

RESOLUTION NO. 2011-13

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, APPROVING AN INTERGOVERNMENTAL AGREEMENT WITH THE CITY OF SCOTTSDALE RELATING TO DESIGN AND CONSTRUCTION OF A SIDEWALK/MULTI-USE PATH ALONG THE SOUTH SIDE OF SHEA BOULEVARD.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS as follows:

SECTION 1. The Intergovernmental Agreement between the Town of Fountain Hills (the “Town”) and the City of Scottsdale relating to design and construction of a sidewalk/multi-use path along the south side of Shea Boulevard (the “Agreement”), is hereby approved in substantially the form attached hereto as Exhibit A and incorporated herein by reference.

SECTION 2. The Mayor, the Town Manager, the Town Clerk and the Town Attorney are hereby authorized and directed to cause the execution of the Agreement and to take all steps necessary to carry out the purpose and intent of this Resolution.

PASSED AND ADOPTED by the Mayor and Council of the Town of Fountain Hills, Arizona, November 3, 2011.

FOR THE TOWN OF FOUNTAIN HILLS:

ATTESTED TO:

Jay T. Schlum, Mayor

Bevelyn J. Bender, Town Clerk

REVIEWED BY:

APPROVED AS TO FORM:

Julie Ghetti, Interim Town Manager

Andrew J. McGuire, Town Attorney

ACTION TAKEN: TABLED

EXHIBIT A
TO
RESOLUTION NO. 2011-13

[Agreement]

See following pages.

INTERGOVERNMENTAL AGREEMENT
BETWEEN
THE TOWN OF FOUNTAIN HILLS
AND
THE CITY OF SCOTTSDALE
FOR
SHEA BOULEVARD SIDEWALK PROJECT

THIS INTERGOVERNMENTAL AGREEMENT (this “Agreement”) is entered into as of _____, between the Town of Fountain Hills, an Arizona municipal corporation (“Fountain Hills”) and the City of Scottsdale, an Arizona municipal corporation (“Scottsdale”). Fountain Hills and Scottsdale are sometimes collectively referred to in this Agreement as the “Parties” and each individually as a “Party.”

RECITALS

A. Fountain Hills and Scottsdale have authority to enter into the Agreement pursuant to ARIZ. REV. STAT. § 11-952.

B. Scottsdale presently has constructed a sidewalk/multi-use path (the “Pathway”) along the southern right-of-way of Shea Boulevard. The current eastern extent of the Pathway terminates at 142nd Street (the “Existing Scottsdale Terminus”).

C. Scottsdale and Fountain Hills desire to provide an uninterrupted pedestrian/bicycle connection between the communities by constructing an extension of the Pathway from the Existing Scottsdale Terminus to the westernmost point of existing sidewalks in the Fountain Hills portion of Shea Boulevard, located at Eagle Mountain Parkway (the “Existing Fountain Hills Terminus”). The area along the southern right-of-way for Shea Boulevard between the Existing Scottsdale Terminus and the Existing Fountain Hills Terminus is referred to herein as the “Project Area”, as more particularly depicted in Exhibit A attached hereto and incorporated herein by reference.

D. Fountain Hills applied for and was awarded a \$273,000 Congestion Mitigation Air Quality (“CMAQ”) grant from the Maricopa Association of Governments (“MAG”) to design and construct the missing portion of the Pathway in the Project Area (the “Pathway Project”). The total estimated cost of the Pathway Project is estimated to be \$466,000.

E. Based upon the length of the Pathway within each jurisdiction, Scottsdale and Fountain Hills have agreed that (i) Fountain Hills shall be responsible for project management and (ii) the local share of the costs for the Pathway Project shall be borne 70% by Fountain Hills (the “Fountain Hills Share”) and 30% by Scottsdale (the “Scottsdale Share”).

F. Fountain Hills and Scottsdale desire to enter into this Agreement to set forth their respective rights and obligations with respect to the implementation of the Pathway Project.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated herein by reference, the promises and covenants set forth below and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Purpose. The purpose of this Agreement is to set forth the duties and responsibilities of the Parties with respect to the Pathway Project.

2. Term. This Agreement shall commence on the date it is fully executed by the Parties and shall terminate on June 30, 2015. This Agreement shall thereafter be automatically renewed for successive additional one-year periods until terminated by either Party for any reason upon delivery of 60 days' written notice prior to the actual date of termination.

