

RESOLUTION NO. 3111

A RESOLUTION OF THE CITY OF WILSONVILLE AUTHORIZING THE CITY MANAGER TO ENTER INTO A NON-STATUTORY DEVELOPMENT AGREEMENT WITH DELTA LOGISTICS, INC.

WHEREAS, on October 15, 2007, City Council adopted the Coffee Creek Master Plan; and

WHEREAS, on May 8, 2023, the Development Review Board approved a warehouse/manufacturing development at 9710 SW Day Road within the Coffee Creek industrial area (the "Property") to be developed by Delta Logistics, Inc. ("Developer"), and the City docket number for the approved development application is DB22-0007 ("Approved Development"); and

WHEREAS, a condition of approval (PFA 7) for the Approved Development requires Developer to place existing overhead utilities crossing SW Day Road underground ("Utility Undergrounding"), which Utility Undergrounding is eligible for transportation system development charge credits; and

WHEREAS, another condition of approval (PFA 14) requires Developer to enter into a development agreement with the City wherein Developer agrees that if it applies to do a development west of the significant resource overlay zone on the Property, Developer will provide adequate right-of-way/easement/improvements reflective of its proportionate share of its impact; and

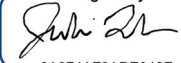
WHEREAS, the parties have negotiated a non-statutory development agreement to memorialize the requirements in PFA 7 and PFA 14, which agreement is attached hereto as Exhibit A.

NOW, THEREFORE, THE CITY OF WILSONVILLE RESOLVES AS FOLLOWS:

Section 1. The City Council authorizes the City Manager to enter into and execute on behalf of the City of Wilsonville a Non-Statutory Development Agreement with Delta Logistics, Inc., which agreement must be substantially similar to Exhibit A attached hereto.

Section 2. Effective Date. This Resolution is effective upon adoption.

ADOPTED by the Wilsonville City Council at a regular meeting thereof this 4th day of January, 2024, and filed with the Wilsonville City Recorder this date.

DocuSigned by:

8A974AE3ADE042E

JULIE FITZGERALD, MAYOR

ATTEST:

DocuSigned by:

E781DE10276B498...

Kimberly Veliz, City Recorder

SUMMARY OF VOTES:

Mayor Fitzgerald	Excused
Council President Akervall	Yes
Councilor Linville	Yes
Councilor Berry	Yes
Councilor Dunwell	Yes

EXHIBIT:

A. Non-Statutory Development Agreement

EXHIBIT A

NON-STATUTORY DEVELOPMENT AGREEMENT BETWEEN DELTA LOGISTICS, INC. AND THE CITY OF WILSONVILLE, OREGON

Pursuant to the City's home rule authority, this non-statutory Development Agreement ("Agreement") is entered into by and between the **City of Wilsonville**, an Oregon municipal corporation ("City"), and **Delta Logistics, Inc.**, an Oregon corporation ("Developer"). This Agreement is not a statutory development agreement under ORS Chapter 94.504-94.528 and does not constitute a "land use decision." The effective date of this Agreement is the _____ day of _____ 2023 ("Effective Date"). The City and Developer may be referred to herein individually as a "Party" or collectively as the "Parties."

RECITALS

A. Developer proposes to construct a warehouse/manufacturing development ("Development") located at Tax Lots 600 and 601, Section 2B, Township 3 South, Range 1 West, Willamette Meridian, Washington County, Oregon ("Property"), which is located in the City's Coffee Creek Industrial Area and to the north of its current operations within the City of Wilsonville, which are located at Tax Lot 400, Section 2CA, Township 3 South, Range 1 West, Willamette Meridian, Washington County, Oregon ("Current Operations site"). The Development will be constructed consistent with Developer's approved development application, City Docket No. DB22-0007 ("Approved Application").

