

CITY COUNCIL

For City Clerk's Use:

☐

APPROVED

☐

DENIED

Reso No. _____

File No. _____

Ord No. _____

Agenda Item No.: 9

Date: September 12, 2012

TO: Honorable Mayor and Members of the City Council

FROM: Edward N. Domingue, Director of Engineering Services
Christopher W. McKinney, Director of Utilities

SUBJECT: Reimbursement Agreement for Installation of Public Improvements in the City of Escondido: Wal-Mart Project

RECOMMENDATION:

It is requested that Council adopt Resolution No. 2012-157 authorizing the Director of Utilities to execute a Reimbursement Agreement with Wal-Mart Stores, Inc., for public improvements.

FISCAL ANALYSIS:

Funds are available within the Water Enterprise Account for these public water improvements.

PREVIOUS ACTION:

On May 4, 2005, Council approved a conditional use permit, grading exemption, zoning code amendment to the East Valley Parkway Area Plan, certified the Environmental Impact Report, and adopted the Mitigation Monitoring and Reporting Program for both the Wal-Mart and EUSD facilities by Resolution No. 2005-79. On June 22, 2011, Council approved Resolution No. 2011-92 approving an economic incentive agreement with Wal-Mart Stores, Inc.

BACKGROUND:

Wal-Mart, in conjunction with their project, is providing improvements to the City's water system. Some of the improvements are beyond the requirements of their project. The Wal-Mart site has an existing 8-inch waterline that must be removed and replaced because it passes through the proposed footprint of the building. The developer is responsible for removing the existing pipe and replacing it with the current standard 12-inch waterline for commercial areas.

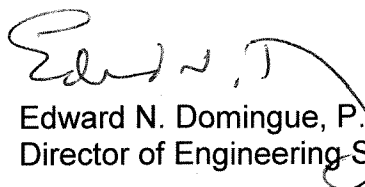
In addition, the City proposes to pay Wal-Mart for replacement of approximately 700 feet more of existing waterline (6 inches) because it is off the Wal-Mart site and within Pennsylvania Avenue. Staff is requiring this to avoid an undersized line, which would be detrimental to our

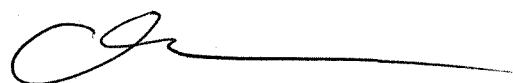
system (potential water quality and reliability issues) as well as inadequate to provide the project its required domestic and fire flows.

Repayment for this work would be accomplished via a reimbursement agreement with Wal-Mart rather than a usual bid process for the following reasons:

1. The Wal-Mart contractor is ready to go with their pipeline replacement. If the City bids the additional waterline as a project, a City contractor would not be onsite for several months at least, and City construction would restrict Wal-Mart's materials and construction access via Pennsylvania Avenue. This could potentially lead to delays for the Wal-Mart construction contract and possible claims against the City for the cost of those delays.
2. There are several advantages to having a single contractor replace the entire run of pipe rather than two contractors working on the same line at different times. Among these are:
 - a. Reduced mobilization/demobilization cost.
 - b. Savings of staff time to process advertisement and bid as well as avoiding the delay to other critical City projects currently in the design/bid phases.
 - c. Fewer in service line shutdowns and hence impacts to other users.
 - d. Less operational risks to domestic or fire flow requirements.
3. The cost estimate received from the developer is consistent with bid responses received recently for similar pipeline replacements and is based on contractor paying prevailing wages for the City work.

Respectfully submitted,


Edward N. Domingue, P.E.
Director of Engineering Services


Christopher W. McKinney
Director of Utilities

RESOLUTION NO. 2012-157

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ESCONDIDO, CALIFORNIA, AUTHORIZING THE DIRECTOR OF UTILITIES TO EXECUTE, ON BEHALF OF THE CITY, A REIMBURSEMENT AGREEMENT IN THE AMOUNT OF \$257,267.05 WITH WAL-MART STORES INC. FOR THE CONSTRUCTION OF A WATER MAIN

WHEREAS, WAL-MART STORES INC. ("WAL-MART"), developer of the property identified by the legal description in Exhibit "A" of the Reimbursement Agreement for the Installation of Public Improvements in the City of Escondido (attached to this Resolution as Exhibit "1" and incorporated herein) must relocate and upsize a water line, from eight to twelve inches, as a condition of approval the project pursuant to the Plot Plan Approval No.: ADM10-0063; and

