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Council Action and Executive Summary

Item # 9 Ordinance/Resolution# 12-079

For Meeting of _____
 (Ordinance First Reading Date)

For Meeting of November 7, 2011
 (Adoption Date)

TITLE: A RESOLUTION APPROVING A UTILITY IMPROVEMENT FUNDING AGREEMENT BETWEEN MESA DEVELOPMENT CENTER, INC. AND THE CITY OF LAS CRUCES FOR MODIFICATIONS TO THE WATER SYSTEM IN MIDWAY AVENUE BETWEEN STEWARDS DRIVE AND GASLINE ROAD. THE RESOLUTION AUTHORIZES THE MAYOR TO SIGN THE AGREEMENT ON THE CITY'S BEHALF.

PURPOSE(S) OF ACTION:

Approve an agreement with Mesa Development Center, Inc. for the water line improvement in Midway Avenue.

COUNCIL DISTRICT: N/A		
<u>Drafter/Staff Contact:</u> David Dollahon	<u>Department/Section:</u> Community Development / Neighborhood Services	<u>Phone:</u> 528-3060
<u>City Manager Signature:</u>		

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

The City of Las Cruces is an entitlement community from the U.S. Department of Housing and Urban Development (HUD) for their Community Development Block Grant (CDBG) Program. As required by HUD, the City must develop an annual Action Plan for the allocation of the CDBG funds each CDBG program year, which coincides with the City's fiscal year. For Program Year 2011 (City FY2012), the City allocated \$200,000 to the reconstruction of Midway Avenue between Stewards Drive and Gasline Road. The CDBG funds will be partnered with City Street Maintenance and Flood Control funds to complete the project, which includes complete reconstruction of the roadway, the addition of curb and gutter and sidewalks, and upgrades to the existing utility systems (water, gas, wastewater, and storm sewer).

All the utilities are owned by the City of Las Cruces, except for the water distribution system, which is owned by Mesa Development Center, Inc. (MDC). Given the proposed scope of work and City staff concerns about the condition and depth of MDC's water distribution lines within the roadway, City staff have proposed that the City's CDBG funds be used to upgrade their waterlines within Midway Avenue. This is an eligible use of the CDBG funds and would comply with HUD's mission of improving the lives of low-income residents by ensuring their continued access to a reliable and safe water system. Further, the use of CDBG funds for this purpose avoids the City's prohibitions under the Anti-Donation Clause of the New Mexico Constitution.

In order to facilitate the improvements to MDC's waterline within Midway Avenue, City Legal Staff developed a "Utility Improvement Funding Agreement" (henceforth "Agreement") that outlines the terms and conditions of the improvements. The draft agreement is attached as Exhibit "A" to the proposed Resolution and has been signed by Grover Pettes, President of MDC. The main issues under the Agreement are that MDC agrees that should they sell their system to either the City or another third party that the City's improvements will be:

- 1) not included in the purchase price should the City buy their system for this portion along Midway Avenue; or
- 2) the City will be reimbursed from the sale's proceeds should they sell to an outside third party.

In the case of Midway and in the event that MDC sells their system, the City or the outside third party will reimburse the City's CDBG program for future use on other CDBG-eligible activities.

No direct expenses will be paid to MDC as the use of the City's CDBG and other funds will be used to pay an outside contractor that is selected through the City's procurement process to make the improvements.

SUPPORT INFORMATION:

1. Resolution.
2. Exhibit "A", Utility Improvement Funding Agreement between the Mesa Development Center, Inc. and the City of Las Cruces for Midway Avenue between Stewards Drive and Gasline Road.
3. Attachment "A", Vicinity map.

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 _____ for FY__.
	No	<input checked="" type="checkbox"/>	There is no new revenue generated by this action.

