Agenda # 8.2
Meeting Date: Dec 19, 2006

CITY COUNCIL AGENDA REPORT

TO: Honorable Mayor and Members of the City Council

VIA: James DeStefano, City Manager

TITLE: Consider Resolution No. 2006-XX Approving a Planning and Pre-Annexation Agreement between the City and Aera Energy, LLC

RECOMMENDATION:

Adopt Resolution

FINANCIAL IMPLICATION:

There is no financial impact to the City. All costs including staff time associated with the tasks outlined in the agreement shall be paid by Aera Energy LLC (Developer). It should be noted that the time spent by the City Manager and Assistant City Manager to negotiate the Pre-Annexation Agreement, Developer Agreement and Tax Allocation Accord with Los Angeles County is not reimbursable as outlined in Section 5.1 of the attached agreement.

The City engaged the services of Keyser Marston Associates, Inc. to provide a cost benefit analysis of the proposed annexation. The preliminary results show that, at project build out, annexing the Project Area would result in a positive impact to the City's General Fund of approximately $1 million annually. This financial analysis will be refined through out the process to ensure the annexation does not negatively impact the City's General Fund.

BACKGROUND:

Aera Energy LLC owns approximately 2,935 acres of land immediately south of the City's municipal boundary. For the past 100 years this land has been operated as a working oil field. The oil field is nearing the end of its useful life cycle and the Developer has proposed a development project to replace the oil operations.

For a considerable amount of time, the Developer has been processing with the counties of Orange and Los Angeles to develop entitlements for the entire 2,935 acres. Recent discussions between the City and Developer have identified potential areas of mutual benefit associated with this project. Developer is now seeking to process entitlements for a portion of the total acreage (1,940 acres) through the City. The

remaining acreage, approximately 995 acres, will be processed for entitlements by the counties of Los Angeles and Orange.

PROJECT SUMMARY

The following is a summary of the project, as presented by Aera Energy LLC, which would ultimately be annexed into the City. Approval of the attached Planning and Pre-Annexation Agreement does not constitute approval of the project as proposed by Aera.

- 2800 residential units
- 200,000 sq. ft. of commercial development
- 1 Fire Station (Location to be TBD)
- 1 K-8 School
- Opportunity for new parks and additional open space

DISCUSSION:

The attached Planning and Pre-Annexation Agreement represents formal authorization by the City Council for staff to begin to pursue annexing a portion of the Area property into the City. The area being considered for annexation is 1,940 acres (Project Area) of the entire 2,935 acre site. If approved by the City Council, the Agreement authorizes staff to begin to the lengthy entitlement and annexation processes but does not commit the City to any future approval of either the proposed project or ultimately annexing the area. Either the Developer or the City can terminate the agreement with ten (10) days written notice to the other party. If such termination should occur, Developer is required to pay all expenses incurred up to the date the notice is received by the City.

If neither party terminates the agreement, there are several tasks that need to be accomplished in order to process entitlements through the City and annex the property into Diamond Bar. These tasks include working with the Developer to:

- Process and certify an Environmental Impact Report
- Draft a General Plan Amendment permitting the development of the Project
- Develop a Specific Plan which will constitute pre-zoning of the Project Area
- Create a master tentative tract map, and
- Negotiate a Development Agreement

In addition, the City must negotiate a Tax Allocation Accord with the County of Los Angeles to share the property tax generated by the development. Also, the City will need to file applications with the Local Area Formation Commission (LAFCO) to modify the City's Sphere of Influence to include this property for ultimate annexation into Diamond Bar.

The Agreement includes a number of significant elements the City Council needs to be aware of such as:

Term of the Agreement:	5 years from the effective date of agreement
Affordable/Work Force Housing	A portion is required to be built in the Project Area that is within City limits
“Green” Construction	Environmental friendly construction practices and products may be required as part of Developer Agreement
Vested Rights	The vested rights, subject to CEQA, would last for 25 years.
Public Financing	Developer has right to encumber the Project Area with public financing bonds, Landscaping and Lighting assessment Districts or other similar financing mechanisms.
Assignability	Developer has the right, without City approval, to assign its rights, as will be defined in a future Developer Agreement, to one or more third parties.
City Costs	All costs including staff time except for the City Manager or Assistant City Manager will be paid by Developer.

As was stated above, the approval of this Agreement is merely the beginning of a fairly lengthy process. Throughout the process, there will be opportunities for public participation and discussion. If approved by the Council tonight, the agreement will be signed by the Mayor and City staff will immediately proceed with the tasks identified above.

PREPARED BY:

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David Doyle, Assistant City Manager

Attachments

1. Resolution No. 2006-XX approving a Planning and Pre-Annexation agreement between the City and Aera Energy, LLC
2. Planning and Pre-Annexation agreement between the City and Aera Energy, LLC

RESOLUTION NO. 2006-XX

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DIAMOND BAR, CALIFORNIA APPROVING A PLANNING AND PRE-ANNEXATION AGREEMENT BETWEEN THE CITY OF DIAMOND BAR, CALIFORNIA AND AERA ENERGY LLC.