3. Fountain Hills' Responsibilities. Fountain Hills will act as the lead entity for the purpose of this Agreement, which duties include:

a. Professional Services. Fountain Hills shall be solely responsible for processing and managing the agreements with the design professionals of the improvements. Fountain Hills shall provide Scottsdale with the opportunity to review and comment upon the Pathway Project design documents not later than 30% design stage, and shall allow for periodic review and comment thereafter. Fountain Hills shall be solely responsible for making all required payments to the design professionals. Following any such payments, Fountain Hills shall provide a notice and request for reimbursement (each a "Reimbursement Request") to Scottsdale, including copies as necessary of the payments made to the design professionals, requesting reimbursement of the Scottsdale Share within 30 days of the date of the Reimbursement Request.

b. ADOT Coordination. Fountain Hills shall be solely responsible for working with the Arizona Department of Transportation ("ADOT") to enter into and implement an intergovernmental agreement with ADOT for the construction of the Pathway Project through the Federal Aid (CMAQ) program (the "ADOT IGA"). Fountain Hills shall provide a representative to act as a liaison to the ADOT Resident Construction Engineer during design and construction of the Pathway Project.

c. Funding. Fountain Hills shall be responsible for paying the Fountain Hills Share to ADOT at such times as are designated in the ADOT IGA. The Parties agree that Fountain Hills is entering into this Agreement with the express understanding that its total Fountain Hills Share shall be approximately \$135,000. If, at the time bids are received for construction of the Pathway Project, the Parties determine that the Fountain Hills Share will exceed expectations by more than 10%, the Parties shall meet to discuss funding for the expected local match shortfall. In the event that the Parties are unable to come to agreement as to allocation of funding for any local match shortfall, the Parties may terminate this Agreement; provided, however, that no such termination shall occur after ADOT has awarded a construction contract for the Pathway Project.

4. Scottsdale's Responsibilities.

a. Professional Services. Scottsdale shall be responsible for providing timely comments to the Pathway Project design documents within a reasonable time after receipt of same from Fountain Hills. The first review shall be no later than at the 30% design stage, and Scottsdale shall provide periodic review and comment thereafter as requested by Fountain Hills. Scottsdale shall, within 30 days of the date of the Reimbursement Request set forth in Subsection 3(a) above, pay to Fountain Hills the full amount of the Scottsdale Share set forth in the Reimbursement Request.

b. ADOT Coordination. Scottsdale shall provide a representative to act as a liaison to the ADOT Resident Construction Engineer during design and construction of the Pathway Project.

c. Funding. Scottsdale shall be responsible for paying the Scottsdale Share to ADOT at such times as are designated in the ADOT IGA. The Parties agree that Scottsdale is entering into this Agreement with the express understanding that its total Scottsdale Share shall be approximately \$58,000. If, at the time bids are received for construction of the Pathway Project, the Parties determine that the Scottsdale Share will exceed expectations by more than 10%, the Parties shall meet to discuss funding for the expected local match shortfall. In the event that the Parties are unable to come to agreement as to allocation of funding for any local match shortfall, the Parties may terminate this Agreement; provided, however, that no such termination shall occur after ADOT has awarded a construction contract for the Pathway Project.

5. Contract Administrators. The contract administrators ("Contract Administrators") for each Party to this Agreement shall be Paul Mood, or his designee, for Fountain Hills, and David Meinhart, or his designee, for Scottsdale. The Contract Administrators for the Parties will discuss and determine any necessary scheduling requirements and will otherwise coordinate to ensure that the Pathway Project is carried out efficiently. The Contract Administrators shall provide for coordination with ADOT as set forth above.

6. Indemnification. To the extent permitted by law, each Party (as "Indemnitor") agrees to indemnify, defend and hold harmless the other Party (as "Indemnitee") for, from and against any and all claims, losses, liability, costs or expenses (including reasonable attorney's fees) (hereinafter collectively referred to as "Claims") arising out of bodily injury of any person (including death) or property damage, but only to the extent that such Claims which result in vicarious/derivative liability to the Indemnitee are caused by the negligence, intentional misconduct or other fault of the Indemnitor, its officers, officials, agents, employees or volunteers.

7. Appropriation of Funds. The provisions of this Agreement for implementation of the Pathway Project by both Parties shall be effective when funds are appropriated for purposes of this Agreement and are actually available to each Party. Each Party shall be the sole judge and authority in determining the availability of funds under this Agreement and shall keep the other Party fully informed as to the availability of funds for the Services. The obligation of each Party to make any payment pursuant to this Agreement is a current expense of each Party,

payable exclusively from such annual appropriations, and is not a general obligation or indebtedness of either Party.

8. Termination. This Agreement may be terminated by either Party at-will upon 60 days' written notice. In the event of such termination, the Parties shall bear their own costs and expenses associated with participation in this Agreement. If refunds of any local match are due to the Parties upon termination, the refunded amounts shall be divided according to the percentages assigned to the Fountain Hills Share and the Scottsdale Share respectively.

9. Entire Agreement; Interpretation; Parole Evidence. This Agreement represents the entire agreement of the Parties with respect to its subject matter, and all previous agreements, whether oral or written, entered into prior to this Agreement are hereby revoked and superseded by this Agreement. No representations, warranties, inducements or oral agreements have been made by any of the parties except as expressly set forth herein, or in any other contemporaneous written agreement executed for the purposes of carrying out the provisions of this Agreement. This Agreement shall be construed and interpreted according to its plain meaning, and no presumption shall be deemed to apply in favor of, or against the Party drafting the Agreement. The Parties acknowledge and agree that each has had the opportunity to seek and utilize legal counsel in the drafting of, review of, and entry into this Agreement.

