

DATE: June 16, 2009

TO: Mayor and City Council

FROM: Development Services Director

SUBJECT: Costco at Eden Shores Project – Approval of Partial Assignment and Assumption of Mount Eden Business and Sports Park Community Development Agreement from Eden Shores Associates I, LLC and Eden Shores Associates II, LLC to Costco Wholesale Corporation

RECOMMENDATION

That the City Council adopts the attached resolution approving the partial assignment and assumption of the Mount Eden Business and Sports Park Community development Agreement for the Costco Project at Eden Shores from Eden Shores Associates I, LLC and Eden Shores Associates II, LLC to Costco Wholesale Corporation.

DISCUSSION

In 1999, the City Council approved the Mount Eden Business and Sports Park Community Development Agreement with then-owners, The Gordon Oliver Estate and Trust and The Alden Oliver Trust (“Development Agreement”). The Development Agreement expressly authorized assignment to Duc Housing Partners, Inc. The Development Agreement also provided that any subsequent assignment required the written consent of the City.

In 2001, the City Council approved the assumption of the Development Agreement by Hayward Oliver Owners, LLC, (a Duc Housing subsidiary) of the entire Mount Eden Project. The Mount Eden Project Area includes the properties originally owned by the Oliver Trust (238.8 acres), Mr. John Weber (80.5 acres), the City of Hayward (12.2 acres), and the Alameda County Flood Control Water Conservation District (2.0 acres), totaling approximately 332.7 gross acres. A map of the Mt. Eden project area is included as Exhibit C to this report.

Simultaneously, the City Council approved the assignment and assumption of the Development Agreement, as it is related to the Oliver West portion of the project, to Standard Pacific and Acacia Credit Fund 7 LLC. Under this latter assignment, Acacia, a holding company, became the owner of record of Oliver West, with Standard Pacific retaining an exclusive option to repurchase Oliver West from Acacia for development of the Oliver West parcels. Oliver West has since been built out

in the manner contemplated by the Development Agreement, which is the Eden Shores development, located west of the railroad tracks.

On February 14, 2006, the City Council approved a partial assignment and assumption of the Development Agreement, as it pertained to a proposed residential development of a portion of the Oliver East property (the "Eden Shores East project"), from Hayward Oliver Owners, LLC, to Standard Pacific and SCC-Canyon II, LLC, a Delaware limited liability company. This area includes properties to the east of the railroad tracks, west of Marina Boulevard. Under the proposed arrangement, SCC-Canyon became the owner of record of the Eden Shores East project, and Standard Pacific acquired the right to purchase the lots for development. The Bridgeport and Crossings projects contemplated by the Eden Shores East land use approvals are currently under construction.

In November 2006, the City Council authorized a land use study for the remaining 60 acres of the Oliver East property. Legacy Partners, Inc., the developer, and Eden Shores Associates I and Eden Shores Associates II, the owners of the property, submitted General Plan Land Use Amendment and Zoning Change applications associated with conceptual development on the remaining 60 acres of Oliver East.

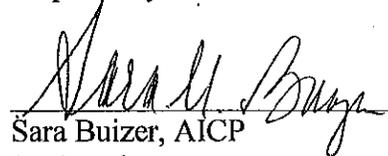
In October 2007, the City Council approved the partial assignment and assumption of the Mount Eden Business and Sports Park Community Development Agreement for the Legacy Eden Shores Project from Hayward Oliver Owners, LLC, to Eden Shores Associates I, LLC and Eden Shores Associates II, LLC.

On December 17, 2008, the Planning Director administratively approved a request to construct a new Costco warehouse and associated 16-pump gasoline station for the corner of Hesperian and Industrial Boulevards. Costco Wholesale Corporation will now be the owner of the property upon which the new Costco warehouse and station will be located. Per the Adopted Community Development Agreement, Costco would assume all obligations as Owner under the Development Agreement as of the date Costco acquires the property.