B. Prior to granting the Approved Application, the City proposed a condition that would have required Developer to place underground existing aerial utility lines crossing Day Road, (the "Underground Improvements") which was required by the City pursuant to Wilsonville Development Code ("WDC") Section 4.320(.01). On March 15, 2023, Developer submitted a letter to the City explaining that, regardless of whether utility line undergrounding is required by the WDC, such a condition of approval would amount to an unconstitutional taking under the 5th Amendment of U.S. Constitution. This Agreement does not represent an opinion by the City as to whether it agrees with Developer's position.

C. In response, the City and Developer entered into an informal agreement that would allow Developer to obtain Transportation Systems Development Charge ("TSDC") credits or a TSDC refund to account for all costs related to undergrounding utility lines across Day Road, which Developer agreed would eliminate any constitutional infirmities of such a requirement.

D. As a result of this informal agreement, the Approved Application includes Condition of Approval "PFA 7," which requires developer to place underground certain overhead utilities, a portion of which will cross SW Day Road, and obligates the City to issue System Development Charge ("SDC") credits for such underground utility crossings of SE Day Road. Condition PFA 7 provides as follows:

"PFA 7. With the Public Works Permit: The construction drawings shall show all existing overhead utilities along the proposed development's frontage on SW Day Road will be placed underground. **Prior to final completeness of the Public Works Permit:** All existing overhead utilities along the proposed development's frontage on SW Day Road shall be placed underground. Placement of existing

overhead utilities crossing SW Day Road are eligible for System Development Charge (SDC) Credits. When eligible, SDC Credits will be issued in accordance with City Code Section 11.100.”

E. As explained in condition PFA 7, underground utility crossings of Day Road are eligible for TSDC credits issued in accordance with WC 11.100, which the City Code authorizes the City to issue a refund of the same in lieu of credits pursuant to Wilsonville Code (“WC”) 11.100(6)(b).

F. The Parties seek to memorialize the terms and conditions for a TSDC credit or refund corresponding to the cost of the Undergrounding Improvements, consistent with the Approved Application’s Condition of Approval PFA 7 and as allowed under Wilsonville Code (“WC”) Section 11.100.

G. The City has sole discretion of whether to issue a systems development charges (“SDC” or “SDCs”) refund check to a developer in lieu of SDC credits pursuant to WC 11.100(6)(b). Given Developer’s unique Development, and considering that Developer’s use of TSDC credits in the future is unlikely, the City is willing to provide a refund check for TSDCs up to the amount paid by Developer at the time of issuance of a building permit, in lieu of issuing credits for TSDCs, pursuant to WC 11.100(6)(b).

H. The Property is within the Coffee Creek Industrial Area and subject to the City’s Coffee Creek Industrial Design Overlay District regulations, including the Coffee Creek Industrial Area Regulating Plan (“Regulating Plan”). The Regulating Plan identifies a supporting street accessing SW Day Road along the western edge of the Property. The Approved Application does not identify development of the portion of the Property between the western boundary and Tapman Creek to the east (the “West Portion”), but does state that potential future development may occur in the West Portion.

I. Since Developer does not propose development on the West Portion but may do so in the future, the Parties agreed to the Approved Application’s Condition of Approval PFA 14, which states:

~~“PFA 14. Prior to Issuance of a Public Works Permit Final Building Certificate of Occupancy: The Applicant shall be required to enter into a Development Agreement with the City. The Development Agreement shall reflect that the applicant agrees that if applicant applies to do a development west of the SROZ, the applicant shall provide adequate right-of-way/easement/improvements reflective of its proportionate share of its impact. shall dedicate a 31-foot wide public access and utility easement along the western property line for the purposes of a future Supporting Street.”~~

[Italicized and stricken text appears in the decision issued May 9, 2023, reflecting insertion and deletion from the initial draft condition, which was approved by the Development Review Board.]

