

ATTACHMENT E

Executed Funding Agreement A-15746 with
Harper Canyon Realty, LLC

**FUNDING AGREEMENT
FOR THE
HARPER CANYON/ENCINA HILLS SUBDIVISION PROJECT
ENVIRONMENTAL IMPACT REPORT**

THIS FUNDING AGREEMENT (“AGREEMENT”) is made and entered into by and between the County of Monterey, a political subdivision of the State of California (“County”) and Harper Canyon Realty, LLC (“PROJECT APPLICANT”) (collectively, the “Parties”) and effective as of the last date opposite the respective signatures below and with reference to the following facts and circumstances:

RECITALS

- A. PROJECT APPLICANT applied to the County for approval of various development permits for the Harper Canyon/Encina Hills Subdivision PLN000696.
- B. PROJECT APPLICANT applied to the County for approval of various development permits for the Harper Canyon Subdivision (“Project”) requiring an Environmental Impact Report (“EIR”).
- C. PROJECT APPLICANT entered into a Reimbursement Agreement (A-10269) with County originally on October 6, 2005, which was subsequently amended.
- D. The County engaged Pacific Municipal Consultants to prepare the EIR for the Project.
- E. On April 7, 2015, the Board of Supervisors certified the EIR and approved the Project.
- F. On May 4 and 6, 2015, LandWatch Monterey County and Meyer Community Group (collectively, “Petitioners”) filed separate but related challenges to the County’s approval of the Project in Monterey County Superior Court (Case Nos. M131893 and M131913).
- G. As of July 1, 2015, Pacific Municipal Consultants was placed under ownership of Michael Baker International, Inc.
- H. On December 3, 2018, the Superior Court issued its Final Statement of Decision and Ruling on Remedy in the case. The County and Harper appealed the Superior Court’s judgment and argued that substantial evidence supported the County’s determinations regarding the Project’s wildlife corridor impacts. The County and Harper also appealed the Superior Court’s decision that California Environmental Quality Act (“CEQA”) requires recirculation of the Final EIR (“FEIR”) on groundwater resources. Petitioners filed cross-appeals asserting that the trial court erred in rejecting their claims that the FEIR was legally inadequate in its discussion of the Project’s setting and its cumulative effect on groundwater resources.
- I. On March 29, 2021, the Court of Appeal issued its opinion. The Court of Appeal denied Petitioners cross-appeal and found that the County’s analysis of groundwater resources in

the Draft EIR was adequate. The Court of Appeal also held that CEQA did not mandate recirculation of the FEIR on the topic of groundwater resources prior to approval of the Project. The Court of Appeal agreed with the trial court's conclusion that the FEIR's analysis of the Project's impact on wildlife corridors was deficient and not supported by substantial evidence.

- J. The Court of Appeal remanded the matter to the trial court with directions to vacate its original order, and to issue a new writ of mandate ordering the Board to vacate Resolution No. 15-084, and to vacate the Board's approval and certification of the EIR for the Project only as it relates to wildlife corridor issues.
- K. On July 1, 2021, the Superior Court issued its Second Amended Judgment Granting Peremptory Writ of Mandate ("Writ of Mandate"), and Second Amended Peremptory Writ of Mandate. The writ requires the Board do the following:
 - 1. Set aside the portions of Resolution No. 15-084 certifying the FEIR for the Project as to project wildlife corridor issues only and reconsider the non-CEQA approvals in Resolution No. 15-084 and set them aside only to the extent they are dependent on project wildlife corridors issues.
 - 2. To not take any further action to approve the Project without the preparation, circulation and consideration under CEQA of a legally adequate EIR with regard to the wildlife corridor issues discussed in the Court of Appeal Opinion.
 - 3. Make and file a return to this writ within 60 days of taking such action, setting forth what it has done to comply.
- L. The Board of Supervisors expressed its desire to comply fully with the Second Amended Peremptory Writ of Mandate issued by the Court.
- M. On July, 27, 2021, the Board of Supervisors adopted a Resolution, including but not limited to, setting aside Resolution No. 15-084 for the purpose of reconsidering whether the Project as designed and previously approved would result in a significant impact to wildlife corridors and to not take any further action to approve the Project without the preparation, circulation and consideration under CEQA of a legally adequate EIR with regard to the wildlife corridor issues discussed in the Court of Appeal Opinion.
- N. PROJECT APPLICANT requests the County to contract with a qualified environmental consultant to provide additional environmental support services are necessary to prepare CEQA documentation focusing on wildlife corridors issues.
- O. The Parties agree that it is necessary and desirable that the County engage Denise Duffy & Associates, Inc., ("CONTRACTOR") to provide additional environmental support services. CONTRACTOR shall perform the Scope of Work specified in the Professional Services Agreement ("PSA") between the County and CONTRACTOR, attached to this AGREEMENT as "Exhibit 1" and incorporated herein by reference. The County shall manage the Project work performed by CONTRACTOR.

