, commence Work on the Project prior to the effective date of insurance required by this Agreement. The Agreement Time shall not be adjusted because of the Developer's failure to obtain insurance required under this Agreement in a timely manner

ARTICLE V – OWNERSHIP OF WORK PRODUCT

5.1 Pre-Development Materials

All documents, data, drawings, specification, software application and other products or materials produced by the Developer or its officers, employees, or agents in connection with the services to be rendered under this Agreement shall become the property of the City, whether the Project for which they are made is executed or not. All such documents, products and materials shall be forwarded to the City at its request and may be used by the City as it sees fit.

ARTICLE VI - CERTIFICATES OF INSURANCE AND ENDORSEMENTS

6.1 Insurance

The Developer agrees to obtain and maintain, at the Developer's expense, insurance necessary to cover all liability which may arise out of services provided under this Agreement. This includes, at a minimum:

- i. Workman's Compensation insurance consistent with State law;
- ii. Commercial General Liability Insurance in an amount not less than



- iii. \$1,000,000 per occurrence; and
Commercial Auto Liability in an amount not less than \$1,000,000 per occurrence.

The Developer must immediately notify the City if insurance is amended and/or canceled.

The City must be named as additional insured – this coverage must be as broad as the coverage provided to the insured; coverage must be primary and non-contributory before any other insurance or self-insurance. A copy of the endorsement(s) for this coverage must be provided as a condition of this Agreement.

Waiver of Subrogation will apply and shall be noted on the certificate for Commercial General Liability, Auto, and Worker's Compensation coverage.

ARTICLE VII – MISCELLANEOUS PROVISIONS

7.1 Indemnity and Limitation

Developer shall indemnify, defend, and hold harmless the City from and against any and all claims, suits, actions, judgments, demands, losses, costs, expenses, damages, and liability caused solely by, resulting solely from, or arising solely out of the negligent acts, errors, or omissions of Developer, its officers, employees, agents, or representatives in the performance of services under this Agreement.

7.2 Applicable Law

This Agreement and the rights and obligations of the parties shall be governed by and construed by the laws of the State of New Mexico applicable to Agreements between New Mexico parties made and performed in that state, without regard to conflicts of law principles.

Developer shall abide and be governed by all applicable state law, City ordinances, and laws regarding the Developer's services or any work done pursuant to this Agreement.

7.3 Procurement

Any contract associated with this Agreement receiving public funding (local, state, or federal) shall be subject to the procurement laws, rules and regulations associated with the funding source.

7.4 Terms and Termination

The term of this Agreement shall commence on the date of execution and shall terminate, subject **Section 1.1(B) herein**. In addition, this Agreement shall not be effective unless countersigned by an authorized representative



of the City.

If the Developer fails to perform any material obligation on its part under this Agreement for 30 days after the City gives it written notice of such failure requesting that it be cured, or the Developer becomes insolvent, or all or a substantial part of the Developer's assets are assigned for the benefit of its creditors, or a receiver or trustee is appointed for the Developer (each an "Developer Default"), then the City may either terminate this Agreement by written notice to the Developer or allow the Developer to cure the Developer Default as provided below. So long as Developer commences to cure such Developer Default within the initial 30 days after the City gives it written notice of such failure and thereafter diligently prosecutes the cure to completion and provides the Authority documentation of such efforts, then the City will not terminate this Agreement; provided, however, that in the event of a Developer Default relating to an insolvency, assignment for the benefit of creditors, receivership or trustee appointment, the 30 day cure period shall be extended to 180 days so long as the obligations on the part of the Developer under this Agreement are otherwise being performed. The City's right to terminate this Agreement for any Developer Default is cumulative of all rights and remedies of the City which exist now or in the future.

The Developer may terminate this Agreement by written notice to the City if the City defaults in observing or performing a material obligation of this Agreement hereunder and fails to cure the default for 30 days after written notice of such default from the Developer.

7.5 Breach

In the event either party breaches any obligation contained in this Agreement, prior to instituting any action or dispute resolution procedure, the breached party shall provide written notice of such breach. In the event either party fails to remedy the breach or otherwise provide a written plan to remedy the breach, within thirty (30) working days of receiving such written notice, either party may terminate this Agreement by written notice.

