

Amended Agenda Item #8

was recognition of the need for a slope easement and sidewalk easement adjacent to the SBM property.

SBM had already dedicated the necessary right of way for the future road widening on one of their parcels (300-191-28) but had not yet dedicated the sidewalk easement nor the slope easement (required since the land slopes away from Yucaipa Blvd.) on that parcel. Also, they had not dedicated road right of way, sidewalk or slope easements their other parcel (300-191-17). SBM felt that it would benefit them to dedicate the right of way, sidewalk and slope easement to the City of Yucaipa at this time to help facilitate the road widening project along their property frontage. The attached MOU includes the necessary right of way dedication and grant of easements. Also, for information purposes, the preliminary site plan is attached.

Staff is working with one additional property owner and may return to Council as early as next meeting with another similar agreement.


FISCAL IMPACT:

Per the MOU, SBM agrees to pay the City \$5.50 per cubic yard of fill dirt placed and compacted on their property. The MOU states that SBM will reimburse the City for the cost prior to SBM commencing grading for their future Retail Development Project. The project requires 100,000 cubic yards of fill dirt at a total cost of \$550,000. The City will front the cost of exporting the fill dirt from the Wildwood Basin Project with the project funds (paid for by Drainage Facility Funds - DFF). When SBM develops their property, they will reimburse the City of Yucaipa and the funds will be returned to the DFF account.

CONCLUSION:

In conclusion, staff recommends that City Council authorize the Mayor to execute the Memorandum of Understanding (MOU) with Stater Bros. Markets (SBM) to purchase Fill Dirt from the Wildwood Basin Project.

Attachment: Memorandum of Understanding (Provided with this Amendment)
Preliminary Site Plan

Approved by: 

**RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:**

Stater Bros. Markets
301 South Tippecanoe Avenue
San Bernardino, CA 92408
Attention: Michael Slaton, Senior Director -
Real Estate

(Space Above Line for Recorder's Use Only)

**MEMORANDUM OF UNDERSTANDING
AND
GRANT OF EASEMENTS**

This Memorandum of Understanding ("MOU") is entered into this 8th day of March, 2010, by and between Stater Bros. Markets, a California corporation ("Stater") and the City of Yucaipa, a California municipal corporation ("City"). Stater and City are sometimes hereinafter referred to individually as "Party" and collectively as "Parties."

RECITALS

A. Stater owns certain real property consisting of approximately ten (10) acres located south of Yucaipa Boulevard between Avenue "E" and 18th Street in the City of Yucaipa, County of San Bernardino, California, as further identified as Assessor Parcel Numbers 300-191-17 and 300-191-28 in Exhibit "A" ("Stater Property") attached hereto and by reference incorporated herein. In the future, Stater plans to develop a retail development ("Retail Project") on the Stater Property.

B. The City owns certain real property proximate to the Stater Property in the City of Yucaipa, County of San Bernardino, California ("City Property"), as well as approximately one hundred thousand (100,000) yards of fill dirt ("Fill Dirt") located on the City Property. The Fill Dirt is a by-product of a recent City public works project.

C. The City desires to sell the Fill Dirt to Stater and Stater desires to purchase the Fill Dirt from the City for the negotiated price of Five Dollars and Fifty Cents (\$5.50) per cubic yard.

D. The City has required Stater to: (i) obtain a conditional use permit ("CUP") for the Retail Project; (ii) obtain a rough grading permit ("Grading Permit") for the grading of the Stater Property and the storage of the Fill Dirt on the Stater Property; and (iii) provide the City with an engineering plan for the storage and erosion control of the Fill Dirt on the Stater Property ("Fill Dirt Plan").

E. Pursuant to the terms and conditions of this MOU, the Parties desire that: (i) the City, at its sole cost, move the Fill Dirt from the City Property to the Stater Property in accordance with the CUP, Grading Permit and Fill Dirt Plan; (ii) Stater store the Fill Dirt on the Stater Property in accordance with the CUP and Fill Dirt Plan until Stater commences grading for the Retail Project; and (iii) Stater pay to the City Five Dollars and Fifty Cents (\$5.50) per cubic yard for the Fill Dirt prior to Stater commencing grading for the Retail Project.

F. Pursuant to the terms and conditions of this MOU, the Parties also desire that Stater dedicate 17 feet of right of way for road purposes from that certain portion of the Stater Property described in Exhibit "B" ("Right of Way Dedication"), attached hereto.