AGREEMENT

In consideration of the foregoing Recitals, and incorporating all of the above Recitals by reference in this Agreement as if fully set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, all of the above-named Parties agree as follows:

1. DEVELOPER'S OBLIGATIONS AND LIMITATIONS

1.1. Construction of Approved Public Improvements. Developer is responsible for constructing and installing all infrastructure, utilities, and other improvements as required in the Conditions of Approval stated in the Approved Application. These improvements shall be constructed by Developer at Developer's sole expense, except Developer will receive a TSDC refund check relating to the Undergrounding Improvements pursuant to WC 11.100. All foregoing improvements must be completed, inspected by the City, and deemed complete by the City before the City will issue any temporary occupancy permits to Developer.

1.2. TSDC Reimbursement Amount. The TSDC credit or refund amount shall be limited to that amount of TSDCs otherwise chargeable against the Development.

1.3. Reimbursement of Expenses. Once Developer has completed the Undergrounding Improvements and paid TSDCs for its Development, and the City has inspected and approved such Undergrounding Improvements, Developer must comply with the requirements in WC 11.100 to request a TSDC refund from the City. Pursuant to WC 11.100, the City will confirm the TSDC credit available to Developer, and will, in lieu of issuing a credit certificate, will issue Developer a TSDC refund pursuant to WC 11.100(6)(b) up to the amount Developer paid in TSDCs. While the parties do not anticipate the TSDC credit to exceed the amount of TSDCs paid by Developer, in the event the credit exceeds the amount of TSDCs paid by Developer, Developer will receive a refund check up to the amount of TSDCs paid and a TSDC credit certificate for any remainder.

1.4. Supporting Street. The Parties acknowledge and agree that future development in the western portion of the Property, which is located west of identified wetlands on the Property, may require Developer to provide right-of-way dedication(s), easement(s), and/or improvement(s) related to a future Supporting Street identified in the Coffee Creek Design Overlay District. Should Developer submit an application to develop such western portion of the Property, the applicant shall provide adequate right-of-way/easement/improvements reflective of its proportionate share of such development's impact on the public street system.

1.5. Dispute Resolution. If Developer reasonably believes that the City's proposed refund amount does not cover the creditable or refundable costs, it may pursue the SDC appeal process outlined in WC 11.150.

2. CITY'S OBLIGATIONS AND LIMITATIONS

2.1. Confirmation of TSDC Credit Eligibility. The City agrees that Developer is eligible for TSDC credits for construction the Undergrounding Improvement.

2.2. City to Pay Refundable Costs. The City agrees to apply a refund from the total TSDC payments of the Developer pursuant to WC 11.100(6)(b).

2.3. Dispute Resolution. If the City believes that certain submitted items do not qualify as Refundable Costs or disputes whether Developer appropriately calculated the Refundable Costs, it shall immediately notify Developer and work in good faith with Developer establish an agreement on final Refundable Costs. If Developer disagrees with the TSDC refund, Developer may pursue an appeal as provided in WC 11.150.

3. RECORDING

This Agreement runs with the Property that is subject to this Agreement. Either this Agreement or a memorandum of this Agreement will be recorded by the City with the Washington County Recorder's Office for all real property subject to this Agreement.

4. DEFAULT

4.1. Except for the SDC appeal process to challenge TSDCs assessed or refunded, if either Party fails to perform its obligations pursuant to the terms of this Agreement ("Defaulting Party"), the other Party ("Non-Defaulting Party") will provide Defaulting Party with written notice of the default and a period of fourteen (14) days to cure the default. If Defaulting Party notifies Non-Defaulting Party that it cannot, in good faith, do so within the fourteen (14) day cure period provided, then Non-Defaulting Party may elect, in its sole discretion, to extend the cure period to an agreed upon time period, which agreed upon extension must be in writing and signed by the Parties prior to the expiration of the cure period. Unless a written, signed extension has been fully executed by the Parties, if Defaulting Party fails to cure prior to expiration of the cure period, the Agreement is automatically terminated.

4.2. Except as limited by Subsection 4.3 below, in addition to any other remedies Non-Defaulting Party may have, both at law and in equity, for breach of contract, Defaulting Party shall be liable for all costs and damages incurred by Non-Defaulting Party as a result of the default by Defaulting Party, including, but not limited to all costs incurred by Non-Defaulting Party in procuring services from others as needed to complete this Agreement.