FISCAL IMPACT

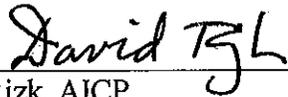
Staff has reviewed the financial capability of Costco Wholesale Corporation and has determined that they have the financial capability to perform the obligations as "Owner" under the Community Development Agreement. In addition, because the proposed Partial Assignment and Assumption Agreement holds Eden Shores I and II, LLC for performing obligations of the Development Agreements that do not pertain to the Costco parcel, staff recommends approval of the partial assignment and assumption of the Development Agreement.

Prepared by:



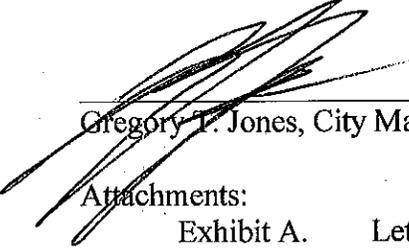
Sara Buizer, AICP
Senior Planner

Recommended by:



David Rizk, AICP
Director of Development Services Department

Approved by:



Gregory T. Jones, City Manager

Attachments:

- Exhibit A. Letter from Steve Dunn Requesting Assignment of Development Agreement, dated June 3, 2009
- Exhibit B. Draft Partial Assignment and Assumption Agreement
- Exhibit C. Map of Mt. Eden Project Area
Draft Resolution



Investment
Management

Property
Management

Marketing
Services

Asset
Management

Acquisitions &
Development

Disposition
Services

Design
Services

Construction
Management

June 9, 2009

Mr. Gregory T. Jones
Office of the City Manager
City Hall, 4th Floor
777 B Street
Hayward, CA 94541

**RE: Partial Assignment of the Mount Eden Business and Sports Park Community
Development Agreement**

Dear Mr. Jones:

Please accept this letter as our request for the City of Hayward's consent of the enclosed
Partial Assignment and Assumption of the Mount Eden Business and Sports Park
Community Development Agreement.

We look forward to your favorable reply.

Thank you,


Steven M Dunn
Managing Partner
Acquisitions & Development

Cc: Gregg Hall
Bridget Metz
Pamela Westhoff
Shane Griffin

RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:

Costco Wholesale Corporation
999 Lake Drive
Issaquah, Washington 98027
Attention: Corporate Counsel

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

This instrument is exempt from Recording Fees (Govt. Code §27383) and from Documentary Transfer Tax (Rev. and Taxation Code § 11922).

**PARTIAL (COSTCO PARCEL) ASSIGNMENT AND ASSUMPTION OF
DEVELOPMENT AGREEMENT**

THIS PARTIAL (COSTCO PARCEL) ASSIGNMENT AND ASSUMPTION OF DEVELOPMENT AGREEMENT (herein the "**Agreement**") is dated as of this ____ day of June, 2009 by and among **EDEN SHORES ASSOCIATES I, LLC**, a Delaware limited liability company and **EDEN SHORES ASSOCIATES II, LLC** (collectively, "**Developer/Assignor**"), and **COSTCO WHOLESALE CORPORATION**, a Washington corporation ("**Assignee**").

RECITALS

- A. Duc Housing Partners, Inc., a California corporation (as successor-in-interest to the Gordon Oliver Estate and Trust, The Alden Oliver Trust) ("**Original Declarant**") and the City of Hayward (the "**City**") entered into that certain Mount Eden Business and Sports Park Community Development Agreement, recorded in the Official Records of Alameda County, State of California (the "**Official Records**") on December 13, 1999 as Instrument No. 1999443129 (the "**Original Development Agreement**").
- B. Original Declarant assigned its rights under and with respect to the Original Development Agreement to Hayward Oliver Owners LLC pursuant to an Assumption Agreement recorded in the Official Records on October 15, 2001, as Instrument No. 2001392229. Hayward Oliver Owners LLC subsequently assigned its rights under and with respect to the Original Development Agreement to Developer/Assignor pursuant to an Assignment and Assumption of Development Agreement recorded in the Official Records on May 1, 2008, as Instrument No. 2008146156.
- C. The Original Development Agreement has been amended pursuant to (i) that certain Amendment to Mount Eden Business and Sports Park Community Development Agreement Relating to Development of Eden Shores East, a Portion of Oliver East Property, as approved by the City Council of the City of Hayward on November 22, 2005, by Ordinance No. 05-17, and dated as of February 3, 2006 and recorded in the Official Records on February 7, 2006 as Instrument No. 200604803 (the "**2006 Amendment**") and (ii) that certain Amendment to Mount Eden Business and Sports Park Community Development Agreement Relating to Development of Legacy Eden Shores, a Portion of Oliver East Property, dated April 2008 and recorded in the Official Records on

