

**AGENDA  
REGULAR MEETING  
CITY OF BANNING  
BANNING, CALIFORNIA**

May 12, 2015  
5:00 p.m.

Banning Civic Center  
Council Chambers  
99 E. Ramsey St.

*The following information comprises the agenda for a regular meeting of the City Council and a Joint Meeting of the City Council and the Banning Utility Authority.*

*Per City Council Resolution No. 2010-38 matters taken up by the Council before 9:00 p.m. may be concluded, but no new matters shall be taken up after 9:00 p.m. except upon a unanimous vote of the council members present and voting, but such extension shall only be valid for one hour and each hour thereafter shall require a renewed action for the meeting to continue.*

**I. CALL TO ORDER**

- Invocation – New Creation Church
- Pledge of Allegiance
- Roll Call – Councilmembers Miller, Moyer, Peterson, Welch, Mayor Franklin

**II. REPORT ON CLOSED SESSION**

**III. PUBLIC COMMENTS/PRESENTATIONS/CORRESPONDENCE**

PUBLIC COMMENTS – *On Items Not on the Agenda*

*A five-minute limitation shall apply to each member of the public who wishes to address the Mayor and Council on a matter not on the agenda. A thirty-minute time limit is placed on this section. No member of the public shall be permitted to "share" his/her five minutes with any other member of the public. (Usually, any items received under this heading are referred to staff or future study, research, completion and/or future Council Action.) (See last page. PLEASE STATE YOUR NAME AND ADDRESS FOR THE RECORD.*

CORRESPONDENCE: Items received under this category may be received and filed or referred to staff for future research or a future agenda.

*The City of Banning promotes and supports a high quality of life that ensures a safe and friendly environment, fosters new opportunities and provides responsive, fair treatment to all and is the pride of its citizens.*

## PRESENTATIONS

1. Recognition of Martha Consentino – 20-Year Service Award (ORAL)
2. Proclamation – Audrey Nathan . . . . . 1
3. Banning High School Solar Board Team Presentation (ORAL)

## **IV. CONSENT ITEMS**

*(The following items have been recommended for approval and will be acted upon simultaneously, unless a member of the City Council wishes to remove an item for separate consideration.)*

**Motion: That the City Council approve Consent Item 1 through 11**

**Items to be pulled \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ for discussion.**

*(Resolutions require a recorded majority vote of the total membership of the City Council)*

1. Approval of Minutes – Special Meeting – 04/28/15. . . . . 2
2. Approval of Minutes – Special Meeting – 04/28/15 (Closed Session) . . . . . 4
3. Ordinance No. 1486, 2<sup>nd</sup> Reading: An Ordinance of the City Council of the City of Banning, California, Approving a Categorical Exemption and Amending Chapter 5.52 (Shopping Carts) of Title 5 (Business Licenses and Regulations) of the Banning Municipal Code . . . . . 19
4. Policy Governing Donations to the City. . . . . 28
5. Selection of Financial Advisor and Approval of Contract . . . . . 31
6. Selection of Bond/Disclosure Council and Approval of Contract . . . . . 60
7. Resolution No. 2015-34, Accepting the Interest in Real Property conveyed from the Amos J. Mathewson Trust dated November 13, 2007, for Assessor's Parcel Numbers (APN) 540-202-002 (260 W. Ramsey Street), 540-202-003 (60 S. 3<sup>rd</sup> Street), and 540-204-009 (33 S. San Geronio Ave.) . 88
8. Resolution No. 2015-35, Renewing the Contract for the Operation and Maintenance of the City of Banning Landscape Maintenance District ("LMD") No. 1 . . . . . 165
9. Resolution No. 2015-39, Approving the Reprogramming of Community Development Block Grant Funds for Construction of Lions Park Accessibility Upgrades . . . . . 171
10. Approve the Settlement Agreement and General Release Between the City and Former City Manager Andrew Takata . . . . . 175
11. Approve the Settlement Agreement and General Release Between the City and current Public Works Director Duane Burk . . . . . 189

- Open for Public Comments
- Make Motion

## **RECESS REGULAR CITY COUNCIL MEETING AND CALL TO ORDER A JOINT MEETING OF THE BANNING CITY COUNCIL AND THE BANNING UTILITY AUTHORITY**

