



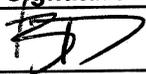
Council Action and Executive Summary

Item # 6 Ordinance/Resolution# 11-102 Council District: 5

For Meeting of November 1, 2010
(Adoption Date)

TITLE: A RESOLUTION APPROVING AN AGREEMENT WITH THE DEVELOPER OF PARKHILL ESTATES SUBDIVISION TO CONSTRUCT A NEIGHBORHOOD PARK.

PURPOSE(S) OF ACTION: To establish an agreement whereby the developer receives a park impact fee credit and waiver of impact fees in return for constructing a park for the City of Las Cruces.

Drafter and Staff Contact: Brian Denmark		Department: Facilities		Phone: 541-2506	
Department	Signature	Phone	Department	Signature	Phone
Facilities Director		541-2506	Budget		541-2107
Other			Assistant City Manager		541-2271
Legal		541-2128	City Manager		541-2076

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

BPS, LLC, the developer for Parkhill Estates Subdivision has proposed to construct a neighborhood park within their respective development to be dedicated to the City of Las Cruces. Parkhill Estates Subdivision is a single family, residential development located east of Del Rey Boulevard with Parkhill Drive traversing east as the primary access to this subdivision.

The City approved an amendment to the Parkhill Estates Subdivision master plan whereby a neighborhood park would be built by the developer, and in return, park impact fees were to be waived. Said waiver was to begin August 21, 2009. Unfortunately, \$26,197.00 in park impact fees were collected over the past year until it was determined that an error had been made and that the fees should have been waived. To correct the matter, City staff proposes to credit the developer \$26,197.00 in park impact fees as well as waive park impact fees for the remainder of the development. In return, the developer will continue with the plan to construct a neighborhood park.

In addition, the developer will be responsible to provide the City with a Letter of Credit and Guarantee of Performance; thus, assuring the \$26,197.00 in credited fees is used for the purpose of building a neighborhood park. Said construction of the park is to occur during final development of Parkhill Estates Subdivision Units 3A-D to ensure a park is built prior to full build-out of the overall development.

(Continue on additional sheets as required)

An Agreement has been drafted and considered acceptable to City staff as well as BPS, LLC. Approval of this Resolution will authorize City staff to proceed with execution of the Agreement, acceptance of a Letter of Credit and Guarantee of Performance and ultimately construction of a neighborhood park.

SUPPORT INFORMATION:

1. Resolution
2. Agreement
3. Draft Letter of Credit and Guarantee of Performance
4. Area map of Parkhill Estates Subdivision

SOURCE OF FUNDING:

Is this action already budgeted?	Yes	<input checked="" type="checkbox"/>	See fund summary below
	No	<input type="checkbox"/>	If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/>	Expense reallocated from: _____
		<input type="checkbox"/>	Proposed funding is from a new revenue source (i.e. grant; see details below)
	<input type="checkbox"/>	Proposed funding is from fund balance in the _____ Fund.	
Does this action create any revenue?	Yes	<input type="checkbox"/>	Funds will be deposited into this fund: _____ in the amount of \$ _____.
	No	<input checked="" type="checkbox"/>	There is no new revenue generated by this action.

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
Park Mgt. Area #1	41125010-854222	\$26,197.00	\$525,936	\$499,739	Dos Suenos Twin Parks Project

(Continue on additional sheets as required)

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will approve the Resolution and authorize execution of an Agreement to ultimately require the developer of Parkhill Estates Subdivision to build and dedicate a neighborhood park to the City.
2. Vote "No"; this will deny the Resolution and will afford the opportunity to consider other alternatives such as the collection of park impact fees and the developer not being responsible to build a neighborhood park or reimbursement of park impact fees after construction of the park.
3. Vote to "Amend and Approve"; the Resolution in order to consider changes to the Agreement between the City and the developer.

REFERENCE INFORMATION

The resolution(s) and/or ordinance(s) listed below are only for reference and are not included as attachments or exhibits.

1. N/A

(Continue on additional sheets as required)

RESOLUTION NO. 11-102

A RESOLUTION APPROVING AN AGREEMENT WITH THE DEVELOPER OF PARKHILL ESTATES SUBDIVISION TO CONSTRUCT A NEIGHBORHOOD PARK.