April 14, 2008 as Instrument No. 2008128384 (the "2008 Amendment"). The Original Development Agreement, as amended by the 2006 Amendment and the 2008 Amendment, is referred to herein as the "Development Agreement".

- D. The Development Agreement relates to the development of, among other property, the real property described on Exhibit A attached hereto and incorporated herein by this reference (herein the "Property"). By its express terms, the 2006 Amendment relates only to real property other than that described on Exhibit A hereto.
- E. Concurrently herewith, Assignee acquired fee title to the Costco Property as more particularly described on Exhibit B attached hereto ("Costco Property") from Developer/Assignor on the date first written above (the "Acquisition Date").
- F. Assignee meets the requirements of Article 6 of the Development Agreement for obtaining the City's consent to an assignment of Developer/Assignor's rights thereunder with respect to the Costco Property.
- G. Article 6 of the Development Agreement requires the consent of the City to the assignment.

AGREEMENT

NOW, THEREFORE, THE DEVELOPER/ASSIGNOR AND ASSIGNEE HEREBY AGREE AS FOLLOWS:

1. For good and valuable consideration, the receipt of which is hereby acknowledged, and in accordance with Article 6 of the Development Agreement, Developer/Assignor hereby assigns, transfers and conveys to Assignee all of Assignor's rights, benefits, burdens, duties and obligations under the Development Agreement with respect to the Costco Property and delegates to Assignee all of Assignor's burdens, duties and obligations that accrue after the Acquisition Date of this Assignment under the Development Agreement with respect to the Costco Property. Upon the execution of this Agreement and written consent of the City of Hayward, Assignee shall become substituted for Developer/Assignor as the "Owner" under the Development Agreement with respect to the Costco Property. Assignee acknowledges that Developer/Assignor or a predecessor-in-interest has previously made one or more partial assignments of the Development Agreement to a party or parties that acquired other property subject to the Development Agreement, and that this Assignment assigns only Developer/Assignor's rights and obligations with respect to the Costco Property.

2. Notwithstanding any other provision of this Agreement, Assignee hereby assumes and agrees to perform all of the "Owner's Obligations" under the Development Agreement with respect to the Costco Property. Developer/Assignor and Assignee hereby confirm that "Owner's Obligations" assumed by Assignee pursuant to this Agreement do not include, and Assignee shall not be responsible or liable for, performance of any action or payment of any money or satisfaction of any exaction with respect to any requirement or condition of the Existing Development Approvals, except to the extent that (i) such action is to be performed within the Costco Property, except to the extent it is an action for which the Eden Shores Owners Association is responsible pursuant to that certain Eden Shores Development Park Declaration of Restrictions (CC&R's) dated May 5, 2006, and recorded May 9, 2006, as Instrument No. 2006-185473 of said Official Records, as the same may be amended from time to time (the "CC&R's"), or (ii) such payment or exaction is directly attributable to impacts generated solely

by the development within or operation of the Costco Property, or (iii) such payment or exaction is imposed with respect to the Property covered by the Development Agreement generally as a whole (or a portion of the Property that includes the Costco Property) and all owners of the Property (or portion thereof as referenced above) generally, and not with respect to any parcel of the Property specifically or individually, in which event Costco shall be obligated only to pay its fairly allocated share of such payment or exaction as determined under the terms of the CC&R's (a "**Costco Property Obligation**"). At such time as Assignee no longer owns any portion of the Property, Assignee shall be released from all of the "Owner's Obligations" under the Development Agreement, provided Assignee is not in default of the Development Agreement at such time. Notwithstanding the release of Assignee pursuant to the preceding sentence, as between Developer/Assignor and Assignee, Developer/Assignor shall not be deemed to have assumed such "Owner's Obligations" after any such release of Assignee unless Developer/Assignor is the assignee of Assignee.

