

COUNCIL DECISION REQUEST

SUBJECT: Culver's Water Development Fee

MEETING DATE: April 21, 2011

PAYSON GOAL: NEW: EXISTING:

ITEM NO.:

TENTATIVE SCHEDULE: Immediate

SUBMITTED BY: Buzz Walker 

AMOUNT BUDGETED: \$-0-

SUBMITTAL TO AGENDA
APPROVED BY TOWN MANAGER

EXPENDITURE REQUIRED: \$-0-

CONT. FUNDING REQUIRED: N/A

EXHIBITS (If Applicable, To Be Attached): Sample form agreement

POSSIBLE MOTION I move to authorize an agreement with the Payson Restaurant Alliance, LLC for the deferred payment of a Water Development Fee in the amount of \$100,908.00 over a ten-year period at 0% interest rate and to authorize the Mayor to execute the agreement after approval by the Town Attorney as to form and content.

SUMMARY OF THE BASIS FOR POSSIBLE MOTION: Town of Payson Administrative Policy A608 allows for the payment of some water development fees over an extended period of time of up to ten years. The owners of the new Culver's restaurant have requested a ten year payment plan of \$10,090.80 per year in monthly installments of \$840.90 per month at 0% interest. The Town Attorney has developed a form agreement for this type of transaction.

I recommend the approval of this request. I would recommend that we do not require any security because the Town has the ability to ultimately discontinue water service to the business in the event of non-payment by the business.

PROS: Allows for an annual revenue stream available for repayment of CC Cragin project debt. Eases the burden of start-up costs for new businesses.

CONS: Business may fail before total fee is paid. In this case no harm is done as water service would cease to the business and any water development fees that were paid would be assigned to the property for the benefit of future owners/operators.

PUBLIC INPUT (if any): N/A

BOARD/COMMITTEE/COMMISSION ACTIONS/RECOMMENDATIONS (if any) (give dates and attach minutes): N/A

APR 21 2011 I.v.l

COUNCIL DECISION REQUEST

FUNDING:

Acct:	Budget:	Available:	Expense:	Remaining:
Acct:	Budget:	Available:	Expense:	Remaining:
Acct:	Budget:	Available:	Expense:	Remaining:

3A: _____ Date: _____

**WATER DEVELOPMENT FEE
DEFERRED PAYMENT AGREEMENT
BETWEEN
DEVELOPER
AND THE TOWN OF PAYSON**

Recitals:

- A. The Town of Payson requires all new developments to pay a Water Development Fee.
- B. The Water Development Fee is based upon water usage, runs with the land, and is subject to increase if the land use increases water usage.
- C. The Town allows the deferral and/or payment over time of the Water Development Fee in specific situations as outlined in Section 50.59 of the Town Code and Administrative Policy A608.
- D. DEVELOPER is developing a project located at ADDRESS, as further described in the legal description attached as Exhibit A ("the Project") and seeks deferral and/or time payments of the Water Development Fee for the Project.

Terms:

- 1. **Parties.** The parties to this Agreement are DEVELOPER, a _____, hereinafter referred to as "Developer," and the Town of Payson, an Arizona municipal corporation, hereinafter referred to as "Town" (collectively, the "Parties"). The Town and the Developer, in consideration of the mutual covenants and conditions herein contained, hereby agree as follows:
- 2. **Town's Agreements.**
 - 2.1 Based upon the Developer's written description of the Project dated _____, the Town has made an initial determination that the peak month water usage for the Project is _____ and therefore the Water Development Fee for the Project is _____ dollars (\$_____).
 - 2.2 The Water Development Fee for the Project is eligible for deferral and/or time payments pursuant to Section 50.59 of the Town Code and Administrative Policy A608.
 - 2.3 The Town agrees to the payment schedule of Water Development Fees as set forth in Exhibit B attached hereto ("the Payment Schedule").

3. Developer's Agreements.

- 3.1 Developer agrees with the Town's initial water usage for the Project of ___ either gal/mo or ERU's _____ and the associated Water Development Fee of _____ dollars (\$ _____).
- 3.2 Developer agrees to pay the Water Development Fee in accordance with the Payment Schedule.
- 3.3 Developer will provide security acceptable to the Town to secure all outstanding amounts of the Water Development Fee.
- 3.4 Developer consents to a notice of this Agreement being recorded in the Gila County Recorder's Office, in substantially the form attached as Exhibit C. If the Developer is not the owner of the real property upon which the Project is located, Developer will obtain written consent from the owner for the filing of the notice.