The City Council is informed that:

WHEREAS, the City of Las Cruces negotiated an Agreement with the developer of Parkhill Estates Subdivision to build a neighborhood park as per the approved amended master plan, and

WHEREAS, the developer will be credited \$26,197.00 in park impact fees to conform to the approved master plan of Parkhill Estates Subdivision where impact fees were to be waived, and

WHEREAS, park impact fees will be waived for the remainder of the development of Parkhill Estates Subdivision, and

WHEREAS, the developer shall be responsible to construct and dedicate a neighborhood park to the City of Las Cruces, and

WHEREAS, the accompanying Agreement allowing the credit of park impact fees and construction of a neighborhood park is acceptable to the City.

NOW, THEREFORE, Be it resolved by the governing body of the City of Las Cruces:

(I)

THAT the Agreement attached hereto to credit park impact fees and construct a neighborhood park and made a part of this Resolution is approved.

(II)

THAT the City Manager is hereby authorized to execute the Agreement.

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(III)

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

DONE and APPROVED this ____ day of _____, 2010.

APPROVED:

Mayor

ATTEST:

City Clerk
(SEAL)

Moved by: _____

Seconded by: _____

VOTE:

Mayor Miyagishima:	_____
Councillor Silva:	_____
Councillor Connor:	_____
Councillor Pedroza:	_____
Councillor Small:	_____
Councillor Sorg:	_____
Councillor Thomas:	_____

APPROVED AS TO FORM:


City Attorney

**AGREEMENT TO CONSTRUCT A NEIGHBORHOOD PARK
IN PARKHILL ESTATES SUBDIVISION UNITS**

THIS AGREEMENT made and entered into this _____ day of _____, 2010, by and between the City of Las Cruces, Dona Ana County, New Mexico, a Municipal Corporation, party of the first part, hereinafter referred to as 'Owner', and BPS, LLC, Developer of Parkhill Estates Subdivision, party of the second part, hereinafter referred to as 'Contractor'.

WITNESSETH:

WHEREAS, in consideration of the sums specified in the proposal to be paid by the Owner to the Contractor at the time and in the manner hereafter provided, the said Contractor does hereby agree to provide labor, tools, equipment and material to construct and complete in every detail a neighborhood park of approximately 2.2 acres within Parkhill Estates Subdivision.

FOR SAID CONSIDERATION, IT IS FURTHER AND PARTICULARLY AGREED BETWEEN THE PARTIES TO THIS AGREEMENT AS FOLLOWS:

1. A neighborhood park will be constructed within Parkhill Estates Subdivision. The park will be approximately 2.2 acres in size and will be dedicated to the Owner, as identified within the preliminary and final plats of Parkhill Estates Unit 3B Subdivision.
2. The Contractor shall construct the park at his cost in exchange for the Owner's credit of \$26,197.00 in park impact fee funds and waiver of park impact fee funds for the remainder of the development within Parkhill Estates Subdivision.
3. The Owner shall provide the credited amount of \$26,197.00 to the Contractor immediately after approval and signature of this AGREEMENT and receipt of a Letter of Credit and Guarantee of Performance from the Contractor.
4. A Letter of Credit and Guarantee of Performance shall be required to insure the \$26,197.00 in credited funds is used for the purpose of constructing the neighborhood park. Said funds shall be returned to the Owner if the Contractor fails to comply with the conditions of this AGREEMENT and/or the Guarantee of Performance. Upon Owner submitting to the City of Las Cruces Facilities Department park construction invoice(s) for the principal amount of \$26,197.00 or any part thereof, that amount shall be reduced from the outstanding Letter of Credit including complete release when the submitted invoice amount(s) equal or exceed \$26,197.00.
5. Concept and final design of the neighborhood park shall be approved by the Facilities Director or designee of the Owner. The construction of the neighborhood park shall be completed to the satisfaction of the Owner and in compliance with all applicable Federal, State and Local rules, regulations and standards.

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6. Periodic and final inspection of the neighborhood park will be conducted and to the satisfaction of the Owner.
7. Construction of the neighborhood park shall be completed within one year of approval and signature of this AGREEMENT. Three, one year extensions to this AGREEMENT may be approved administratively by and with the consent of the Owner.
8. Upon completion of the neighborhood park, said park shall be dedicated to the Owner free of all liens, claims and demands of any kind including materials, equipment, supplies, services, labor, taxes and any damages to property or person.
9. If, for any reason, the funds held in subject Letter of Credit are released to the Owner, then and in that instance, should Contractor subsequently start the process of park construction, the funds shall be returned to Contractor upon proof of expenditures being made for park construction as defined within this Agreement.
10. In the event, during the time of this AGREEMENT, any changes are made, it shall be done by written consent and agreement between the Owner and Contractor.
11. In the event any of the provisions of this AGREEMENT are violated by the Contractor, the Owner may serve a ten (10) day written notice upon the Contractor of said Owner's intention to terminate said AGREEMENT. Such notice will contain the reasons for the intention to terminate the AGREEMENT.