G. Pursuant to the terms and conditions of this MOU, the Parties also desire that Stater grant to the City a temporary non-exclusive revocable access easement over the entire Stater's properties described in Exhibit "A" ("Stater Property"), attached hereto and by reference incorporated herein for the limited purposes set forth in this MOU.

H. Pursuant to the terms and conditions of this MOU, the Parties also desire that Stater grant to the City a sidewalk easement over that certain portion of the Stater Property described in Exhibit "C" ("Sidewalk Easement Area"), attached hereto and by reference incorporated herein for the limited purposes set forth in this MOU.

I. Pursuant to the terms and conditions of this MOU, the Parties also desire that Stater grant to the City a slope easement over that certain portion of the Stater Property described in Exhibit "D" ("Slope Easement Area"), attached hereto and by reference incorporated herein for the limited purposes set forth in this MOU.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth in this MOU and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by each of the Parties, the Parties hereby agree as follows:

OPERATIVE PROVISIONS

1. Incorporation of Recitals. The Recitals are incorporated as though fully set forth herein.
2. Stater to Submit Applications for CUP and Grading Permit and Provide City with Fill Dirt Plans. No later than fifteen (15) days after the date this MOU is approved and executed by the City, Stater shall, at its sole cost and expense: (i) submit to the City completed applications for the CUP and the Grading Permit, and (ii) provide the City with the Fill Dirt Plan for the storage and erosion control of the Fill Dirt on the Stater Property. The City shall cooperate with Stater in processing, in a timely manner, the CUP and Grading Permit applications. The Parties desire that the CUP and the Grading Permit be approved by the City within forty-five (45) days after Stater submits to the City the completed applications for the CUP and the Grading Permit.

3. City to Move Fill Dirt from City Property to Stater Property. Within eighteen (18) months after the date that: (i) Stater obtains the CUP and Grading Permit and (ii) provides the City with the Fill Dirt Plan, the City shall, at its sole cost and expense, move the Fill Dirt from the City Property to the Stater Property in accordance with the CUP, Grading Permit and Fill Dirt Plan. In completing the movement of the Fill Dirt from the City Property to the Stater Property, the City shall ensure that all work is done by contractors qualified to perform such work, and that all work is completed in a timely manner. In accordance with the CUP, Grading Permit and Fill Dirt Plan, the City shall ensure that: (i) the Fill Dirt on the Stater Property is compacted to ninety percent (90%) relative compaction and certified to meet this requirement by a geotechnical engineering firm ("Engineering Firm") hired by the City and approved by Stater in its reasonable discretion, and (ii) the area to receive the compacted Fill Dirt is over-excavated by at least twelve (12) inches to ensure that deleterious material is removed and that the interface between the existing ground and the Fill Dirt is compacted. Stater shall release and discharge the City and its Council members, officers, employees, agents, representatives, successors, assigns, affiliates, and attorneys, and each of them (collectively, the "Released Parties"), of and from any and all claims, demands, liabilities, loss, costs, damages, expenses, debts, accounts, controversies, agreements, claims which Stater may have against the Released Parties, and any injuries related thereto not now known, or which may later develop or be discovered, to the extent arising from or in any way related to the placement of the Fill Dirt onto the Stater Property. The foregoing release and waiver shall become effective upon the date that the Engineering Firm determines that the City's movement of the Fill Dirt complies with the ninety percent (90%) compaction standard, the twelve (12) inch excavation standard and the Fill Dirt Plan and the City certifies to Stater that the movement of the Fill Dirt onto the Stater Property complies with the CUP and the Grading Permit.

4. Stater to Store the Fill Dirt on Stater Property and Pay City Five Dollars and Fifty Cents (\$5.50) Per Cubic Yard Upon Grading for Retail Project. After the City moves the Fill Dirt from the City Property to the Stater Property, Stater shall store the Fill Dirt on the Stater Property in accordance with the CUP, Grading Permit and the Fill Dirt Plan until Stater commences grading for the Retail Project. Prior to Stater's commencement of grading for the Retail Project, Stater shall pay the City Five Dollars and Fifty Cents (\$5.50) per cubic yard for the Fill Dirt.

