

RESOLUTION NO. 693

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, AUTHORIZING THE EXECUTION OF A DEVELOPMENT AGREEMENT WITH HARBOR HILL LLC.

WHEREAS, the Washington State Legislature has authorized the execution of a development agreement between a local government and a person having ownership or control of real property within its jurisdiction (RCW 36.70B.170(1)); and

WHEREAS, a development agreement must set forth the development standards and other provisions that shall apply to, govern and vest the development, use and mitigation of the development of the real property for the duration specified in the agreement (RCW 36.70B.170(1)); and

WHEREAS, for the purposes of this development agreement, “development standards” includes, but is not limited to, all of the standards listed in RCW 36.70B.170(3); and

WHEREAS, a development agreement must be consistent with the applicable development regulations adopted by a local government planning under chapter 36.70A RCW (RCW 36.70B.170(1)); and

WHEREAS, the Developer has a fee simple or other substantial beneficial interest in the real property located south of Borgen Boulevard and west of Harbor Hill Drive, Gig Harbor, Washington, which is legally described in Exhibit A of the Development Agreement, attached hereto and incorporated herein by this reference, on which the Developer intends to develop five (5) store buildings; and

WHEREAS, on November 13, 2006, the City Council held a public hearing on the Development Agreement during a regular public meeting and voted to approve the Development Agreements attached hereto as Exhibits A; Now, Therefore,

THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

Section 1. The City Council hereby authorizes the Mayor to execute the Development Agreement attached hereto as Exhibit A, with the applicant Harbor Hill LLC.

Section 2. The City Council hereby directs the Community Development Director to record the Development Agreements against the Property legally described in Exhibit A to the Development Agreement, at the cost of the applicant, pursuant to RCW 36.70B.190.

PASSED by the City Council this 13th day of November, 2006.

APPROVED:



MAYOR, CHARLES L. HUNTER

ATTEST/AUTHENTICATED:



CITY CLERK, MOLLY M. TOWSLEE

APPROVED AS TO FORM;
OFFICE OF THE CITY ATTORNEY:

BY:


CAROL A. MORRIS

FILED WITH THE CITY CLERK: 10/18/06
PASSED BY THE CITY COUNCIL: 11/13/06
RESOLUTION NO. 693

**DEVELOPMENT AGREEMENT
BY AND BETWEEN THE CITY OF GIG HARBOR
AND HARBOR HILL LLC, FOR THE
COSTCO SHOPPING CENTER RESIDUAL PARCELS**

THIS DEVELOPMENT AGREEMENT (this “Agreement”) is made and entered into this 13th day of November, 2006, by and between the City of Gig Harbor, a Washington municipal corporation, hereinafter the “City,” and Harbor Hill LLC, a limited liability company organized under the laws of the State of Washington, hereinafter the “Developer.”

RECITALS

WHEREAS, the Washington State Legislature has authorized the execution of a development agreement between a local government and a person having ownership or control of real property within its jurisdiction (RCW 36.70B.170(1)); and

WHEREAS, local governments may also enter into a development agreement for real property outside its boundaries as part of a proposed annexation or service agreement (RCW 36.70B.170(1)); and

WHEREAS, a development agreement must set forth the development standards and other provisions that shall apply to, govern and vest the development, use and mitigation of the development of the real property for the duration specified in the agreement (RCW 36.70B.170(1)); and

WHEREAS, for the purposes of this development agreement, “development standards” includes, but is not limited to, all of the standards listed in RCW 36.70B.170(3); and

WHEREAS, a development agreement must be consistent with the applicable development regulations adopted by a local government planning under chapter 36.70A RCW (RCW 36.70B.170(1)); and

WHEREAS, the Developer has a fee simple or other substantial beneficial interest in the real property located south of Borgen Boulevard and west of Harbor Hill Drive, Gig Harbor, Washington, which is legally described in Exhibit A attached hereto and incorporated herein by this reference (hereinafter the “Residual Parcels”), on which the Developer intends to develop five (5) store buildings; and

WHEREAS, the Residual Parcels comprise Residual Parcels A, B, and C, as described on Exhibit A hereto; and

WHEREAS, Developer intends to develop Building A on Parcel A, Building B on Parcel B, and Buildings C, D, and E on Parcel C; and

WHEREAS, the Developer has sold to Costco Wholesale Corporation, a Washington corporation (hereinafter “Costco”), an adjoining parcel of real property (the “Costco Parcel”), on which Costco intends to construct a Costco wholesale store (the “Costco Store”); and