IN WITNESS WHEREOF, said parties hereto have hereunto set their hands and seals at Las Cruces, Dona Ana County, New Mexico, this day and year as written above.

(SEAL)

THE CITY OF LAS CRUCES (OWNER)

ATTEST:

CITY MANAGER

CITY CLERK

ARLON PARISH as Manager Member of BPS,
LLC (CONTRACTOR)

APPROVED AS TO FORM:
CITY ATTORNEY:

BY: _____

TITLE: _____

IRREVOCABLE LETTER OF CREDIT

Borrower: BPS, LLC
PO BOX 2338
LAS CRUCES, NM 88004

Lender: CITIZENS BANK OF LAS CRUCES
3-BUSINESS BANKING
505 S. MAIN
PO BOX 2108
LAS CRUCES, NM 88001

Beneficiary: CITY OF LAS CRUCES

DRAFT

NO.: 10657

EXPIRATION DATE. This letter of credit shall expire upon the close of business on 10-13-2011 and all drafts and accompanying statements or documents must be presented to Lender on or before that time (the "Expiration Date").

AMOUNT OF CREDIT. Lender hereby establishes at the request and for the account of Borrower, an Irrevocable Letter of Credit in favor of Beneficiary for a sum of Twenty-six Thousand One Hundred Ninety-seven & 00/100 Dollars (\$26,197.00) (the "Letter of Credit"). These funds shall be made available to Beneficiary upon Lender's receipt from Beneficiary of sight drafts drawn on Lender at Lender's address indicated above (or other such address that Lender may provide Beneficiary in writing) during regular business hours and accompanied by the signed written statements or documents indicated below.

WARNING TO BENEFICIARY: PLEASE EXAMINE THIS LETTER OF CREDIT AT ONCE. IF YOU FEEL UNABLE TO MEET ANY OF ITS REQUIREMENTS, EITHER SINGLY OR TOGETHER, YOU SHOULD CONTACT BORROWER IMMEDIATELY TO SEE IF THE LETTER OF CREDIT CAN BE AMENDED. OTHERWISE, YOU WILL RISK LOSING PAYMENT UNDER THIS LETTER OF CREDIT FOR FAILURE TO COMPLY STRICTLY WITH ITS TERMS AS WRITTEN.

DRAFT TERMS AND CONDITIONS. Lender shall honor drafts submitted by Beneficiary under the following terms and conditions:

Upon Lender's honor of such drafts, Lender shall be fully discharged of Lender's obligations under this Letter of Credit and shall not be obligated to make any further payments under this Letter of Credit once the full amount of credit available under this Letter of Credit has been drawn.

Beneficiary shall have no recourse against Lender for any amount paid under this Letter of Credit once Lender has honored any draft or other document which complies strictly with this Letter of Credit, and which on its face appears otherwise in order but which is signed, issued, or presented by a party or under the name of a party purporting to act for Beneficiary, purporting to claim through Beneficiary, or posing as Beneficiary without Beneficiary's authorization. By paying an amount demanded in accordance with this Letter of Credit, Lender makes no representation as to the correctness of the amount demanded and Lender shall not be liable to Beneficiary, or any other person, for any amount paid or disbursed for any reason whatsoever, including, without limitation, any nonapplication or misapplication by Beneficiary of the proceeds of such payment. By presenting upon Lender or a confirming bank, Beneficiary certifies that Beneficiary has not and will not present upon the other, unless and until Beneficiary meets with dishonor. Beneficiary promises to return to Lender any funds received by Beneficiary in excess of the Letter of Credit's maximum drawing amount.

USE RESTRICTIONS. All drafts must be marked "DRAWN UNDER CITIZENS BANK OF LAS CRUCES IRREVOCABLE LETTER OF CREDIT NO. 10657 DATED 10-13-2010," and the amount of each draft shall be marked on the draft. Only Beneficiary or Beneficiary's transferee may complete a draft and accompanying statements or documents required by this Letter of Credit and make a draw under this Letter of Credit. This original Letter of Credit must accompany any draft drawn hereunder.

Partial draws are permitted under this Letter of Credit. Lender's honor of a partial draw shall correspondingly reduce the amount of credit available under this Letter of Credit. Following a partial draw, Lender shall return this original Letter of Credit to Beneficiary with the partial draw noted hereon; in the alternative, and in its sole discretion, Lender may issue a substitute Letter of Credit to Beneficiary in the amount shown above, less any partial draw(s).