WHEREAS, the City's long term Capital Improvement Plan provides for waterline improvements and the City Engineer and the City Director of Utilities assert the most cost economical and efficient approach to upgrade approximately 700 feet of six-inch waterline, running from Ash Street along Pennsylvania Avenue, to a twelve-inch waterline, is to make the City's waterline improvements in conjunction with the planned WAL-MART improvements; and

WHEREAS, WAL-MART is prepared to complete construction within 90 days and the City has a limited opportunity to take advantage of the work already planned by WAL-MART; and

WHEREAS, the City Engineer and the City Director of Utilities recommend

approval of a Reimbursement Agreement with WAL-MART in the amount of two hundred fifty-seven thousand, two hundred sixty-seven dollars and five cents (\$257,267.05) for the City's section of water line improvements; and

WHEREAS, the City Council desires at this time and deems it to be in the public interest to authorize the City Director of Utilities to execute a Reimbursement Agreement with WAL-MART, in order to reimburse WAL-MART for the City portion of the water line upon its completion to the satisfaction of the City Engineer and the City Director of Utilities;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Escondido, California, as follows:

1. That the above recitations are true.
2. That the City Council accepts the recommendations of the City Engineer and the City Director of Utilities.
3. That the City Director of Utilities is authorized to execute, on behalf of the City, a Reimbursement Agreement ("Agreement") with WAL-MART for the construction of a water main as described in Exhibit "1," in the amount of two hundred fifty-seven thousand, two hundred sixty-seven dollars and five cents (\$257,267.05), which Agreement shall be in substantially the form found herein and to be finalized to the satisfaction of the City Attorney.

REIMBURSEMENT AGREEMENT FOR INSTALLATION OF PUBLIC IMPROVEMENTS IN THE CITY OF ESCONDIDO

This Public Improvement and Reimbursement Agreement ("Agreement") is made and entered into on _____ between THE CITY OF ESCONDIDO, a California municipal corporation ("City"), and WAL-MART STORES, INC., a Delaware corporation ("Developer"), (collectively, the "Parties"):

RECITALS

A. Developer is the lessee of that certain real property located within the City of Escondido described on Exhibit "A" ("Property") on which the Developer is planning to construct a new building for purposes of a retail store ("Development").

B. In connection with the Development, and as a condition of the City's approval of the Project pursuant to Plot Plan approval No.: ADM10-0063 the City has required that Developer relocate and upsize a water main pipeline that bisects the Property and continues to run into public property, as depicted on Exhibit "B" attached to this Agreement (the "Developer Improvements").

C. The City's long term Capital Improvement Program provides for certain additional water system improvements, including the upsizing of water main pipelines situated on public property and under public roadways outside the limits of the Development Property ("City Improvements"). The City Improvements are described more specifically on Exhibit "C" attached to this Agreement.

D. Developer's Improvement Plans, Drawing No. W12-0003, include both the Developer Improvements and the City Improvements, and the City has approved these Plans.

E. The City and Developer agree that it is cost effective and economical to construct the Developer Improvements and the City Improvements at the same time and has requested that Developer construct the City Improvements at the City's expense.

F. The purpose of this Agreement is to provide for the construction of the City Improvements in a manner acceptable to the City and to provide for the full reimbursement to Developer of the cost to construct the City Improvements.

Now, therefore, in consideration of the recitals and mutual obligations of the Parties as herein expressed, City and Developer agree as follows:

1. Developer's Obligations Developer shall install the City Improvements pursuant to City of Escondido Design Standards and Standard Drawings, effective May 2009 and consistent with construction permits which shall be timely and separately issued by City for City Improvements. Developer shall maintain

separate records and contractor invoices for the City Improvements until payment is made by the City.

2. Developer's Completion of the Project. Developer agrees to complete the Project within 90 days.
3. Cost. City has approved and hereby affirms its approval of Developer's estimate of the cost of the City Improvements as set forth in Exhibit "D." City acknowledges that the cost estimate is subject to increase based on the actual cost of construction. Developer agrees to notify the City and receive prior written approval from the City's Director of Utilities for any construction costs in support of the City Improvements that exceeds the total amount estimated in Exhibit "D;" which approval shall not be unreasonably withheld.
4. Certificate of Completion. Promptly after completion of Developer's completion of the City Improvements, but in no event later than within fifteen (15) days after written request therefor by Developer, the City shall provide Developer with an executed "Notice of Completion". The City shall not unreasonably withhold such Notice of Completion. The Notice of Completion shall be a conclusive determination of satisfactory completion of the City Improvements. After the recordation of the Notice of Completion, any person then owning or thereafter purchasing, leasing or otherwise acquiring any interest in the Property shall be entitled to rely upon the Notice of Completion with respect to any obligation or liability under this Agreement regarding construction or installation of the City Improvements, except that such person shall be bound by any reservations, covenants, conditions, restrictions and other interests recorded against the Property pursuant to this Agreement.

If the City refuses or fails to furnish the Notice of Completion, after written request from Developer, the City shall, within fifteen (15) days of written request therefor, provide Developer with a written statement of the reasons the City refused or failed to furnish the Notice of Completion. The statement shall also contain the City's opinion of the actions Developer must take to obtain the Notice of Completion. If Developer resolves the items in the City's refusal notice, the City shall issue to Developer the Notice of Completion. If the City fails to provide such written statement, within said fifteen (15) day period, the Developer shall be deemed, conclusively and without further action of the City, to have satisfied the requirements of this Agreement with respect to the construction and installation of the Project, as if a Notice of Completion had been issued by the City pursuant to this Agreement.

5. Reimbursement. Following the City's acceptance of the City Improvements and issuance (either actual or deemed) of a Notice of Completion, Developer agrees to submit the invoices from Developer's contractors for the actual costs of the work performed in support of the City Improvements, including supervision, profit/overhead and insurance costs as itemized in Exhibit "D." City agrees to provide cash reimbursement to Developer within 30 days after Developer's submission of billing for such actual costs.
6. City's Obligations. The City acknowledges that the City Improvements described herein may require the Developer to work on private property and will necessitate the substantial disturbance, removal and replacement of private landscaping and hardscape, the cost of which is unknown at this time. City agrees to provide Developer with executed rights of entry, temporary construction easements, waivers and hold harmless agreements, in a form satisfactory to Developer, from all owners of private property included in the City Improvements.
7. Maintenance. City shall have the sole responsibility for maintaining the City Improvements.
8. Indemnity and Defense. City agrees to and shall hold harmless, defend, and indemnify Developer, its officers, employees, subcontractors and agents from any and all claims, demands, causes or action, liability or loss because of, or arising out of the designing of, construction of or maintenance of the City Improvements or any entry onto or damage to any private property or any City property in connection with the City Improvements. This section shall remain in full force and effect for ten (10) years following acceptance of the improvements by the City. The Parties specifically acknowledge that construction of the City Improvements may involve the removal of an existing asbestos cement water main pipeline ("ACP") and that the indemnity obligations of the City shall apply to any causes of action related to asbestos exposure in connection with the City Improvements so long as Developer complies with all applicable laws regarding such removal and disposition; and to the extent causes of action relate to asbestos exposure, this section shall remain in full force and effect.
9. Notices. Any demands or notice required or permitted under this Agreement may be personally served on the other party, by the party giving notice, or may be served by certified mail, return receipt requested, to the following addresses:

City: City Engineer
City of Escondido
201 North Broadway
Escondido, CA 92025

Developer: Wal-Mart Stores, Inc.
(Store No. 5996-00)

Attn: Realty Manager
2001 SE 10th Street
Bentonville, AR 72716

With copy to: Gresham Savage Nolan & Tilden, PC
550 East Hospitality Lane, Ste. 300
San Bernardino, CA 92408
Attn: Robert Ritter

Jeffrey R. Epp, City Attorney

9. Waiver. No failure of either City or Developer to insist upon the strict performance by the other of any covenant, term or condition of this Agreement, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Agreement, shall constitute a waiver of any such breach or of such covenant, term or condition. No waiver of any reach shall affect or alter this Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach.
10. Whole Agreement. This Agreement and the exhibits and references incorporated into this Agreement fully express all understandings of the Parties concerning the matters covered in this Agreement. The recitals set forth above are also incorporated herein by this reference. No change, alteration, or modification of the terms or conditions of this Agreement, and no verbal understanding of the Parties, their officers, agents, or employees shall be valid unless made in the form of a written change agreed to in writing by both Parties or an amendment to this Agreement agreed to by both Parties. All prior negotiations and agreements are merged into this Agreement.
11. Consent. Where the consent or approval of a party is required or necessary under this Agreement, the consent or approval shall not be unreasonably withheld.
12. Cooperation. The parties shall cooperate with each other in good faith, and assist each other in the performance of the provisions of this Agreement.
13. Force Majeure. If the performance of any act required of City or Developer is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the Party required to perform an act, that Party shall be excused from performing that act for the period of time equal to the period of time of the prevention or delay. In the event City or Developer claims the existence of such a delay, the Party claiming the delay shall notify the other Party in writing of that fact within 10 calendar days after the beginning of any such claimed delay.

