

TO: Mayor and Councilmembers

FROM: Thomas Frutche, City Manager

SUBJECT: Agreement for Advance of Funds and Budget Appropriation for The Quorum Project along South Vine Street and Highway 46

DATE: September 6, 2016

Needs: For the City Council to approve an Agreement for Advance of Funds for City expenses related to the annexation and development of the Quorum properties at the City's western gateway, adjacent to South Vine Street and Highway 46.

- Facts:
1. Quorum Realty Fund IV is seeking to initiate extensive development at the City's western gateway. On August 2, The Council approved a settlement agreement and release that will allow this development proposal to move forward. Prior to any development being entitled, however, the property must be annexed into the City and the City's General Plan must be amended.
 2. The annexation process is complex and time-consuming. Under the terms of the settlement agreement and release, the City will be the applicant for the annexation. This process will require updating and completing a CEQA analysis initiated several years ago. This analysis, plus other necessary steps, must be performed by a mix of in-house staff and outside substantive matter experts.
 3. The settlement agreement specifies that Quorum will underwrite the total costs of the annexation, environmental analysis, General Plan amendment, and entitlement processes, and will do so by establishing an account that the City will draw down as bills are paid. At pre-determined points, the account will be replenished.
 4. As expenditures will not be made prior to the revenues being received, no reserve funds need to be committed by approving the appropriation. In this way, the private project is always being paid for by Quorum, the private entity proposing the project, not the City.
 5. The City and Quorum have developed an agreement that provides structure to the process.

Analysis &

Conclusion: By executing the agreement, the City ensures that the citizens of Paso Robles are never paying for any part of the work required for project completion. This is the best means for ensuring fairness to both parties and transparency for the general public.

Policy

Reference: City General Plan and Gateway plan.

Fiscal

Impact: Approval of the agreement ensures the annexation process has no fiscal impact on the City. The agreement calls for an initial deposit into the advance deposit fund of \$36,000. It is expected that as much as \$75,000 will be required before the end of the fiscal year. That amount is subject to change as the project progresses. No budget amendment is necessary as receipts and disbursements will be posted to a deposit account or a balance sheet account, not an operating or capital fund.

- Options:
- A.
 - 1. Approve an Agreement for the Advance of Funds with Quorum Realty Fund IV, LLC for the annexation, environmental analysis, General Plan amendment, entitlement, and ancillary processes for a proposed development project at the City's western gateway, adjacent to South Vine Street and Highway 46; and
 - 2. Authorize the City Manager and City Attorney to jointly make any minor changes to the draft agreement, consistent with Council policy and the benefit of the City, to reflect needs that may later become apparent; or
 - B. Amend, modify, or reject the above option.

Attachments:

- 1. Draft Agreement for the Advance of Funds

**CITY OF EL PASO DE ROBLES
AGREEMENT FOR ADVANCE OF FUNDS
[QUORUM REALTY FUND IV, LLC]**

1. PARTIES AND DATE.

This Agreement for Advance of Funds (“Agreement”) is made this _____ day of _____, 2016, by and between the City of El Paso de Robles, a California municipal corporation (“City”), and Quorum Realty Fund IV, LLC, a Delaware limited liability company (“Developer”). City and Developer are sometimes individually referred to as “Party” and collectively as “Parties” in this Agreement.

2. RECITALS.

2.1 Property. The Developer is the owner of that certain real property located adjacent to the City of El Paso de Robles, County of San Luis Obispo, California, and more particularly described in Exhibit “A” attached hereto and incorporated herein by reference (“Property”).

2.2 Project. The Developer is contemplating the development of the Property as described in Exhibit “B” attached hereto and incorporated herein by reference. The Developer has submitted applications for various discretionary land use approvals for the Project, including, without limitation, (i) an expansion of the boundaries of the City’s sphere of influence; (ii) annexation of the Property to the City; (iii) certain proposed land uses for the Property; (iv) an amendment to the City’s General Plan; (v) possible agreements between the City and Developer regarding development of the Property, including, but not limited to, a development agreement pursuant to Government Code section 65864 *et seq.*; and (vi) all related environmental review pursuant to the California Environmental Quality Act (“CEQA”) and other applicable laws, rules and regulations. (All such actions are collectively referred to herein as the “Project”).

2.3 Prior Application. City previously had been processing applications submitted by Developer for expansion of the boundaries of the City’s sphere of influence, annexation to the City of the Property as well as additional real property owned by Developer, and certain land use entitlements, when a dispute arose between the parties. Thereafter, the parties entered into a Settlement Agreement and Release, dated August 2, 2016. The City and Developer now desire to proceed with processing and consideration of the Project.

