Revision to ASR and/or Attachments

Date: January 26, 2018
To: Clerk of the Board of Supervisors
Cc: County Executive Office
From: Shane L. Silsby, Director of OC Public Works
Re: ASR Control #: 17-001358, Meeting Date 02/06/2018 Agenda Item No. #18

Subject: Indemnification Agreement for Land Use and Subdivision Projects

Explanation: Replace Indemnification Agreement (Attachment A), as the previous version contained formatting errors that have been corrected.

- [ ] Revised Recommended Action(s)
- [ ] Make modifications to the:
  - [ ] Subject
  - [ ] Background Information
  - [ ] Summary
- [x] Revise Attachments (attach revised attachment)

Replace Attachments A with the version included.
INDEMNIFICATION AGREEMENT

This INDEMNIFICATION AGREEMENT ("Agreement"), made by and between the COUNTY OF ORANGE, a political subdivision of the State of California ("County"), and ______________________ (“Property Owner”) (Individually a "Party," and collectively, the “Parties”), relating to the Property Owner’s indemnification of the County under the terms set forth herein:

WITNESSETH:

WHEREAS, the Property Owner has a legal interest in the certain real property described as ______________________ (“Property”); and,

WHEREAS, on ______________________, Property Owner filed an application with the County for ______________________ (“Project”); and,

WHEREAS, judicial challenges of projects requiring discretionary approvals, including, but not limited to, California Environmental Quality Act ("CEQA") determinations and related land use approval, are costly and time consuming, and project opponents often seek an award of attorneys' fees in such challenges; and,

WHEREAS, since applicant property owners are the primary beneficiaries of such approvals, it is appropriate that such owners bear the expense of defending against any such judicial challenge, and bear the responsibility of any costs, attorneys’ fees and damages which may be awarded to a successful challenger; and,

WHEREAS, in the event of judicial challenge is commenced against the Project, the County has requested and the Property Owner has agreed to defend with counsel approved by the County in writing, indemnify and hold harmless the County, its officers, agents and employees from any claim, action or proceeding, including costs associated with Public Records Act ("PRA") requests, against the County, its officers, agents or employees to attack, set aside, void, or annul any approval of the application or related decision, or the adoption of any environmental documents, findings or other environmental determination, by the County, its Board of Supervisors, Planning Commission, Zoning Administrator, Director of OC Public Works, or Director of OC Development Services concerning an application ("Litigation"); and,

WHEREAS, the County may, at its sole discretion, participate in the defense of any action, at the Property Owner’s expense, but such participation shall not relieve Property Owner of his/her obligations; and,

WHEREAS, this Agreement is entered into by the County and Property Owner to establish specific terms concerning Property Owner’s indemnification obligation for the Project and any related Litigation.
NOW, THEREFORE, it is mutually agreed between County and Property Owner as follows:

1. **Indemnification.** Property Owner, at its own expense, shall defend, indemnify and hold harmless the County, its agents, officers, and employees from and against any claim, action or proceeding brought against the County, its agents, officers, and employees to attack, set aside, void or annul any approval of the Project including any associated costs, damages, and expenses including, but not limited to, costs associated with PRA requests submitted to the County related to the Project and an award of attorneys’ fees and costs incurred or arising out of the above-referenced Litigation brought against the County. The County may, at its sole discretion, participate in the defense of any Litigation, at the Property Owner’s expense, but such participation shall not relieve Property Owner of his/her obligations (collectively, the “Indemnification Obligation(s)”).

2. **Defense Cooperation.** Property Owner and the County shall reasonably cooperate in all aspects of the Litigation. Nothing contained in this Agreement, however, shall be construed to limit the discretion of County, in the interest of the public welfare, to settle, defend, appeal or to decline to settle or to terminate or forego defense or appeal of the Litigation. It is also understood and agreed that all litigation pleadings are subject to review, revision and approval by County’s Office of County Counsel (“County Counsel”).

3. **Representation and Payment for Legal Services Rendered.** County shall have the right to approve any and all counsel retained to by Property Owner in the Litigation. Property Owner shall pay the attorney’s fees and costs of the legal firm retained by Property Owner. Property Owner shall also pay the fees and costs incurred by the County Counsel in defense of the litigation. Failure by Property Owner to pay such attorneys’ fees and costs may be treated as an abandonment of the Project and as a default of Property Owner’s obligations under this Agreement.

4. **Payment for County’s Litigation Costs.** Applicant shall reimburse the County for any court costs and attorneys’ fees that the County may be required to pay as a result of any claims, action or proceeding against the County. Litigation costs include any associated costs, fees, damages, and expenses as further described in Section 1 here in as Indemnification Obligation. Within thirty (30) days of receipt of notice from County that Litigation has been initiated against the County or Property Owner related to the Project approvals, including CEQA determinations, Property Owner shall initially deposit with the County the total amount of $__________. Property Owner shall deposit with County such additional amounts as County reasonably and in good faith determines, from time to time, are necessary to cover costs and expenses incurred by the County, including but not limited to, the County Counsel, OC Public Works and the County of Orange Clerk of the Board associated with the Litigation. Within ten (10) days of written notice from County, Property Owner shall make such additional deposits. Collectively, the initial deposit and additional deposits shall be referred to herein as “Deposit”.