WHEREAS, the Costco Parcel and Residual Parcels together comprise the entirety of the Shopping Center Property, a drawing of which is attached hereto as Exhibit B (hereinafter the “Drawing”); and

WHEREAS, the City’s code requires that primary structures be located near the front setback line (GHMC Section 17.99.300(B)) and the City’s code also requires that parking in front of buildings be minimized (GHMC Section 17.99.330(H)); and

WHEREAS, the construction of Buildings A, B, C, D, and E on the Residual Parcels will partially screen the Costco Store on the Costco Parcel from motorists and pedestrians on Borgen Boulevard, partially mitigating the aesthetic impacts of the Costco Store on such motorists and pedestrians; and

WHEREAS, existing trees within the Residual Parcels also partially screen the Costco Store on the Costco Parcel from motorists and pedestrians on Borgen Boulevard, partially mitigating the aesthetic impacts of the Costco Store on such motorists and pedestrians; and

WHEREAS, as a condition of the City’s approval of the design of the Costco Store on the Costco Parcel, the City requires assurances that the Developer either will preserve existing trees within that portion of the Residual Parcels legally described on Exhibit C attached hereto and incorporated herein by this reference (hereinafter the “Tree Preservation Area”) or will cause Buildings A, B, C, D, and E to be constructed within the time periods set forth in this Agreement (unless an extension is granted by the City as provided in Section 17 herein), as described in Sections A.4, A.6, and A.7 of the Notice of Recommendation dated June 26, 2006, from Jennifer Sitts of the City to Costco (DRB 05-75), which were incorporated into the Hearing Examiner Findings, Conclusions, and Decision dated August 1, 2006 (File Nos. SPR 05-67, REZ 04-35, and DRB 05-75), as approved in this Agreement by Resolution No. 693; and

WHEREAS, the City requires the making of this Agreement to assure that the Developer will comply with the City’s code and that future development and use of the Residual Parcels is consistent with the Residual Parcel Conditions and the conditions of the City’s permits and approvals; and

WHEREAS, this Agreement governs the development of the Residual Parcels but does not govern the development or use of the Costco Parcel; and

WHEREAS, the Developer desires to make this Agreement with the City to comply with the City’s code and the Residual Parcel Conditions; and

WHEREAS, the City has the authority to enter into a development agreement with the Developers of real property for the purposes described above; and

WHEREAS, on August 2, 2006, the City Hearing Examiner approved the Costco site plan application and rezone application; and

WHEREAS, on November 13, 2006, the City Council held a public hearing regarding this Agreement; and

WHEREAS, on November 13, 2006, the City Council voted to approve the making of this Agreement, which upon mutual execution, acknowledgment, and delivery shall be recorded in the real property records of Pierce County, Washington.

Now, therefore, the parties hereto agree as follows:

AGREEMENT

Section 1. The Project. The Project is the development and use of the Residual Parcels.

Section 2. The Subject Property. The Residual Parcels and Project site are legally described in Exhibit A attached hereto and incorporated herein by this reference.

Section 3. Definitions. As used in this Agreement, the following terms, phrases and words shall have the meanings and be interpreted as set forth in this Section.

a) "Adopting Resolution" means the Resolution which approves this Agreement, as required by RCW 36.70B.200.

b) "Certificate of Occupancy" means either a certificate issued after inspections by the City authorizing a person(s) in possession of property to dwell or otherwise use a specified building or dwelling unit, or the final inspection if a formal certificate is not issued.

c) "Council" means the duly elected legislative body governing the City of Gig Harbor.

d) "Design Manual" means the Gig Harbor Design Manual, as chapter 17.98 of the Gig Harbor Municipal Code, adopted by the City.

e) "Director" means the City's Community Development Director or Director of Planning and Building.

f) "Effective Date" means the effective date of the Adopting Resolution.

g) "Existing Land Use Regulations" means the ordinances adopted by the City Council of Gig Harbor in effect on the Effective Date, including the adopting ordinances that govern the permitted uses of land, the density and intensity of use, and the design, improvement, construction standards and specifications applicable to the development of the Residual Parcels, including, but not limited to the Comprehensive Plan, the City's Official Zoning Map and

development standards, the Design Manual, the Public Works Standards, SEPA, Concurrency Ordinance, and all other ordinances, codes, rules and regulations of the City establishing subdivision standards, park regulations, building standards, and other development standards. Existing Land Use Regulation does not include non-land use regulations, which includes taxes and impact fees.

h) “Landowner” is the party who has acquired any portion of the Residual Parcels from the Developer and who, unless otherwise released as provided in this Agreement, shall be subject to the applicable provisions of this Agreement. The “Developer” is identified in Section 5 of this Agreement.

i) “Project” means the anticipated development of the Residual Parcels, as specified in Section 1 and as provided for in all associated permits/approvals, and all incorporated exhibits.