BUDGET NARRATIVE

N/A

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
Community Development (Fund 2000)	20184330-854121-71110	\$196,939.85	\$196,939.85	\$0	N/A
Street Maintenance (Fund 4202)	42806040-854121-71110	\$150,000.00	\$150,000.00	\$0	N/A
Flood Control (Fund 4400)	44806010-854121-71110	\$100,000.00	\$100,000.00	\$0	N/A

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will adopt a Resolution approving the Utility Improvement Funding Agreement between Mesa Development Center, Inc. and the City.
2. Vote "No"; this will not adopt a Resolution approving the Utility Improvement Funding Agreement between Mesa Development Center, Inc. and the City.
3. Vote to "Amend" and vote "Yes"; this may allow Council to modify the Resolution by adding conditions as they deem appropriate. Direction would need to be provided by Council on any proposed amendments.
4. Vote to "Table"; Council may table/postpone the Resolution and direct staff accordingly.

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

RESOLUTION NO. 12-079

A RESOLUTION APPROVING A UTILITY IMPROVEMENT FUNDING AGREEMENT BETWEEN MESA DEVELOPMENT CENTER, INC. AND THE CITY OF LAS CRUCES FOR MODIFICATIONS TO THE WATER SYSTEM IN MIDWAY AVENUE BETWEEN STEWARDS DRIVE AND GASLINE ROAD. THE RESOLUTION AUTHORIZES THE MAYOR TO SIGN THE AGREEMENT ON THE CITY'S BEHALF.

The City Council is informed that:

WHEREAS, the City of Las Cruces has actively worked to improve the utilities, streets, and sidewalks along various local roads in the City's East Mesa since the area's annexation in 1986; and

WHEREAS, the City is an entitlement community from the U.S. Department of Housing and Urban Development (HUD) for their Community Development Block Grant (CDBG) Program; and

WHEREAS, as part of the City's HUD-required 2011 Action Plan for the use of \$200,000 in CDBG funding is proposed for the improvement of Midway Avenue between Stewards Drive and Gasline Road to bring this roadway and other improvements to current City standards; and

WHEREAS, Mesa Development Center, Inc. (MDC) owns a private water utility company that serves the residents along the identified portion of Midway Avenue; and

WHEREAS, in order to complete the roadway construction project and to provide quality water service to Mesa Development Center's (MDC) customers, it has been determined that a Utility Improvement Funding Agreement is necessary to outline the terms of the improvements to MDC's water system along Midway Avenue; and

WHEREAS, the State of New Mexico Constitution's Article IX, Section 14 (otherwise known as the "Anti-Donation" Clause), is not applicable to this agreement in that the City's federal CDBG funds are being used to improve MDC's water lines within

Midway Avenue; and

WHEREAS, the Utility Improvement Funding Agreement outlines the long-term conditions and potential future acquisition of MDC's water system by either the City or another party; and

WHEREAS, City staff has developed the necessary construction documents, secured the proper approvals, obtained bids, and is prepared to award the contract for the construction of Midway Avenue between Stewards Drive and Gasline Road and the Utility Improvement Funding Agreement's execution is necessary in order to begin construction.

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

(I)

THAT the Utility Improvement Funding Agreement between the Mesa Development Center, Inc. and the City of Las Cruces for modifications to the water system in Midway Avenue between Stewards Drive and Gasline Road, as shown in Exhibit "A," attached hereto and made part of this Resolution, is hereby approved.

(II)

THAT the Mayor is hereby authorized to sign the Utility Improvement Funding Agreement on the City's behalf.

(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 _____ 2011.

APPROVED:

Mayor

ATTEST:

City Clerk

(SEAL)

Moved by: _____

Seconded by: _____

APPROVED AS TO FORM:

Harriet Oryza
Asst City Attorney

VOTE:

Mayor Miyagishima: _____

Councillor Silva: _____

Councillor Connor: _____

Councillor Pedroza: _____

Councillor Small: _____

Councillor Sorg: _____

Councillor Thomas: _____

UTILITY IMPROVEMENT FUNDING AGREEMENT BETWEEN MESA DEVELOPMENT CENTER, INC. AND THE CITY OF LAS CRUCES FOR MODIFICATIONS TO THE WATER SYSTEM IN MIDWAY AVENUE BETWEEN STEWARDS DRIVE AND GASLINE ROAD.