4. Effective Date and Term.

- 4.1 This Agreement shall be effective on the date of the last signature of the Parties.
- 4.2 This Agreement shall terminate upon full payment of the Water Development Fees and all accrued interest set forth in the Payment Schedule.

5. Interest on Outstanding Water Development Fees.

- 5.1 Interest shall accrue on all outstanding Water Development Fees at the rate of 12% per annum.
- 5.2 Notwithstanding subsection 5.1, if Developer complies with the Payment Schedule, the rate of interest shall be as set forth in Exhibit B.

[note - if they make payments on time, Exhibit B governs; if they miss payments or quit making payments, the 12% rate kicks in.]

6. Water Development Fee Review.

- 6.1 This Agreement is subject to the provisions of Section 50.57(C) (True Up Provision) of the Town Code.
- 6.2 If, based upon 50.57(C)(3), water usage is greater than determined based upon the Developer's written description, additional Water Development Fees shall be determined and such additional Water Development Fees shall be due and owing concurrently with the last payment of the Payment Schedule.

6.3 If, based upon 50.57(C)(3), water usage is less than determined based upon the Developer's written description, no refund or reduction in the Payment Schedule shall be made.

7. **Payments.**

7.1 All payments are payable in the amount and upon the date listed in the Payment Schedule.

7.2 Late payments are subject to a \$_____ penalty per day.

7.3 If the Developer is more than 30 days late on any payment, the Developer shall be deemed to be in default of this Agreement.

8. **Town's Remedies.**

8.1 Upon any default or breach of this Agreement, the Town shall make written demand upon the Developer to remedy such default or breach within 14 calendar days.

8.2 If Developer fails to remedy any default or breach within 14 calendar days pursuant to subsection 8.1, the Town's remedies shall include, but not be limited to, the following:

8.2.1 Specific performance of this Agreement, including any term for which Developer is in default or breach;

8.2.2 Accelerate all outstanding payments, including accrued interest, and demand payment in full;

8.2.3 Utilize any security to, at the Town's option, remedy the default or breach, or to provide payment for all outstanding amounts as calculated under 8.2.2;

8.2.4 Discontinue water service to the Property;

8.2.5 Seek damages and any other remedies at law or in equity.

8.3 If Developer fails to pay the entire Water Development Fee as set forth in this Agreement, any future use of the property will receive credit only for the Water Development Fees actually paid.

9. **Modification.** No provision of this Agreement shall be amended or otherwise modified, in whole or in part, except by an instrument in writing duly executed by the Town and the Developer.

10. **Dispute Resolution.** This Agreement shall be governed and construed in accordance with the internal laws of the State of Arizona. With the written consent of both Parties, any dispute, controversy, claim, or cause of action arising out of or related to this Agreement may, but in no event need, be settled by submission to binding arbitration in accordance with the rules of the American Arbitration Association and the Arizona

Uniform Arbitration Act, A.R.S. § 12-1501, et seq.; and judgment upon any award rendered by the arbitrator(s), if filed in Arizona Superior Court, shall be filed in the Superior Court of Gila County, Arizona; or any such dispute, controversy, claim, or cause of action may be submitted to mediation or litigated in the Superior Court of Gila County, Arizona. The venue for any such dispute shall be Gila County, Arizona, and both Parties consent in advance to such venue and jurisdiction and waive any right to object that Gila County is an inconvenient or improper forum based upon lack of venue.

10. **Cancellation (A.R.S. §38-511).** This Agreement is subject to the provisions of A.R.S. § 38-511 which provides for cancellation of contracts by the municipality for certain conflicts of interest.
11. **Assignment.** Developer shall not assign this Agreement without the written consent of the Town.
12. **Notices.** All notices, filings, consents, approvals, and other communications provided for herein or given in connection herewith shall be validly given, filed, made, delivered, or served if in writing and delivered personally or sent by certified United States mail, postage prepaid, return receipt requested, to:

Town:
Town of Payson
303 North Beeline Highway
Payson, Arizona 85541
Attention: Debra Galbraith

Contractor:
DEVELOPER

Attention:

With a copy to:
Town of Payson
Attention: Public Works Director

or to such other addresses as either party hereto may from time to time designate in writing and deliver in a like manner. Notices, filings, consents, approvals, and communication given by certified mail shall be deemed delivered forty-eight (48) hours following deposit in the U.S. mail, postage prepaid and addressed as set forth above. Notices delivered personally shall be deemed delivered upon delivery.

13. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument so that the signatures of all parties may be physically attached to a single document.
14. **No Waiver.** No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by the Town of a breach of any of the covenants of this Agreement shall be construed as a waiver of any proceeding or succeeding breach of the same or any other

covenant or condition of this Agreement.

- 15 **Construction.** This Agreement shall be construed and interpreted according to its plain meaning, and no presumption shall be deemed to apply in favor of or against the party drafting this Agreement. The Parties acknowledge and agree that each has had the opportunity to seek and utilize legal counsel in the drafting of, review of, and entry into this Agreement.
- 16 **Time of Essence.** Time is of the essence in this Agreement.
- 17 **Time Periods.** Except as expressly provided for herein, the time for performance of any obligation or taking any action under this Agreement shall be deemed to expire at 5:00 p.m. (Payson time) on the last day of the applicable time period. If the time for the performance of any obligation or taking any action under this Agreement expires on a Saturday, Sunday or legal holiday, the time for performance or taking such action shall be extended to the next succeeding day which is not a Saturday, Sunday or legal holiday.
- 18 **Severability.** If any portion of this Agreement is found to be invalid, such finding will not affect the validity of the remainder of this Agreement and to this end the provisions of this Agreement are severable.
- 19 **Authority.** The Parties acknowledge and warrant that each of them is fully authorized and empowered to execute this Agreement by and through the individual(s) executing hereinafter.
- 20 **Entire Agreement.** This Agreement contains and sets forth the entire and exclusive agreement and understanding between the Parties hereto pertaining to the subject matter and all prior or contemporaneous oral or written agreements shall have no effect.

WHEREFORE, the parties have caused this Agreement to be executed by their duly authorized representatives.

DEVELOPER

an _____

By _____
_____, its _____

Dated

TOWN OF PAYSON,
an Arizona municipal corporation

By _____
Debra Galbraith, its Manager

_____ Dated

[if council approves, probably should be mayor signing. If it is administrative, who do we want to have sign? Public Works Director?]

ATTEST:

Silvia Smith, Town Clerk

APPROVAL AS TO FORM

The Town of Payson Legal Department has reviewed this Agreement and approved it as to form and has determined that it is in proper form and is within the powers and authority granted under the laws of the State of Arizona.

Dated: ____ day of _____, 2010

By _____
Timothy M. Wright, Town Attorney



Exhibit A

Legal Description of the Property:

Exhibit B

Water Development Fee, Interest Rate, and Payment Schedule

Water Development Fee _____

Interest Rate _____

Payment Schedule

<u>Payment number</u>	<u>Date Due</u>	<u>Amount</u>	<u>Remaining Balance</u>
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Exhibit C

WHEN RECORDED RETURN TO:
Town of Payson Water Department
303 North Beeline Highway
Payson, Arizona 85541
928-474-5242

**NOTICE OF
WATER DEVELOPMENT FEE DEFERRED PAYMENT AGREEMENT**

On ____ date ____, the Town of Payson, an Arizona municipal corporation (the "Town"), and _____, _____ (the "Developer") have entered into a Water Development Fee Deferred Payment Agreement (the "Agreement") for the property located at _____ and further described on Exhibit A hereto (the "Property"). A copy of the Agreement may be obtained by contacting the Town of Payson Water Department, 303 North Beeline Highway, Payson, Arizona 85541, telephone 928-474-5242.

If Developer fails to fulfill its obligations under the Agreement, Water Development Fees for the Property will remain due and owing to the Town. The Town will collect such outstanding Water Development Fees from future owners, lessors, lessees, or users of the Property. Future water service to the Property is contingent upon the payment of such outstanding Water Development Fees.

DATED this ____ day of _____, 2010.

Debra A. Galbraith, Town Manager
[Or whoever is going to sign]

SUBSCRIBED AND SWORN to before me this ____ day of _____, 2010, by Debra A. Galbraith, Town Manager for the Town of Payson, an Arizona municipal corporation, on behalf of the Town.

Notary Public

My commission expires:
