

Mitigation Fee Collection and Indemnity Agreement

Summary:

El Dorado County collects for the District the Development Impact Fees established by the District through its Facilities Master Plan, Nexus Study and related studies. The County has the authority to collect these fees on behalf of the District, while the District does not have independent authority to do so. The County has undertaken these collections on behalf of the District since 1985.

On August 29, 2017, the County amended County Ordinance 13.20 pertaining to the collection of development impact mitigation fees. The staff was directed to update all existing agreements with affected agencies by the end of 2017. The County, working with the various agencies, developed the form titled Mitigation Fee Collection and Indemnity Agreement presented to the Board in connection with this agenda item. The County has required each agency to enter into this agreement as a condition of continued collection of the respective agency's development impact mitigation fees.

The County has no obligation to collect the subject fees and has indicated that absent entry into this agreement, collection of future fees will cease. Given that the County is empowered but not required to collect such fees and given that the District has no independent authority to collect such fees, appropriate mitigation of the impacts of continuing development depend upon the District entry into this agreement to ensure the continued collection of development impact mitigation fees.

The County has significant development fee revenues on deposit, the disbursement of which depends on this agreement, and the District Facilities Master Plan and Nexus Study indicate a continuing need for these mitigation fees, the ongoing collection of which also depends upon entry into this agreement.

The agreement describes the respective obligations of the parties to ensure continuous compliance with applicable law, including the Mitigation Fee Act, and provides to the County what the County requires in terms of indemnities against liability, without which the County would not perform the required fee collection duties. The agreement applies to sums collected both prospectively and retrospectively. All other agencies collecting development impact mitigation fees within the County have executed a similar agreement. The agreement is terminable with a sixty-day notice.

Recommendation:

We recommend that the Board of Directors approve the Mitigation Fee Collection and Indemnity Agreement.

MITIGATION FEE AGREEMENT
FOR COLLECTION OF FEES ON BEHALF OF SPECIAL DISTRICT

This Agreement is made and entered into this ____ day of _____, 2017, by and between the El Dorado Hills County Water District, operating as the El Dorado Hills Fire District (“District”) and the County of El Dorado, a political subdivision of the State of California (“County”).

RECITALS

WHEREAS, pursuant to the California Mitigation Fee Act (Gov. Code, §§ 66000-66025), local agencies may establish mitigation fees (“fees”) in connection with the approval of a development project to offset the costs of new public facilities that become necessary as a result of the development; and

WHEREAS, under existing state law, District cannot directly adopt mitigation fees, but Chapter 13.20 (as amended on August 29, 2017) of the El Dorado County Ordinance Code (“Ordinance Code”) authorizes the Board of Supervisors to adopt fees on behalf of special districts within County to offset the impacts of new development on equipment and capital facilities; and

WHEREAS, District is duly organized pursuant to the California County Water District Law (Water Code §§ 30000-30901), and operates a Fire Protection District pursuant to Water Code § 31120 and the Fire Protection District Law of 1987 (Health & Safety Code, §§ 13800-13970); and

WHEREAS, Chapter 13.20 authorizes County to collect and disburse fees on behalf of District subject to and in accordance with a written agreement between County and District;

WHEREAS, District wishes to enter into an Agreement with County to establish and collect such fees pursuant to County Ordinance Code 13.20; and

WHEREAS, County and District recognize the need to allocate obligations and administrative costs arising from County’s voluntary creation, collection, and disbursement of fees on behalf of District and assign responsibility for any additional expenses or liability arising from the creation, collection, and disbursement of said fees.

THEREFORE, County and District mutually agree as follows:

1. Establishment of Fees.

In seeking to establish a new fee or to modify an existing fee, District shall provide County with all information, documentation, studies, reports, and proposed findings required under County Ordinance Code 13.20 and the Mitigation Fee Act. District shall propose the amount of the fee to be collected through the County building permit process from any

development project within the boundaries of District and shall transmit said proposed fee amount in writing to County with all supporting documentation.

