



## Staff Report

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**TO:** Honorable Mayor and Members of the Town Council  
**FROM:** Sean Rabé, Town Manager  
**DATE:** September 14, 2021  
**RE:** Reimbursement Agreement for Proposed Green Business Park Project

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### **Recommendation**

Staff recommends the Town Council authorize the Town Manager to sign the attached agreement for advancement of funds, reimbursement, and indemnification for the processing of the proposed Green Business Park Project.

### **Issue Statement and Discussion**

Building Engineering and Maintenance, Inc., has submitted an application for a Specific Plan for approximately 900,000 square feet of proposed business park and 126 residential housing units, to be located on 86 acres off Sierra College Boulevard, near Bankhead Road and Delmar Road. Staff has sent back the application to the developer for additional information; however, the application will be completed and re-submitted soon. Council authorized the developer to submit an application for a General Plan amendment, in accordance with Loomis Municipal Code section 13.76.010, at the July 2020 Council meeting.

As is customary with most municipalities, developers in Loomis are required to sign a reimbursement agreement for the processing of their projects. The purpose of this agreement is two-fold: first, it requires developments to pay their own way during the processing of their projects, ensuring the public isn't subsidizing private developments. Second, the Town's reimbursement agreement format includes indemnification clauses that protect the Town in the event of any action brought against the Town during the entitlement process.

The attached agreement requires the developer to advance \$200,000 for the initial processing for the development. Once the deposit falls to a lower than appropriate level (based on the Town Manager's estimate of upcoming processing costs) the Town Manager will request additional funding to bring the balance up to the initial \$200,000.

### **CEQA Requirements**

There are no CEQA implications associated with the recommended action.

### **Financial and/or Policy Implications**

Authorization to sign the attached agreement protects the Town from subsidizing the processing of the development and indemnifies the Town from any potential action against the Town during the entitlement process.

### **Attachments**

- A. Agreement for Advancement of Funds, Reimbursement, and Indemnification

**AGREEMENT FOR ADVANCEMENT OF FUNDS, REIMBURSEMENT, AND INDEMNIFICATION FOR PREPARATION OF PLANNING PERMITS, REPORTS, STUDIES AND ENVIRONMENTAL REVIEW DOCUMENTS AS REQUIRED BY THE LOOMIS MUNICIPAL CODE AND THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

This Agreement ("Agreement") is made this \_\_\_ day of September 2021, by and between the Town of Loomis, a municipal corporation ("Town"), and Building Engineering and Maintenance, Inc. ("Applicant"). The Town and Applicant are collectively referred to as the "Parties."

**RECITALS**

This Agreement is made with respect to the following facts:

A. The Applicant is in contract to purchase that approximately 86-acre parcel of certain real property located south Sierra College Boulevard and west of Bankhead Road, within the Town of Loomis, County of Placer, California and further identified as APNs: 030-100-013; 030-100-021; 030-100-022; 030-100-024; 030-110-010; 030-110-011; and 030-110-013 ("Property").

B. The Applicant is contemplating the development of the Property for industrial, commercial, and residential uses, requiring a conditional use permit, design review, tree removal permits, subdivision map, and other approvals as may be determined by the Town and as required by other governmental agencies. Furthermore, development of the Property is subject to environmental analysis as required by the California Environmental Quality Act ("CEQA"), through the preparation of an environmental impact report ("EIR"). All the above shall be referred to collectively as the "Project."

C. As a condition to the Town's completion of the Project EIR, the Applicant has agreed to advance an initial deposit and to subsequently reimburse the Town for all costs, fees, and expenses related to the Project EIR in the manner and amounts set forth in this Agreement whether such fees, costs, or expenses are incurred before or after Applicant submits a formal application to the Town and whether Applicant pursues any such application to completion. The Applicant's reimbursement of Town costs, fees, and expenses under this Agreement is for the purpose of ensuring that Town has the necessary resources to process the Project EIR diligently and efficiently.

D. It is the intent of this Agreement that Applicant shall pay for all fees, costs, and expenses associated with the processing of a project application. This includes but is not limited to the Project EIR, preparation of all documentation, agreements, studies, analyses, legal services, and any other activity reasonably associated with the Project, which will include, but not be limited to, the cost of in-house Town staff time and any Consultants (as herein below defined) retained by the Town, and that this Agreement shall be construed broadly to further this intent.

## AGREEMENT

**NOW, THEREFORE,** the Parties agree to as follows:

1. Incorporation of Recitals. The parties agree that the Recitals constitute the factual basis upon which Town and Applicant have entered into this Agreement. The Town and Applicant each acknowledge the accuracy of the Recitals and agree that the Recitals are incorporated into this Agreement as though fully set forth at length.