WHEREAS, Aera Energy LLC owns 2,935 acres of land of which a portion is adjacent to the City's southern municipal boundary; and

WHEREAS, Aera Energy LLC has an interest in developing the property; and

WHEREAS, recent discussions between Aera Energy LLC representatives and City staff have identified areas of mutual interest between the parties; and

WHEREAS, Aera Energy LLC is requesting the City to process the entitlements for a 1,940 acre portion of the property (Project Area); and

WHEREAS, the City's initial financial analysis, assuming receipt of 5.25% of the County's property tax revenue; shows the annexation of the Project Area at build out will result in a positive impact to the City's General Fund of approximately $1 million annually; and

WHEREAS, the City and Aera Energy LLC have negotiated the attached Planning and Pre-Annexation agreement over the last several weeks to outline the responsibilities of each party throughout the entitlement and annexation process.

NOW, THEREFORE the City Council of the City of Diamond Bar does resolve as follows:

1. The Planning and Pre-Annexation Agreement between the City and Aera Energy LLC is approved and the Mayor is authorized to sign the Agreement
2. City staff is directed to retain, at Aera's expense, consultants and other professional experts to review and provide comments on the Environmental Impact Report, assist with creation of the Development Agreement, and facilitate annexation of the Project Area.

PASSED, APPROVED AND ADOPTED this 19th day of December 2006.

_____

Steve Tye, Mayor

I, Tommye Cribbins, City Clerk of the City of Diamond Bar, do hereby certify that the foregoing Resolution was Passed, Approved and Adopted at a Regular Meeting of the City Council of the City of Diamond Bar held on the 19th day of December 2006 by the following vote:

AYES: COUNCIL MEMBERS:

NOES: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ABSTAINED: COUNCIL MEMBERS:

_____

Tommye Cribbins, City Clerk
City of Diamond Bar

PLANNING AND PRE-ANNEXATION AGREEMENT
BETWEEN
THE CITY OF DIAMOND BAR
AND
AERA ENERGY, LLC

This PLANNING AND PRE-ANNEXATION AGREEMENT ("Agreement") is made and entered in the County of Los Angeles ("County") on the 19th day of December 2006 by and between the CITY OF DIAMOND BAR, a general law city and California municipal corporation ("City") and AERA ENERGY LLC, a California limited liability corporation ("Developer") (collectively, the "Parties").

RECITALS

A. Developer owns real property identified in the attached Exhibit "A," which is incorporated by reference, which consists of approximately 2,935 acres ("Total Project Area").

B. For some considerable period of time, Developer has been processing with the Counties of Los Angeles and Orange, as co-lead agencies, to obtain development entitlements for the Total Project Area.

C. Recent discussions between City and Developer have identified potential areas of mutual benefit and the Parties have mutually agreed to process entitlements for the development of a portion of the Total Project Area within the jurisdictional boundaries of the City. Upon execution of this agreement by the Parties, Developer shall file an application with City which, if approved by the City Council and the Los Angeles County Local Area Formation Commission ("LAFCO"), would, among other things, cause approximately 1,940 acres of the Total Project Area to be annexed to the City's corporate territory as designated on the attached Exhibit "B," which is incorporated by reference ("Aera Project Area" or "Project Area").

D. As contemplated by Developer at the time of executing this Agreement, Developer will develop the Aera Project Area as a master-planned community - within the framework of the "AESP" (defined in Recital E below) to be developed as provided more fully below - consisting of residential housing, various public infrastructure facilities, recreation and open space uses, and neighborhood retail and commercial uses (collectively, the "Aera Project").

E. In order to cause the Project Area to be annexed to the City's territorial limits, LAFCO must amend the City's Sphere of Influence boundary and approve the reorganization of the Aera Project Area which will result in, at least, detachment from the territorial limits of Los Angeles County. City intends to satisfy all conditions of LAFCO approval related to the above mentioned sphere of influence amendment and to

initiate annexation proceedings with LAFCO, as provided by Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Government Code §§ 56000 et seq.; "Cortese-Knox-Hertzberg"), pursuant to which the Aera Project Area ultimately will be annexed in whole to the City's boundaries. As required by Cortese-Knox-Hertzberg, however, City must first prezone the Project Area for those uses intended to be developed within the Project Area (the "Prezoning"). Moreover, the General Plan requires that, before annexation, a specific plan be developed for the Project Area, in accordance with the requirements of Government Code §§ 65450 et seq., that reflect the land use buildout and other development policies to be described in the General Plan ("AESP" or "Specific Plan").

F. The General Plan must be amended ("GPA") to include and designate the Project Area for not less than 2,800 market rate dwelling units. Accordingly and as more fully set forth below, in preparing and considering the AESP and the Prezoning, and conducting the requisite environmental review under the California Environmental Quality Act ("CEQA"), Public Resources Code §§ 21000 et seq., City will evaluate as the "Proposed Project" the potential for including within the Project Area 2,800 market rate residential dwelling units through a General Plan amendment.

G. Developer's application with the City for the Aera Project includes applications for City's approval of the GPA; the Prezoning; the AESP; the "Development Agreement" (defined below); and for initiation by the City of annexation proceedings with respect to the Project Area (collectively, and including the GPA application, the "Applications").

H. As City and Developer both desire to facilitate the annexation and entitlement of the Project Area area, they have entered into this Agreement to establish a process pursuant to which (i) the AESP and Prezoning will be developed, and considered by City, together with certain other actions described below including the GPA; (ii) the Parties will undertake to negotiate and agree upon a development agreement between City and Developer in accordance with Government Code §§ 65864 et seq. (the "Development Agreement"); (iii) the Parties will undertake and complete required environmental review under CEQA; (iv) subject to the timely achievement of all of the foregoing, annexation of the Project Area will be sought from LAFCO as required by Cortese-Knox-Hertzberg (the "Annexation"); and (v) the Parties will take such further actions as may be necessary or appropriate towards the entitlement of the Project Area, such as tentative subdivision maps and other permits and approvals.