4.3. Except as provided in Section 4.2, above, neither party to this Agreement shall be liable to the other party for special, indirect or consequential damages under any provision of this Agreement or for any special, indirect or consequential damages arising out of any act or failure to act hereunder.

5. MISCELLANEOUS PROVISIONS

5.1. Integration. This Agreement contains the entire and integrated agreement between the Parties regarding TSDC refund and potential future development of the West Portion of the Property and supersedes all prior written or oral discussions, representations, or agreements regarding the same. In case of conflict among this Agreement and any other documents, the provisions of this Agreement shall control, and the terms most favorable to the City, within the City's sole discretion, will apply.

5.2. Legal Effect and Assignment. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, personal representatives, successors, and assigns. This Agreement may be enforced by an action at law or in equity.

5.3. Assignment. This Agreement is to be assignable to a ground-lessee of, or a successor in title, to the Property. Consistent with Section 4, above, this Agreement shall be deemed assigned by operations of a fee simple conveyance of the property to a successor in title. This Agreement shall not be assigned to any other person or corporate entity.

5.4. No Third-Party Beneficiaries. None of the duties and obligations of any Party under this Agreement shall in any way or in any manner be deemed to create any rights in any person or entity other than the Parties hereto or their respective heirs, successors, and assigns.

5.5. Governing Law/Jurisdiction. This Agreement shall be construed in accordance with and governed by the laws of the State of Oregon, regardless of any conflicts of laws. Jurisdiction and venue for any dispute will be in Washington County Circuit Court, Oregon.

5.6. Time of the Essence. Time is expressly declared to be of the essence of this Agreement.

5.7. Notices. All notices, demands, consents, approvals, and other communications which are required or desired to be given by any Party to each other hereunder shall be in writing and shall be hand delivered or sent by overnight courier or United States Mail at its address set forth below, or at such other address as such Party shall have last designated by notice to the other. Notices, demands, consents, approvals, and other communications shall be deemed given when delivered, three (3) days after mailing by United States Mail, or upon receipt if sent by courier; provided, however, that if any such notice or other communication shall also be sent by telecopy or fax machine, such notice shall be deemed given at the time and on the date of machine transmittal.

To City: City of Wilsonville
Attn: Amy Pepper, Development Engineering Manager
29799 SW Town Center Loop East
Wilsonville, OR 97070

With a Copy To: City of Wilsonville
Attn: Amanda Guile-Hinman, City Attorney
29799 SW Town Center Loop East
Wilsonville, OR 97070

To Developer: Delta Logistics, Inc.
Attn: Vladimir Tkach
9835 SW Commerce Circle
Wilsonville, OR 97070

With a Copy To: Schwabe Williamson & Wyatt PC
Attn: Garrett Stephenson
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204

5.8. Severability. If any provision of this Agreement is found to be void or unenforceable to any extent, it is the intent of the Parties that the rest of the Agreement shall remain in full force and effect, to the greatest extent allowed by law.

5.9. Modification. This Agreement may not be modified except by written instrument executed by Developer and the City.

5.10. Interpretation. As a further condition of this Agreement, the City and Developer acknowledge that this Agreement shall be deemed and construed to have been prepared mutually by each party and it shall be expressly agreed that any uncertainty or ambiguity existing therein shall not be construed against any party.

5.11. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall constitute an original Agreement but all of which together shall constitute one and the same instrument.

5.12. Authority. Each party signing on behalf of Developer and the City hereby warrants actual authority to bind their respective party.

IN WITNESS WHEREOF the City and Developer caused this Agreement to be executed by its duly authorized undersigned officer or agent on the date hereinabove first written.

DELTA LOGISTICS, INC.

CITY OF WILSONVILLE

By: _____

By: _____

Print Name: _____

Print Name: _____

As Its: _____

As Its: _____

APPROVED AS TO FORM:

Garrett Stephenson
Of Counsel for Developer

Amanda Guile-Hinman, City Attorney