

INDEMNIFICATION AGREEMENT

CITY OF FRESNO
City Clerk's Office (Original)

APN: 467-076-15

THIS AGREEMENT is entered into this 16th day of December, 2010 by and between the CITY OF FRESNO, a municipal corporation (hereinafter CITY), and California Dairies, Inc. (hereinafter APPLICANT).

W I T N E S E T H:

WHEREAS, APPLICANT has applied to CITY for a LAND USE APPROVALS affecting the Subject Property described as follows:

[Legal Description];

and with the address of 755 F St., Fresno, CA 93706; and,

WHEREAS, litigation challenging the granting or issuance of land use approvals by governmental bodies is proliferating, and such litigation exposes CITY to potential liability for damages, costs, and attorney's fees; and,

WHEREAS, in such litigation, the person or entity receiving land use approvals is designated as a real party in interest and is the party that primarily and directly benefits from the granting or issuance of the land use approvals; and

WHEREAS, the City's Director of Development and Resource Management, Fresno City Planning Commission and Fresno City Council are objective decision-making body, and therefore have no special interest in the approval or denial of land use applications or the outcome of litigation arising from such grant or denial, except for promoting adopted public policy; and

WHEREAS, CITY incurs great expense in the active defense of such litigation and, if unsuccessful, may also be required to pay the prevailing party's attorney's fees and costs; and,

WHEREAS, fairness and sound fiscal policy require that the person or entity receiving the benefits of a land use approval should also bear the burden of the liability for potential injuries and the expense of such litigation and claims; and

WHEREAS, APPLICANT and CITY mutually desire to enter into this Indemnification Agreement, by which APPLICANT shall indemnify, (at CITY's request) defend, save and hold CITY harmless, in order that CITY shall bear no fiscal or financial burden whatsoever resulting from any litigation challenging the CITY's grant or issuance of land use approvals to APPLICANT or any litigation arising out of personal injury, wrongful death or property damage arising or allegedly arising out of the Alley Vacation.

1. DEFINITIONS:

(a) APPLICANT means California Dairies, Inc., and its heirs, assigns or successors in interest;

(b) LAND USE APPROVAL, for purposes of this Agreement, shall mean any benefits arising from any of the following: the grant of Site Plan Review Application No. S-10-034 and any document prepared pursuant to the California Environmental Quality Act (CEQA) or other law that is approved in conjunction with Site Plan Review No. S-10-034. LAND USE APPROVAL does not include a ministerial permit.

(c) CITY shall mean the City of Fresno, a municipal corporation.

(d) PROJECT shall mean the use of the land authorized by the LAND USE approval at property located at 755 F Street, Fresno, California.

2. HOLD HARMLESS AND INDEMNIFICATION RELATED TO LAND USE APPROVAL

To the furthest extent allowed by law, Applicant shall indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers from any and all

loss, liability, fines, penalties, forfeitures, costs and damages (whether statutory, in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by City in connection with any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses) arising from, resulting from, or in connection with any CITY action in granting, issuing or approving the LAND USE APPROVAL. Applicant's obligations under the preceding sentence shall apply regardless of whether CITY or any of its officers, officials, employees, agents or volunteers are actively or passively negligent, but shall not apply to any loss, liability, fines, penalties forfeitures, costs or damages caused solely by the gross negligence or willful misconduct of the City or any of its officers, officials, employees, agents or volunteers.

3. NOTIFICATIONS AND COOPERATION BY CITY:

CITY shall notify APPLICANT within a reasonable period of time of its receipt of any demand, claim, action, proceeding, or litigation in which CITY is to be indemnified and held harmless by APPLICANT. If CITY requests that APPLICANT defend CITY, it shall notify APPLICANT in writing within a reasonable period of time of its receipt of any such demand, claim, action, proceeding, or litigation and CITY shall cooperate fully in such defense.

CITY shall have the right to select the attorney or attorneys who will defend the CITY. APPLICANT agrees to accept such selection. APPLICANT further agrees to be fully responsible for any and all costs and attorney's fees generated by said attorney(s) in the defense of CITY in any claim, demand, action, proceeding or litigation arising out of the project.

4. CITY'S PARTICIPATING IN DEFENSE:

Nothing contained herein shall prohibit CITY, in its sole discretion, from participating in the defense of any demand, claim, action, proceeding, or litigation over and above representation

by outside counsel, or from participating in the defense of any demand, claim, action, proceeding, or litigation. If CITY elects to also defend, it shall do so in good faith. In no event shall CITY'S participation in the defense of any demand claim, action, proceeding, or litigation affect the obligations imposed upon APPLICANT in section 2 of this Agreement.