I. City and Developer acknowledge that a precondition to the Annexation is that the City and County of Los Angeles reach an accord on the division of real property taxes that are generated from the development of the Aera Project (the "Tax Allocation Accord").

AGREEMENT

ARTICLE 1. EFFECTIVE DATE AND TERM

Section 1.01. Effective Date. This Agreement becomes effective either upon City Council approval of this Agreement or the date this Agreement is fully executed by the Parties, whichever is later (the "Effective Date").

Section 1.02. Term. Subject to early termination as provided in Section 6.06 below, the term of the Agreement (the "Term") begins on the Effective Date and, unless otherwise agreed to by the Parties, continues for a period of five (5) years.

ARTICLE 2. PLANNING AND ENTITLEMENT IN GENERAL

Section 2.01. In General. As set forth more fully below, City and Developer agree to enter into and carry out in good faith a process, if at all, between Developer and the City, for the review and consideration of Applications for the Project Area; provided, however, notwithstanding the foregoing to the contrary, at no cost, expense or risk to Developer other than for previously agreed to reimbursements, Developer shall have the right to terminate this Agreement on ten (10) business days written notice to City.

Section 2.02. Planning Parameters. The Parties estimate that the Project Area may be developed with 2,800 market rate dwelling units provided they are developed in accordance with a phasing plan for the project together with all appropriate CEQA required facilities and infrastructure – within the general development standards established in the General Plan, as the same may be modified by the GPA. Accordingly, in developing the entitlements and agreements to be considered by City before the initiation of annexation proceedings, including the GPA, the AESP, the Prezoning and the Development Agreement, and subject to City's first reviewing and considering the environmental impacts of (and alternatives to) the Phase I Approvals as required by CEQA, the "Proposed Project" to be evaluated by City consists of 2,800 market rate dwelling units, approximately 200,000 square feet of commercial development, and related improvements as set forth in the Applications (the "Planning Parameters").

Section 2.03. Process in General. As more fully set forth below, the Parties agree that the first phase of approvals necessary for the development of the Project will include a Tax Allocation Accord, an environmental impact report, a GPA permitting the development of the Project in the Project Area in accordance with the Planning Parameters; a proposed Specific Plan (which will constitute Prezoning), to be prepared in accordance with the requirements of Government Code §§ 65450 et seq. as required by the General Plan; the City's Prezoning of Project Area for the uses anticipated by the GPA and the AESP as required by Cortese-Knox-Hertzberg; a master tentative tract map; and the Development Agreement between City and Developer, in accordance with the requirements of Government Code § 65864 et seq., which will affect the Project Area and, if approved by City and Developer, become operative upon, and as a precondition to, the annexation of the Project Area to the City's boundaries (collectively, the "Phase 1 Approvals"). After City completes its environmental review and if it adopts

the Phase 1 Approvals, as may be more fully set forth in the executed and finalized Development Agreement, City may initiate annexation proceedings by petitioning LAFCO for approval of annexation of the Project Area into the City's jurisdictional boundary (the "Annexation" or the "Phase 2 Approvals"). If Phase 2 approvals implementing Annexation are complete, as will be set forth in the Development Agreement, City shall process, and consistent with the Phase 1 Approvals, additional entitlement actions needed for development of the Project Area, including considerations for review and approving one or more vesting tentative tract maps and final subdivision maps affecting the Project Area; review and approving a development plan for the Project; and review and approval of various project level matters including, without limitation, grading permits, building permits, design review, certificates of occupancy, and sewer and water connection permits, if applicable (collectively, the "Phase 3 Approvals"). Developer understands and agrees that to the extent that any of the foregoing submissions are not in conformity with the Phase 1 Approvals or Phase 2 Approvals that they will be subject to the discretionary approvals of the Planning Commission and City Council and nothing in this Agreement is intended to, nor can it, mandate City approval of a map, plan, or other matter in a manner proposed by Developer.

ARTICLE 3. PROCESS FOR CONSIDERATION

Section 3.01. CEQA Review and Fiscal Impacts Review. In connection with the Phase 1 Approvals, the City shall review Developer's screen check EIR documentation and, following such review, provide the Developer with a list of modifications that City will require for further processing. City agrees to promptly commence its environmental review under CEQA and to undertake to complete such review, to the extent practicable, in accordance with the schedule attached as Exhibit "C," which is incorporated by reference (the "Processing Schedule"). The Parties agree to use good faith efforts to process all matters in accordance with the time periods set forth in the Processing Schedule and to otherwise perform their respective obligations and commitments hereunder in an expeditious manner. The Parties intend that, for the purposes of CEQA, City will become a co-lead agency and LAFCO will act as a responsible agency. To expedite the completion of this process, Developer will prepare (at its sole cost) and submit to City any and all studies and evaluations that may be required under CEQA as a part of the City's CEQA review, including, without limitation, the following: (1) concept grading plans and studies; (2) Environmental Conditions Study (inclusive of biological conditions surveys); (3) Archeological and Cultural Resources Study; and (4) Local Streets and Roadway System Capacity Study; (5) Geotechnical Studies; (6) as more fully provided in Section 4.02 below, Water Supply Assessment (inclusive on any updates to the Urban Water Management Plan, as may be warranted by the development anticipated in the AESP); and (7) Hydrology Study (collectively, the "Technical Studies"). Developer understands and acknowledges that City must exercise its independent judgment with respect to the content or conclusions of the Technical Studies, and may in its discretion retain consultants (at Developer's cost) to review and comment on the Technical Studies during the environmental review process. Developer acknowledges and agrees that City will retain, at Developer's cost, an environmental consultant to review the environmental impact report, including traffic

