



PLACER COUNTY COUNSEL

GERALD O. CARDEN, COUNTY COUNSEL

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MEMORANDUM

TO: Honorable Board of Supervisors
FROM: Gerald O. Carden, County Counsel
By: Karin E. Schwab, Deputy County Counsel
DATE: February 24, 2015
SUBJECT: Placer County Government Center – Costco Wholesale Corporation Option to Ground Lease and Ground Lease

ACTIONS REQUESTED

Adopt a resolution to:

1. Accept Termination by Costco Wholesale Corporation of Option to Ground Lease;
2. Rescind Resolution No. 2014-251 and vacate Notice of Exemption posted December 11, 2014;
3. Rescind County's Execution of the Option to Ground Lease, dated December 9, 2014, and vacate all authority to implement the provisions and responsibilities of the same; and
4. Authorize the Director of Facility Services to take all necessary steps to rescind all actions taken to date to implement the Option to Ground Lease.

BACKGROUND

On December 9, 2014, the Board of Supervisors took the following actions:

1. Authorized the Chairman to execute the Option to Ground Lease between Costco Wholesale Corporation and the County of Placer for approximately 16 acres at the Placer County Government Center in Auburn, at no new net County cost and, after Costco Wholesale Corporation has obtained necessary land use approvals in compliance with the California Environmental Quality Act and has exercised its rights to the Ground Lease pursuant to the terms of the Option to Ground Lease, to execute the Ground Lease and associated documents.
2. Adopted Resolution No. 2014-251 authorizing the Director of Facility Services, or designee, to administer on behalf of the County all provisions and responsibilities of the Option to Ground Lease including the Escrow Agreement between Costco

Wholesale Corporation, the Volunteers for the Multipurpose Senior Center, Inc. and the County of Placer, and after execution of the Ground Lease, administer on behalf of the County all provisions and responsibilities of the Ground Lease, at no new net County cost.

At the same December 9th hearing, the Board determined that the above actions were exempt from environmental review pursuant to California Environmental Quality Act ("CEQA") Guidelines section 15061(b)(3).

The Chairman of the Board executed the Option to Lease on December 9, 2014. A Notice of Exemption was posted with the County Clerk-Recorder on December 11, 2014.

On January 12, 2015, Auburn Highway 49 Corridor Association, an "unincorporated association formed in 2015" ("Auburn 49"), filed a writ of mandate challenging the Board's above described December 9, 2014 actions. The writ of mandate asserts the County violated CEQA and seeks a Court-issued peremptory writ of mandate to "vacate and rescind approval of the Option to Ground Lease", "suspend approval of any and all modifications to the Placer County Government Center" and for an award of attorney's fees and costs.

On January 15, 2015, the City of Auburn filed a writ of mandate based on the same allegations and seeking the same relief as the Auburn 49 writ.

On February 9, 2015, Costco Wholesale Corporation noticed the County of its election "to terminate the Option Agreement effective immediately." Costco also requested the \$530,000 deposited into escrow pursuant to the Escrow Agreement be refunded within thirty (30) days. A copy of Costco's termination letter is attached as Exhibit A. On February 10, 2015, this office noticed both petitioners of the termination and requested the parties dismiss their lawsuits. (Exhibit B) Through their respective attorneys, the petitioners rejected this request and insist that the County must rescind its December 9, 2014 actions on the Option to Lease and the CEQA exemption.

DISCUSSION

Section 1.3(e)(vii) of the Option to Lease agreement allows Costco Wholesale Corporation to terminate the agreement without cause. "Upon termination of the Option as described in this Section 1.3(e), ...this Agreement shall terminate." (Section 1.3(e).) Under standard contract interpretation principles, a termination of an agreement means that the parties "release each other from the rights and duties under the contract." *Martter v. Byers*, (1946) 75 Cal.App.2d 375, 379. "The noun 'termination' is defined as 'that which ends, limits or bounds – outcome; completion; result.'" *Martter*, 75 Cal.App.2d at 380. The words 'terminate,' 'revoke' and 'cancel,' ...all have the same meaning, namely, the abrogation of so much of the contract as might remain executory at the time notice is given..." *Welles v. Turner Entertainment Company*, (2007) 503 F.3d 728, 737, quoting *Grant v. Aerodraulics Co.*, (1949) 91 Cal.App.2d 68.