- P. The Parties hereby agree that the County shall engage CONTRACTOR to provide the services set forth in “Exhibit 1” of this AGREEMENT.
- Q. A fundamental premise of this AGREEMENT is that nothing herein is to be construed as a representation, promise, or commitment on the part of the County to give special treatment to, or exercise its discretion favorably for, the Project in exchange for PROJECT APPLICANT’S obligation to cover the County’s cost of retaining CONTRACTOR and providing County staff to work on the Project.
- R. The subject matter of this AGREEMENT is PROJECT APPLICANT’S funding of the CONTRACTOR’S services on the Project. This AGREEMENT also covers the County fee for project management, contract administration and work associated with processing the Project.
- S. The Parties make this AGREEMENT with full knowledge of the requirements of state and local law, including, but not limited to the CEQA (Public Resources Code Section 21000 *et seq.*) and the State CEQA Guidelines (California Code of Regulations Title 14, Section 15000 *et seq.*, “Guidelines”) and the Monterey County Code.

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED IN THIS AGREEMENT, THE PARTIES AGREE AS FOLLOWS:

1. Deposits to Fund PSA and County Fee for Contract Administration.

PROJECT APPLICANT shall deposit an amount equal to the base amount of the PSA between the County and CONTRACTOR for preparation of the EIR and the County Administration fees. This totals \$22,867.75 and includes: :

CONTRACTOR’S Base Budget	\$19,885.00
County Project Management/Contract Administration	<u>2,982.75</u>
	\$22,867.75

PROJECT APPLICANT shall deposit an additional \$22,000 with the County upon approval of this AGREEMENT by the County of Monterey Board of Supervisors acting on behalf of the County to reimburse County staff time for processing the PROJECT APPLICANT’S environmental review associated with the land use application.

PROJECT APPLICANT’S deposit of \$22,000 with the County shall be a condition precedent to the County’s obligation under this AGREEMENT. Any unused funds from the deposit, shall be returned to the PROJECT APPLICANT subsequent to the Project’s consideration of the Board of Supervisors.

PROJECT APPLICANT and the County understand and agree that PROJECT APPLICANT is entitled to and shall receive credit for the remaining balance of \$22,000 on deposit with the County and PROJECT APPLICANT and further agrees to reimburse County for any costs that exceed the initial \$22,000 application processing deposit.

2. Fifteen Percent (15%) Project Contingency. An additional fifteen percent (15%) of CONTRACTOR’s Base Budget shall be included in the AGREEMENT between the County and CONTRACTOR to cover contingencies. This fifteen percent (15%) Project Contingency totals \$2,982.75 and is subject to the procedures set forth in this AGREEMENT.

3. Budget Under AGREEMENT. The amount which may be charged to PROJECT APPLICANT under this AGREEMENT is initially \$47,850.50.

CONTRACTOR’S Base Budget	\$19,885.00
Land Use Application Processing Deposit	22,000.00
Project Contingency	2,982.75
Project Management/Contract Administration Fee	2,982.75
Charged Under Agreement	\$47,850.50

4. Within thirty (30) days after the end of each quarter, the County shall provide quarterly progress reports to the PROJECT APPLICANT showing CONTRACTOR’s charges from the prior quarter associated with completion of task(s) as specified in “Exhibit A” of the PSA (Scope of Services/Payment Provisions for the Project). Any Base Budget funds remaining at completion of CONTRACTOR’s services shall be returned to the PROJECT APPLICANT.

5. Engagement of CONTRACTOR. This AGREEMENT is based on the County engaging CONTRACTOR in accordance with the PSA between the County and CONTRACTOR attached as Exhibit 1. CONTRACTOR shall be responsible only to the County, and nothing in this AGREEMENT imposes any obligation on the County or CONTRACTOR to PROJECT APPLICANT other than to devote the time and attention to assisting with the processing of the Project. The County shall provide direction and guidance to the CONTRACTOR. CONTRACTOR’s contact(s) with PROJECT APPLICANT shall only be through the County. PROJECT APPLICANT, its agents, employees, consultants, representatives or partners shall not contact CONTRACTOR directly in any manner unless at a public hearing, meeting, or workshop for the PROJECT.