5. REIMBURSEMENT OF CITY'S COSTS RE: ADMINISTRATIVE RECORD:

Without limiting the CITY'S and the APPLICANT'S right to recover the costs of preparing the administrative record from the petitioner or plaintiff in any litigation challenging a land use approval or the CITY's right to recover its costs from APPLICANT under paragraph 2 herein above, APPLICANT agrees to reimburse the CITY for its actual cost incurred, including, but not limited to, CITY staff and attorney time expended for certifying and/or preparing the administrative record in connection with and proceedings related to the subject matter of this Indemnification Agreement. If the CITY is not timely reimbursed by other parties, APPLICANT shall pay such cost to CITY before receiving such administrative record. To the extent the costs of the administrative record or any related costs paid by the APPLICANT are recovered by the CITY in any litigation, the CITY shall reimburse the APPLICANT.

6. BINDING OBLIGATION:

APPLICANT hereby agrees that this Agreement shall be recorded in the office of the Recorder of the County of Fresno and the obligations thereunder shall run with and be appurtenant to and be a charge upon the land and be binding on APPLICANT's successor(s) in interest, heirs, transferee(s), and assign(s).

7. COVENANT NOT TO SUE:

(a) APPLICANT on behalf of itself, and its successors, and assigns, hereby fully releases CITY, its successors, and all other persons and associations, known or unknown,

from all claims and causes of action by reason of any damage which has been sustained, or may be sustained, as a result of the above-described land use approval and covenants not to sue relating to such claims.

(b) APPLICANT acknowledges and agrees that this release applies to all claims that APPLICANT may have against CITY arising out of the above-described land use approval for injuries, damages, or losses to APPLICANT's person and property, real or personal, whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, or patent or latent.

(c) APPLICANT certifies that APPLICANT has read section 1542 of the Civil Code, set out below.

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

(d) APPLICANT hereby waives application of section 1542 of the Civil Code.

(e) APPLICANT understands and acknowledges that the significance and consequence of this waiver of section 1542 of the Civil Code is that even if APPLICANT should eventually suffer additional damages arising out of the above-described land use approval, APPLICANT will not be permitted to make any claim for those damages. Furthermore, APPLICANT acknowledges that APPLICANT intends these consequences even as to claims for damages that may exist as of the date of this release but which APPLICANT does not know exist, and which, if known, would materially affect APPLICANT's decision to execute this

release, regardless of whether APPLICANT's lack of knowledge is the result of ignorance, oversight, error, negligence or any other cause.

(f) APPLICANT warrants and represents that in executing this release, APPLICANT has relied on legal advice from the attorney of APPLICANT's choice that the terms of this release and its consequences have been completely read and explained to APPLICANT by that attorney, and that APPLICANT fully understands the terms of this release.

(g) APPLICANT acknowledges and warrants that APPLICANT's execution of this release is free and voluntary.

(h) This release pertains to a disputed claim and does not constitute an admission of liability by CITY for the above-described land use approval.

(i) The provisions of paragraph 10 herein below shall not apply to this covenant not to sue.

8. TERMINATION OF AGREEMENT:

(a) This Indemnification Agreement may be terminated only upon the following conditions:

(i) The parties agree to terminate this Indemnification Agreement by their express, mutual written consent; or

(ii) The APPLICANT petitions the Fresno City Council to terminate this Indemnification Agreement by providing to the Council a written opinion of APPLICANT's legal counsel and the Fresno City Council, in its sole discretion, determines that termination of this Indemnification Agreement is in the best interest of the public and the CITY. It is understood and agreed that the CITY, in making such determination of whether to terminate this

Indemnification Agreement, may reasonably rely upon said opinion of APPLICANT's legal counsel.

(b) If this Indemnification Agreement is terminated as provided above, the CITY shall execute a written release of APPLICANT's obligations under this Indemnification Agreement. It shall be APPLICANT's responsibility to record such document with the office of the Recorder of the County of Fresno.

9. ATTORNEY'S FEES:

If either party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney's fees and legal expenses.

10. SEVERABILITY:

If any provision of this Agreement is determined to be invalid in a final judgment by a court of competent jurisdiction, each and every other provision hereof shall remain in full force and effect.

11. CONSTRUCTION OF CONTRACT:

The parties hereby acknowledge that they and their respective counsel have cooperated in the drafting and preparation of this agreement, for which reason this agreement shall not be construed against any party as the drafter thereof.

* * *

IN WITNESS WHEREOF, APPLICANT and CITY hereby execute this Agreement.

DATED: 11-12-10

APPLICANT:

CALIFORNIA DAIRIES, Inc.

By: Eric G. Snoke
Name ERIC G. SNOKE
Title VP OPERATIONS

DATED: _____

CITY OF FRESNO

By: John Sanchez
Name _____
Title _____

ATTEST:

REBECCA E. KLISCH
CITY CLERK

By: Sherrie L. Badetscher
Deputy 12/16/10

APPROVED AS TO FORM:

JAMES C. SANCHEZ
CITY ATTORNEY

By: John W. Fox
John W. Fox, Sr., Deputy
Date: 12/15/2010

