

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF THE SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT
AND RECORD OF ACTION**

November 19, 2024

FROM

**NOEL CASTILLO, Chief Flood Control Engineer, Flood Control District
TERRY W. THOMPSON, Director, Real Estate Services Department**

SUBJECT

Approval of Force Majeure Delay of Agreements with the City of Highland

RECOMMENDATION(S)

Acting as the Governing Body of the San Bernardino County Flood Control District:

1. Acknowledge and not dispute the position taken by the City of Highland in their letter, dated October 21, 2024, regarding a unanticipated 12-month delay caused by the COVID-19 pandemic under both the Habitat Mitigation Reimbursement Agreement and the First Amended and Restated Purchase and Sale Agreement and Joint Escrow Instructions, both dated January 28, 2020, resulting in a corresponding 12-month extension on the completion date for the City to perform the mitigation for San Bernardino Kangaroo Rat habitat, and a 12-month extension on the close of escrow due date under the First Amended and Restated Purchase and Sale Agreement and Joint Escrow Instructions.
2. Waive the requirement in Section 6.9 of the Habitat Mitigation Reimbursement Agreement with the City of Highland, that required the City of Highland to provide the San Bernardino County Flood Control District notice of their 12-month delay, within 30 days of the occurrence.
3. Find that the COVID-19 pandemic created a 12-month force majeure delay pursuant to Section 4.10(b)(4) of the First Amended and Restated Purchase and Sale Agreement and Joint Escrow Instructions, dated January 28, 2020, for the San Bernardino County Flood Control District to complete "Seller Work" as defined in the First Amended and Restated Purchase and Sale Agreement and Joint Escrow Instructions.

(Presenter: Terry W. Thompson, Director, 387-5000)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Create, Maintain and Grow Jobs and Economic Value in the County.

Operate in a Fiscally-Responsible and Business-Like Manner.

Ensure Development of a Well-Planned, Balanced, and Sustainable County.

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). There is no cost associated with the extension period caused by the COVID-19 pandemic under the First Amended and Restated Purchase and Sale Agreement and Joint Escrow Instructions (PSA) and Habitat Mitigation Reimbursement Agreement.

BACKGROUND INFORMATION

Approval of Force Majeure Delay of Agreements with the City of Highland
November 19, 2024

On January 28, 2020 (Item No. 60), the Board of Supervisors (Board) approved the First Amended and Restated PSA, Contract No. 20-21, between the San Bernardino County Flood Control District (FCD) and the City of Highland (City) amending the property sale of 20.19 acres from FCD to the City for \$4,500,000, into two separate transactions to: 1) sell 11.58 acres of FCD property in fee for \$2,500,000 and to close escrow on or before February 28, 2020, and 2) sell 8.61 acres of FCD property in fee for \$2,000,000 and to close escrow upon the removal of certain berms, which are raised mounds of earth used to control water flow or provide protection, and related mitigation of impacted San Bernardino Kangaroo Rat (SBKR) habitat, but in no event beyond five years; and 3) to amend certain other terms and conditions of the original PSA, Contract Number 18-17. The Board also approved the Habitat Mitigation Reimbursement Agreement, Contract No. 20-22, authorizing the City to perform the mitigation for SBKR habitat as necessitated for FCD's berm removal on the northerly 8.61-acre portion of the FCD property, as well as authorized FCD to reimburse the City up to, but not exceeding, \$1,500,000 for the cost to perform the related habitat mitigation.

Once the City completes the required "Habitat Mitigation Work", which includes the City's acquisition of real property for dedication of habitat to mitigate the loss of existing habitat on the Property, under the Habitat Mitigation Reimbursement Agreement, then FCD is obligated to complete "Seller Work" under the First Amended and Restated PSA which includes the berm removal. In 2020, escrow closed on the 11.58 acres of the FCD property. Escrow has not closed on the 8.61 acres of FCD property.

The First Amended and Restated PSA remains in effect for the sale of the remaining approximately 8.61 acres, comprising the northerly portion of the Property, to the City for \$2,000,000. The sale will proceed following the City's completion of any necessary SBKR mitigation and the FCD's subsequent removal of the existing berm. Under the terms of this PSA, escrow is to close no later than January 27, 2025. Likewise, under the Habitat Mitigation Reimbursement Agreement, the City has until January 27, 2025, to complete their work.

After the parties entered into the agreements, the COVID-19 pandemic occurred.

By letter dated October 21, 2024, the City advised FCD that the COVID-19 pandemic was unexpected, impacted their ability to perform under this Agreement, and extended by 12 months the completion date in the Habitat Mitigation Reimbursement Agreement and the close of escrow date in the First Amended and Restated PSA.

This item will acknowledge and not dispute the position taken by the City in their letter dated October 21, 2024. It will waive the requirement in Section 6.9 of the Habitat Mitigation Reimbursement Agreement that the City provide the FCD with notice of the delay within 30 days of the occurrence. Additionally, it will approve FCD's 12-month force majeure delay, also caused by the COVID-19 pandemic, pursuant to Section 4.10(b)(4) of the First Amended and Restated PSA for FCD to complete the "Seller Work". Per the Habitat Mitigation Reimbursement Agreement, the City must complete "Habitat Mitigation Work" before FCD begins "Seller Work" or ground disturbance activities on the property.

The new due date for the City to complete their work under the Habitat Mitigation Reimbursement Agreement, will now be January 27, 2026. Once the City completes their work, FCD will complete "Seller Work" as defined in Section 4.10(b)(4) of the First Amended and Restated PSA (including berm removal and grading), allowing escrow to close on the remaining approximate 8.61 acres under the First Amended and Restated PSA

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PROCUREMENT

Not applicable.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Sophie A. Curtis, Deputy County Counsel, and Scott Runyan, Principal Assistant County Counsel, 387-5455) on November 15, 2024; Flood Control District (Mervat Mikhail, Deputy Director, 387-7916) on November 15, 2024; Finance (Jessica Trillo, 387-4222, and Garrett Baker, 387-3077, Administrative Analysts) on November 15, 2024; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on November 15, 2024

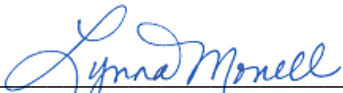
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Record of Action of the Board of Supervisors
San Bernardino County Flood Control District

APPROVED (CONSENT CALENDAR)

Moved: Curt Hagman Seconded: Joe Baca, Jr.
Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: November 19, 2024



cc: File - Flood Control Operations Division w/attach
MBA 11/27/2024