Section 4. Exhibits. Exhibits to this Agreement are as follows:

- a) Exhibit A – Description of Residual Parcels
- b) Exhibit B – Drawing
- c) Exhibit C – Description of Tree Preservation Area

Section 5. Parties to Development Agreement. The parties to this Agreement are:

a) The “City” is the City of Gig Harbor, 3510 Grandview Street, Gig Harbor, Washington 98335.

b) The “Developer” or Owner is a private enterprise which owns the Residual Parcels in fee and whose principal office is located at 19245 Tenth Avenue N.E., Poulsbo, Washington 98370.

c) The “Landowner.” From time to time, as provided in this Agreement, the Developer may sell or otherwise lawfully dispose of a portion of the Residual Parcels to a Landowner who, unless otherwise released, shall be subject to the applicable provisions of this Agreement related to such portion of the Residual Parcels.

Section 6. Project is a Private Undertaking. It is agreed among the parties that the Project is a private development and that the City has no interest therein except as authorized in the exercise of its governmental functions.

Section 7. Term of Agreement. This Agreement shall commence upon the effective date of the Adopting Resolution approving this Agreement and shall continue in force for a period of two (2) years or until all of the obligations of the Developer as set forth herein have been fully performed to the satisfaction of the City, whichever is later, unless extended or terminated as provided herein. Following the expiration of the term or extension thereof, or if sooner terminated, this Agreement shall have no force and effect, subject however, to post-termination obligations of the Developer or Landowner.

Section 8. Further Discretionary Actions. Developer acknowledges that the Existing Land Use Regulations contemplate the exercise of further discretionary powers by the City. These powers include, but are not limited to, review of additional permit applications under SEPA. Nothing in this Agreement shall be construed to limit the authority or the obligation of the City to hold legally required public hearings, or to limit the discretion of the City and any of its officers or officials in complying with or applying Existing Land Use Regulations.

Section 9. Satisfaction of Residual Parcel Conditions. The Developer proposes to perform the Residual Parcel Conditions under the following schedule, instead of at the time of construction of the Costco Store. The City agrees to the following schedule, subject to the terms and conditions of this Agreement:

(a) The Developer shall not cut, damage, or remove any tree within the Tree Preservation Area except as necessary for utility installations within thirty (30) feet of any roadway, unless prior to any such cutting, damaging, or removing Developer has obtained from the City a building permit for the construction of a Building within the Residual Parcels.

(b) Within eighteen (18) months after the date that the Costco Store building passes its foundation inspection, the Developer or its successors and assigns shall have obtained building permits for the construction of Buildings A and B on Residual Parcels A and B, shall have completed shell construction of Buildings A and B, and shall have obtained shell Certificates of Occupancy for Buildings A and B.

(c) Within thirty (30) months after the date that the Costco Store building passes its foundation inspection, the Developer or its successors and assigns shall have obtained building permits for the construction of Buildings C, D, and E on Residual Parcel C, shall have completed shell construction of Buildings C, D, and E, and shall have obtained shell Certificates of Occupancy for Buildings C, D, and E.

Section 10. Security. The parties agree that in order to ensure performance by the Developer or Landowner of the provisions of Section 9 of this Agreement, the Developer shall execute a Cash Set Aside Agreement with the City and an appropriate Financial Institution of the Developer's choice, on a form approved by the City Attorney. The Developer shall execute the Cash Set Aside Agreement, and the Developer shall deposit One Hundred Fifty Thousand Dollars (US\$150,000.00) (the "Security Deposit") into the account with the Financial Institution, concurrent with the Mayor's execution of this Development Agreement, at the Financial Institution, so that there is mutual execution and delivery of the Agreements. The Cash Set Aside Agreement shall provide that the Financial Institution will hold the Security Deposit in an escrow account invested according to the instructions in the Cash Set Aside Agreement. At no time shall any portion of the Security Deposit be released without written authorization from the City. The Security Deposit shall represent the amount of money determined by the City to be adequate to secure performance with the City's codes and the conditions of Section 9 of this Agreement, because the Developer's performance under this Agreement does not constitute an optional phasing plan for development of the Property. In the event that the Developer shall not

have performed as required by Section 9 of this Agreement on the dates established herein, then the Financial Institution shall, upon the demand of the City after the Developer's failure to cure after notice by the City, as described in Section 11 of this Agreement, remit the Security Deposit to the City within two (2) business days after the demand, based on the following schedule:

(a) For each of the first fourteen (14) days of Developer's default, the Financial Institution will remit \$500 to the City.