5. Access Easement. Stater hereby grants to the City a temporary non-exclusive revocable access easement over the Access Easement Area ("Access Easement") for the limited purpose of allowing the City, its affiliates and their respective employees, representatives, invitees, consultants, agents, contractors, successors and assigns, ingress and egress to the Stater Property for the purpose of moving the Fill Dirt onto the Stater Property. The City shall not use the Access Easement for any other purpose but for the purposes set forth herein, unless the City provides Stater with thirty (30) days prior written notice and Stater consents thereto in writing. The Access Easement shall become effective on the date this MOU is recorded with the County Recorder of San Bernardino County. The Access Easement shall terminate when the Fill Dirt has been moved by the City to the Stater Property and the other work required by Section 3 of this MOU has been completed. Stater shall have the right, with or without cause, at its sole and absolute discretion to terminate the Access Easement upon written notice to the City. In such event, Stater shall not be responsible for, including, without limitation, any losses, damages, costs, expenses, fines or penalties that the City may incur as a result of Stater's revocation of the Access Easement, except that within ten (10) days of such termination, Stater shall pay to the City the sum of Five Dollars and Fifty Cents (\$5.50) per cubic yard for the Fill Dirt that City has moved to the Stater Property prior to such termination. The City shall not be responsible for any losses, damages, costs, expenses, fines or penalties that Stater may incur as a result of Stater's revocation of the Access Easement and the City's inability to permissibly move any or all of the Fill Dirt to the Stater Property. The City shall not have the right to assign, transfer, sublease or encumber (or otherwise transfer or allow the use of) the Access Easement or assign, in any manner, its rights under this MOU. This MOU is not intended to grant a fee interest in the Access Easement Area, nor is it intended to be a lease or license.

6. Roadway Dedication. Within ten (10) days after approval of the CUP and Grading Permit, Stater shall dedicate to the City right of way for road purposes. The dedication shall become effective on the date of recordation of the dedication and continue in perpetuity.

7. Sidewalk Easement. Within ten (10) days after approval of the CUP and Grading Permit, Stater shall grant to the City a sidewalk easement over the Sidewalk Easement Area ("Sidewalk Easement") for the limited purpose of a right-of-way for public sidewalk, including all rights of ingress and egress and the right to lay, construct, repair, maintain, renew and replace sidewalk improvements, and appurtenances incidental thereto. The Sidewalk Easement shall be conveyed from Stater to the City by a deed in a form reasonably acceptable to Stater and the City. The City shall not use the Sidewalk Easement for any other purpose but for the purposes set forth herein, unless the City provides Stater with thirty (30) days prior written notice and Stater consents thereto in writing. The Sidewalk Easement shall become effective on the date of recordation of the deed granting the Sidewalk Easement and continue in perpetuity. The City shall not have the right to assign, transfer, sublease or encumber (or otherwise transfer or allow the use of) the Sidewalk Easement or assign, in any manner, its rights under this MOU. This MOU is not intended to grant a fee interest in the Sidewalk Easement Area, nor is it intended to be a lease or license.

8. Slope Easement. Within ten (10) days after approval of the CUP and Grading Permit, Stater shall grant to the City a slope easement over the Slope Easement Area ("Slope Easement") for the limited purpose of maintaining a slope, including all rights of ingress and egress and the right to lay, construct, repair, maintain, renew and replace slope improvements, and appurtenances incidental thereto. The Slope Easement shall be conveyed from Stater to the City by a deed in a form reasonably acceptable to Stater and the City. The City shall not use the Slope Easement for any other purpose but for the purposes set forth herein, unless the City provides Stater with thirty (30) days prior written notice and Stater consents thereto in writing. The Slope Easement shall become effective on the date of recordation of the deed granting the Slope Easement and continue in perpetuity. The City shall not have the right to assign, transfer, sublease or encumber (or otherwise transfer or allow the use of) the Slope Easement or assign, in any manner, its rights under this MOU. This MOU is not intended to grant a fee interest in the Slope Easement Area, nor is it intended to be a lease or license.

9. Term of MOU. The term of this MOU shall commence on the date first written above and shall terminate when all of the Parties' respective obligations hereunder have been performed.

10. Legally Binding Obligations. Upon execution of this MOU, the Parties understand and agree that the obligations hereunder shall be deemed to create legally binding obligations.