Based on the above cited principals, the Board need not take any formal action to rescind its December 9, 2014 approvals as the underlying subject of those approvals has been formally and legally terminated. The termination of the agreement also moots the subject matter of both of the above identified lawsuits. However despite these legal tenants, the two petitioners refused to dismiss their respective lawsuits. In the interest of reducing the time and expense of defending

litigation that is for all intents and purposes moot, this office brings the present request forward.

RECOMMENDATION

This office recommends the Board adopt the resolution attached as Exhibit C.

Exhibit A: February 9, 2015 Costco Termination Letter

Exhibit B: February 10, 2015 Letter Requesting Dismissal

Exhibit C: Resolution re: Placer County Government Center – Costco

Wholesale Option to Ground Lease and Ground Lease – Rescission of Resolution

No. 2014-251, Vacation of Notice of Exemption and Other Associated Actions

EXHIBIT A



February 9, 2015

VIA FACSIMILE: (530) 889-6857
AND VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Mary Dietrich
Director of Facility Services
County of Placer Facility Services Department
11476 C Avenue
Auburn, CA 95603

RE: Option to Ground Lease (Auburn, California) by and between Placer County and Costco Wholesale Corporation, a Washington corporation, dated December 9, 2014 (the "Option Agreement")
NOTICE OF TERMINATION

Dear Ms. Dietrich:

This will serve as notice pursuant to the provisions of Section 1.3(e)(vii) of the Option Agreement referenced above, that Costco Wholesale Corporation has elected to terminate the Option Agreement effective immediately. You are hereby directed to pay directly to Costco, within thirty (30) days of the date hereof, Five Hundred and Thirty Thousand Dollars (\$530,000), which is the full amount of the "Deposit" as provided in the Option Agreement.

Thank you for your assistance.

Sincerely yours,

Costco Wholesale Corporation

A handwritten signature in black ink, appearing to read "Richard J. Olin", written over the printed name.

Richard J. Olin
SVP/Asst. Secretary

cc: David A. Lurker, Esq. (via e-mail)

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EXHIBIT B



PLACER COUNTY COUNSEL

GERALD O. CARDEN, COUNTY COUNSEL

175 Fulweiler Avenue
Auburn, California 95603
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February 10, 2015

Via Facsimile (530-758-7169) and First Class Mail

Donald B. Mooney, Esq.
Law Offices of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Via Facsimile (530-432-7356) and First Class Mail

David Ruderman, Esq.
Colantuono, Highsmith & Whatley, PC
11364 Pleasant Valley Rd.
Penn Valley, CA 95946

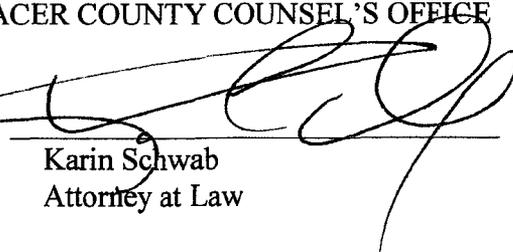
Re: *Auburn Highway 49 Corridor Assoc. v. County of Placer, et al.*
Placer County Superior Court Case No. SCV0035698
City of Auburn v. County of Placer, et al.
Placer County Superior Court Case No. SCV0035751

Dear Counsel:

The County received the attached notice from Costco Wholesale Corporation terminating the Option to Ground Lease. As a result of this action, the subject matter of your respective lawsuits is now moot. The County requests that you file dismissals with prejudice of your respective writs no later than February 17, 2015. If you fail to do so, the County is prepared to file a motion with the court for dismissal.