3. Assignee hereby acknowledges and agrees that development of the Costco Property is subject to all of the burdens and obligations of the "Owner" of the Costco Property under the Development Agreement and Assignee is obligated to, and shall, fully perform all of the duties and obligations of the "Owner" under the Development Agreement with respect to the Costco Property.

4. Nothing in this Assignment is intended to release, or releases, Hayward Oliver Owners LLC and Duc Housing Partners, Inc. ("**Duc**") (Hayward Oliver Owners LLC and Duc being sometimes collectively referred to herein as the "**Oliver East Commercial Parties**") from the burdens and obligations they assumed pursuant to that certain Assumption Agreement entered into between the Oliver East Commercial Parties and the City, recorded in the Official Records of Alameda County on October 15, 2001, as Instrument No. 2001392229, and effective September 25, 2001, nor Developer/Assignor from the burdens and obligations they assumed pursuant to that certain Assumption Agreement entered into between Hayward Oliver Owners LLC and Developer/Assignor, recorded in said Official Records on May 1, 2008, as Instrument No. 2008146156, and effective June 6, 2007, other than with respect to the Costco Property Obligation.

5. For purposes of Section 14.18 of the Development Agreement, the address of the Owner of the Costco Property is as follows:

COSTCO OWNER: Costco Wholesale Corporation
999 Lake Drive
Issaquah, WA 98027
Attention: Property Management (Legal Department)

With a copy to: Luce Forward Hamilton & Scripps LLP
121 Spear Street, Suite 200
San Francisco, CA 94105
Attention: David B. Franklin

6. This Agreement shall be recorded in the Office of the Alameda County Recorder.

7. If there is any dispute, action, lawsuit or proceeding relating to this Assignment, or any default hereunder, whether or not any action, lawsuit or proceeding is commenced, the non-prevailing party shall reimburse the prevailing party for its attorneys' fees, expert witness

fees and all fees, costs and expenses incurred in connection with such dispute, action, lawsuit or proceeding, including, without limitation, any post-judgment fees, costs or expenses incurred on any appeal, in collection of any judgment or in appearing in any bankruptcy proceeding.

8. Each party hereto covenants and agrees to perform all acts to prepare, execute and deliver such written agreements, documents, instruments, statements, filings and notices as may be reasonably necessary to carry out the terms and provisions of this Assignment.

9. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity and authority to enter into and to execute this Agreement on behalf of the respective legal entities of the Developer/Assignor and the Assignee.

10. This Assignment may only be amended or modified by a written instrument signed by all of the parties hereto.

11. This Assignment shall be binding upon and inure to the benefit of the heirs, successors and assigns of the respective parties hereto. Assignee shall have the right to reassign these rights and obligations only in connection with a conveyance of the fee title to the Property.

12. This Assignment sets forth the entire understanding between the parties hereto with respect to all matters discussed herein and supersedes any and all prior agreements whether written or oral regarding such matters. Should any term, condition, covenant or provision of this Assignment be held to be invalid or unenforceable, the remainder of this Assignment shall continue in full force and effect.

13. This Assignment may be executed in several counterparts and, when so executed, shall constitute one agreement binding on all parties hereto, notwithstanding that all parties are not signatory to the original and the same counterpart. A facsimile signature shall be deemed an original signature.

14. All capitalized terms used herein but not otherwise defined herein shall have the meanings ascribed to such terms as set forth in the Original Development Agreement and the 2008 Amendment.