District shall ensure that any proposed establishment of a fee or modification to an existing fee complies with all provisions of the Mitigation Fee Act, including but not limited to California Government Code sections 66001, 66005, 66007, 66014, 66016, 66017, 66018, and 66019, and County Ordinance Code 13.20.

Prior to seeking any action or finding from County related to any fee, the District Board shall first approve a proposal of such action and make any findings that it will request County to make. District Board's request for action and its findings must be included in the supporting documentation submitted to County in conjunction with such request. In requiring the District Board to first consider and make advisory findings, County is not delegating authority to adopt or increase any fee and County will independently consider any proposed new or amended fee as required under California Government Code subdivision 66016(b). If adopted by County, any establishment of a fee or amendment or change to an existing fee shall not become effective until sixty (60) days after final County approval pursuant to subdivision 66017(a).

2. Calculation of Fees.

District understands that County staff will rely on the information and analysis District provides to County. District expressly waives any right, title, interest, claim, action, or recourse that District may have against County for perceived or actual miscalculations by County of fees to the extent such perceived or actual miscalculations are based on errors within the information provided by District staff and consultants. Notwithstanding the above, this Agreement shall not be construed to limit or restrict in any way the rights of County to seek or collect fees from any developer for any development project when County believes the fees were improperly calculated, assessed, or collected. If County believes the fees were improperly calculated, assessed, or collected, County will notify the District of its concerns within a reasonable time, and the parties shall meet and confer to address County's concerns.

3. Administrative Charge.

In consideration of County collecting fees on behalf of District, County shall retain up to one percent (1%) of all fees collected on behalf of District for costs actually and reasonably incurred by County in the performance of this Agreement ("administrative charge"). This administrative charge shall be imposed regardless of whether the fee was created before or after execution of this Agreement. The administrative charge provided for in this Agreement shall be applied to any fee disbursed after execution of this Agreement even if the fee was collected prior to execution of this Agreement.

Any refund of fees processed by County will be reduced by the administrative charge collected by County.

Upon mutual agreement of the parties and provided that County can demonstrate that the costs actually and reasonably incurred in the performance of this Agreement exceed one percent

(1%), the administrative charge may be modified to reflect the actual cost to County in administering and collecting the fees. Upon request by the District, the County shall provide the District with documentation in support of such costs actually and reasonably incurred by the County in the performance of this Agreement. In the event County determines the actual cost is greater than one percent (1%), but District does not consent to the increase in the administrative charge that County requests, County may terminate this Agreement as set forth below.

4. Disbursement Procedure.

County may establish procedures for the collection and disbursement of fees on behalf of District and will provide those procedures to District and any changes thereafter. In a claim for disbursement of fees, District shall include sufficient information so it can be readily determined by County that the disbursement request is consistent with the purposes for which the fees were imposed and that disbursement would comply with the Mitigation Fee Act.

Absent consultation with County, District agrees that it shall not adopt procedures or interpretations relating to the collection or disbursement of fees that differ from the procedures or interpretations of County. In the event of a disagreement, the parties shall cooperate in good faith to insure that their procedures and interpretations are consistent.

5. Time of Collection.

District certifies by this Agreement that there has been compliance with the requirements of Government Code section 66007 and County Ordinance Code 13.20 and that any existing, new, or modified fees may properly be collected at the time of issuance of a building permit. District directs County to collect the fees at the time of the building permit issuance. Pursuant to such direction, County agrees to comply with District's request to collect the fees at the time of building permit issuance, provided that District agrees to hold County harmless and defend and indemnify County from any and all claims that may arise due to County's collection of the fees at the time of building permit issuance, as more fully set forth below.

6. Timing of Agreement.

This Agreement applies to any fees collected by County on behalf of District regardless of whether the fee was established before execution of this Agreement.