11. Time of the Essence. Time is of the essence regarding this MOU.

12. Indemnification. The City, for itself and on behalf of any successors or assigns who acquire the easement rights and obligations described herein agree to indemnify, protect, defend and hold harmless Stater, its successors and assigns, from and against any and all claims, obligations, expenses, liabilities, and costs, arising from the City's, and its successor's, assign's, invitee's and agents', use of the Access Easement, Sidewalk Easement and Slope Easement. The foregoing indemnity and defense obligations do not apply to (a) any loss, liability, cost or expense to the extent arising from or related to the willful misconduct or the active negligent acts or omissions of Stater, its successors, assigns, invitees and agent, and (b) the release or spread of any hazardous substances or regulated substances which are discovered (but not deposited) on or under the Stater Property by the City, its successors, assigns, invitees and agents.

13. Authority. Each signatory of this MOU represents that they are dully authorized to execute this MOU on behalf of the Party for which such signatory executes this MOU. Each Party represents that it has the appropriate legal authority to enter into this MOU and to perform all obligations under this MOU, including, but not limited to, the payment of dollar amounts to the other Party as required herein.

14. Jurisdiction and Venue. This MOU shall be governed by and construed in accordance with the laws of the State of California, except for its conflicts of law rules. Any suit, action or

proceeding brought under the scope of this MOU shall be brought and maintained to the extent allowed by law in the County of San Bernardino, California.

15. Construction and Interpretation. This MOU has been arrived at through negotiations and each Party has had a full and fair opportunity to revise the terms of this MOU. As a result, the normal rule of construction that any ambiguities are to be resolved against the drafting Party shall not apply in the construction or interpretation of this MOU.

16. Entire Agreement. This MOU constitutes the entire agreement of the Parties with respect to the subject matter of this MOU and supersedes any and all prior oral or written agreement, understanding, or representation relating to the subject matter of this MOU.

17. Successors and Assigns. This MOU shall be binding on and inure to the benefit of the successors and assigns of the respective Parties to this MOU. No Party may assign its interests in or obligations under this MOU without the written consent of the other Parties, which consent shall not be unreasonably withheld or delayed.

18. Waivers. Waiver of any breach or default hereunder shall not constitute a continuing waiver or a waiver of any subsequent breach either of the same or of another provision of this MOU and forbearance to enforce one or more of the remedies provided in this MOU shall not be deemed to be a waiver of that remedy.

19. Compliance with Law. In performing their respective obligations under this MOU, the Parties shall comply with and conform to all applicable laws, rules, regulations and ordinances.

20. Third Party Beneficiaries. This MOU shall not create any right or interest in any non-Party or in any member of the public as a third party beneficiary.

21. Notices. All notices, requests, demands or other communications required or permitted under this MOU shall be in writing unless provided otherwise in this MOU and shall be deemed to have been duly given and received on: (i) the date of service if served personally or served by facsimile transmission on the Party to whom notice is to be given at the address or addresses as provided below, (ii) the first day after mailing, if mailed or dispatched by Federal Express, United States Express Mail, or other similar overnight courier service, postage prepaid and addressed as provided below, or (iii) the third (3rd) business day after mailing if mailed to the Party to whom notice is to be given by first class mail, registered or certified, postage prepaid, addressed as follows:

To Stater:

Stater Bros. Markets
301 South Tippecanoe Avenue
San Bernardino, CA 92408
(909) 733-5002
(909) 733-4002 (FAX)
Attention: Michael Slaton, Senior Director - Real Estate

With a copy to:

Varner & Brandt LLP
3750 University Avenue, Suite 610
Riverside, CA 92501
(951)274-7777
(951)274-7770 (FAX)
Attention: Sean S. Varner, Esq.

To the City:

City of Yucaipa
34272 Yucaipa Boulevard
Yucaipa, CA 92399
(909) 797-2489
(909) 790-9203 (FAX)
Attention: City Manager

With a copy to:

Richards, Watson & Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071-3101
(213) 626-8484
(213) 626-0078 (FAX)
Attention: Michael Estrada, Esq.

[signature page follows]

IN WITNESS WHEREOF, the Parties hereto have duly executed this MOU as of the date first above written.

STATER

STATER BROS. MARKETS,
a California corporation

By: _____
James W. Lee
Its: President and Chief Operating Officer

By: _____
Phillip J. Smith
Its: Executive Vice President, Chief Financial
Officer and Chief Accounting Officer

CITY

CITY OF YUCAIPA,
a California municipal corporation

By: _____
Its: _____