2.4 City Costs. The Parties intend that all costs and expenses associated with City’s review, evaluation, processing of the Project application and negotiation, analysis, drafting and implementation of any agreements related to the Project, including but not limited to compensation for all City employee staff time and payment of all third-party consultant contracts (“Consultants”), including legal consultations, shall be paid using funds deposited in advance with City by Developer for such purpose and that City shall not be required to advance City funds or incur any liability to cover such costs and expenses.

2.5 Reimbursement. As a condition to the City’s completion of the Project review process, the Developer has agreed to reimburse the City for City staff time and Consultants’ costs and expenses related to the City’s Project review process, as well as any other out-of-pocket

expenses incurred by the City, in the manner and amounts set forth in this Agreement. The Developer's reimbursement of City under this Agreement will ensure that the City has the necessary resources to diligently and efficiently process the Developer's Project.

3. TERMS.

3.1 Incorporation of Recitals. The Parties agree that the Recitals constitute the factual basis upon which the City and the Developer have entered into this Agreement. The City and the Developer each acknowledge the accuracy of the Recitals and agree that the Recitals are incorporated into this Agreement as though fully set forth at length.

3.2 City Selection of Consultants. As a necessary and indispensable part of its fact finding process relating to the review of the Developer's proposed Project and uses of the Property, the City shall retain the services of Consultants to provide advice as the City may deem necessary in its reasonable and sole discretion. The City has thus far retained or is prepared to retain (either directly or as subconsultants) those Consultants listed in Exhibit "C" attached hereto and incorporated herein by reference, but shall have the right to retain any additional consultants or sub-consultants pursuant to this Agreement. The contemplated general scope of work of the Consultants for the Project is also described in Exhibit "C" attached hereto, but the City reserves the right, in its reasonable and sole discretion, to amend the scope of work as it deems necessary and appropriate to the City's proper review and consideration of the Developer's Project.

The Developer agrees that, notwithstanding the Developer's reimbursement obligations under this Agreement, Consultants shall be the contractors exclusively of the City and not of the Developer. Except for those disclosures required by law, including, without limitation, the Public Records Act, all conversations, notes, memoranda, correspondence and other forms of communication by and between the City and its Consultants shall be, to the extent permissible by law, privileged and confidential and not subject to disclosure to the Developer. The Developer agrees that it shall have no claim to, nor shall it assert any right in any reports, correspondence, plans, maps, drawings, news releases or any and all other documents or work product produced by the Consultants.

3.3 Developer to Cooperate with Consultants. The Developer agrees to cooperate in good faith with the Consultants. The Developer agrees that it will instruct its agents, employees, consultants, contractors and attorneys to reasonably cooperate with the Consultants and to provide all necessary documents or information reasonably requested of them by the City and/or the Consultants; provided, however, that the foregoing shall not require the disclosure of any documents or information of the Developer which by law is privileged, proprietary, confidential, and exempt from disclosure under the Public Records Act.

3.4 Developer's Deposit Account. The Developer shall advance to the City one hundred percent (100%) of the actual fees, costs, and other expenditures incurred by the City relative to City staff time and the Consultant costs, as well as any other out-of-pocket expenses incurred by the City ("Costs"). The City has preliminarily reviewed the scope(s) of work required and has estimated the initial Costs for employee staff time and all Consultants to be approximately THIRTY-SIX THOUSAND DOLLARS (\$36,000). Within ten (10) calendar days of the execution of this Agreement, the Developer shall submit a deposit in the amount of THIRTY-SIX

THOUSAND DOLLARS (\$36,000) to cover the initial Costs, which amount the City shall separately account for in a Project deposit account (“Deposit Account”).

As expenditures associated with the Project are incurred, the City shall draw upon the Deposit Account to make the required payments. At any time, the City may request an additional deposit based on the City’s good faith estimates of City’s anticipated expenditures for the following two months, and Developer shall submit the required amount of funds to City within five (5) business days of such request. In the event Developer fails to make any required deposit, City shall have the right to consider Developer's Project applications as withdrawn and cease processing such applications.

The City shall maintain accurate records of all expenditures resulting from the Project, and will provide a payment summary to Developer each time additional funds are requested or within a reasonable time upon request. In the event that excess funds remain in the Deposit Account upon conclusion of the Project and after all final payments to the Consultants have been made, the City agrees to refund that excess amount, if any, to Developer within fifteen (15) days of final payment to the Consultants. Alternatively, if the Costs of the services of the Consultants exceed the Estimated Costs and Excess Costs, if any, then Developer shall remain obligated to pay for all such Costs. Developer shall pay any such amount within ten (10) calendar days of demand for payment by City.