2. Town May Retain Consultants. As a necessary and indispensable part of its fact-finding process relating to the review of the Applicant's proposed Project, the Town may, in its discretion, retain the services of qualified professionals and experts in the fields and subject matters of the Project ("Consultants") to provide such environmental, fiscal, planning, public information, and legal advice as the Town may deem necessary in its discretion, by means of contracts ("Consultants' Contract"). The identity of the Consultants employed shall be as determined by the Town in its sole discretion, after prior consultation with the Applicant. The Town reserves the right, in its discretion, to amend the Consultants' scope of work as it deems necessary and appropriate where such amendments are reasonably necessary and related to the Town's proper review and consideration of the Project. The Town may also replace Consultants at any time, without consulting with the Applicant or obtaining the Applicant's approval. Notwithstanding the Applicant's reimbursement obligations under this Agreement, the Applicant agrees that the Consultants selected by the Town shall be the exclusive contractors of the Town and not of the Applicant.

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

4. Applicant's Advancement of Costs and Reimbursement of Expenditures. Applicant hereby agrees to advance to the Town the sum of \$200,000 (the "Funds") which Funds shall be used to reimburse the Town for costs incurred in analyzing the environmental impacts of and processing the application for the Project. Applicant understands and agrees that the term "Project", as used in this Agreement, includes any changes or modifications to the Project and any and all application(s) for permits or other approvals required by Applicant or otherwise required in connection with the Town's review of the Project. Applicant acknowledges that:

(a) The advance of Funds shall be made to the Town upon execution of this Agreement.

(b) If, after completion of all Town work related to the Project, any portion of the Funds has not been expended or committed for expenditure, the Town shall return to Applicant such unexpended or uncommitted amount.

(c) Applicant fully understands and agrees to each of the following:

i. Applicant acknowledges that the Funds paid herewith may not be adequate to fully reimburse the Town for costs incurred in connection with the Project, and that periodically, as the need arises, Applicant may be called upon to make further deposits. In the event, for any reason, the Town's request for further deposit from Applicant is not fully satisfied, the Town reserves the right to cease processing the Project and to cancel any pending application(s).

ii. Applicant agrees to bring the account current through the date of any public meeting of the Town related to consideration of the Project, prior to the date of the meeting. Applicant shall pay the charges estimated by the Town for work to be performed through the date of the meeting.

iii. The Funds shall be deposited to the Town's Revolving Trust Fund and shall be accounted for by the Town in the same way accounting is normally done for Revolving Trust Fund monies. The Funds shall be used, in the discretion of the Town, to fund or aid in the funding of certain services, studies, activities, supplies and other costs incurred by the Town in connection with the Project. These include but are not limited to review of application(s), responses to public inquiries regarding applications(s), preparation and administrative review costs of any required environmental documents(s), implementation and inspection of mitigation measures identified in the environmental documents(s), checking for conformance with and implementation of the conditions of approval of applications(s), Town Attorney and Consultant costs attributable to the Project, Town staff costs attributable to the Project and other items not specifically identified here. The termination of this Agreement will not take place until all conditions of approval and implementation measures of the environmental document are met by the Applicant or pursuant to early termination under Section 8 hereof. While Applicant acknowledges Town's discretion in entering into Consultant Contracts and processing the Project Application. Applicant shall receive on a monthly basis as processing of the Project application progress, a financial summary showing deposit status with copies of supporting documentation for the Funds applied by the Town against the costs incurred, including, without limitation (except as noted below), copies of Consultants' Contracts and invoices, calculations of staff time expended and compensation therefor, and publication and mailing costs, and a budget of the amount of Project costs and expense expected to be incurred, stated on a monthly basis, which budget shall be updated at least each sixty (60) days. Notwithstanding the foregoing, Town may redact descriptions of services performed by Town's attorneys.

iv. The advance of Funds shall not be contingent on the hiring of any specific employee or Consultant. The Town reserves discretion as to the selection, hiring, assignment, supervision, and evaluation of all employees, contractors, or Consultants that may be necessary to assist the Town in connection with the Project. The Town shall have the discretion to establish the amount of compensation paid to the employees and the amount of fees paid to the Consultants or the Consultants' firms that are hired by the Town in connection with the Project. Applicant acknowledges that the Town will be using staff and Consultants of the Town in preparing the environmental analysis of the Project.