10. Amendment. The Parties understand and specifically agree that the terms of this Agreement may be amended from time to time only upon written agreement by each Party.

11. Severability. The provisions of this Agreement are severable to the extent that any provision or application held to be invalid by a Court of competent jurisdiction shall not affect any other provision or application of the Agreement which may remain in effect without the invalid provision or application.

12. Notices and Requests. Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given if (a) delivered to the Party at the address set forth below, (b) deposited in the U.S. Mail, certified, return receipt requested, to the address set forth below, or (c) given to a recognized and reputable overnight delivery service, to the address set forth below:

If to Fountain Hills: Town of Fountain Hills
16705 East Avenue of the Fountains
Fountain Hills, Arizona 85268
Attn: Paul Mood, Development Services Director

With copy to: GUST ROSENFELD, P.L.C.
One East Washington, Suite 1600
Phoenix, Arizona 85004-2327
Attn: Andrew J. McGuire, Esq.

If to Scottsdale: City of Scottsdale
7575 East Main Street
Scottsdale, Arizona 85251
Attn: _____

With copy to: City of Scottsdale
3939 North Drinkwater Boulevard
Scottsdale, Arizona 85251
Attn: Bruce Washburn, City Attorney

or at such other address, and to the attention of such other person or officer, as any Party may designate in writing by notice duly given pursuant to this Section. Notices shall be deemed received (a) when delivered to the Party, (b) three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage, or (c) the following business day after being given to a recognized overnight delivery service, with the person giving the notice paying all required charges and instructing the delivery service to deliver on the following business day. If a copy of a notice is also given to a Party's counsel or other recipient, the provisions above governing the date on which a notice is deemed to have been received by a Party shall mean and refer to the date on which the Party, and not its counsel or other recipient to which a copy of the notice may be sent, is deemed to have received the notice.

13. Assignment and Delegation. Neither Party shall assign nor delegate any of its rights, interest, obligations, covenants, or performance under this Agreement. Any termination shall not relieve either Party from liabilities or costs already incurred under this Agreement.

14. Applicable Law. This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Arizona.

15. Conflict of Interest. This Agreement may be cancelled pursuant to ARIZ. REV. STAT. § 38-511.

16. Nondiscrimination. Each Party shall comply with State Executive Order No. 99-4 and all other applicable Federal and State laws, rules and regulations regarding nondiscrimination, including the Americans with Disabilities Act.

17. E-verify, Records and Audits. To the extent applicable under ARIZ. REV. STAT. § 41-4401, the Parties and their respective subcontractors warrant compliance with all federal immigration laws and regulations that relate to their employees and compliance with the E-verify requirements under ARIZ. REV. STAT. § 23-214(A). The Parties' or a subcontractor's breach of the above-mentioned warranty shall be deemed a material breach of the Agreement and may result in the termination of the Agreement by either Party under the terms of this Agreement. The Parties each retain the legal right to randomly inspect the papers and records of the other Party and the other Party's subcontractors who work under this Agreement to ensure that the other Party and its subcontractors are complying with the above-mentioned warranty. The Parties warrant to keep their respective papers and records open for random inspection during normal business hours by the other Party. The Parties and their respective subcontractors shall cooperate with the other Party's random inspections including granting the inspecting Party entry

rights onto their respective properties to perform the random inspections and waiving their respective rights to keep such papers and records confidential.

18. Scrutinized Business Operations. Pursuant to ARIZ. REV. STAT. §§ 35-391.06 and 35-393.06, the Parties each certify that they do not have scrutinized business operations in Sudan or Iran. For the purpose of this subsection the term “scrutinized business operations” shall have the meanings set forth in ARIZ. REV. STAT. § 35-391 or 35-393, as applicable. If the either Party determines that the other Party submitted a false certification, the Party making such determination may impose remedies as provided by law including terminating this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this instrument as of the date and year first set forth above.

“Fountain Hills”

“Scottsdale”

TOWN OF FOUNTAIN HILLS, an Arizona
municipal corporation

CITY OF SCOTTSDALE, an Arizona
municipal corporation

Jay T. Schlum, Mayor

W. J. “Jim” Lane, Mayor

Date: _____

Date: _____

ATTEST:

ATTEST:

Bevelyn J. Bender, Fountain Hills Town Clerk

Carolyn Jagger, Scottsdale City Clerk

In accordance with the requirements of ARIZ. REV. STAT. § 11-952(D), the undersigned attorneys acknowledge that (i) they have reviewed the above Agreement on behalf of their respective clients and that (ii) as to their respective clients only, each attorney has determined that this Agreement is in proper form and is within the powers and authority granted under the laws of the State of Arizona.

Andrew J. McGuire
Fountain Hills Town Attorney

Bruce Washburn
Scottsdale City Attorney