impact studies, previously prepared by Developer's consultant and required under CEQA, provided, however, City may require that such report be supplemented. Developer agrees to respond promptly to any and all City requests for information City considers relevant to the environmental review process. Developer further acknowledges and agrees that City will retain an economic impact consultant to prepare a fiscal impact analysis of the Project and Developer expressly acknowledges that it will reimburse City for all costs related to such analysis of the Project, whether incurred before or after execution of this Agreement. City agrees to respond promptly to any and all requests of Developer for information Developer considers relevant to the fiscal impact review process.

Section 3.02. Phase 1 Approvals. City agrees to promptly begin negotiating a Tax Allocation Accord with the County of Los Angeles, preparing the Phase 1 Approvals (subject to CEQA review), complete such preparation, and consider approving the Applications in accordance with the Processing Schedule and applicable law. If requested by Developer and subject to the Approved Budget, following consultation with the Developer, but at City's sole discretion, City will engage outside consultants (at Developer's cost) as may be needed to timely process the Phase 1 Approvals. In furtherance of City's obligations under this Section 3.02, City and Developer agree to work together in good faith to, among other things, (1) develop a conceptual land plan for the Project Area that is consistent with the Planning Parameters (the "Land Plan"); (2) develop a mutually-acceptable draft AESP consistent with the requirements of applicable law, and which incorporates the Land Plan, for Planning Commission and City Council consideration; (3) develop appropriate amendments to the Diamond Bar Municipal Code ("DBMC") to accommodate a "Project Area Planned Development" zoning district and which can be presented for Planning Commission and City Council consideration as a part of the Prezoning; (4) negotiate the Development Agreement for consideration by the Planning Commission and City Council consistent with the requirements of Government Code §§ 65864 et seq.; and (5) prepare for Planning Commission and City Council consideration any and all GPAs needed to ensure consistency between the Phase 1 Approvals and amended General Plan or otherwise necessary to comply with the requirements of applicable law.

Section 3.03. Phase 2 and Phase 3 Approvals. As may be more fully set forth in the Development Agreement, if the City Council approves the Phase 1 Approvals, City agrees to petition LAFCO for approving Project Area annexation into City's jurisdictional boundaries, pursuant to Cortese-Knox-Hertzberg within thirty (30) days following such City Council approval. The Parties further agree to cooperate in taking additional actions that may be needed to accomplish such annexation and/or LAFCO approval (e.g., initiate proceedings to annex unincorporated islands of territory, as contemplated by Government Code § 56375.3, as and when required by Developer). If requested by Developer, but at City's sole discretion, City will, (at Developer's expense) engage outside consultants as may be needed to process the Phase 2 Approvals in a timely manner. Also as may be more fully set forth in the Development Agreement, upon completion of annexation and submission by Developer of all requisite application materials, City agrees to consider the Phase 3 Approvals as and when requested by Developer.

ARTICLE 4. ADDITIONAL UNDERSTANDINGS REGARDING PROJECT AREA

Section 4.01. In General. As set forth more fully below in this Article 4, City and Developer acknowledge and agree that, in addition to the various tasks outlined in Article 3 above, a number of additional tasks must be completed, or understandings reached, and approvals of other agencies obtained, to ensure the success of the planning effort described in this Agreement.

Section 4.02. Water. As required by applicable law, Developer agrees to work with the anticipated water service provider, the Rowland Water District to complete a Water Supply Assessment study for the Total Project Area consistent with its adopted urban water management plan ("UWMP") in accordance with the requirements of applicable law, including Water Code §§ 10910, et seq., in a manner which accommodates the foreseeable water demand expected to be generated consistent with the General Plan. City and Developer further agree to undertake reasonable efforts to implement the provisions of the updated UWMP, subject to environmental review, including all steps necessary to secure such water supplies as may be needed to serve growth generated by the Aera Project within the Project Area and otherwise comply with the provisions of state law, including, without limitation, Water Code §§ 10631, 10656-57, and 10910-10912.

Section 4.03. Public Facilities. City and Developer agree that certain public facilities will be needed to serve the Project Area. All public facilities shall be evaluated prior to or at the time of, and identified in, the Development Agreement and shall not increase the mitigation requirements identified in the CEQA analysis. This evaluation may include, without limitation, the design, construction and dedication of public facilities necessary to serve the Project Area such as a fire station, police substation, and wireless facilities. Dedication of said facilities shall be made to applicable public agencies. City and Developer also agree that the detailed design and construction issues related to streets, curbs, gutters, sidewalks, waterlines, sewer lines, trails and such other comparable matters requiring detailed engineering will be constructed consistent with the Project Area Specific Plan and other City standards and identified and included upon the submission of tentative tract maps.

Section 4.04. Work Force/Senior Housing. Developer is committed to providing for the construction of an appropriate number of work force/senior housing units that address the housing requirements for the Total Project Area and agrees to work with the City and other non-profit entities to develop a mutually acceptable mix of housing products designed to satisfy the Projects' fair share of the community's housing needs. City and Developer agree that a portion of the Project's Fair Share of affordable (e.g. Work Force/Senior) housing will be constructed within the Project Area.