(b) On the fourteenth (14th) day of Developer's default, the Financial Institution will remit \$43,000 to the City.

(c) For each of the next fourteen (14) days of Developer's default, the Financial Institution will remit \$1,000 to the City.

(d) On the twenty-eighth (28th) day of Developer's default, the Financial Institution will remit \$86,000 to the City.

(e) In the event that any or all of the trees are cut before the Developer has obtained a building permit for the construction of Building (A, B, C, D or E) within the Residual Parcels, the City shall be entitled to the entire Security Deposit in the Cash Set Aside.

The Developer shall not be in default until after the Developer's failure to cure after notice by the City, as described in Section 11 of this Agreement. The Financial Institution shall have no duty or right to evaluate the correctness or appropriateness of the City's demand and shall not interplead or in any manner delay payment of the Security Deposit to the City. The Cash Set Aside Agreement shall provide that if the Developer performs as required by Section 9 of this Agreement, as acknowledged by the City in a Resolution adopted for this purpose, then the City will authorize the Financial Institution to release the Security Deposit to the Developer. Otherwise, if the Developer does not perform as required by Section 9 of this Agreement, then the City shall retain that portion of the Security Deposit to which the City is entitled, based on the foregoing provisions.

Section 11. Default.

A. Subject to extensions of time by mutual consent in writing by the duly authorized representatives of the parties, failure or delay by the Developer to perform any term or provision of this Agreement shall constitute a default. In the event of alleged default or breach of any terms or conditions of this Agreement, the City shall give the Developer and/or Landowner not less than thirty (30) days notice in writing, specifying the nature of the alleged default and the manner in which said default may be cured. During this thirty (30) day period, Developer and/or Landowner charged shall not be considered in default for purposes of termination, institution of legal proceedings, or collection of the Security Deposit.

B. After notice and expiration of the thirty (30) day period, if such default has not been cured or is not being diligently cured in the manner set forth in the notice, the City may, at its

option, demand that the Security Deposit in the Cash Set Aside account be turned over to the City as provided in Section 10. The City shall not have the ability to sue for money damages under this Agreement, in excess of the Security Deposit in the Cash Set Aside. However, the City may institute legal proceedings to enforce this Development Agreement, ask for specific performance of this Agreement, to enforce the City's codes and/or to obtain penalties and costs as provided in the Gig Harbor Municipal Code for violation of this Agreement and the Code.

Section 12. Annual Review. The City shall, at least every twelve (12) months during the term of this Agreement, review the extent of good faith substantial compliance by Developer and Landowner with this Agreement.

Section 13. Termination. This Agreement shall expire and/or terminate as provided below:

This Agreement shall terminate upon the expiration of the term identified in Section 7 as long as all of the Developer's obligations in connection therewith have been fully complied with, including the obligations required by this Agreement, as determined by the City. Upon satisfaction of all obligations and termination of this Agreement, the City shall pass a Resolution, which shall be recorded against the Property in a form satisfactory to the City Attorney, indicating that the Agreement has been terminated.

Section 14. Effect of Termination on Developer Obligations. Termination of this Agreement as to the Developer of the Residual Parcels or any portion thereof shall not affect any of the Developer's obligations to comply with the City Comprehensive Plan and the terms and conditions or any applicable zoning code(s) or subdivision map or other land use entitlements approved with respect to the Residual Parcels, any other conditions of any other development specified in the Agreement to continue after the termination of this Agreement or obligations to pay assessments, liens, fees or taxes.

Section 15. Assignment and Assumption. The Developer shall have the right to sell, assign or transfer this Agreement with all their rights, title and interests therein to any person, firm or corporation at any time during the term of this Agreement. Developer shall provide the City with written notice of any intent to sell, assign, or transfer all or a portion of the Residual Parcels, at least 30 days in advance of such action.

Section 16. Covenants Running with the Land. This Agreement shall be recorded against the Property legally described in Exhibit A, and the conditions and covenants set forth in this Agreement and incorporated herein by the Exhibits shall run with the land and the benefits and burdens shall bind and inure to the benefit of the parties. The Developer, Landowner and every purchaser, assignee or transferee of an interest in the Residual Parcels, or any portion thereof, shall be obligated and bound by the terms and conditions of this Agreement, and shall be the beneficiary thereof and a party thereto, but only with respect to the Residual Parcels, or such portion thereof, sold, assigned or transferred to it. Any such purchaser, assignee or transferee shall observe and fully perform all of the duties and obligations of a Developer contained in this

Agreement, as such duties and obligations pertain to the portion of the Residual Parcels sold, assigned or transferred to it.