7.6 Dispute Resolution

In the event that a dispute arises between City and Developer under this Agreement or as a result of breach of this Agreement, the parties agree to act in good faith to attempt to resolve the dispute through mediation prior to commencing any litigation. The costs of such mediation shall be born equally by the Parties.

7.7 Venue

This Agreement is entered into and performed in Doña Ana County, New Mexico, and the Developer and the City agree that mandatory venue for any legal action related to this contract shall be in the Third Judicial District Court of Doña Ana County, New Mexico.

7.8 Successors and Assigns

The City and Developer, respectively, bind themselves, their partners, successors, assigns and legal representatives to the covenants, agreements and obligations contained herein. Neither party to this Agreement shall assign it in whole or in part without the express written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Agreement and the attempted assignment shall be of no legal force or effect as to the other party.

7.9 Written Notice

Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the party for which it was intended; or if delivered at, or sent by, registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice. Written notice, sent or transmitted by electronic mail or facsimile, must be received to be considered delivered and to comply with notice requirements herein. Transmission alone by electronic mail or facsimile does not constitute delivery.

7.10 Rights and Remedies

- A. Duties and obligations imposed by this Agreement, and rights and remedies available thereunder, shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law.
- B. No action or failure to act by either party shall constitute a waiver of a right or duty afforded them under the Agreement, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be agreed upon in writing.
- C. Each of the parties hereto acknowledges that the other party will have no adequate remedy at law if it fails to perform any of its obligations under this Agreement. In such event, each of the parties agrees that the other party shall have the right, in addition to any other rights it may have (whether at law or in equity), to specific performance of this Agreement.

7.11 Interpretation

Unless otherwise stated herein, words which have well-known technical, or construction industry meanings, are used in accordance with such recognized meanings.

7.12 Conflict of Interest

Developer represents and warrants that Developer has no business, professional, personal, or other interest, including, but not limited to, the representation of other clients, who would conflict in any manner or degree



with the performance of its obligations under this Agreement. If any such actual or potential conflict of interest arises under this Agreement, Developer shall immediately inform the City in writing of such conflict. If, in the reasonable judgment of the City, such conflict poses a conflict to and with the performance of Developer's obligations under this Agreement or is otherwise a violation of the City's current policy or ordinances, then the City may terminate the Agreement immediately upon written notice to Developer; such termination of the Agreement shall be effective upon the receipt of such notice by Developer.

7.13 Severability

The parties agree that each provision of this Agreement is severable, and the invalidity or unenforceability of any one or more of the provisions of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement; and, that this Agreement shall be construed in all respects as if such invalid or unenforceable provisions have been omitted.

7.14 Force Majeure

If any party hereto shall be unable to observe or perform any covenant or condition herein by reason of force majeure, then the failure to observe or perform such covenant or condition shall not constitute a default hereunder so long as the party shall use its best efforts to remedy with all reasonable dispatch the event or condition causing such inability and such event or condition can be cured within a reasonable amount of time. "Force majeure", as used herein, means any condition or event not reasonably within the control of a nonperforming party, including, without limitation, acts of God; strikes, lock-outs, or other disturbances of employer/employee relations; acts of public enemies; orders or restraints of any kind of the government of the United States or any state thereof or any of their departments, agencies, or officials, or of any civil or military authority; insurrection; civil disturbances; riots; epidemics; landslides; lightning; earthquakes; subsidence; fires; hurricanes; storms; droughts; floods; arrests; restraints of government and of people; explosions; and partial or entire failure of utilities. Failure to settle strikes, lock-outs, and other disturbances of employer/employee relations or to settle legal or administrative proceedings by acceding to the demands of the opposing party or parties, in either case when such course is in the judgment of the party hereto unfavorable to such party, shall not constitute failure to use its best efforts to remedy such a condition or event.



This Agreement is entered into as of the day and year written above ("the Effective Date").

SIERRA NORTE LAND
HOLDINGS, LLC

CITY OF LAS CRUCES

BY: _____

NAME
Managing Member


Date

BY: _____

NAME
Title

Date

APPROVED AS TO FORM

 2/14/2023

City Attorney
Reviewed & Approved /
by outside counsel.