3.5 Term. The term of this Agreement shall commence on the date that this Agreement is approved by the City Council and fully executed by the Parties, and shall terminate when all services required for the project by Consultants have been completed to the City’s reasonable satisfaction and the Developer has satisfied all of its obligations under this Agreement. For purposes of this section, Developer’s obligations shall include, but shall not be limited to, its obligation to reimburse the City for Estimated Costs and Excess Costs, whether or not paid by the City to Consultants prior to the date of termination. The Developer’s obligation to reimburse the City as provided in this Agreement shall survive the natural expiration of this Agreement pursuant to this section, as well as the termination of this Agreement pursuant to Section 3.6.

3.6 Early Termination.

3.6.1 By City. The City may, in its reasonable and sole discretion, terminate this Agreement prior to the term set forth in Section 3.5 above, without cost or liability to the City, upon thirty (30) days prior written notice to the Developer in the event that Developer either: (1) fails to satisfy any obligation of this Agreement; or (2) fails to reasonably prosecute its application(s) for the Project.

3.6.2 By Developer. The Developer may, in its reasonable and sole discretion, terminate this Agreement prior to the end of the term set forth in Section 3.5 above, upon thirty (30) days' prior written notice to the City; provided, however, that Developer’s right to so terminate this Agreement is expressly contingent upon Developer satisfying both of the following: (1) Developer shall give City written notice withdrawing its application(s) for the Project; and (2) Developer shall satisfy all of its obligations under this Agreement up through the proposed effective date of termination. For purposes of this section, Developer’s obligations shall include, but shall not be limited to, its obligation to reimburse the City for Estimated Costs and Excess

Costs, whether or not paid by the City to Consultants prior to the date of termination.

3.6.3 Notice to Consultants. Within two (2) working days following either the City's decision to terminate this Agreement or the City's receipt of written notice indicating the Developer's decision to terminate this Agreement, the City shall notify all Consultants and instruct them to cease work on the Project. Consultants shall also be instructed to bill the City for any services completed prior to the notice of termination.

3.7 Assignability. This Agreement may not be assigned by either Party without the prior and express written consent of the other Party, which consent shall not be unreasonably withheld. In determining whether to approve a request by the Developer to assign this Agreement, the City may consider, among other things, the proposed assignee's financial status and commitment to the Project. Any attempted assignment of this Agreement not in compliance with the terms of this Agreement shall be null and void and shall confer no rights or benefits upon the assignee.

3.8 No Oral Modifications. This Agreement represents the entire understanding of the City and the Developer and supersedes all other prior or contemporaneous written or oral agreements pertaining to the subject matter of this Agreement. This Agreement may be modified, only by a writing signed by both the authorized representatives of both the City and the Developer. All modifications to this Agreement must be approved by the City Council.

3.9 Binding Upon Successors. This Agreement and each of its terms shall be binding upon the City, the Developer and their respective officers, elected officials, employees, agents, contractors, and permitted successors and assigns.

3.10 Legal Challenges. Nothing herein shall be construed to require City to defend any third party claims and suits challenging any action taken by the City with regard to any procedural or substantive aspect of the City's approval of development of the Property, the environmental process, or the proposed Project. The Developer may, however, in its sole and absolute discretion appear as real party in interest in any such third party action or proceeding, and in such event, it and the City shall defend such action or proceeding and the Developer shall be responsible and reimburse the City for whatever legal fees and expert or other costs, in their entirety, including actual attorneys' fees, which may be incurred by the City in defense of such action or proceeding. This City shall have the absolute right to retain such legal counsel as the City deems necessary and appropriate and the Developer shall reimburse the City for any and all attorneys' fees and expert or other costs incurred by the City as a result of such third party action or proceeding. Developer may, at any time, notify City in writing of its decision to terminate such reimbursement obligation and, thereafter, the City may choose, in its sole discretion, to defend or not defend such third party action or proceeding. In the event that the City decides not to continue the defense of such third party action or proceeding, Developer shall be obligated to reimburse City for any and all costs, fees, penalties or damages associated with dismissing the action or proceeding. In the event that the City decides to continue the defense of such third party action or proceeding, Developer shall have no further obligation to reimburse City for its attorney's fees and expert or other costs. City will provide Developer with monthly invoices for all such costs in the case of a Third Party Project-Related Challenge. Developer shall make payment to City for any costs covered by this section within thirty (30) days of receipt of an invoice from City for such costs.

The rights and obligations set forth in this Section 3.10 shall survive termination of this Agreement.