14. Assignment. Developer may assign the obligations and rights under this Agreement, to any successor in interest of Developers property.
15. Successors-in-Interest. This Agreement and all rights and obligations contained herein shall be in effect whether or not any or all parties to this Agreement have been succeeded by another entity, and all rights and obligations of the parties signatory to this Agreement shall be bested and binding on their successors-in-interest.
16. Laws and Venue. This Agreement is entered into and shall be construed and interpreted in accordance with the laws of the State of California. Venue for any action under this Agreement shall be in the Superior Court of California, North County Branch, or if such action is a federal action, in the Federal District Court, Southern District.
17. Negotiated Agreement. The parties agree that they have the right to be advised by counsel with respect to the negotiations, terms, and conditions of this Agreement, and the decision whether to seek advice of counsel with respect to his Agreement is the sole responsibility of each of the parties. This Agreement shall not be construed in favor of or against either party by reason of the extent to which each party participated in the drafting of this Agreement.
18. Counterparts. This Agreement may be executed in counterparts, which when taken together shall constitute a single signed original as though all parties had executed the same page.
19. Authority to Sign. Each party signing on behalf of a corporation, partnership, joint venture or governmental entity hereby declares that he, she, or it has the authority to sign on behalf of his, her or its respective corporation, partnership, joint venture, entity and agrees to hold the other party or parties hereto harmless if he, she or it does not have such authority.

[Signature page follows]

Escondido, CA
Store No. 5996-00

IN WITNESS WHEREOF, this Agreement is executed by the City of Escondido, acting by and through its Director of Utilities, pursuant to Resolution No. R2012-157, authorizing such execution, and by Developer, on the date set forth below.

WAL-MART STORES, INC.,
a Delaware corporation

By: _____
John Clarke
Its: Vice President of Real Estate

Date: _____

THE CITY OF ESCONDIDO,
a California municipal corporation

By: _____
Name: Christopher McKinney
Its: Director of Utilities

Date: _____

APPROVED AS TO FORM:

OFFICE OF THE CITY ATTORNEY
JEFFREY R. EPP, City Attorney

By: _____

THE CITY OF ESCONDIDO DOES NOT DISCRIMINATE AGAINST QUALIFIED PERSONS WITH DISABILITIES.

EXHIBIT "A"

LEGAL DESCRIPTION

The land referred to herein is situated in the State of California, County of San Diego, City of Escondido, and described as follows:

PARCEL 1:

LOT 2 IN BLOCK 180 OF RANCHO RINCON DEL DIABLO, IN THE CITY OF ESCONDIDO, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 723, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY.

ALSO THAT PORTION OF LOT 9 IN BLOCK 180 OF RANCHO RINCON DEL DIABLO, IN THE CITY OF ESCONDIDO, COUNTY OF SAN DIEGO, State of California, ACCORDING TO MAP THEREOF NO. 723, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY DESCRIBED AS BEGINNING AT THE SOUTHEASTERLY CORNER OF LOT 9, THENCE ALONG THE SOUTHERLY LINE OF SAID LOT 9 SOUTH 60 DEGREES 29 MINUTES 31 SECONDS WEST 329.89 FEET TO THE SOUTHWESTERLY CORNER OF SAID LOT 9, THENCE ALONG THE WESTERLY LINE OF SAID LOT 9 NORTH 29 DEGREES 29 MINUTES 22 SECONDS WEST 174.76 FEET, THENCE NORTH 60 DEGREES 31 MINUTES 30 SECONDS EAST 67.22 FEET, THENCE SOUTH 29 DEGREES 28 MINUTES 30 SECONDS EAST 5.01 FEET, THENCE NORTH 60 DEGREES 31 MINUTES 30 SECONDS EAST 26.15 FEET, THENCE SOUTH 29 DEGREES 28 MINUTES 30 SECONDS EAST 7.53 FEET, THENCE NORTH 60 DEGREES 31 MINUTES 30 SECONDS EAST 37.36 FEET, THENCE SOUTH 29 DEGREES 28 MINUTES 30 SECONDS EAST 6.54 FEET, THENCE NORTH 60 DEGREES 49 MINUTES 38 SECONDS EAST 199.14 FEET TO THE EASTERLY LINE OF SAID LOT 9, THENCE SOUTH 29 DEGREES 29 MINUTES 54 SECONDS EAST 154.44 FEET TO THE SOUTHEASTERLY CORNER OF SAID LOT 9.