**V. CONSENT ITEM**

1. Resolution No. 2015-06 UA, Approving the Construction of Modifications to Well No. 25 and Associated Cost Share ..... **200**

- Open for Public Comments
- Make Motion

**RECESS joint meeting and reconvene the regular City Council Meeting.**

**VI. REPORTS OF OFFICERS**

1. Animal Control Services Update (Informational Report)  
Staff Report. .... **207**
2. Selection of City Auditor  
Staff Report. .... **209**  
**Recommendations: Staff recommends the selection of Lance, Soll, and Lunghard, LLP, as the City's external auditors for the audit periods covering June 30, 2015 through June 30, 2017 (with the option of extending through June 30, 2020), and authorize the City Manager to execute the attached contract for a three-year total of \$175,872.**

**VII. ANNOUNCEMENTS/REPORTS (Upcoming Events/Other Items if any)**

- City Council
- City Committee Reports
- Report by City Attorney
- Report by City Manager

**VIII. ITEMS FOR FUTURE AGENDAS**

New Items –

Pending Items – City Council

1. Discussion regarding City's ordinance dealing with sex offenders and child offenders. (6/2015)
2. Discussion regarding Animal Control Services (7/2015)
3. Golf Cart Lanes (4/28/15)
4. Discussion regarding change in time for Council Meetings (4/28/15 – Part 2 – Goals)
5. Fee Study
6. Discussion on how to handle/address upcoming Assembly Bills

*(Dates attached to pending items are the dates anticipated when it will be on an agenda. The item(s) will be removed when completed.)*

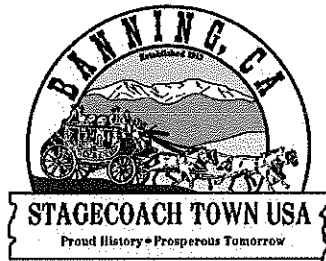
## **IX. ADJOURNMENT**

*Pursuant to amended Government Code Section 54957.5(b) staff reports and other public records related to open session agenda items are available at City Hall, 99 E. Ramsey St., at the office of the City Clerk during regular business hours, Monday through Thursday, 7 a.m. to 5 p.m.*

**NOTICE:** Any member of the public may address this meeting of the Mayor and Council on any item appearing on the agenda by approaching the microphone in the Council Chambers and asking to be recognized, either before the item about which the member desires to speak is called, or at any time during consideration of the item. A five-minute limitation shall apply to each member of the public, unless such time is extended by the Mayor. No member of the public shall be permitted to "share" his/her five minutes with any other member of the public.

Any member of the public may address this meeting of the Mayor and Council on any item which does not appear on the agenda, but is of interest to the general public and is an item upon which the Mayor and Council may act. A five-minute limitation shall apply to each member of the public, unless such time is extended by the Mayor. No member of the public shall be permitted to "share" his/her five minutes with any other member of the public. The Mayor and Council will in most instances refer items of discussion which do not appear on the agenda to staff for appropriate action or direct that the item be placed on a future agenda of the Mayor and Council. However, no other action shall be taken, nor discussion held by the Mayor and Council on any item which does not appear on the agenda, unless the action is otherwise authorized in accordance with the provisions of subdivision (b) of Section 54954.2 of the Government Code.

**In compliance with the Americans with Disabilities Act**, if you need special assistance to participate in this meeting, please contact the City Clerk's Office (951) 922-3102. **Notification 48 hours prior to the meeting** will enable the City to make reasonable arrangements to ensure accessibility to this meeting. [28 CFR 35.02-35.104 ADA Title II]



## **PROCLAMATION**

*WHEREAS, the people of Banning mourn the loss of former City Treasurer Audrey Murphy Nathan who passed away on May 2, 2015; and*

*WHEREAS, Audrey was born in Chicago, Illinois and moved to southern California with her family during her teenage years; and*

*WHEREAS, she married Darrell "Murph" Murphy as a young woman. Together, they led a life full of exciting business ventures; and*

*WHEREAS, After Murph's passing, Audrey moved to the Sun Lakes Community in Banning, California; and*

*WHEREAS, she became very involved in community activities in Sun Lakes and the City of Banning, including the Rotary Club, an organization she believed in passionately. She also worked part time at the Methodist Church in Banning; and*