7. District's Obligation to Indemnify, Defend, and Hold County Harmless.

To the fullest extent allowed by law, District covenants and agrees to defend, indemnify, and hold County, its officers, agents, and employees, in their official capacity or individually as a result of actions taken in their official capacity, harmless from and against any and all liability, loss, damage, claims, judgments, costs, staff time, expenses (including but not limited to attorney's fees, expert witness fees, paralegal fees, and fees and costs of litigation, mediation, or arbitration), and any other costs of defense (collectively, "Liability"), arising out of, resulting from, or related to the creation, establishment, modification, collection, and disbursement of fees on behalf of District or any other obligation of District or County under this Agreement, or the

Mitigation Fee Act, including also any County Ordinance, or any local, state, or federal law or regulation governing or relating to the creation, establishment, modification, collection, and disbursement of fees on behalf of District under the Mitigation Fee Act. To the fullest extent allowed by law, this defense, indemnification, and hold harmless obligation extends to damage to or loss of property and to any negligent act or omission by County, its officers, agents, and employees, including the sole, active, concurrent, or contributory negligence of County, its officers, agents, and employees, unless the act is fraudulent or is known by such person at the time of doing it to be unlawful. Any obligation of District arising hereunder is limited to any Liability arising out of, resulting from, or related to the creation, establishment, modification, collection, or disbursement of fees on behalf of District. If any Liability results in part from the creation, establishment, modification, collection, or disbursement of fees on behalf of any other local agency, District's obligation hereunder is limited to its proportional share as determined in good faith based on objective criteria by County.

District agrees that County has the right to choose its defense counsel without seeking approval from District provided that the hourly rate is comparable to the hourly rate charged by other attorneys with similar expertise and experience. County may choose to have all or part of any litigation handled by the County Counsel's Office, in which case the hourly rates shall be the hourly rates set by the Board of Supervisors for County Counsel for outside entities with an obligation to defend and indemnify the County. District agrees that County has the right to control the defense of the action, including any strategy or settlement decision. County shall notify District of any claim, action, or proceeding, but failure of County to notify District does not affect or limit District's obligations to defend, indemnify, and hold harmless under this Agreement.

If it is determined by a court, settlement agreement, or other binding decision that monies transferred by County to District are subject to refund pursuant to any provision of the Mitigation Fee Act, including but not limited to Government Code section 66001, or for any other reason, District covenants and agrees that it shall hold County harmless with regard to any such sums, including any interest required to be paid. District agrees that the refund amount, provided for in the order or agreement requiring reimbursement, shall, at the option of and in the sole discretion of County, be paid through one or more of the following: (1) any undisbursed fees that County collected on behalf of District; (2) District's direct payment to County within thirty (30) days of written notice from County of the amount due; (3) property tax revenues due to District; or (4) subsequent fee disbursements due to District. For any refund amount that District fails to pay within thirty (30) days of written notice from County, District shall pay, in addition to any interest required by the order or settlement agreement requiring reimbursement, interest of eight percent (8%) per annum on the balance and any costs or fees (including attorney's fees and costs) County incurs to collect the amount due and owing by District.

In consideration for County's continued voluntary collection of fees on behalf of District, District agrees that the covenant to indemnify, defend, and hold harmless provided for in this Article extends to any Liability arising out of, resulting from, or related to any fees County collected on behalf of District prior to execution of this Agreement unless the act by County, its officers, agents, or employees that gave rise to the Liability was a felony. The same procedures and covenants for any required refunds in the prior paragraph apply to any and all fees collected

by County on behalf of District, under the Mitigation Fee Act and/or County Ordinance Code, before execution of this Agreement.

District specifically acknowledges and agrees that County is voluntarily providing a service to District because District lacks the ability to directly adopt mitigation fees under the Mitigation Fee Act. It is thus the parties' intent that County does not incur any additional expense, fee, or Liability as a result of this Agreement or the adoption, collection, or disbursement fees on behalf of District. The parties therefore intend the indemnity and defense obligations provided herein to be construed in favor of County and upheld to the fullest extent possible under the law and that any ambiguity in this Article be resolved in favor of County.

8. Responsibilities under the Mitigation Fee Act.

A. Compliance with Mitigation Fee Act. District shall take all reasonable steps to ensure that any fee County imposes and collects on its behalf complies with the requirements of the Mitigation Fee Act, including but not limited to Government Code sections 66001, 66006, 66007, 66008, 66011, 66014, 66016, 66017, and 66018.