Page 2 of 5
5. **Provision of Security.** The County may, at its sole discretion, require the Applicant to post a bond, enter into an escrow agreement, obtain an irrevocable letter of credit from a qualified financial institution, or provide other security, to the satisfaction of the County, in anticipation of litigation and possible attorney’s fee awards.

6. **Return of Deposit.** County shall return to Property Owner any funds remaining on deposit after ninety (90) days have passed since final adjudication of the Litigation.

7. **Notices.** For all purposes herein, notices shall be effective when personally delivered, delivered by commercial overnight delivery service, or sent by certified or registered mail, return receipt requested, to the appropriate address set forth below:

   **COUNTY:**  
   Office of County Counsel  
   Attn: Nicole Walsh  
   333 West Santa Ana Boulevard, Suite 407  
   Santa Ana, CA 92701

   **PROPERTY OWNER**

   With a copy to:

8. **Default and Termination.** This Agreement is not subject to termination, except by mutual agreement or as otherwise provided herein. In the event of a default of Property Owner’s obligations under this Agreement, County shall provide written notification to Property Owner of such alleged default and Property Owner shall have ten (10) days after receipt of written notification to cure any such alleged default. If Property Owner fails to cure such alleged default within the specified time period or otherwise reach agreement with the County on a resolution of the alleged default, County may, in its sole discretion, do any of the following or combination thereof:

   a. Deem Property Owner’s default of Property Owner’s obligations as abandonment of the Project and as a breach of this Agreement;
   b. Rescind any Project approvals previously granted;
   c. Settle the Litigation.

   In the event of a default, Property Owner shall remain responsible for any costs and attorney’s fees awarded by the Court or as a result of settlement and other expenses incurred by the County related to the Litigation or settlement.

9. **County Review of the Project.** Nothing is this Agreement shall be construed to limit, direct, impede or influence the County’s review and consideration of the Project.

10. **Complete Agreement/Governing Law.** This Agreement represents the complete understanding between the Parties with respect to matters set forth herein. This Agreement shall be construed in accordance with the laws of the State of California.

11. **Successors and Assigns.** The obligations specific herein shall be made, and are binding
on the successors in interest of the Property Owner, whether the succession is by agreement, by operation of law or by any other means.

12. **Amendment and Waiver.** No modification, waiver, amendment or discharge of this Agreement shall be valid unless the same is in writing and signed by all Parties.

13. **Severability.** If any term, provision, covenant or condition of this Agreement is held to be invalid, void or otherwise unenforceable, to any extent, by any court of competent jurisdiction, the remainder of this Agreement shall not be affected thereby, and each term, provision, covenant or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

14. **Survival of Indemnification.** The Parties agree that this Agreement shall constitute a separate agreement from any Project approval, and if the Project, in part or in whole, is invalidated, rendered null or set aside by a court of competent jurisdiction, the Parties agree to be bound by the terms of this Agreement, which shall survive such invalidation, nullification or setting aside.

15. **Interpretation.** The Parties have been advised by their respective attorneys, or if not represented by an attorney, represent that they had an opportunity to be so represented in the review of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not be applied in interpreting this Agreement.

16. **Captions and Headings.** The captions and section headings used in this Agreement are inserted for convenience of reference only and are not intended to define, limit or affect the construction or interpretation of any term or provision hereof.

17. **Jurisdiction and Venue.** Any action at law or in equity arising under this Agreement or brought by a Party hereto for the purpose of enforcing, construing or determining the validity of any provision of this Agreement shall be filed in the Courts of Orange County, State of California, and the Parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court or jurisdiction.

18. **Counterparts; Facsimile & Electronic Execution.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document. To facilitate execution of this Agreement, the Parties may execute and exchange facsimile or electronic counterparts, and facsimile or electronic counterparts shall serve as originals.

19. **Joint and Several Liability.** In the event there is more than one Property Owner, the liability of Property Owner shall be joint and several, and Property Owner each of them Owner under this Agreement.

20. **Effective Date.** The effective date of this Agreement is the date the Parties sign the Agreement. If the Parties sign the Agreement on more than one date, then the last date the Agreement is signed by a Party shall be the effective date.
IN WITNESS WHEREOF, the Parties hereto have duly caused this Agreement to be executed by their authorized representatives as of the date written.

COUNTY:
COUNTY OF ORANGE,
a political subdivision of the State of California

By: ____________________________
Name: __________________________
Title: __________________________

Dated: __________________________

PROPERTY OWNER:

By: ____________________________
Name: __________________________
Title: __________________________

Dated: __________________________

[Signature]
Date: 12/4/18