ALSO THAT PORTION OF LOT 10 IN BLOCK 180 OF RANCHO RINCON DEL DIABLO, IN THE CITY OF ESCONDIDO, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO MAP THEREOF NO. 723, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY BEGINNING AT THE SOUTHEASTERLY CORNER OF SAID LOT 10, THENCE ALONG THE EASTERLY LINE OF SAID LOT 10 NORTH 29 DEGREES 29 MINUTES 22 SECONDS WEST 174.76 FEET, THENCE SOUTH 60 DEGREES 31 MINUTES 30 SECONDS WEST 69.98 FEET, THENCE SOUTH 29 DEGREES 28 MINUTES 30 SECONDS EAST 41.03 FEET, THENCE SOUTH 60 DEGREES 31 MINUTES 30 SECONDS WEST 84.14 FEET THENCE SOUTH 29 DEGREES 28 MINUTES 30 SECONDS EAST 133.82 FEET TO THE SOUTHERLY LINE OF SAID LOT 10, THENCE ALONG SAID SOUTHERLY LINE OF LOT 10 NORTH 60 DEGREES 29 MINUTES 31 SECONDS EAST 154.17 FEET TO THE SOUTHEASTERLY CORNER OF SAID LOT 10.

EXCEPTING FROM SAID LOT 2, THE SOUTHEASTERLY 147.00 FEET OF THE SOUTHWESTERLY 300.00 FEET THEREOF.

ALSO EXCEPTING FROM SAID LOT 2, THE SOUTHEASTERLY 9.00 FEET THEREOF.

EXHIBIT "B"