[NEXT PAGE IS SIGNATURE PAGE]

IN WITNESS WHEREOF, Developer/Assignor and Assignee do hereby agree to the full performance of the terms set forth herein.

DEVELOPER/ASSIGNOR: **EDEN SHORES ASSOCIATES I, LLC,**
a Delaware limited liability company

By: Legacy Partners II Hayward I, LLC,
a Delaware limited liability company,
its Administrative Member

By: Legacy Partners Realty Fund II, LLC,
a Delaware limited liability company,
its managing member

By: Legacy Partners Investment
Management Services, LLC,
a Delaware limited liability company,
its managing member

By: _____
Name: _____
Title: _____

EDEN SHORES ASSOCIATES II, LLC,
a Delaware limited liability company

By: Legacy Partners II Hayward II, LLC,
a Delaware limited liability company,
its Administrative Member

By: Legacy Partners Realty Fund II, LLC,
a Delaware limited liability company,
its managing member

By: Legacy Partners Investment Management
Services, LLC,
a Delaware limited liability company,
its managing member

By: _____
Name: _____
Title: _____

[SIGNATURES CONTINUED ON NEXT PAGE]

ASSIGNEE:

COSTCO WHOLESALE CORPORATION,
a Washington corporation

By: _____

Name: _____

Title: _____

Date: _____

CITY OF HAYWARD CONSENT

In accordance with Section 14.4.1 of the Development Agreement, City hereby certifies to Assignee that (a) the Development Agreement is in full force and effect and is a binding obligation of the parties; (b) the Development Agreement has not been amended or modified either orally or in writing, except by the recorded documents referred to in the foregoing Assignment and Assumption Agreement; and (c) Developer/Assignor is not in default in the performance of its obligations under the Development Agreement. Subject to resolution of issues regarding colored concrete at entry drives and rebar in the warehouse floor, City certifies the plans and specifications for development of the Costco Property comply with the requirements of the "Existing Development Approvals" as defined in the Development Agreement as amended. City also confirms that in accordance with Section 10.4 of the Development Agreement, the default by any other owner under the Development Agreement shall not constitute a default by the Owner of the Costco Property, and the Owner of the Costco Property shall be in default only for failure to perform a "Costco Property Obligation" as defined in the foregoing Assignment and Assumption Agreement. In accordance with Section 6.1.4 of the Development Agreement, City hereby releases Developer/Assignor from the Costco Property Obligation.

The City Council of the City of Hayward hereby consents to the covenants, terms and conditions of the foregoing Assignment and Assumption Agreement, by Resolution _____ on _____, 2009.

By: _____
Name: _____
City Manager, City of Hayward

Attest: _____
Name: _____
City Clerk

Approved as to form:

By: _____
Name: _____
City Attorney, City of Hayward

STATE OF CALIFORNIA)
)
COUNTY OF _____)

On _____, before me, _____, a Notary Public, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

[AFFIX INK SEAL]

ACKNOWLEDGMENT

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

On the ____ day of _____, 2009, before me, _____,
Notary Public, personally appeared _____

_____ personally known to me

or

_____ proved to me on the basis of satisfactory evidence

to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

IN WITNESS WHEREOF I have hereunto set my hand and official seal.

OATHS

NOTARY PUBLIC COMMISSIONER OF

(Seal or stamp)

Notary Signature

Print/Type Name
Notary Public in and for the State of Washington
residing at _____

My appointment expires _____

STATE OF CALIFORNIA)
)
COUNTY OF _____)

On _____, before me, _____, a Notary Public, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

[AFFIX INK SEAL]

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

REAL PROPERTY IN THE CITY OF HAYWARD, COUNTY OF ALAMEDA, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL ONE:

LOTS 1, 10, 11, 15, 16 AND 17, INCLUSIVE, AS SHOWN ON THAT CERTAIN MAP ENTITLED "TRACT 7065" WHICH MAP WAS FILED IN THE OFFICE OF THE RECORDER OF THE COUNTY OF ALAMEDA COUNTY, STATE OF CALIFORNIA ON OCTOBER 16, 2001, IN BOOK 261 OF MAPS PAGES 68 THROUGH 74, INCLUSIVE.