Section 4.05. Parks and Open Space. The Parties agree that the provision of adequate park and open space amenities are necessary to ensure the success of the Project and Developer agrees to fulfill its Quimby Act obligations, to City standards that are applicable to Developer under the Development Agreement by either constructing the appropriate park and/or open space improvements or paying applicable fees

necessary to adequately serve the recreational and aesthetic needs of the Aera Project community. Developer will, in conjunction with the City, undertake studies to identify mutually acceptable acreage and design elements within the Aera Project Area for dedication to and acceptance by the City for recreational and passive open space development and preservation.

Section 4.06. School Facilities. Developer agrees to work with the applicable School District, which is the Rowland Unified School District, to develop an appropriate school facilities plan in accordance with applicable laws and regulations.

Section 4.07. Circulation and Transportation. Developer understands and agrees that it will be required to design, construct, and provide public access to certain arterial, collector, and residential streets, the location of which shall be mutually agreed to by Developer and City. While certain streets may be retained as private streets, with irrevocable offers of dedication, City and Developer will mutually designate certain streets within the AESP circulation plan as being required for public access.

Section 4.08. Revisions to Applicable Codes. City and Developer acknowledge and agree that, because a comprehensive specific plan will be prepared for the Project Area to address on an area-wide basis all of the significant land planning issues that may be associated with Project Area, certain of the City's codes, rules, regulations, resolutions, ordinances or other official policies may be incompatible with Developer's proposed Project. For example, a strict application of the City's grading regulations or any of the City's existing zoning districts may prevent the development of the Project Area in accordance with the Planning Parameters. Accordingly, during the planning process for the Phase 1 Approvals, Developer may propose amendments to any of the City's codes, rules, regulations, resolutions, ordinances or other official policies as a part of the Phase 1 Approvals and present such proposed amendments to the Planning Commission or City Council, as appropriate, for consideration together with the other Phase 1 Approvals.

Section 4.09 "Green" Construction. Developer understands that the Development Agreement may include some principles of "green" construction into the proposed project. For example, and without limitation, the Development Agreement may provide that Developer incorporate construction elements that reduce potable water consumption, utilize "state of the art" irrigation systems, incorporate strict urban runoff and related water quality treatment programs, and offer access to solar energy options.

Section 4.10 Development Agreement Provisions. In addition to Development Agreement inclusions referred to elsewhere in this Agreement, City and Developer agree that, subject to CEQA analysis, the following provisions are appropriate for inclusion in the Development Agreement:

4.10.1 Vested Rights. Subject to CEQA analysis, Developer will be granted vested rights to develop the Aera Project for a period of 25 years, tolled by any force majeure events.

4.10.2 Term of Tentative Maps. The term of tentative maps shall be co-terminous with the term of the Development Agreement or to the maximum extent permitted under the law.

4.10.3 Assignability. Developer shall have the right, without City's consent, but with notice to the City, to assign its rights, in whole or in part, under the Development Agreement, to one or more third parties, which third parties shall not have the right to modify or amend the Development Agreement in any respect with respect to that portion of the Project Area that was not assigned to that party.

4.10.4 Fees and Exactions. Due to the anticipated long lead time between the date of this Agreement and the date that the Development Agreement may become effective, the schedule of filing, permit and other fees and exactions that may be imposed by the City shall be those in effect on the date of the Development Agreement.

4.10.5 Public Financing. In accordance with applicable law, including requisite public hearings, the Developer will be permitted to encumber all or a portion of the Project Area with public financing bonds, including, without limitation direct funding of condemnation costs and constructions costs, acquisition of improvements, establishing reserve accounts to fund capital improvement program projects, Landscaping and Lighting Districts, Mello-Roos Districts, Geological Hazard Abatement Districts, habitat maintenance districts or other similar mechanisms.

4.10.6 Timing of Development. The timing and phasing of development, if at all, shall be in the sole discretion of the Developer in accordance with the phasing plan set forth in the Development Agreement.

4.10.7 Superior Law. The City shall not be entitled to adopt and impose on the Aera Project a "superior law" if City has the option of electing not to adopt a superior law, if the adoption might result in: (i) reducing the density or intensity of the vested rights; (ii) limit the Project's phasing plan; (iii) alter the location of any planned improvements; (iv) impose new exactions or fees; (v) be applied only to all or any part of the Project Area, or in a dissimilar manner to the balance of the City; or (vi) otherwise conflict with material provisions of the Development Agreement.

4.10.8 Operating Memoranda.

(a) The Parties acknowledge that the provisions of the Development Agreement will require a close degree of cooperation and that new information and future events may demonstrate that changes are appropriate with respect to the detail of performance of the Parties under that Agreement. The Parties desire, therefore, to retain a certain degree of flexibility with respect to the details of performance for those items covered in general terms under the Development Agreement. If and when from time to time, the Parties find that refinements or adjustments are desirable, such refinements or adjustments will be accomplished through operating memoranda or implementation agreements approved by the Parties

which, after execution, will be attached to the Development Agreement as addenda and become a part thereof.

(b) Operating memoranda or implementation agreements may be executed on behalf of the City by the City Manager and the City Attorney. In the event a particular subject requires notice or hearing, such notice or hearing will be appropriately given. Any significant modification to the terms or performance under the Development Agreement will be processed as an amendment of the Development Agreement and must be approved by the City Council.