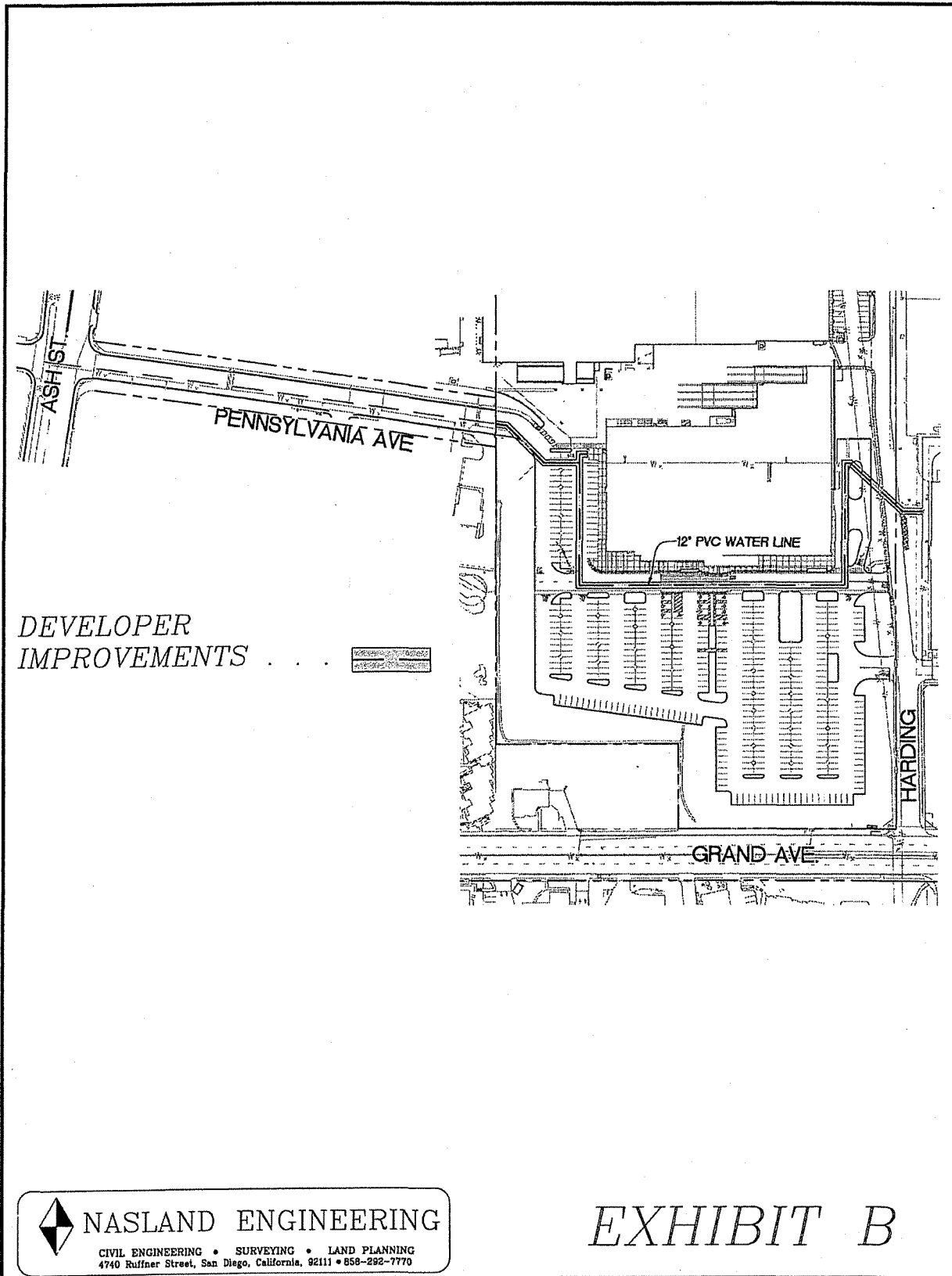
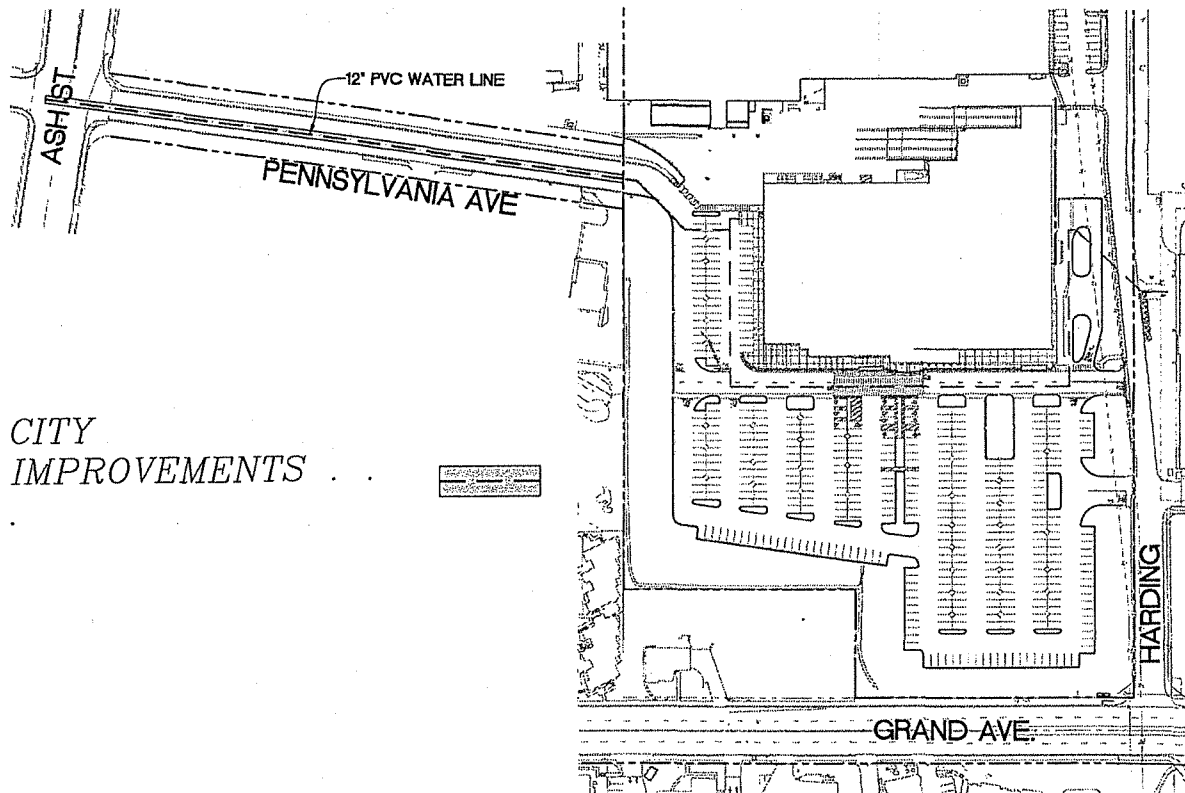