This Agreement is entered into on this _____ day of _____, 2011, by and between the CITY OF LAS CRUCES, a New Mexico municipal corporation ("City"), and MESA DEVELOPMENT CENTER, INC. ("Owner") as follows:

WHEREAS, the Owner owns a private water system serving portions of the East Mesa with infrastructure within Midway Avenue between Stewards Drive and Gasline Road; and

WHEREAS, the City is undertaking the reconstruction and paving of Midway Avenue as part of a Community Development Block Grant Program and general street improvement program; and

WHEREAS, the Owner's existing water distribution system within that portion of Midway Avenue may be adversely impacted as the result of the proposed City roadway improvements; and

WHEREAS, the Owner is unable or unwilling to relocate its infrastructure within that portion of Midway Avenue in accordance with the City's 1988 franchise with the Owner; however, the City is willing to pay for the improvements to that portion of the Owner's water system because the City at this time intends to resume negotiations with the Owner to acquire the water system once impediments to acquisition have been removed; and

WHEREAS, further, the City is not prohibited by the anti-donation provisions contained in Article IX, Section 14 of the New Mexico State Constitution from paying for such improvements because the improvements will be paid from Community Development Block Grant Program (CDBG) funding, and said funding conditions allow for such improvements so long as the private beneficiary does not financially benefit directly there from; and

WHEREAS, the City desires to relocate and replace that portion of the Owner's water system within Midway Avenue to minimize the potential for damaging that portion of the Owner's water system or the City's new street at a later date as a result of a water system failure; and

WHEREAS, this Agreement further provides for the potential future acquisition of the water company by the City, and is not to be used as a precedent for future City street projects within the service area of Owner or other City water franchisees, and is not intended to modify the Owner's franchise agreement with the City.

NOW, THEREFORE, in consideration of the mutual obligations and promises contained herein, the City and the Owner agree as follows:

1. City shall design and build Midway Avenue between Stewards Drive and Gasline Road including the necessary design and construction of the roadway as well as the Owner's water system within that portion of the roadway. The water system shall consist of 6" PVC C-900 main, ¾" poly services, 6' gate valves, ductile iron fittings, relocation and reconnection of existing meters into existing meter boxes, necessary wet connections, and other miscellaneous items to make that portion of the Owner's system and services complete.
2. City will secure Owner's concurrence on all proposed system modifications and will complete all construction improvements within one (1) year from the date of this Agreement.
3. City will ensure that all affected customers are notified of the schedule for the proposed outages and that all such outages are kept to a minimum.
4. Owner hereby grants the City permission to modify its water system without exception within the boundaries of the Midway Avenue Construction Project to include the installation of water mains, valves, services and relocation and reconnection of existing services.
5. Owner shall not be paid for the cost of the water system improvements in Midway Avenue paid for by the City if the City or a third party ever purchases or otherwise acquires the affected water system. If the water system in Midway Avenue is sold to a third party, the City's Community Development Block Grant and other funding sources shall be fully compensated for all costs associated with the installation of the new water system improvements in Midway Avenue. The cost of such improvements will be determined from the Contract Bid Amount in the Midway Avenue Construction Project No. 11-12-346.
6. If the City fails to construct the modifications to the water system within the time indicated by this Agreement, item five above will no longer be in effect. Nothing herein commits the City to undertaking any specified modifications, improvements, or changes to the existing water system to improve the existing water pressure or volume of water to existing water customers. Furthermore, the City will not be responsible for water quality for water delivered through the new system.
7. This Agreement contains the entire agreement between the parties with respect to the Midway Avenue Construction Project.

- 8. Changes to this Agreement are not binding unless made in writing and signed by both parties.
- 9. This Agreement is binding upon and inures to the benefit of the successors and/or assigns of the parties.
- 10. In any part of this Agreement is held to be invalid or unenforceable, such holding will not affect the validity or enforceability of any other part of this Agreement so long as the remainder of the Agreement is reasonably capable of completion. If either party defaults, the defaulting party shall be responsible for the non-defaulting party's reasonable attorney's fees and court costs.

IN WITNESS WHEREOF, the parties have hereunto executed this Agreement as of the date and year first above written.

CITY OF LAS CRUCES

MESA DEVELOPMENT CENTER, INC.

By: _____
Mayor

By: Grover L. Pettes Sr.
Printed Name: GROVER L. PETTES SR.
Title: PRESIDENT

ATTESTED:

City Clerk

APPROVED AS TO FORM:

[Signature]
Asst City Attorney