*WHEREAS, Audrey remarried to Steve Nathan. They enjoyed traveling together, but sadly their marriage was very brief, as he passed away only one year later; and*

*WHEREAS, Audrey kept a positive outlook on life; and*

*WHEREAS, she put a hobby she was very passionate about into action and wrote for the Sun Lakes Lifestyles supplement of the Record Gazette Newspaper, bringing publicity through her writing to community organizations and events; and*

*WHEREAS, on August 13, 2002 Audrey was appointed by the Banning City Council as City Treasurer and served in that capacity until December 10, 2004; and*

*WHEREAS, the City of Banning is a better place because of people like Audrey Murphy Nathan. She is survived by her sister, Beverly Davis; her nephew Lee Davis and his wife Carolyn Broussard Davis; nieces Deanna Davis and Sandra Davis; great nephew Daniel Davis-Williams; and of course all of her Sun Lakes Lifestyle readers.*

***NOW, THEREFORE, BE IT RESOLVED,** that I, Deborah Franklin, Mayor of the City of Banning do hereby recognize and honor the life and community service of Audrey Murphy Nathan and the impact she has left upon the City of Banning.*

***IN WITNESS WHEREOF,** I have set my hand and caused the seal of the City of Banning, California to be affixed this 12<sup>th</sup> day of May, 2015.*

**ATTEST:**

\_\_\_\_\_  
Marie A. Calderon, City Clerk

\_\_\_\_\_  
Deborah Franklin, Mayor

MINUTES  
CITY COUNCIL  
BANNING, CALIFORNIA

04/28/15  
SPECIAL MEETING

A special meeting of the Banning City Council was called to order by Mayor Franklin on April 28, 2015 at 4:08 p.m. at the Banning Civic Center Council Chambers, 99 E. Ramsey Street, Banning, California.

COUNCIL MEMBERS PRESENT: Councilmember Miller  
Councilmember Moyer  
Councilmember Peterson  
Councilmember Welch  
Mayor Franklin

COUNCIL MEMBERS ABSENT: None

OTHERS PRESENT: James E. Smith, Interim City Manager  
David J. Aleshire, City Attorney  
Rita Chapparosa, Deputy Human Resources Director  
Marie A. Calderon, City Clerk

CLOSED SESSION

City Attorney Aleshire said the closed session are two matters of significant exposure to litigation pursuant to Government Code Section 54956.9 (d)(2); existing litigation matter pursuant Government Code Section 54956.9 (d)(1) – a) Robertson’s Ready Mix, Lt., v. City of Banning; b) Burk, Takata, and Purvis vs. City of Banning et al; Case No. RIC 1408547; c) Takata vs. City of Banning – Case No. RIC 502374; real property negotiations pursuant to Government Code Section 54956.8 to confer with its real property negotiator James E. Smith in regards to the Village at Paseo San Gorgonio(APN: 541-181-009 thru 012, 541-181-024 thru 028, 541-183-001 thru 004 and vacated rights-of-way as depicted on Tentative Parcel Map No. 36285; labor negotiations pursuant to the provisions of Government Code Section 54957.6 - City is represented by the City Attorney and negotiations are with International Brotherhood of Electrical Workers (IBEW) – Utility Unit and General Unit, Banning Police Officers Association (BPOA), and San Bernardino Public Employees Association (SBPEA); and public employee appointment (a) Pursuant to Government Code § 54957, to continue discussing the appointment of an employee to the position of City Manager, and (b) Also authorized pursuant to Government Code § 54957.6 regarding labor negotiations continuing to discuss the filling of the unrepresented position of City Manager.

Mayor Franklin opened the closed session items for public comments; there were none.

Meeting went into closed session at 4:10 p.m. and reconvened at 5:03 p.m.

ADJOURNMENT

By common consent the meeting adjourned at 5:03 p.m.

---

Marie A. Calderon, City Clerk

MINUTES  
CITY COUNCIL  
BANNING, CALIFORNIA

04/28/15  
REGULAR MEETING

A regular meeting of the Banning City Council was called to order by Mayor Franklin on April 28, 2015, at 5:10 p.m. at the Banning Civic Center Council Chambers, 99 E. Ramsey Street, Banning, California.