EXHIBIT "C"



NASLAND ENGINEERING

CIVIL ENGINEERING • SURVEYING • LAND PLANNING
4740 Ruffner Street, San Diego, California, 92111 • 619-292-7770

EXHIBIT C

EXHIBIT "D"

Pennsylvania Ave. Water Main								
Bid Dated 09/11/12						Per Plans Dated 8/22/12		
No.	Description	Quan.	Unit	Unit \$	Item Total	Wal-Mart	LaCaze	City
OFFSITE WATER								
1	Watermain from STA 10+00 to STA 17+47 per plans dated 08/22/12							
A.	12" CML&C Water Main Siphon from STA 10+00 to 10+38	36	LF	180.80	6,508.80			6,508.80
B.	12" C900 CL 235 Water Main from STA 10+38 to 19+00	711	LF	67.80	48,205.80			48,205.80
C.	12" Cut in Tee with 3 each 12" gutter valves @ STA 10+00	1	LS	15,850.00	15,850.00			15,850.00
D.	Install 12" x 6" Tee w/ 6" gate valve and construct new fire hydrant @ STA 14+27	1	EA	6,310.00	6,310.00			6,310.00
E.	Install 12" x 6" Tee w/ 6" gate valve and construct new fire hydrant and wall @ STA 17+13	1	EA	8,591.00	8,591.00			8,591.00
F.	Install 12" x 6" Tee w/ 6" gate valve and connect to existing fire service.	1	EA	1,966.00	1,966.00			1,966.00
G.	Install 12" x 4" Tee w/ 2 each, 12" gate valves, 1 each 4" gate valve, and connect to existing 4" water main.	1	EA	9,830.00	9,830.00			9,830.00
H.	Install 12" inline gate valve at STA 10+37.	1	EA	4,710.00	4,710.00			4,710.00
I.	Install 4" Blowoffs from new water main.	4	EA	3,990.00	15,960.00			15,960.00
J.	Install 4" Blowoffs from existing water main.	1	EA	4,890.00	4,890.00			4,890.00
K.	Install 2" Air releases from new water main.	2	EA	3,933.00	7,866.00			7,866.00
L.	Install 2" Air releases from existing water main.	2	EA	4,750.00	9,500.00			9,500.00
M.	Install 2" water services, connect to existing.	13	EA	1,390.00	18,070.00			18,070.00
N.	Slurry fill existing 6" and 8" water main and leave in place	750	LS	11.00	8,250.00			8,250.00
O.	Chlorination and Testing	1	LS	3,000.00	3,000.00			3,000.00
P.	Traffic Control	1	LS	2,800.00	2,800.00			2,800.00
Q.	Staking & Surveying	1	LS	1,000.00	1,000.00			1,000.00
R.	Soil Compaction	1	LS	1,250.00	1,250.00			1,250.00
Off Site Water subtotal					174,657.60			174,657.60
OFF SITE PATCHING								
A.	AC trench patching ± 2' wide including night patching on Ash Street, 2 move-ins, per City Standard	2,650	SF	11.78	31,217.00			31,217.00
B.	Remove and Replace cross gutter @ Pennsylvania Ave. & Ash Street.	750	SF	13.90	10,425.00			10,425.00
Off Site Patching Total					41,642.00			41,642.00
Off Site Water & Patching Subtotal					216,199.60			216,199.60
	Supervision	3	WK	2,000.00	6,000.00			6,000.00
	Prevailing Wage (required for the off site work)				7,700.00			7,700.00
	Profit/Overhead			10%	21,619.96			21,619.96
	Insurance			2.50%	5,747.49			5,747.49
Off Site Water & Patching Total					257,267.05			257,267.05
The staking bids have been provided by Nasland Engineering, however the developer and/or Wal-Mart may consider this a conflict of interest. In the event Nasland Engineering is not chosen as the staking engineer then these amounts may be adjusted upward or downward based on competitive bids.								
Includes:				Excludes:				
All water installed & tested				All work not specifically indicated				
Backfill & patching				Haul off of trench spoils				
AC & PCC Repairs				Irrigation backflow				
Overlay as indicated				All permits & fees				
Tie-ins				Purchase of construction water				
				Rock excavation or disposal				
				Soils Engineer				