Section 17. Amendment to Agreement; Effect of Agreement on Future Actions.

This Agreement may be amended by mutual consent of all of the parties, provided that any such amendment shall follow the process established by law for the adoption of a development agreement (*see*, RCW 36.70B.200). However, nothing in this Agreement shall prevent the City Council from making any amendment to its Comprehensive Plan, Zoning Code, Official Zoning Map or development regulations during the next two (2) years, as the City Council may deem necessary to the extent required by a serious threat to public health and safety. Nothing in this Development Agreement shall prevent the City Council from making any amendments of any type to the Comprehensive Plan, Zoning Code, Official Zoning Map or development regulations two (2) years from the anniversary date of the Effective Date of this Agreement.

Section 18. Releases. Developer, and any subsequent Landowner, may free itself from further obligations relating to the sold, assigned, or transferred property, provided that the buyer, assignee or transferee expressly assumes the obligations under this Agreement as provided herein.

Section 19. Notices. Notices, demands, correspondence to the City and Developer shall be sufficiently given if dispatched by pre-paid first-class mail to the addresses of the parties as designated in Section 5. Notice to the City shall be to the attention of both the City Administrator and the City Attorney. Notices to subsequent Landowners shall be required to be given by the City only for those Landowners who have given the City written notice of their address for such notice. The parties hereto may, from time to time, advise the other of new addresses for such notices, demands or correspondence.

The City of Gig Harbor

Attn: Community Development Director
3510 Grandview Street
Gig Harbor, WA 98335
(253) 851-6170

Harbor Hill LLC

Attn: President
19245 Tenth Avenue N.E.
Poulsbo, WA 98370
(360) 697-6626

City Attorney
Carol Morris
P.O. Box 948
Seabeck, WA 98380-0948

Section 20. Reimbursement for Agreement Expenses of the City. Developer agrees to reimburse the City for actual expenses incurred over and above the fees paid by Developer as an applicant incurred by City directly relating to this Agreement, including recording fees, publishing fees and reasonable staff and consultant costs not otherwise included within application fees. This Agreement shall not take effect until the fees provided for in this section, as well as any processing fees owed to the City for the development of the Residual Parcels, are

paid to the City. Upon payment of all expenses, the Developer may request written acknowledgement of all fees. Such payment of all fees shall be paid, at the latest, within thirty (30) days from the City's presentation of a written statement of charges to the Developer.

Section 21. Applicable Law and Attorneys' Fees. This Agreement shall be construed and enforced in accordance with the laws of the State of Washington. If litigation is initiated to enforce the terms of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs from the non-prevailing party. Venue for any action shall lie in Pierce County Superior Court or the U.S. District Court for Western Washington.

Section 22. Third Party Legal Challenge. In the event any legal action or special proceeding is commenced by any person or entity other than a party or a Landowner to challenge this Agreement or any provision herein, the City may elect to tender the defense of such lawsuit or individual claims in the lawsuit to Developer and/or Landowner(s). In such event, Developer and/or such Landowners shall hold the City harmless from and defend the City from all costs and expenses incurred in the defense of such lawsuit or individual claims in the lawsuit, including but not limited to, attorneys' fees and expenses of litigation, and damages awarded to the prevailing party or parties in such litigation. The Developer and/or Landowner shall not settle any lawsuit without the consent of the City. The City shall act in good faith and shall not unreasonably withhold consent to settle.

Section 23. Severability. If any phrase, provision or section of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, or if any provision of this Agreement is rendered invalid or unenforceable according to the terms of any statute of the State of Washington which became effective after the effective date of the ordinance adopting this Development Agreement, and either party in good faith determines that such provision or provisions are material to its entering into this Agreement, that party may elect to terminate this Agreement as to all of its obligations remaining unperformed.

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I certify that I know or have satisfactory evidence that Chuck Hunter is the person who appeared before me, and said person acknowledged that he was authorized to execute the instrument and acknowledged it as the Mayor of the City of Gig Harbor for the uses and purposes mentioned in this instrument.

DATED: _____

(Signature)

NOTARY PUBLIC, State of Washington,
residing at: _____
My appointment expires: _____