v. The advance of Funds shall not be dependent upon the Town's approval or disapproval of any Project or any application(s) by Applicant, or upon the result of any action, and shall in no way influence the Project. Neither Applicant nor any other person providing funding for the Project shall, because of such funding, have any expectation as to the outcome of any application or the selection of any alternative favorable to or benefiting Applicant.

vi. Applicant is expressly prohibited from directly or indirectly exercising any supervision or control over any employee, agent or Consultant of the Town involved in the Project. This prohibition shall not be construed to preclude Applicant, its agents or representatives, from providing information to the Town or any employee, agent or Consultant of the Town for incorporation into the Project, or from seeking information from the Town, or any employee, agent or Consultant of the Town with respect to the Project.

vii. Applicant understands that, despite the Town's efforts to hire qualified Consultants, it is possible that the work of any Consultant may, in the Town's discretion, prove to be defective, which may in turn lead to the Town to refusing to pay some portion of Consultants' bills and/or the Town terminating the services of the Consultants. In such situations, the Town may assign, and the Applicant shall accept, the obligation of resolving and/or paying any outstanding bills of such Consultants. If litigation ensues concerning Consultants' bills, Applicant must indemnify, defend, and hold harmless the Town in that regard, except that if the litigation concerns Town's nonpayment to Consultants and Applicant has paid Town for Consultants' fees at issue or if the Consultant asserts wrongful termination by the Town, Applicant shall not be required to indemnify, defend, and hold harmless the Town in that regard. In any situation in which a Consultant is discharged, the Town will, pursuant to Sections 2 through 4, retain other Consultants at Applicant's expense.

5. Indemnification, Defense and Hold Harmless.

(a) Applicant hereby acknowledges and agrees that, except to the extent of negligence, unlawful conduct or willful misconduct on the part of Town or Town's Agents (as defined below), Applicant shall defend, indemnify, release and hold harmless the Town and its agents, officers, attorneys, elected officials, Consultants (whether professional, legal, technical, or other), independent contractors and employees ("Town's Agents") from any and all damage, liability or loss, or any claim of damage, liability or loss, including without limitation attorneys'

fees or costs (including claims for "private attorney general" fees), connected with or arising out of any action, proceeding or alternative dispute resolution process, including, without limitation, any litigation under Section 4(c)vii hereof (collectively, "Action") against the Town or the Town's Agents to: (1) attack, set aside, void, or annul the actions of the Town or the Town's Agents related to development of the Project, including without limitation any decision, determination, or action made or taken approving, supplementing or sustaining the Project or any part thereof, or any related approvals or Project conditions imposed by the Town or the Town's Agents concerning the Project; or (2) to impose personal liability against the Town's Agents resulting from or arising out of their involvement in the Project.

(b) In the event of any such Action, the Town and Applicant shall confer and cooperate with each other in response to such Action, including the use of outside Consultants and/or legal counsel; however, this Agreement to 'confer and cooperate' shall in no way be construed to limit the Town's independence in its response to such Action, including without limitation, its authority in connection with the retention and/or use of outside Consultants and/or legal counsel, nor shall it obligate the Town to in any way compromise or alter its attorney-client relationships or confidences with legal counsel or outside Consultants. To the extent that the Town, in its discretion, uses any of its resources, including, without limitation, the fees and expenses of outside Consultants, attorneys and experts, in responding to any Action, Applicant shall reimburse the Town in accordance with this Agreement for the use of such resources within thirty (30) days of the Town's written demand for payment. Such resources include, but are not limited to, staff time, court costs, and Town Attorney's or other Town legal counsel's, agent's or Consultant's time at a rate equal to its total costs, or any other direct or indirect costs associated with responding to the Action. If Applicant does not reimburse all costs associated with responding to the Action within thirty (30) business days of the Town's written demand for payment, interest shall accrue on the unpaid amount at a rate of five percent (5%) per annum, calculated monthly.

(c) The Town shall promptly notify Applicant of any Action.

(d) The Town, in its discretion, may actively participate, at Applicant's expense, in the defense of any Action in which it is named as a party. If the Town retains outside counsel, agents, or Consultants at Applicant's expense as part of Town's active participation, then the Town shall exercise sole, reasonable control and supervision over such Agents, including in a manner to avoid unnecessary duplication of effort between Town's legal representatives and the legal representatives of Applicant.

(e) No settlement of any such Action shall be binding on the Town unless the Town approves of the settlement in writing after consultation with the Applicant and its legal counsel.

