

ORDINANCE NO. 1137

AN ORDINANCE OF THE CITY OF SOUTH EL MONTE APPROVING A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF SOUTH EL MONTE AND FARM ASSIST REMEDIES MINISTRY TO ENABLE THE ESTABLISHMENT OF A MEDICAL MARIJUANA DISPENSARY

THE CITY COUNCIL OF THE CITY OF SOUTH EL MONTE HEREBY ORDAINS AS FOLLOWS:

Section 1. Farm Assist Remedies Ministry (“Developer”) proposes to enter into a development agreement (“Development Agreement”) with the City of South El Monte (“City”), which is attached to this Ordinance as Exhibit “A,” in connection with the development of a medical marijuana dispensary (“Project”) to be located at 2112 Rosemead Boulevard.

Section 2. The Project, including this Ordinance and the Development Agreement, has been environmentally reviewed pursuant to the provisions of the California Environmental Quality Act (Public Resources Code Sections 21000, *et seq.* (“CEQA”) and the State CEQA Guidelines (California Code of Regulations, Title 14, Sections 15000, *et seq.*). The City prepared an initial study and, based on the information contained in the initial study, determined that there was no substantial evidence that development of the Project would have a significant environmental impact. Accordingly, the City prepared a negative declaration in accordance with Section 15070 of the State CEQA Guidelines. Pursuant to Section 15074(b) of said Guidelines, the City Council independently reviewed and considered the contents of the initial study and the negative declaration during the course of a public hearing prior to deciding whether to approve the Project. Based on the initial study, the negative declaration, the comments received thereon, and the record before the City Council, the City Council hereby finds that the negative declaration for the Project represents the independent judgment of the City and that there is no substantial evidence that the approval of the Project may have any significant environmental impact. The documents and other material that constitute the record on which this decision is based are located in the Department of Community Development and are in the custody of the Director of Community Development.

Section 3. On February 17, 2010, the Planning Commission conducted a duly noticed public hearing to consider the Development Agreement and the Project. Notice of the time, place and purpose of the public hearing was duly provided in accordance with California Government Code Sections 65867, 65090 and 65091.

Section 4. The Planning Commission found that the Project is consistent with the City’s General Plan and recommended that the City Council adopt an ordinance approving a Development Agreement incorporating revisions recommended by the Planning Commission.

Section 5. On March 10, 2010, the City Council conducted a duly noticed public hearing to consider the Development Agreement and the Project. Notice of the time,

place and purpose of the public hearing were duly provided in accordance with California Government Code Sections 65867, 65090 and 65091.

Section 6. Based upon the evidence presented and the record of the hearing, the City Council finds that the provisions of the Development Agreement are consistent with the City of South El Monte General Plan, and comply with its objectives and policies.

Section 7. Based upon the foregoing, the City Council hereby adopts the Negative Declaration and approves the Development Agreement and authorizes the City Manager to execute the Development Agreement on behalf of the City.

SECTION 4. The City Clerk shall certify to the adoption of this ordinance.

PASSED, APPROVED AND ADOPTED this ___ day of ___ 2010.

Mayor Louis Aguinaga

ATTEST:

City Clerk Rose Juarez

APPROVED AS TO FORM:

City Attorney Quinn M Barrow

DEVELOPMENT AGREEMENT

This DEVELOPMENT AGREEMENT (“Agreement”) is entered into between David Touhey of Farm Assist Remedies Ministry (“Developer”) and the City of South El Monte (“City”), a municipal corporation organized and existing under the laws of the State of California. Developer and City are sometimes collectively referred to herein as the “parties.”

RECITALS

A. Government Code §§ 65864 - 65869.5 authorize the City to enter into agreements with persons having an interest in real property for the development of such property, all for the purpose of strengthening the public planning process, encouraging private participation in comprehensive planning and reducing the economic costs of such development on City services.

B. Developer is the lessee of property located at 2112 Rosemead Boulevard.

C. Developer has applied for and is seeking City Council approval of this Agreement in order to operate a medical marijuana dispensary under the provisions of California Health & Safety Code Sections 11365.2 *et seq.* and City Code Chapters 5.26 and 17.31.

D. The Project, including this Ordinance and this Development Agreement, has been environmentally reviewed pursuant to the provisions of the California Environmental Quality Act (Public Resources Code Sections 21000, *et seq.* (“CEQA”), the State CEQA Guidelines (California Code of Regulations, Title 14, Sections 15000, *et seq.*), and the City’s Local CEQA Guidelines. The City prepared an initial study and, based on the information contained in the initial study, determined that there was no substantial evidence that development of the Project would have a significant environmental impact. Accordingly, the City prepared a negative declaration in accordance with Section 15070 of the State CEQA Guidelines. Prior to approving this Agreement, the City has approved a negative declaration for the Project.