4.10.9 Termination Rights. Except for reimbursement obligations arising from performance of this Agreement, at no risk or cost to Developer, Developer has the right to terminate the Development Agreement and its obligations thereunder in the event that a schedule of performance is not met, including, without limitation, for: (i) achieving Annexation to the City; (ii) securing "will serve letters" from all appropriate public utilities; and (iii) the passage of all appeal periods, without challenge, or the defeat of challenges, to the Phase 1 and Phase 3 Approvals and any required ordinances to allow for the implementation of the intended purposes of the Development Agreement.

ARTICLE 5. FUNDING OF PLANNING EFFORTS

Section 5.01. In General. From and after the Effective Date, in connection only with the Phase 1 Approval activities under this Agreement (the "Planning Activities") Developer agrees, on a calendar quarterly basis, to pay to the City the reasonable costs incurred during the immediately preceding calendar quarter, to the extent not already paid, and for those reasonable costs expected to be incurred in the immediately following calendar quarter for (1) reasonable staff time (City agrees that time expended by the City Manager and Assistant City Manager will not be reimbursable by Developer) and expenses; (2) consultant fees and costs (including, without limitation, City's legal costs and attorney's fees, except in the event such legal costs or attorney's fees are incurred as a result of a dispute between the Parties). In the event of a dispute between the Parties, each Party will bear its own legal costs, including, without limitation, attorney's fees.); and (3) any other items agreed to by City and Developer (collectively, "Planning Costs").

Section 5.02. Planning Cost Budgets and Quarterly Reports. Upon execution of the Agreement, and each year thereafter, Developer and City agree to meet and confer in order to develop a budget to identify expected Planning Costs. The Parties agree that each annual budget will be subject to quarterly budget reviews to be conducted by City and Developer in order to accommodate any budget adjustments deemed necessary by both City and Developer. City further agrees to establish a "Planning Costs Account," into which Developer will make quarterly deposits based on the immediately preceding quarterly budget review to cover expected Planning Costs for the then calendar quarter, in accordance with the approved budget. City agrees to provide Developer with quarterly reports of all activity in the Planning Costs Account. Developer shall be responsible for the payment of all costs and

fees, including City Attorney fees and costs, that is incurred in connection with the Phase 1 Approvals or Phase 2 Approvals, that are within the quarterly budget review budget and the City shall not be responsible for the payment of any such fees or costs. The Developer shall be obligated to reimburse the City, at the rate of $85 per hour, for City staff time incurred and documented. City shall inform Developer of projected budget shortfalls, if any, and the parties shall confer regarding the need to augment the budget or otherwise revise the scope of work prior to City authorizing any work to be conducted outside the mutually agreed to budget. The Parties agree that any funds remaining in the Planning Costs Account at the conclusion of the Planning Activities will be reimbursed to Developer. The Planning Costs Account will be a non-interest bearing account and Developer will neither demand, nor will City pay, interest on funds deposited into such Account.

Section 5.03. Consultants. The Parties agree that certain consultants will be retained by City with written contracts in accordance with applicable laws, including, without limitation, the DBMC. Budgets and scopes of work may be reviewed in advance by Developer, but final approval lies within the City's sole discretion. Said consultants will report to City. Developer may offer advice regarding the Planning Activities, but City will exercise independent judgment and direction over the consultants.

ARTICLE 6 MISCELLANEOUS PROVISIONS.

Section 6.01. Excusable Delays; Extension of Time of Performance.

In the event of delays due to strikes, inability to obtain materials, civil commotion, fire, war, terrorism, lockouts, riots, floods, earthquakes, epidemic, quarantine, freight embargoes, failure of contractors to perform, or other circumstances beyond the reasonable control of the parties and which cause substantially interferes with the ability of either party to perform its obligations under this Agreement, then the time for performance of any such obligation will be extended for such period of time as the cause of such delay exists but in any event not longer than for such period of time.

Section 6.02. California Law.

This Agreement is governed by, and construed in accordance with, the laws of the State of California. Exclusive venue for any action involving this Agreement is Los Angeles County.

Section 6.03. Legal Challenges; Indemnification and Defense.

(a) Third Party Challenges. In the event of any administrative, legal or equitable action or other proceeding instituted by any person or entity not a party to the Agreement challenging the validity of any provision of this Agreement, challenging any Approval, or challenging the sufficiency of any environmental review of either this Agreement or any Approval under CEQA (each a "Third Party Challenge"), each party must cooperate in the defense of such Third Party Challenge, in accordance with this Section 6.03(a). Developer agrees to pay the City's legal costs of defending a Third Party Challenge, including all court costs and reasonable attorney's fees expended by City (including the time of the City Attorney) in defense of any Third Party Action.

Developer may select its own legal counsel to represent Developer's interests in any Third Party Challenge at Developer's sole cost and expense. City agrees that it will not enter into a settlement agreement to any Third Party Challenge without Developer's written consent. Developer's obligation to pay the City's costs in the defense of a Third Party Challenge does not extend to those costs incurred on appeal unless otherwise authorized by Developer in writing.

(b) Third Party Challenges Related to the Applicability City Laws. The provisions of this Section 6.03 will apply only in the event of a legal or equitable action or other proceeding, before a court of competent jurisdiction, instituted by any person or entity not a party to this Agreement challenging the applicability to the Project or Project Site of a conflicting City Law (a "Third Party Enforcement Action"). A City Law is any City rule, regulation or official policy (including any municipal code, ordinance, resolution or other local law, regulation or policy of City.