6. Town to Retain Discretion. The Applicant acknowledges and agrees that notwithstanding the Applicant's reimbursement obligations under this Agreement, the Town is not obligated to approve any or all of the proposed uses or permits for the Property, to approve

any environmental documents or land use entitlement which may be required for any of the uses contemplated for the Property and/or the Project. The Applicant warrants and represents that no Town official, officer, employee, agent, or attorney has represented, expressly or impliedly, that the Town will approve any proposed use of the Property and/or the Project. The Applicant understands: that there may be numerous legislative and quasi-judicial decisions to be made by the Town with regard to the development of the Property and/or the Project; that all such decisions of the Town with regard to the Property and/or the Project and the contemplated uses of the property and/or the Project will be made only after compliance with all the Town's statutory and other legal obligations and after considering all appropriate information and evidence; and that such evidence may cause the Town to disapprove any or all of the contemplated uses of the property and/or the Project. Notwithstanding anything in this Agreement to the contrary, the Town retains all authority and discretion granted to it by law to approve, disapprove or modify any of the proposed uses of the Property and/or Project.

The Applicant further understands that the Town shall not be bound by any recommendations or conclusions reached by the Consultants and that the Town may accept or reject, in whole or in part, any such recommendations or conclusions that the Town, in its discretion, deems to be unreasonable or contrary to the Town's land use ordinances and regulations or State statutes or regulations.

7. Term. The term of this Agreement shall commence on the date that this Agreement is approved by the Town and fully executed by the Parties. This Agreement shall terminate when all work required by each Consultants' Contract has been completed to the Town's reasonable satisfaction and the Applicant has satisfied all of its obligations under this Agreement including, without limitation, the obligation to pay the Town for all Costs, whether or not paid by the Town to a Consultant prior to the date of termination. The Applicant's obligation to reimburse the Town as provided in this Agreement, as well as Applicant's obligation to indemnify the Town pursuant to Section 5, shall survive the termination of this Agreement.

8. Early Termination. Following an uncured event of default (as defined in Section 9), either Party may terminate this Agreement prior to the term set forth in Section 7 above, upon thirty (30) days prior written notice to the other Party.

Within two (2) Town working days following either the Town's decision to terminate this Agreement or the Town's receipt of written notice indicating the Applicant's decision to terminate this Agreement, the Town shall notify the Consultants and instruct them to cease work under any Contracts. The Consultants shall be instructed to bill the Town for any work completed prior to the date of termination of the Consultant Contract, and Applicant shall be responsible for reimbursing the Town for such work.

9. Remedies Upon Default. An event of default shall be deemed to exist upon the occurrence of all of the following:

(a) The Applicant or the Town has, without legal justification or excuse, breached any one or more of its obligations under this Agreement; and

(b) Either party has sent written notice to the party claimed to be in default, specifying the default and what actions the non-defaulting party asserts should be taken to remedy the default; and

(c) The party claimed to be in default has not, within ten (10) days following receipt of the written notice described above, either corrected the default or taken actions, reasonably satisfactory to the other party, to remedy the default within a reasonable period of time, but in no event longer than thirty (30) days after receipt of the written notice described in (b) above.

Following an event of default, either party may exercise any and all remedies available to it pursuant to this Agreement, or at law or in equity, including, without limitation, instituting an action for damages, injunctive relief, or specific performance.

10. Nonwaiver of Rights or Remedies. The failure of a party to exercise any one or more of its rights or remedies under this Agreement shall not constitute a waiver of that party's right to enforce that right or seek that remedy in the future. No course of conduct or act of forbearance on any one or more occasions by a party shall preclude that party from asserting any right to remedy available to it in the future. No course of conduct or act of forbearance on any one or more occasions by a party shall be deemed to be an implied modification of the terms of this Agreement.

11. Assignability. This Agreement may not be assigned by the Applicant without the prior and express written consent of the Town. In determining whether to approve a request by the Applicant to assign this Agreement, the Town 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. The restrictions of this Section 11 notwithstanding, Applicant may at any time, and without the necessity of approval from the Town, assign this Agreement, to: (i) a subsidiary, affiliate, parent or other entity which controls, is controlled by, or is under common control with Applicant, including a single asset entity (e.g. a Limited Liability Company) that is the fee title owner of the Property; (ii) a successor corporation related to Applicant by merger, consolidation, non-bankruptcy reorganization, or government action; (iii) a purchaser of substantially all of Applicant's assets located in the northern Central Valley of California; or (iv) a joint venture in which Applicant or any successor to Applicant under the preceding clauses (i) to (iii) is a venturer or partner. For purposes of this Agreement, sale or transfer of Applicant's capital stock through any public exchange, or redemption or issuance of additional stock of any class shall not be deemed an assignment or change of control.