Very truly yours,

PLACER COUNTY COUNSEL'S OFFICE

By: 

Karin Schwab
Attorney at Law

Attachment

cc: Dale Goldsmith



February 9, 2015

VIA FACSIMILE: (530) 889-6857
AND VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Mary Dietrich
Director of Facility Services
County of Placer Facility Services Department
11476 C Avenue
Auburn, CA 95603

RE: Option to Ground Lease (Auburn, California) by and between Placer County and Costco Wholesale Corporation, a Washington corporation, dated December 9, 2014 (the "Option Agreement")
NOTICE OF TERMINATION

Dear Ms. Dietrich:

This will serve as notice pursuant to the provisions of Section 1.3(e)(vii) of the Option Agreement referenced above, that Costco Wholesale Corporation has elected to terminate the Option Agreement effective immediately. You are hereby directed to pay directly to Costco, within thirty (30) days of the date hereof, Five Hundred and Thirty Thousand Dollars (\$530,000), which is the full amount of the "Deposit" as provided in the Option Agreement.

Thank you for your assistance.

Sincerely yours,

Costco Wholesale Corporation

A handwritten signature in black ink, appearing to read "Richard J. Ofin", written over the printed name.

Richard J. Ofin
SVP/Asst. Secretary

cc: David A. Lurker, Esq. (via e-mail)

EXHIBIT C

Before the Board of Supervisors County of Placer, State of California

In the matter of:

Placer County Government Center – Costco
Wholesale Option to Ground Lease and
Ground Lease – Rescission of Resolution
No. 2014-251, Vacation of Notice of
Exemption and Other Associated Actions

Reso. No. 2015-_____

The following Resolution was duly passed by the Board of Supervisors of the County of Placer at a regular meeting held _____, by the following vote on roll call:

Ayes:

Noes:

Absent:

Signed and approved by me after its passage.

Attest:

Clerk of said Board

Chair, Board of Supervisors

Ann Holman, Clerk of the Board

Kirk Uhler, Chair

WHEREAS, on December 9, 2014, the Placer County Board of Supervisors took the following actions:

1. Authorized the Chairman to execute the Option to Ground Lease between Costco Wholesale Corporation and the County of Placer for approximately 16 acres at the Placer County Government Center in Auburn, at no new net County cost and, after Costco Wholesale Corporation has obtained necessary land use approvals in compliance with the California Environmental Quality Act and has exercised its rights to the Ground Lease pursuant to the terms of the Option to Ground Lease, to execute the Ground Lease and associated documents.

2. Adopted Resolution No. 2014-251 authorizing the Director of Facility Services, or designee, to administer on behalf of the County all provisions and responsibilities of the Option to Ground Lease including the Escrow Agreement between Costco Wholesale Corporation, the Volunteers for the Multipurpose Senior Center, Inc. and the County of Placer, and after execution of the Ground Lease, administer on behalf of the County all provisions and responsibilities of the Ground Lease, at no new net County cost. A certified copy of Resolution No. 2014-251 is attached hereto as Exhibit 1.
3. Determined the above actions to be exempt from environmental review pursuant to California Environmental Quality Act ("CEQA") Guidelines section 15061(b)(3).

WHEREAS, on December 9, 2014 the County executed the Option to Lease, a copy of which is attached hereto as Exhibit 2.

WHEREAS, on December 11, 2014, the County posted a Notice of Exemption with the County Clerk-Recorder, a copy of which is attached hereto as Exhibit 3.

WHEREAS, on January 12, 2015 and January 15, 2015, the County was served with two separate lawsuits challenging the above December 9, 2014 Board actions.

WHEREAS, on February 9, 2015, Costco Wholesale Corporation noticed the County of its election "to terminate the Option Agreement effective immediately" and citing to Section 1.3(e)(vii) of the Option to Lease agreement. A copy of said termination notice is attached hereto as Exhibit 4.

WHEREAS, by operation of law, the termination renders the Option to Lease terminated and releases the parties from the rights and duties under this Agreement.

WHEREAS, on February 10, 2015, the County notified the counsel for both litigants of Costco's notice of termination, the fact that this termination rendered both lawsuits moot and requested the petitioners dismiss their lawsuits. A copy of said request is attached as Exhibit 5.

WHEREAS, both litigants refuse to dismiss their respective lawsuits absent action by this Board to rescind and vacate the December 9, 2014 actions.