(i) In the event of a Third Party Enforcement Action, the City must (i) promptly notify Developer of such action or proceeding, and (ii) stipulate to Developer's intervention as a party to such action or proceeding unless Developer has already been named as a respondent or real party in interest to such action or proceeding. In no event will City take any action that would frustrate, hinder, or otherwise complicate Developer's efforts to intervene, join or otherwise participate as a party to any Third Party Enforcement Action. As requested by Developer, City must use its best efforts to ensure that Developer is permitted to intervene, join or otherwise participate as a party to any Third Party Enforcement Action. If, for any reason, Developer is not permitted to intervene, join or otherwise participate as a party to any Third Party Enforcement Action, the parties to this Agreement agree to cooperate, to the maximum extent permitted by law, in the defense of such action or proceeding. For purposes of this Section, the required cooperation between the parties includes, without limitation, developing litigation strategies, preparing litigation briefs and other related documents, conferring on all aspects of the litigation, developing settlement strategies, and, to the extent permitted by law, jointly making significant decisions related to the relevant litigation, throughout the course thereof.

(ii) City's legal costs of defending any Third Party Enforcement Action, including all court costs, and reasonable attorney's fees expended by City (including the time of the City Attorney) in defense of any Third Party Enforcement Action, (the "Enforcement Action Defense Costs"), will be paid by in accordance with Section 6.03(a) of this Agreement. Notwithstanding the forgoing, in no event will the Enforcement Action Defense Costs extend to, nor will Developer or the Project be obligated to pay, any costs incurred on appeal unless otherwise authorized by Developer in writing;

(iii) City must not enter into a settlement agreement or take any other action to resolve any Third Party Enforcement Action without Developer's written consent. City must not, without Developer's written consent, take any action that would frustrate, hinder or otherwise prevent Developer's efforts to settle or otherwise resolve any Third Party Enforcement Action.

(iv) Provided that City complies with this Section 6.03 and provided that Developer is a party to the relevant Third Party Enforcement Action, Developer agrees to be bound by any final judgment (i.e., following all available appeals) arising out of a Third Party Enforcement Action and further agrees that no default under this Agreement will arise if such final judgment requires City to apply to the Project or Project Site a City Law that conflicts with Applicable Law or this Agreement.

(c) Defense and Indemnity. Except for the negligence or willful misconduct of City or any City contractor, subcontractor or any of their respective officers, employees or agents, Developer must defend and indemnify City from and against any and all damages, claims, costs and liabilities arising out of the personal injury or death of any third party, or damage to the property of any third party, to the extent such damages, claims, costs or liabilities result from the construction of the Project by Developer or by Developer's contractors, subcontractors, agents or employees. Nothing in this Section 6.03(c) will be construed to mean that Developer must defend or indemnify City from or against any damages, claims, costs or liabilities arising from, or alleged to arise from, activities associated with the maintenance or repair by City or any other public agency of improvements that have been offered for dedication and accepted by City or such other public agency or for any other public improvements constructed by City or constructed by Developer at direction of City. City and Developer may from time to time enter into subdivision improvement agreements, as authorized by the Subdivision Map Act, which agreements may include defense and indemnity provisions different from those contained in this Section 6.03(c). In the event of any conflict between such provisions in any such subdivision improvement agreement and the provisions set forth above, the provisions of such subdivision improvement agreement will prevail.

Section 6.04. Default and Remedies.

City and Developer acknowledge that, in the event of a breach of this Agreement, it may not be possible to calculate an appropriate amount of damages, and that damages may not be an adequate remedy. Accordingly, the Parties have available to them any all equitable remedies in the event of a breach of this Agreement, including without limitation: (1) suits for specific performance to remedy a specific breach; (2) suits for declaratory or injunctive relief; or (3) suits for mandamus under Code of Civil Procedure § 1085. All of these or other remedies are cumulative and not exclusive of one another, and the exercise of any one or more of these remedies does not constitute a waiver or election with respect to any other available remedy.

Section 6.05. Nature of Commitment. This Agreement represents City's commitment only to plan, review, and consider the Phase 1 Approvals, the Phase 2 Approvals, and the Phase 3 Approvals (collectively, the "Project Approvals"). Nothing in this Agreement is or should be construed to be a covenant, promise, or commitment by City, or any agency, board, or commission of the City, to grant any Project Approval or to enter into the Development Agreement on any particular terms or conditions. Nothing herein can be deemed a covenant, promise, or commitment by Developer, or its successors in interest, to annex the Aera Project Area, or any part thereof, or to construct any Project improvements on the Project Area. The purpose of this Agreement is merely to set forth the Parties' understanding regarding the manner in which the Parties intend to proceed with cooperative efforts to provide a planning and processing framework in furtherance of the Project, reserving final discretion and approval of the Project Approvals to the Diamond Bar City Council, subject to environmental review in accord with CEQA.

Section 6.06. Termination of Agreement. Developer or its successors have the right, upon ten (10) day's prior written notice to City, to terminate this Agreement if it determines in its sole discretion that it is in its best interest to do so. If Developer so terminates this Agreement, City agrees, within sixty (60) days, to reimburse Developer all monies remaining in the Planning Costs Account, as established pursuant to Section 5.02 of this Agreement, in excess of that required to cover the unpaid Planning Costs incurred by City before City's receipt of the written notice provided for in this Section 6.06. In the event Developer so terminates this Agreement and the Planning Cost Account funds are insufficient to cover the unpaid Planning Costs incurred by City before City's receipt of the written notice provided for in this Section 6.06, Developer agrees to reimburse City in an amount equal to the difference between the unpaid Planning Costs then incurred by City and the amount then remaining in the Planning Cost Account. Other than Planning Costs that accrued as of the effective date of termination, in no event will Developer be responsible for the payment of Planning Costs incurred by City after City's receipt of the written notice provided for in this Section 6.06.