12. No Oral Modifications. This Agreement represents the entire understanding of the Town and Applicant 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 the authorized representatives of both the Town and the Applicant. Modifications to this Agreement may be approved by the Town Manager.

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

14. Legal Challenges. Nothing herein shall be construed to require Town to defend any third-party claims and suits challenging any action taken by the Town with regard to any procedure or substantive aspect of the Town's approval of development of the property and/or the Project, the environmental process, or the proposed uses of the property and/or the Project. The Applicant may, however, in its discretion appear as real party in interest in any such third-party action or proceeding. If the Town, in its discretion, defends such action or proceeding, the Applicant shall be responsible and shall reimburse the Town for any and all legal fees and costs that may be incurred by the Town in defense of such action or proceeding. Subject to Section 5 hereof, the Town shall have the right to retain such legal counsel as the Town deems necessary and appropriate, and Applicant shall reimburse Town in the event of any award of Court costs or attorneys' fees is made against Town in favor of any third party including, but not limited to, a third party challenging either the sufficiency of any environmental documents/certifications or the validity of the Town's approval of the Application in connection with the Property and/or the Project.

15. Attorneys' Fees. In the event that any action or proceeding, including arbitration, is commenced by either the Town or the Applicant against the other to challenge 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 aid equitable remedies available to it, its actual attorneys' fees and costs of such litigation and/or arbitration, including, without limitation, filing fees, service fees, deposition costs, arbitration of costs and expert witness fees, including actual costs and attorneys' fees on appeal.

16. Jurisdiction and Venue. This Agreement is executed and is to be performed in the Town of Loomis, and any action or proceeding brought relative to this Agreement shall be heard in the appropriate court in the County of Placer, California, or in the Federal District Courts of the Eastern District of California. The Town and the Applicant each consent to the personal jurisdiction of these courts in any such action or proceeding.

17. Time is of the Essence. Except as otherwise expressly stated, time is of the essence in the performance of each and every action required of Applicant pursuant to this Agreement.

18. Covenant of Further Assurances. The Applicant shall take all other actions and execute all other documents, which are reasonably necessary to effectuate this Agreement.

19. Interpretation. The Town and the Applicant agree that this Agreement is the product of mutual negotiations and is an arms-length transaction. Each party has negotiated this Agreement with the advice and assistance of legal counsel of its own choosing.

It is further agreed that the terms of this Agreement shall be construed in accordance with the meaning of the language and shall not be construed for or against either party by reason of authorship and the rule that ambiguities in a document shall be construed against the drafter of the document shall have no application to this Agreement. In construing and interpreting this Agreement, the finder of fact shall give effect to the mutual intention of the Town and the Applicant, notwithstanding such ambiguity, and may refer to the facts and circumstances under which this Agreement is made and such other extraneous evidence as may assist the finder of fact in ascertaining the intent of the Town and the Applicant. Wherever in this Agreement the right is reserved to a party to make a decision or take any action in its "discretion," that term shall be construed as being the sole but reasonable discretion of the party, acting in good faith and in accordance with all applicable laws.

20. Severability. If any term or provision of this Agreement is found to be invalid or not enforceable to its full extent, such term or provision shall be enforced to the fullest extent permitted by law, and the validity of the remaining provisions hereof shall not be affected thereby.

21. 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.

22. 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.

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

If to the Town:	Town of Loomis Attn: Town Manager 3665 Taylor Road Loomis, CA 95650
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If to the Applicant:	Building Engineering & Maintenance, Inc. Attn: Michel Fournier 4120 Douglas Boulevard No. 306-175 Granite Bay, CA 95746
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Notices given pursuant to this Agreement shall be deemed received as follows:

(a) If sent by United States Mail – five (5) calendar days after deposit into the United States Mail, first class postage paid.

(b) 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 23 may be changed upon written notice of such change to either the Town or the Applicant, as appropriate.

24. Days. Unless otherwise specified to the contrary, “days” in this Agreement shall mean calendar, not business, days.

25. Public Record. This Agreement shall be a public record of the Town.

**TOWN OF LOOMIS,  
a municipal corporation**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Sean Rabé, Town Manager

**ATTEST:**

\_\_\_\_\_  
Charlene Strock, Town Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Jeffrey Mitchell, Town Attorney

**Developer:**

**Building Engineering & Maintenance, Inc.**

Dated: September 1<sup>st</sup> 2021

By:   
Michel M Fournier, President