WHEREAS, the Board of Supervisors states and recognizes that while said rescission and vacation of these actions is legally unnecessary it is prudent from the standpoint of saving taxpayer dollars defending now-moot lawsuits.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF THE COUNTY OF PLACER:

1. The Board of Supervisors hereby accepts the February 9, 2015 termination notice by Costco Wholesale Corporation of Option to Ground Lease.
2. The Board of Supervisors hereby rescinds Resolution No. 2014-251 and vacates the Notice of Exemption posted December 11, 2014.
3. The Board of Supervisors hereby rescinds the County's execution of the Option to Ground Lease, dated December 9, 2014, and vacates all authority to implement the provisions and responsibilities of the same.
4. The Board of Supervisors hereby authorizes the Director of Facility Services to take all necessary steps to rescind all actions taken to date to implement the Option to Ground Lease.
5. This resolution shall become effective immediately upon adoption.

EXHIBIT 1

Resolution No. 2014-251

Before the Board of Supervisors County of Placer, State of California

In the matter of: A RESOLUTION AUTHORIZING THE
DIRECTOR OF FACILITY SERVICES, OR DESIGNEE,
TO ADMINISTER THE OPTION TO GROUND LEASE AND
GROUND LEASE BETWEEN THE COUNTY AND COSTCO
WHOLESALE CORPORATION FOR APPROXIMATELY 16
ACRES AT THE PLACER COUNTY GOVERNMENT CENTER.

RESOLUTION No: 2014-251

The following RESOLUTION was duly passed by the Board of Supervisors of the County of Placer at a regular meeting held December 9, 2014 by the following vote on roll call:

Ayes: WEYGANDT, HOLMES, UHLER, DURAN

Noes: MONTGOMERY

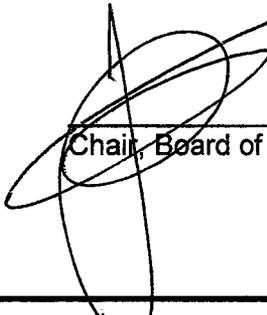
Absent: NONE

Signed and approved by me after its passage.

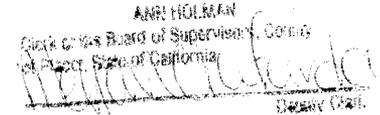
Attest:



Clerk of said Board


Chair, Board of Supervisors

THE FOLLOWING DOCUMENT IS A COPY
COPY OF THE ORIGINAL ON FILE IN THIS OFFICE
ATTEST:

ANN HOLMAN
Clerk of the Board of Supervisors, County
of Placer, State of California

Secretary (Clerk)

WHEREAS, the County of Placer (County) is the owner of approximately 16 acres of property at the Placer County Government Center (PCGC) in Auburn, California; and the County and Costco Wholesale Corporation (Costco) entered into a Site Access and Negotiating Agreement on March 21, 2014 to negotiate an Option to Ground Lease the approximately 16 acres of property at the PCGC; and

WHEREAS, the County staff has negotiated an Option to Ground Lease (Option) and Ground Lease, and the County and Costco desire to enter into the Option to Ground Lease with the ability to execute the Ground Lease at a later date; and

WHEREAS, after entering into the Option, Costco intends to deposit funds into an Escrow Account to assist with a future Senior Center location, and the County, Costco and the Volunteers for the Multipurpose Senior Center, Inc. (Senior Center) have negotiated an Escrow Agreement to address distribution of funds towards tenant improvements and rent.

NOW THEREFORE, BE IT RESOLVED, the Placer County Board of Supervisors does hereby authorize the Chairman of the Board to execute the Option to Ground Lease, and after Costco Wholesale Corporation has obtained necessary land use approvals in compliance with the California Environmental Quality Act and has exercised its rights to the Ground Lease pursuant to the terms of the Option to Ground Lease, to execute the Ground Lease and associated documents; and

BE IT FURTHER RESOLVED that the Director of Facility Services, or designee, is hereby delegated authority to administer on behalf of the County all provisions and responsibilities of the Option and the Ground Lease once fully executed, including the recordation of Memoranda and other financing agreements or instruments as contemplated in said Option or Ground Lease; and to execute and administer on behalf of the County all provisions and responsibilities of the Escrow Agreement between Costco, the Senior Center, and the County to provide funding for tenant improvements and rent associated with a future Senior Center location.