B. Deposit, Investment, and Disbursement of Fees. County shall deposit collected fees in accordance with Government Code subdivision 66006(a) and may invest them in its sole discretion subject to any governing law, regulation, ordinance, or agreement. To obtain disbursement of fees collected pursuant to this Agreement, District must submit documentation reasonably confirming and itemizing valid expenditures and any additional documentation requested by County. County will disburse fees within thirty (30) days of receiving sufficient documentation confirming and itemizing valid expenditures and any other requested documentation as reasonably requested by County. In the event any issues arise regarding the sufficiency of documentation or the validity of an expenditure, District and County will work in good faith to resolve the issues within a reasonable time and County may withhold disbursement until the issue is resolved.

C. Accounting and Audit. District shall account for and expend fees in compliance with Government Code sections 66006, 66008, and 66011, including ensuring that the requisite public notice is provided. District has the sole responsibility to account for the expenditure of fees and perform at its own expense any audit of it required under the Mitigation Fee Act and County Ordinance Code 13.20 or as reasonably requested by County. To the extent District needs information from County to comply with subdivision 66006(b), District shall request the information from County in writing and provide County with no less than twenty (20) days to respond.

If any audit relating to County's creation, collection, or disbursement of fees on behalf of District is requested under subdivision 66006(d) or section 66023, County, in its sole discretion, but upon consultation with the District, and subject to the limitation in subdivision 66023(c), may elect to (1) perform the audit and be reimbursed for the reasonable costs and staff time incurred in undergoing the audit; or (2) contract with an independent auditor to perform the audit. If County elects to use an independent auditor for any audit related to fees collected or disbursed under this Agreement and the auditor fees are not covered by subdivision 66023(c),

District shall reimburse County for all of the uncovered reasonable fees and costs charged by the independent auditor provided that County consulted in good faith with District in advance about the retention of such auditor and the charges to be incurred for such audit are reasonable. District shall promptly respond to all reasonable requests for information made by County in relation to any audit.

D. Five-Year Findings. District shall take all reasonable steps within its authority to ensure compliance with the five-year reporting and finding requirements under California Government Code subdivision 66001(d). District shall submit any necessary supporting documentation and proposed findings required under subdivision 66001(d)(1) no later than sixty (60) days before findings are required under that subdivision and shall take the reasonable and necessary steps within its authority to ensure the findings will be considered by County in the time required. Prior to requesting County to make the five-year findings, the District Board shall independently consider and approve any necessary supporting documentation and proposed findings and submit its action and findings with its request to County. District shall promptly provide any additional information County reasonably requests relevant to the five-year findings. Based on the information District provides, County shall consider the information and timely make findings, if appropriate, under subdivision 66001(d)(1).

E. New Obligations. District and County shall take reasonable steps to stay informed of and ensure compliance with any new obligations arising from the collection of fees on the District's behalf, including but not limited to amendments to the Mitigation Fee Act and court decisions interpreting it and any amendment to County Ordinance Code 13.20 or any new County ordinance(s) governing the collection of fees on behalf of special districts. County recognizes the value of providing District with reasonable notice in advance of its adoption of any amendment to or repeal of County Ordinance Code Chapter 13.20 or any new County ordinance(s) governing the collection of fees on behalf of special districts and will strive to provide District notice of any proposed amendment or repeal and strive to afford District with a reasonable opportunity to provide meaningful comments to County prior to any such enactment or repeal, provided that the failure to do so will not affect the validity of any such action or constitute a breach of this agreement.

9. Disputes As to Fees.

District agrees that its sole remedy in any action to recover fees it claims County should have disbursed to District, including any untimely disbursement, is limited to the amount of the undisbursed fees. District waives any and all right to seek or recover interest on any sum unpaid or owed beyond any interest accrued by the County or any consequential, compensatory, or punitive damages, or any other relief or recovery other than the fees County collected and should have disbursed to District.