COUNCIL MEMBERS PRESENT: Councilmember Miller  
Councilmember Moyer  
Councilmember Peterson  
Councilmember Welch  
Mayor Franklin

COUNCIL MEMBERS ABSENT: None

OTHERS PRESENT: James E. Smith, Interim City Manager  
David J. Aleshire, City Attorney  
Dean Martin, Interim Administrative Services Director  
Fred Mason, Electric Utility Dir.  
Art Vela, Acting Public Works Director  
Alex Diaz, Interim Chief of Police  
Brian Guillot, Acting Community Development Director  
Oliver Mujica, Contract Planner  
Sonja De La Fuente, Office Specialist  
Marie A. Calderon, City Clerk

The invocation was given by Rev. Daniel Pedraza, First Hispanic Baptist Church. Councilmember Miller led the audience in the Pledge of Allegiance to the Flag.

REPORT ON CLOSED SESSION

City Attorney reported that the City Council met in closed session. The two items of significant exposure to litigation were not discussed. In the existing litigation matter of Robertson's Ready Mix a status report was given and there was no reportable action taken. In the matter of Burk, Takata, and Purvis vs. City of Banning a status report was given and no reportable action was taken. On the matter of Takata vs. City of Banning a status report was given and there was no reportable action taken. Concerning real property negotiations in regards to the Village at Paseo San Gorgonio a status report was given and no reportable action taken. In regards to the three bargaining units in labor negotiations a status report was given and no reportable action was taken. Under public employee employment the position of City Manager was discussed and there was no reportable action taken with regards to that item.

PUBLIC COMMENTS/CORRESPONDENCE/PRESENTATIONS

PUBLIC COMMENTS – *On Items Not on the Agenda*

4



Dorothy Familetti-McLean, representing Banning Stagecoach Days addressed the Council stating that two weeks after Stagecoach Days last year they started preparing for this year's Stagecoach Days and it is going to be better than ever. They are having a three-day rodeo and selling specific tickets for Friday, Saturday and Sunday and presale tickets will be on sale in July. It is costing them a lot of money and this whole thing is done through sponsorships, donations and fundraisers. They are having a fundraiser this Thursday, April 30<sup>th</sup> at Canyon Lanes in Cabazon from 6 to 9 p.m. and the cost is \$20.00 and includes three games and shoes and there will also be raffle prizes.

Jerry Westholder, 1151 Elisa Dawn invited the City Council to National Day of Prayer being hosted at their church located at 5297 W. Wilson Street on May 7<sup>th</sup> at 7:30 p.m. Also, he wanted to address something that the Council addressed back in December or November of last year concerning the Electric Department. He said it was pointed out to us how we are not the highest in the state and he did a little homework and went over the four cities above Banning (see Exhibit "A"). Now it is interesting to him that we had an increase in our utilities of 12% two years ago and at the last Council meeting we have almost \$7 million dollars in reserve for a non-profit corporation. He encouraged the Council to consider rescinding that 12% increase and give some relief to the people of this city who need it so desperately with their utilities.

Don Smith invited the Council and the public to a Memorial Day event on May 25<sup>th</sup> at 2:00 p.m. to 5:00 p.m. at the Banning Women's Club Building, 175 W. Hays. The memorial service will start at 2:30 p.m. at the Memorial Plaque in the Memorial Garden honoring those people from Banning who gave their all in war.

Frank Burgess, 2021 W. Wilson Street addressed the City Attorney stating that in your report at the last Council Meeting he kind of took offense to the City Attorney's Assistant's remarks of the person complaining about \$12 million dollars when it was actually only \$6.5 million dollars of what he calls "give away money" and that is under the Pardee Development that we hope someday will be a reality. He said that he came January 12<sup>th</sup> and it took three months to get a report back and each time he stood before the Council he said he didn't know the actual figure; you tell me the figures. He finds that it says, "Approximately \$6.4 million dollars not near the \$12 million dollars...." He said that he wanted to know the truth and it shouldn't take three months for a citizen of Banning to get answers. He said he wanted to let the attorney know that he appreciates whether it is \$12 million dollars for \$6 million dollars that we cannot afford to give \$6 million dollars to a development for 500 homes and the program calls for 35 to 40 years; how many of us are going to be around.