Section 6.07. No Agency, Joint Venture or Partnership.

It is understood that this Agreement is a contract that has been negotiated and voluntarily entered into by City and Developer and that Developer is not an agent of City. City and Developer renounce the existence of any form of joint venture or partnership between them, and agree that nothing contained herein or in any document executed in connection therewith can be construed as making City and Developer joint venturers or partners.

Section 6.08. Notices.

Any notice or communication required hereunder between the Parties must be in writing, and may be given either personally, by facsimile (with original forwarded by regular United States mail) by registered or certified mail (return receipt requested), or by Federal Express or other similar courier promising overnight delivery. If personally

delivered, a notice is deemed to have been given when delivered to the party to whom it is addressed. If given by facsimile transmission, a notice or communication shall be deemed to have been given and received upon actual physical receipt of the entire document by the receiving party's facsimile machine. Notices transmitted by facsimile after 5:00 p.m. on a normal business day or on a Saturday, Sunday or holiday are deemed to have been given and received on the next normal business day. If given by registered or certified mail, such notice or communication is deemed to have been given and received on the first to occur of (i) actual receipt by any of the addressees designated below as the party to whom notices are to be sent; or (ii) five (5) days after a registered or certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. If given by Federal Express or similar courier, a notice or communication is deemed to have been given and received on the date delivered as shown on a receipt issued by the courier. Any party hereto may at any time, by giving ten (10) days written notice to the other party hereto, designate any other address in substitution of the address to which such notice or communication shall be given. Such notices or communications will be given to the Parties at their addresses set forth below:

CITY: City of Diamond Bar

Attn:
City Hall
_____
Diamond Bar, CA 9_____

with copies to: City of Diamond Bar
City Attorney
Attn: Michael Jenkins
City Hall
_____
Diamond Bar, CA 9_____

DEVELOPER: Aera Energy, LLC
3030 Saturn Street, Suite 101
Brea, CA 92821
Attn: George L. Basye

with copies to: Donfeld, Kelley & Rollman
11845 West Olympic Blvd, Suite 1245
Los Angeles, CA 90064
Attn: Jeffrey Donfeld, Esq.

Section 6.09. [INTENTIONALLY OMITTED]

Section 6.10. Severability.

If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, will continue in full force and effect unless amended or modified by mutual consent of the Parties. Notwithstanding the foregoing, if any material provision of this Agreement, or the application of such provision to a particular situation, is held to be invalid, void or unenforceable, either City or Developer may (in their sole and absolute discretion) terminate this Agreement by providing written notice of such termination to the other party.

Section 6.11. Further Assurances.

The Parties will execute and deliver, upon demand by the other Party, such further documents, instruments and conveyances, and shall take such further actions as such other party may request from time to time to document the transactions set forth herein.

Section 6.12. Assignment and Transfer.

Developer has the right to assign or transfer all or any portion of Developer's interest, rights, obligations under this Agreement to third parties and to subsidiaries, affiliates and successors of Developer acquiring an interest or estate in the Project or Project Area upon City's prior written approval which will not be unreasonably withheld. If all or any portion of the Project or Project Area is so transferred by Developer to any person or entity, the transferee succeeds to all of Developer's rights under this Agreement, insofar as they relate to such transferred property, and the transferee will automatically assume all obligations of Developer, present and future, insofar as they relate to each transferred property. Developer is released from its obligations accruing on or after the date of any sale, transfer or assignment under this Agreement with respect to that portion of the Project Area sold, transferred or assigned as permitted under this Section 6.12. Failure to deliver a written assumption agreement hereunder does not negate, modify or otherwise affect the liability of any transferee pursuant to the provisions of this Agreement. No breach or default by any person succeeding to any portion of Developer's interest with respect to the transferred or assigned rights and/or obligations is attributable to Developer, nor may Developer's rights hereunder be cancelled or diminished in any way by any default or breach by any such person. Notwithstanding the foregoing, no mortgagee, upon foreclosure or thereafter, will be deemed to have assumed any of Developer's obligations hereunder without an express written assumption agreement signed by the mortgagee, or its nominee or purchaser at a foreclosure sale, and the City.

Section 6.13. Integration; Counterparts; Exhibits.

This Agreement may executed in two (2) duplicate originals, each of which is an original, but all of which taken together is considered one and the same instrument. This Agreement consists of Articles 1.01 through 6.14, including the Recitals, and Exhibits A through C both inclusive, attached hereto and incorporated by reference

herein, which constitute the entire understanding and agreement of the Parties. The exhibits are as follows:

Exhibit A Map of Total Project Area

Exhibit B Map of Aera Project Area

Exhibit C Processing Schedule

Section 6.14. Amendment of This Agreement.

This Agreement may be amended from time to time, in whole or in part, by mutual written consent of the parties hereto or their successors in interest. City's city manager may execute any such amendment on City's behalf.

CITY:

CITY OF DIAMOND BAR, CALIFORNIA

James DeStefano, City Manager

APPROVED AS TO FORM:

Michael Jenkins, City Attorney

ATTEST:

_____

Tommye Cribbins, City Clerk

DEVELOPER:

Aera Energy LLC,

a California limited liability company

By:_____

Its: _____