6. Payment(s) to CONTRACTOR and County.

a. CONTRACTOR

CONTRACTOR’s invoices shall be paid from Base Budget funds deposited by PROJECT APPLICANT and shall be paid in accordance with the terms of Section II of Exhibit “A” of the PSA with CONTRACTOR, included in Exhibit “1” of this AGREEMENT.

Should this AGREEMENT be terminated prior to March 31, 2024, any unearned balance of the Base Budget deposited by PROJECT APPLICANT to fund the PSA’s Base Budget amount shall be returned to PROJECT APPLICANT within sixty (60) days of receipt of notice of termination by the County.

b. County Contract Administration Fee

The County Project Management and Contract Administration Fee of \$2,982.75 shall be paid by PROJECT APPLICANT upon approval of this Agreement by the County of Monterey Board of Supervisors. These fees are nonrefundable.

c. Project Contingency

An additional fifteen percent (15%) of CONTRACTOR's Base Budget, in an amount not to exceed \$2,982.75, covers potential contingencies, and transfer of any Project Contingency funds into the Base Budget shall require the approval of both the County and PROJECT APPLICANT. Within five (5) working days of receipt of a request from the County, PROJECT APPLICANT shall approve or disapprove the Request for Transfer from Project Contingency and, if approved, at the same time submit a check to the County for the amount requested.

If PROJECT APPLICANT takes more than five (5) working days to respond to a Request for Transfer from Project Contingency, additional costs may accrue to CONTRACTOR, which may result in another Request for Transfer from Project Contingency.

d. Land Use Application Fees (Environmental Review)

The PROJECT APPLICANT agrees that PROJECT APPLICANT will separately pay fees to cover all County staff costs associated with the PROJECT in accordance with the current County of Monterey extraordinary application policies. The fee will be based on actual hours, measured by actual time spent on an application in quarter-hour (.25) increments. PROJECT APPLICANT is required to pay the deposit (\$22,000), which is initially established based on an estimated minimum set of hours multiplied by the applicable billable rates. If during the processing of application County staff determines that the deposit is insufficient to cover actual processing time, the PROJECT APPLICANT will be asked to increase the deposit amount based on a revised estimate provided by the County. The revised estimate will be calculated based on the established billable rate(s) multiplied by actual hours expended. Should the instance arise where the deposit is insufficient to cover the actual cost of the actual processing time, the applicant will be billed to cover the outstanding amount. All outstanding amounts must be paid prior to the County finalizing the application.

7. Relationship to Other Charges. PROJECT APPLICANT and the County agree that the expenditures associated with this AGREEMENT are in addition to the standard development application fees approved by the County.

8. No Promise or Representation. The Parties agree that nothing in AGREEMENT is to be construed as a representation, promise, or commitment on the part of the County to give special treatment to, or exercise its discretion favorably for the Project, it being understood that

PROJECT APPLICANT's funding obligation under AGREEMENT is undertaken without regard to the County's actions regarding the Project.

9. Term. AGREEMENT shall become effective April 1, 2022, and continue through March 31, 2024, unless terminated pursuant to Paragraph 9 of AGREEMENT.

10. Termination. AGREEMENT shall terminate on March 31, 2024, but may be terminated earlier by PROJECT APPLICANT or the County, by giving thirty (30) days' written notice to the other. Upon such termination, PROJECT APPLICANT shall immediately pay any outstanding invoices, as well as pay for any work performed by CONTRACTOR through effective date of termination.

11. Entire Agreement. AGREEMENT and its attachments constitute the entire agreement between the Parties respecting the matters set forth herein. The Parties each represent that neither has relied on any promise, inducement, representation, or other statement made in connection with AGREEMENT that is not expressly contained herein.

12. Negotiated Agreement. It is agreed and understood by the Parties that the AGREEMENT has been arrived at through negotiations and that neither is deemed the party which prepared AGREEMENT within the meaning of Civil Code Section 1654.

13. Assignment. Neither the County nor PROJECT APPLICANT shall have the right to assign its respective rights and obligations hereunder without the written consent of the other party. This AGREEMENT shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns.