3.11 Attorneys' Fees. In the event that any action or proceeding, including arbitration, is commenced by either the City or the Developer against the other to establish the validity of this Agreement or to enforce any one or more of its terms, the prevailing Party in any such action or proceeding shall be entitled to recover from the other, in addition to all other legal and equitable remedies available to it, its actual attorneys' fees and costs of litigation, including, without limitation, filing fees, service fees, deposition costs, arbitration costs and expert witness fees, including actual costs and attorneys' fees on appeal.

3.12 Jurisdiction and Venue. This Agreement is executed and is to be performed in the City of El Paso de Robles, San Luis Obispo County, California, and any action or proceeding brought relative to this Agreement shall be heard in the appropriate court in the County of San Luis Obispo, California. The City and the Developer each consent to the personal jurisdiction of the court in any such action or proceeding.

3.13 Severability. If any term or provision of this Agreement is found to be invalid or unenforceable, the City and the Developer both agree that they would have executed this Agreement notwithstanding the invalidity of such term or provision. The invalid term or provision may be severed from the Agreement and the remainder of the Agreement may be enforced in its entirety.

3.14 Headings. The headings of each Section of this Agreement are for the purposes of convenience only and shall not be construed to either expand or limit the express terms and language of each Section.

3.15 Representations of Authority. Each Party signing this Agreement on behalf of a Party which is not a natural person hereby represents and warrants to the other Party that all necessary legal prerequisites to that Party's execution of this Agreement have been satisfied and that he or she has been authorized to sign this Agreement and bind the Party on whose behalf he or she signs.

3.16 Retention of City Discretion. The Developer acknowledges and agrees that, notwithstanding the Developer's reimbursement obligations under this Agreement, the City is not obligated to approve any or all of the Project. The Developer warrants and represents that no City official, officer, employee, agent or attorney has represented, expressly or impliedly, that the City will approve the Project. The Developer understands that there will be numerous legislative and adjudicatory decisions made by the City with regard to the Project. All such decisions of the City shall be made only after full compliance with all the City's statutory and other legal obligations and after considering all appropriate information and evidence, including such evidence which may cause the City to disapprove any or all of the Project. Notwithstanding anything in this Agreement to the contrary, the City retains all authority and discretion granted to it by law to either approve, disapprove or modify the Project. The Developer agrees that the City may approve, or approve with modifications, any or all of the Project.

The Developer agrees that the City shall not be bound by any recommendations or conclusions reached by the Consultants and that the City may accept or reject, in whole or in part, any such recommendations or conclusions.

3.17 Notices. Notices required under this Agreement shall be sent to the following:

City: City of El Paso de Robles
1000 Spring Street
Paso Robles, CA 93446
Attn: Community Development Director
Tel: (805) 237-3970
Fax: (805) 237-3904

Developer: Quorum Realty Funds IV, LLC
c/o Michael Furlotti
P.O. Box 862
Ross, CA 94957
Tel: (415) 992-5945
Fax: (415) 992-5947

Notices given pursuant to this Agreement shall be deemed received as follows: (1) if sent by United States Mail, five (5) calendar days after deposit into the United States Mail, first class postage prepaid; (2) if sent by facsimile, upon transmission and actual receipt by the receiving Party; (3) if by express courier service or hand delivery, on the date of receipt by the receiving Party. The addresses for notices set forth in this Section may be changed upon written notice of such change to either the City or the Developer, as appropriate.

{Signatures on following page}

**SIGNATURE PAGE FOR
AGREEMENT FOR ADVANCE OF FUNDS
(QUORUM REALTY FUND IV, LLC)**

CITY OF EL PASO DE ROBLES

By: _____
Thomas Frutchey
City Manager

Attest: _____
Kristen L. Buxkemper
Deputy City Clerk

Approved as to Form:

By: _____
Iris P. Yang
City Attorney

**QUORUM REALTY FUND IV, LLC, a
Delaware limited liability company**

By: _____
Michael Furlotti

Its Managing Member

EXHIBIT "A"
LEGAL DESCRIPTION OF THE PROPERTY

**EXHIBIT “B”
PROJECT DESCRIPTION**

*****INSERT PROJECT DESCRIPTION*****

**EXHIBIT “C”
CONSULTANTS**

BEST BEST & KRIEGER LLP

Legal Services: Environmental (CEQA, water and other applicable environmental legal issues), planning, and other necessary legal services for the Project.

*****INSERT NAME OF CONSULTANT*****

*****INSERT DESCRIPTION OF SERVICES TO BE PROVIDED*****

*****INSERT NAME OF CONSULTANT*****

*****INSERT DESCRIPTION OF SERVICES TO BE PROVIDED*****

OTHER CONSULTANTS

Any and all other consultants determined by the City to be reasonably necessary for its review and processing of the Project application(s).