PARCEL TWO:

NEW LOT 1 AS SHOWN ON LOT LINE ADJUSTMENT LLA 08-05 RECORDED FEBRUARY 23, 2009, AS INSTRUMENT NO. 2009-055634 ALAMEDA COUNTY RECORDS BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

ALL OF LOTS 7 & 8, AS SHOWN ON THE MAP ENTITLED "TRACT 7065" RECORDED IN BOOK 261 OF MAPS, PAGE 68.

TOGETHER WITH ALL OF NEW LOT 4, AS SHOWN ON THAT LOT LINE ADJUSTMENT, RECORDED SEPTEMBER 15, 2008 AS INSTRUMENT NO. 2008-276985, CONTAINING 16.32 +/- ACRES.

PARCEL THREE:

NEW LOT 2, 3, AND 4 AS SHOWN ON LOT LINE ADJUSTMENT LLA 08-05 RECORDED FEBRUARY 23, 2009, AS INSTRUMENT NO. 2009-055634 ALAMEDA COUNTY RECORDS.

NEW LOTS 5 AND 6 AS SHOWN ON LOT LINE ADJUSTMENT LLA 08-01 RECORDED SEPTEMBER 15, 2008, AS INSTRUMENT NO. 2008-276985 ALAMEDA COUNTY RECORDS.

APNs: 456-0097-003 and 004-4
456-0097-007 through 17,
456-0097-021 through 023

EXHIBIT B

LEGAL DESCRIPTION OF COSTCO PROPERTY

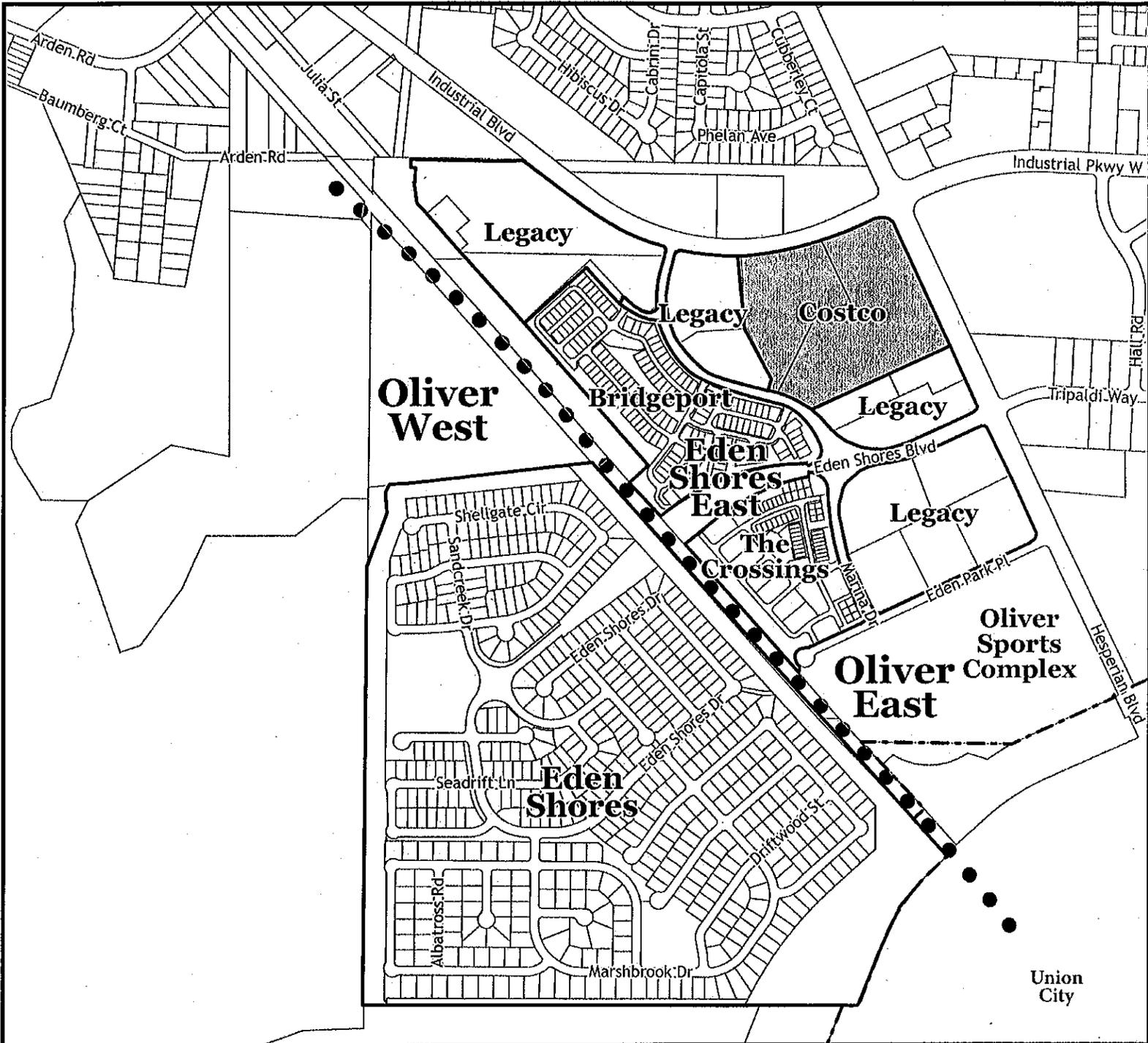
Real property in the City of HAYWARD, County of ALAMEDA, State of California, described as follows:

NEW LOT 1 AS SHOWN ON LOT LINE ADJUSTMENT LLA 08-05 RECORDED FEBRUARY 23, 2009, AS INSTRUMENT NO. 2009-055634 ALAMEDA COUNTY RECORDS BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

ALL OF LOTS 7 & 8, AS SHOWN ON THE MAP ENTITLED "TRACT 7065" RECORDED IN BOOK 261 OF MAPS, PAGE 68.

TOGETHER WITH ALL OF NEW LOT 4, AS SHOWN ON THAT LOT LINE ADJUSTMENT, RECORDED SEPTEMBER 15, 2008 AS INSTRUMENT NO. 2008-276985, CONTAINING 16.32 +/- ACRES.

APNs: 456-0097-007(por.),
456-0097-008 (por.),
456-0097-011,
456-0097-012,
456-0097-013
456-0097-014
456-0097-015 (por.)



South of Route 92
Specific Plan Area

FEET 500 1000



DRAFT

HAYWARD CITY COUNCIL

RESOLUTION NO. 09-

Introduced by Council Member _____

me
6/11/09

**RESOLUTION APPROVING THE PARTIAL ASSIGNMENT
AND ASSUMPTION OF THE MOUNT EDEN BUSINESS
AND SPORTS PARK COMMUNITY DEVELOPMENT
AGREEMENT AS IT RELATES TO THE COSTCO
DEVELOPMENT AT THE LEGACY EDEN SHORES
PROJECT**

BE IT RESOLVED that the City Council of the City of Hayward hereby authorizes the City Manager to negotiate and execute all documents necessary to effectuate the partial assignment and assumption of the Mount Eden Business and Sports Park Community Development Agreement, as said development agreement relates to the Costco development at the Legacy Eden Shores project, from Eden Shores Associates I, LLC, and Eden Shores Associates, II, LCC, to Costco Wholesale Corporation, in a form approved by the City Attorney.

IN COUNCIL, HAYWARD, CALIFORNIA _____, 2009

ADOPTED BY THE FOLLOWING VOTE:

AYES: COUNCIL MEMBERS:

NOES: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ATTEST: _____
City Clerk of the City of Hayward

APPROVED AS TO FORM:

City Attorney of the City of Hayward