City Attorney Aleshire responded to Mr. Burgess. He said that the \$6 million assumes that all of those permits get issued and one of the things is that there is a time deadline. If the developer does not move quickly enough to get the project going, then he doesn't get that fee credit and that fee credit was minor compared to the fees that the City would collect from the other 4000 units that get built. That was negotiated under the direction of a prior Council and the Council at that point in time felt it was very important to get that project up and going. The project got delayed because of the litigation but that was built in there to provide an incentive to the developer so that the development would proceed. He apologized for the length of time it took to provide the information and there were several people in the City that could have come up

with that information and eventually the Mayor because of the questioning did request that he provide that information and because it costs the City money they wait to be instructed to do things but because of that process it did take a period of time.

Mr. Burgess responded stating that in his question it was directed to the Mayor and the staff and there is no reason for the attorney to be paid \$400 or \$500 dollars an hour to get this report back and it should have been done by our own staff. They shouldn't be picking up the phone and calling the lawyer every time they want an answer; you have a city manager type government. He hopes that this agreement gets torn up because that developer bought that land 5 to 10 years ago at this lower price and he bought it for a development. He said that if he buys a warehouse or a piece of property to develop it is at his expense and not at the taxpayer's expense.

CORRESPONDENCE – None at this time.

### CONSENT ITEMS

Mayor Franklin said that Consent Items 8, 9 and 11 are pulled.

1. Approval of Minutes – Special Meeting – 04/14/15 (*Interviews*)

Recommendation: That the minutes of the Special Meeting of April 14, 2015 be approved.

2. Approval of Minutes – Special Meeting – 04/14/15

Recommendation: That the minutes of the Special Meeting of April 14, 2015 be approved.

3. Approval of Minutes – Special Meeting – 04/14/15 (*Closed Session*)

Recommendation: That the minutes of the Special Meeting of April 14, 2015 be approved.

4. Approval of Minutes – Regular Meeting – 04/14/15

Recommendation: That the minutes of the Regular Meeting of April 14, 2015 be approved.

5. Report of Investments for March 2015

Recommendation: That the City Council receive and file the monthly Report of Investments.

6. Approval of Accounts Payable and Payroll Warrants for Month of March 2015

Recommendation: That the City Council review and ratify the following reports per the California Government Code.

7. Ordinance No. 1487, 2<sup>nd</sup> Reading: An Ordinance of the City Council of the City of Banning, California, Approving a Categorical Exemption and Zoning Text Amendment No. 15-97503 to Amend Chapter 17.36 (Sign Regulations) of the Zoning Ordinance (Title 17) of the Banning Municipal Code.

Recommendation: That Ordinance No. 1487 pass it second reading and be adopted.

10. Resolution No. 2015-32, Clarifying Appropriation Instructions for Resolution No. 2015-12.

Recommendation: That the City Council adopt Resolution No. 2015-32.

**Motion Moyer/Welch to approve Consent Items 1 through 7, and 10.** Mayor Franklin opened the item for public comments; there were none. **Motion carried, all in favor.**

8. Legal Service Agreement with McIntyre Law Group

City Attorney Aleshire gave a brief staff report stating that this has to do with a lawsuit two years back. Basically there was James Smith and David Dysart that brought an action against the City Council and Council Member Hanna. They defended the lawsuit on the basis of a SLAPP motion that was basically saying that the lawsuit was really directed against the Council Members participating in a public proceeding. This cause of action exists to protect Council people in terms of being able to express opinion and not be subject to litigation so it actually provides for recovery of attorney fees. The City received a judgement of \$80,000 in attorney fees and the then City Manager, Mr. Takata, spent some time trying to work with Mr. Smith and Mr. Dysart to work out an agreement in terms of settlement payment and ultimately nothing came of that conversation. At that point of time the City had the ability of going forward in trying to collect a judgement lien to collect the money. He said that their law firm bills by the hour and the idea was brought up that we basically proceed with a contingent fee lawyer and the contingent fee lawyer is the McIntyre Law Group. You have on your agenda this evening a contract with them to undertake the representation of the City in this matter. The amount of the fee is 25% of the total gross recovery and they would not bill hourly but instead would get their recovery out of any award that is collected.