E. In adopting Planning Commission Resolution No. 10-003, the Planning Commission found that the Project is consistent with the City’s General Plan.

F. The Development Plan implements the goals and policies of the City’s General Plan, and contributes to the balanced and diversified land uses of the City in order to maintain the overall quality of life and of the environment within the City and to impose appropriate standards and requirements with respect to land development and usage.

G. City has found and determined that the execution of this Agreement is in the best interest of the public health, safety and general welfare of City and its residents and that adopting this Agreement constitutes a proper exercise of its police power.

THE PARTIES AGREE AS FOLLOWS:

1. Definitions.

1.1 “Agreement”: Development Agreement.

1.2 “City”: the City of South El Monte, California.

1.3 “Developer”: David Touhey of Farm Assist Remedies, an individual, and his assignees or successors in interest to all or any part of Developer’s interest in the Property.

1.4 “Development Plan”: all ordinances, resolutions, rules, regulations and policies of City governing the development and use of the Property as of the Agreement Date, including, without limitation, regulations regarding the permitted uses of the Property and the density or intensity of use.

1.5 “Director”: City’s Director of Community Development.

1.6 “Effective Date”: April 9, 2010.

1.7 “Project”: the operation of a medical marijuana dispensary in accordance with the provisions of California Health & Safety (“H&S”) Code §§ 11365.2 *et seq.* and City’s Municipal Code Chapters 5.26 and 17.31, that is not for profit as required by H&S Code § 11362.765(a) (“nothing in this section shall authorize ... any individual or group to cultivate or distribute marijuana for profit”).

1.8 “Property”: the real property located at 2112 Rosemead Boulevard.

1.9 “Property Owner”: George Bachman.

2. Mutual Benefits. This Agreement is entered into for the purpose of carrying out the Project in a manner that will insure certain anticipated benefits to City, residents of City and Developer. City and Developer agree that certain assurances on the part of each party will be necessary to achieve the desired benefits.

2.1 Benefits to City. The benefits to City (including, without limitation, the residents of City) under this Agreement include the payment by Developer of a fee to the City to mitigate traffic, parking and police service impacts due to the operation of the Project. Developer shall pay to City \$1,000 per year for each year of operation to mitigate the Project’s impacts caused by increased traffic, impacts caused to the City’s roads by this increased traffic, and the impacts the operation of Project will have on police services. In addition, Developer shall reimburse City for all legal fees and costs incurred by the City in connection with the processing of this application and preparation and review of this Agreement and all ordinances, resolutions and environmental review related thereto.

2.2 Benefits to Developer. Developer has expended and will continue to expend substantial amounts of time and money on the planning and development of the Project. In addition, Developer will expend substantial amounts of time and money in contributing to the

payment for the mitigation of the public service impacts in connection with the Project. Developer would not make such additional expenditures without the rights conferred by this Agreement and such additional expenditures will be made in reliance upon this Agreement.

2.3 Operational and Development Standards.

(a) Developer shall comply with all of the operating and development standards contained in Municipal Code Chapters 5.26 and 17.31.

(b) Developer shall have a minimum of three employees.

(c) Developer shall not be open for the period between 7:00 p.m. to 10:00 a.m. on the following day.

(d) Developer may be open Monday – Saturday each week. Developer may apply on or after October 1, 2010 for permission to be open on Sundays.

(e) Developer shall provide 9 parking spaces as indicated on the Site Plan.

(f) Developer shall submit a security plan to the Director for his review and approval. At a minimum, such plan shall include interior and exterior video cameras. Developer shall maintain the recordings in an off-site location, and shall retain such recordings for a minimum of 30 days.

(g) Developer shall provide a sign program to the Director for his review and approval. Signage shall be limited to one wall sign not to exceed ten square feet in area that is not externally or internally illuminated or visible from the 60 Freeway. The sign cannot have any leaf emblem, insignia or depiction, but may include two green crosses. In addition to the wall sign, there may be a placard that indicates that the business is open. Such placard cannot be illuminated. There shall be no banners.

(h) All dispensary operators and employees shall complete a criminal background check (Life Scan).

(i) At all times the dispensary is open for business, Developer shall provide at least one armed security guard who is licensed and possesses a valid department of consumer affairs “security guard card” at all times.