PERMITTED TRANSFEREES. This Letter of Credit may be transferred by Beneficiary upon prior written notice to Lender of the transfer. The transferee shall be deemed the new Beneficiary of this Letter of Credit and the documents of the transferee, including drafts required under this Letter of Credit, will be processed by Lender (or any intermediary) without the original Beneficiary's intervention and without any further obligation of Lender to the original Beneficiary.

TRANSFEREES REQUIRED DOCUMENTS. When the presenter is a permitted transferee under the "Permitted Transferees" paragraph above (the "Permitted Transferee"), the documents required for a draw shall include all documents required elsewhere in this Letter of Credit, except that such documents may be in the name of and executed by either the original Beneficiary or the presenter permitted by the "Permitted Transferees" paragraph above.

COMPLIANCE BURDEN. Lender is not responsible for any impossibility or other difficulty in achieving strict compliance with the requirements of this Letter of Credit precisely as written. Beneficiary understands and acknowledges: (i) that unless and until the present wording of this Letter of Credit is amended with Lender's prior written consent, the burden of complying strictly with such wording remains solely upon Beneficiary, and (ii) that Lender is relying upon the lack of such amendment as constituting Beneficiary's initial and continued approval of such wording.

NON-SEVERABILITY. If any aspect of this Letter of Credit is ever declared unenforceable for any reason by any court or governmental body having jurisdiction, Lender's entire engagement under this Letter of Credit shall be deemed null and void ab initio, and both Lender and Beneficiary shall be restored to the position each would have occupied with all rights available as though this Letter of Credit had never occurred. This non-severability provision shall override all other provisions in this Letter of Credit, no matter where such provision appears within this Letter of Credit.

GOVERNING LAW. This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of New Mexico without regard to its conflicts of law provisions, and except to the extent such laws are inconsistent with the 2007 Revision of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, ICC Publication No. 600. This Agreement has been accepted by Lender in the State of New Mexico.

EXPIRATION. Lender hereby agrees with Beneficiary that drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored if presented to Lender on or before the Expiration Date unless otherwise provided for above.

Dated: October 13, 2010

IRREVOCABLE LETTER OF CREDIT
(Continued)

Loan No: 193824473

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LENDER:

CITIZENS BANK OF LAS CRUCES

DRAFT

By: 
Authorized Signer

ENDORSEMENT OF DRAFTS DRAWN:

Date	Negotiated By	Amount In Words	Amount In Figures
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GUARANTEE OF PERFORMANCE

This Agreement is made and entered into this ____ day of _____ 20__, by and between BPS, LLC. hereinafter referred to as the Developer and the Indemnitor and the City of Las Cruces, hereinafter referred to as Indemnitee.

In consideration of final approval by the Planning & Zoning Commission of the City of Las Cruces, New Mexico, for development of a portion of PARKHILL ESTATES UNIT #3a-d, it is hereby agreed, as to the full and final construction of a Park to be dedicated to the City of Las Cruces.

1. Indemnitor is the developer of the subdivisions to be known as PARKHILL ESTATES UNIT #3a-d within the City of Las Cruces, New Mexico. In order to comply with the City of Las Cruces Subdivision Code, effective on the 3rd day of June 2000, certain performance guarantees for the development of Park improvements are required. The Amended Master Plan for the PARKHILL ESTATES properties provides that Indemnitor will construct a 2.2 acre park located in the middle of PARKHILL ESTATES UNIT #3b. The Park will be fully constructed in conjunction with the construction of said subdivision.

2. In order to comply with these regulations as pertains to the Guarantee of Performance, Indemnitor hereby agrees to indemnify Indemnitee from \$26,197 costs and legal expenses that the Indemnitee suffers as a result of the Indemnitor beginning the construction of an approximately 2.2 acre park. The City of Las Cruces has reimbursed to Indemnitor the sum of \$26,197 representing a credit to Park Impact Fees to come into compliance with the approved Amended Master Plan that allows for waiver of Park Impact Fees. Once Indemnitor has provided to the City an invoice or invoices in the total amount of \$26,197 for work performed regarding construction of the park, the City shall release the Letter of Credit subject of this Guarantee.

3. Indemnitor has provided a Letter of Credit from Citizen's Bank guaranteeing the availability of funds in the amount of \$26,197 at this time guaranteeing the start of the construction of the City Park. The initial Letter of Credit is scheduled for a term of one year. Indemnitor will renew the Letter of Credit each year as it nears expiration. Indemnitor will be allowed up to 3 renewal periods with City acceptance and approval. If the Park construction can not be started prior to the end of the