14. Amendment. This AGREEMENT may be amended, modified or supplemented only in writing by both the Parties.

15. Contracting Officer. The contracting officer of the County, and the only entity authorized by law to make or amend AGREEMENT on behalf of the County, is the County of Monterey Board of Supervisors or a County employee whom they have specifically authorized.

16. Waiver. The failure of a party hereto at any time or times to require performance of any provision hereof shall in no manner affect its right at a later time to enforce the same. No waiver by a party of any condition or of any breach of any term contained in this AGREEMENT shall be effective unless in writing, and no waiver in any one or more instances shall be deemed to be a further or continuing waiver of any such condition or breach in any other instance or a waiver of any other condition or breach of any other term.

17. Governing Law. AGREEMENT shall be construed, interpreted and applied in accordance with the laws of the State of California applicable to commercial contracts entered into and to be performed wholly in California.

18. Construction. The language in all parts of AGREEMENT shall be construed, in all cases, according to its fair meaning. The Parties acknowledge that each party has reviewed

AGREEMENT and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of AGREEMENT.

18. Conflict with Professional Services Agreement between CONTRACTOR and the County. In the event of a conflict between the provisions of AGREEMENT and the PSA between the County and CONTRACTOR, the provisions of AGREEMENT shall govern.

19. Relationship of Parties. The Parties agree that this AGREEMENT establishes only a funding arrangement between the Parties, and that the parties are not joint venturers or partners.

20. Indemnification. PROJECT APPLICANT agrees to defend, indemnify and hold the County harmless in any action brought by any third party in which the authority of the County to enter into AGREEMENT or the validity of AGREEMENT is challenged.

21. Counterparts. This AGREEMENT may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same AGREEMENT.

22. Notices. Notice to the Parties in connection with AGREEMENT shall be given personally or by regular mail addressed as follows:

TO COUNTY: Erik V. Lundquist, AICP, Director
County of Monterey
Housing and Community Development
1441 Schilling Place, South 2nd Floor
Salinas, California 93901

TO PROJECT APPLICANT: HARPER CANYON REALTY, LLC
11400 W. Olympic Boulevard, STE 1700
Los Angeles, CA 90064

WITH A COPY TO:

TO PROJECT APPLICANT'S REPRESENTATIVES: Michael D. Cling, Attorney
313 South Main Street, Suite D
Salinas, California 93901

Notice shall be deemed effective at the time of personal delivery or seventy-two (72) hours after mailing.

IN WITNESS WHEREOF, the Parties have executed this AGREEMENT as of the last day and year written below.

COUNTY OF MONTEREY

PROJECT APPLICANT*

By: DocuSigned by:
Erik V. Lundquist
75B116916341 Erik V. Lundquist, AICP, Director
Housing and Community Development

Date: 4/8/2022

By: DocuSigned by:
Burt Forester
(Signature of Chair, President or Vice President)

Burt Forester, President
(Print Name and Title)

Date: 4/5/2022

**Approved as to Form
Office of the County Counsel
Leslie J. Girard, County Counsel**

By: DocuSigned by:
Kelly L. Donlon
22D690CA05A940E Kelly L. Donlon
Assistant County Counsel

Date: 4/6/2022

By: DocuSigned by:
Sandra Gong
(Signature of Secretary, Asst. Secretary, CFO,
Treasurer or Asst. Treasurer)

Sandra J. Gong, Chief Financial Officer
(Print Name and Title)

Date: 4/5/2022

Approved as to Fiscal Provisions

By: DocuSigned by:
Bircu Mousa
811C333563B9474 Gary Giboney
Chief Deputy Auditor-Controller

Date: 4/8/2022

**Approved as to Indemnity and Insurance Provisions
Office of the County Counsel-Risk Manager**

By: _____
Danielle Mancuso
Risk Manager

Date: _____

*INSTRUCTIONS: If CONTRACTOR is a corporation, including non-profit corporations, the full legal name of the corporation shall be set forth above together with the signatures of two (2) specified officers per California Corporations Code Section 313. If CONTRACTOR is a Limited Liability Corporation (LLC), the full legal name of the LLC shall be set forth above together with the signatures of two (2) managers. If CONTRACTOR is a partnership, the full legal name of the partnership shall be set forth above together with the signature of a partner who has authority to execute this Agreement on behalf of the partnership. If CONTRACTOR is contracting in an individual capacity, the individual shall set forth the name of the business, if any, and shall personally sign the Agreement or Amendment to said Agreement.