(j) No recommendations from a doctor for medical marijuana shall be issued on-site.

(k) No on-site sale of smoking paraphernalia.

(l) The dispensary shall only dispense medical marijuana to qualified patients and their caregivers as defined by California Health and Safety Code.

(m) The dispensary shall not provide marijuana to any individual in an amount not consistent with personal medical use.

(n) Any patient under 18 years of age shall be accompanied by a parent or legal guardian with a valid California ID.

3. Interest of Developer. Developer represents that Developer has a leasehold interest in the Property.

4. Binding Effect of Agreement. The burdens of this Agreement bind, and the benefits of this Agreement inure to, the successors in interest to the parties hereto.

5. Term. The term of this Agreement shall be two years.

6. Time of Performance. The terms and provisions of this Agreement shall expire 1 year from the Effective Date, unless all required approvals have been issued for Project operation.

7. Changes in Project. Developer shall not be entitled to any change, modification, revision or alteration in the permitted uses of the Property, the density or intensity of use, and the design, improvement and standards and specifications applicable to the development of the Property without applying for further City review and approval.

8. Indemnification and Legal Challenge.

8.1. Indemnification. In addition to its duties under Section 8.2, Developer shall defend, indemnify, and hold the City, its elected officials, officers, employees, volunteers, agents, and those City agents serving as independent contractors in the role of City officials (collectively "Indemnitees") free and harmless from and against any and all claims (including, without limitation, claims for bodily injury, death or damage to property), demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including, without limitation, attorney's fees, disbursements and court costs) of every kind and nature whatsoever (individually, a "Claim," collectively, "Claims"), in any manner arising out of or incident to the performance of the Agreement, including without limitation, the payment of all consequential damages and attorneys' fees and other related costs and expenses. Developer shall pay and satisfy any judgment, award or decree that may be rendered against City or the other Indemnitees in any such suit, action, or other legal proceeding arising out of or incident to the performance of the Agreement. Developer shall reimburse the City and the other Indemnitees, for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided. Developer's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by Developer or Indemnitees. This indemnity shall apply to all Claims and liability regardless of whether any insurance policies are applicable. Nothing in this Section shall be construed to require Developer to indemnify Indemnitees for that portion of any Claim to the extent arising from the sole negligence or willful misconduct of the Indemnitees.

8.2. Legal Challenge. In the event of any legal action challenging the validity, applicability, or interpretation of any provision of this Agreement, any of the entitlement documents pertaining to the Project including, without limitation, the City's General Plan, Zoning Ordinance, or any other supporting document relating to the project, the Developer shall indemnify, defend and hold harmless the City, its officers, agents, employees and representatives from and against all liability, costs and expenses, including attorneys' fees, incurred by City or awarded against City in relation to such action. The City shall have the right to select counsel of its choice. The parties hereby agree to cooperate in defending such action. In the event of any litigation challenging the effectiveness of this Agreement, or any portion hereof, this Agreement shall remain in full force and effect while such litigation, including any appellate review, is pending, unless otherwise ordered by the court. Absent issuance of an injunction, Developer may elect to continue development under this Agreement pending completion of the litigation but it shall do so at its sole risk, and City shall not be liable for any loss suffered as a result thereof.

9. General Development of the Project.

9.1 Project. The permitted uses of the Property, the density or intensity of use, and other terms and conditions of development applicable to the Property shall be those set forth in the Development Agreement.

9.2 Effect of Agreement on Land Use Regulations. The rules, regulations and official policies governing permitted uses of the Property, the density and intensity of use of the Property and the design, improvement and standards and specifications applicable to the use of the Property are those rules, regulations and official policies in force as of the Effective Date.

9.3 Development Fees. Except as provided in this Agreement, City shall not, without the prior written consent of Developer, impose or increase any fees applicable to the use of the Property or any portion thereof, or impose any such fees as a condition to the implementation of the Project or any portion thereof, except those fees set forth in this Agreement or in effect on the Effective Date of this Agreement.

10. Rules, Regulations and Official Policies.

10.1 New Rules. This Agreement shall not prevent City from applying the following new rules, regulations and policies:

(a) Processing fees and charges imposed by City to cover the estimated actual costs to City of processing applications for development approvals, for monitoring compliance with any development approvals, or for monitoring compliance with environmental impact mitigation measures.

(b) Procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure.