In the event of any application to reduce or appeal a fee by a developer, disagreement regarding the amount or application of any fees collected by County on behalf of District by a third party, or protest under Government Code sections 66020 or 66021, County may refer the matter to District and, within the reasonable time requested by County, District shall advise the County in writing as to how District recommends the County should proceed. Any disagreement

as to the amount or application of any fees or any protest are included in the District's covenant to defend, indemnify, and hold County harmless as detailed in Article 7.

10. Termination of Agreement.

Either party may terminate this Agreement by providing sixty (60) days' notice in writing to the other party for any reason. Termination of this Agreement relieves County of the obligation to collect fees only after expiration of the sixty (60) days' notice, unless the parties mutually agree in writing to cease collection of fees sooner.

The parties agree that District's covenant to defend, indemnify, and hold County harmless, as provided for in Article 7, survives termination of this Agreement regardless of which party terminates the agreement or the circumstances or reasons giving rise to the termination. The parties further agree that District's covenant to defend, indemnify, and hold harmless in Article 7 continues even after this Agreement expires or County ceases collecting fees on behalf of District. The parties further agree that District's obligations in this Agreement as to fees already collected survive termination regardless of which party terminates the agreement or the circumstances or reasons giving rise to the termination.

11. General Provisions.

A. Governing Law. This Agreement shall be governed by and construed under the laws of the State of California. Any action to interpret or enforce this Agreement shall be brought and maintained exclusively in the courts of and for El Dorado County. No such action may be instituted by either party until they have met and conferred in good faith over any disputed issues.

B. Severance. Any provision, sentence, or word of this Agreement that proves to be invalid or illegal shall in no way affect, impair, or invalidate any other provision, sentence, or word of this Agreement and such other provisions, sentences, and words shall remain in full force and effect.

C. Entire Agreement; Amendment. This Agreement contains the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior negotiations, understandings, or agreements unless otherwise stated herein. This Agreement may be modified only in writing signed by both parties.

D. No Presumption Against Drafter. This Agreement shall be interpreted as if jointly prepared by the parties. No presumption shall arise from the identity of the drafter.

E. Authority. Each party warrants to each other that the individual signing this Agreement on behalf of such party is fully authorized to bind such party and agrees to be bound by this Agreement as of the effective date of this Agreement.

F. Administrator. The County employee with responsibility for administering this Agreement is Don Ashton, Chief Administrative Officer, or successor.

G. No Third Party Rights. This Agreement has been created exclusively for the benefit of the signatory parties and no rights are created in any third party by entry into this Agreement.

H. Effective Date. The effective date of this Agreement shall be upon execution by the parties.

I. Notices. All notices permitted or required under this Agreement shall be deemed made when delivered to the applicable party's representative as provided in this Agreement. The applicable representative shall be the individual listed, his or her designee, or his or her successor in the position listed below. Additionally, such notices may be given to the respective parties at the following address or at such other address as the respective parties may provide in writing for this purpose:

COUNTY:

Don Ashton
Administrative Officer or successor
330 Fair Lane
Placerville, CA 95667

DISTRICT:

David Roberts
Fire Chief
El Dorado Hills Fire District
1050 Wilson Boulevard
El Dorado Hills, CA 95762

Such notice shall be deemed made when personally delivered or, when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid, return receipt requested and addressed to the party at its applicable address.

J. Time of the Essence. The Parties shall act promptly and in good faith to perform all such acts required under this Agreement, including but not limited to execution of any necessary documents, required effectuate the terms of this Agreement.

K. Enforcement of Agreement. The prevailing party shall be entitled to attorney's fees and costs in the event of litigation related to any action brought to enforce the terms and conditions of or obligations provided for in this Agreement. This provision is intended to include any action brought by County to enforce District's covenant to defend, indemnify, and hold harmless and any other obligation set forth herein.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the dates set forth below.

County of El Dorado

Dated: _____

By: _____
Shiva Frentzen, Chair, Board of Supervisors

ATTEST: James S. Mitrisin, Clerk of the Board

By: _____
Deputy Clerk

El Dorado Hills County Water District

Dated: _____

By: _____
Charles J. Hartley
Its: President of the Board of Directors