(c) Regulations governing construction standards and specifications including, without limitation, the City's Building Code, Plumbing Code, Mechanical Code, Electrical Code, and Fire Code provided that such construction standards and specifications are applied on a City-wide basis.

(d) Regulations which are not in conflict with this Agreement.

(e) Regulations which are in conflict with this Agreement to which Developer has consented in writing.

10.1 Subsequent Actions and Approvals. This Agreement shall not prevent City in subsequent actions applicable to the Property from applying new rules, regulations and policies which do not conflict with those existing rules, regulations and policies, nor shall this Agreement prevent City from denying or conditionally approving any subsequent development project application on the basis of such existing or new rules, regulations and policies.

10.2 State and Federal Laws. In the event that state or federal laws or regulations, enacted after this Agreement is executed, prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations; provided, however, that this Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations and to the extent such laws or regulations do not render such remaining provisions impractical to enforce.

11. Amendment or Cancellation of Agreement. This Agreement may be amended or canceled in whole or in part only by mutual consent of the parties.

12. Remedies. Any legal action shall be brought in the Superior Court for Los Angeles County, California.

13. City Not Liable For Damages. It is acknowledged by the Parties that City would not have entered into this Agreement if it were to be liable in damages under or with respect to this Agreement or the application thereof. Consequently, and except for the payment of attorneys fees in accordance with Section 19 below, City shall not be liable in damages to Property Owner, Developer, or to any assignee, transferee or any other person, and Developer and Property Owner covenant on behalf of themselves and their successors in interest not to sue for or claim any damages:

(a) for any breach of, or which arises out of, this Agreement;

(b) for the taking, impairment or restriction of any right or interest conveyed or provided hereunder or pursuant hereto; or

(c) arising out of or connected with any dispute, controversy or issue regarding the application or interpretation or effect of the provisions of this Agreement.

14. Breach By Action of the Electorate. The Parties hereby warrant that each enters into this Agreement with the understanding that if the City defaults on its obligations under the Agreement due to an action taken by the electorate of the City in the exercise of the reserved powers of initiative and referendum, this Agreement shall be modified or suspended to the extent required by Government Code Section 65869.5 and Developer's right to seek specific performance, a writ of mandate, or other mandatory relief shall be limited by such force as the action taken by the electorate may have in light of state law as determined by any court of competent jurisdiction, in which case Developer's principal remedy shall lie in reformation of this Agreement.

15. Periodic Review of Compliance With Agreement.

15.1 Periodic Review. City and Developer shall review this Agreement at least once each successive year from the date of this Agreement at a duly noticed public hearing. Nothing herein limits the ability of the City to review Developer's compliance with the terms and provisions of this Agreement and the Municipal Code at any time. City shall notify Developer in writing of the date for review at least 30 days prior thereto.

15.2 Good Faith Compliance. During each periodic review, Developer shall be required to demonstrate good faith compliance with the terms of this Agreement.

16. Event of Default by Developer. If City determines that Developer has not complied in good faith with the terms and conditions of this Agreement, City shall, by written notice to Developer, specify the manner in which Developer has failed to so comply and state the steps Developer must take to bring itself into compliance. If, within 60 days after the effective date of notice from City specifying the manner in which Developer has failed to so comply, Developer does not commence all steps reasonably necessary to bring itself into compliance as required and thereafter diligently pursue such steps to completion, then Developer shall be deemed to be in default under the terms of this Agreement and City may terminate this Agreement, seek specific performance, or invoke any other remedies afforded by law.

17. Waivers and Delays.

17.1 Waiver. Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, and failure by a party to exercise its rights upon a default by the other party hereto, shall not constitute a waiver of such party's right to demand strict compliance by such other party in the future.

17.2 Third Parties. Nonperformance shall not be excused because of a failure of a third person.

17.3 Force Majeure. Neither party shall be deemed to be in default where failure or delay in performance of any of its obligations under this Agreement is caused by floods, earthquakes, other Acts of God, fires, wars, riots or similar hostilities, strikes, other labor difficulties, federal or state government regulations, court actions, or other causes beyond the party's control.

provisions of this Agreement, such amendment shall not be applicable to the Agreement unless necessary for this Agreement to be enforceable or unless this Agreement is modified pursuant to the provisions set forth in the Agreement and Government Code Section 65868.

24. Interpretation and Governing Law. This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with California laws.

Dated: _____, 2010

By: _____

Dated: _____, 2010

City of South El Monte, a municipal corporation of the State of California

By: _____
Mayor of City of South El Monte

ATTEST:

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
City Attorney