Councilmember Moyer brought up a couple of items: 1) page 93 the initial sentence says, "In addition, and upon written consent of the City..." he would like that to read as, "...upon written consent of the City Council,..." The reason being that the clause goes on to say what he can get in addition to the 25% on an hourly basis and it goes on later to say that that can amount to a sum up to \$25,000. So he would like the Council to be the determining factor on whether we spend a lot of money. 2) On page 96, No. 4. Coordination of Work, 4.2 Contract Officer. It currently says, "City Attorney is hereby designated as being the representative of the City..." and he would like to change that to, "City Manager is hereby..."

City Attorney said that they can make those changes.

Councilmember Miller said that the two individuals are well-known in this city and quite prominent and he would like to know what efforts were made to reach a settlement in this respect.

City Attorney Aleshire said the liability here is joint and several which means that either one of them could have been held liable for the whole \$80,000 dollars. First, they did to try and work

out a settlement, the offer was made that if we couldn't reach a settlement with both of them, we would enter into a settlement with one for instance, half the amount, \$40,000 and that would be the limit of their liability and we would have to go after the other person for the remaining amount. His recollection was that in that conversation we were willing to discount a little bit from exactly half. Initially in the discussion there was one point where we had reported to the Council that was acceptable and were going to work out the details of it but ultimately they were never able to get a final agreement from either party.

Mayor Franklin opened the item for public comments.

Frank Burgess said that he spoke to Mr. Dysart after reading the agenda yesterday and Mr. Dysart advised him that the City was furnished a bankruptcy clearance on this matter. Mr. Burgess feels that as important as the Dysart name is in this community that it should be checked and dropped and his name should not appear at all on any part of it. Here we have two local people in this community right or wrong, he wasn't involved and doesn't know anything about it but we are going to take the axe to them for \$80,000 dollars and when you go down to page 118 of the agenda you are going to be asking to waive \$1.2 million on a company that is still in existence and his concern if you waive this and you don't take action when you get to that item you are allowing that man to stay out there and gouge other cities with other environmental problems. You spent \$1.8 million on the east Ramsey oil spill, you collect \$625,000 and in this package on page 118A you are asking to waive fees because these two fellows have no money and they are going to pay between them \$50,000 and let it go away; what is the justification. These are strangers that came into town and took advantage of the citizens of Banning and the other two, like or dislike personally, you are going to put liens out there and hire a collection agency and spend more money. They get 25% of whatever they will collect; if they will collect and obviously, according to Mr. Dysart he owns no land so you can't put a lien against his property and number two, you need to recheck your papers to see if perhaps he is telling the truth that he was cleared under the bankruptcy law because mention his name here in public and if he does have a clearance, then you are jeopardizing this City to more lawsuits against you for bringing it up so be sure and have it checked out. Any action you have with Mr. Smith that is up to you and the courts but verify what he has said and get Mr. Dysart's name off of all the paper work or prove that it is wrong.

Inge Schuler, resident of Banning addressed the Council stating that she wanted to pick up on Mr. Moyer's comments about the fees for the litigation attorney and this firm that is trying to collect. She thanked the Council for finally bringing this up. This has been going on for a very long time and on page 92 of the packet it is not just \$80,000 dollars but unspecified additional charges that can be attached to that and she would like to know what the total amount would be and she does also think we should leave it at the 25% max and no additional hourly charges because that can go until the attorney gets all the money and we get nothing. She is very pleased to see that we are finally going after some people, local people who have gouged the citizens on various charges and this is not the only case. She wished that the City would pursue any of the other claims that we have against individuals, companies and organizations that we get our money and that in the future we are not as footloose or fancy free with giving money away.

Don Smith addressed the Council stating that he has numerous times used the services of the McIntyre Law Group for collection efforts and he has been quite satisfied with their services.

They don't often call up and ask for hourly additions but if they do, what they say is here is what we have done. We have done all the normal things covered under your contract but there is this extra thing we could do that cost money if you want to do it and then you decide whether or not you want to do it. He said that he has also been informed that Mr. Dysart received a Chapter 7 discharge so you may want to look into that before you turn it over to collection.

Mayor Franklin closed the item for further public comments.

City Attorney Aleshire responded that he doesn't know that the bankruptcy discharged their claim and that would be something for the McIntyre Law Group to deal with. He thinks that there is the potential of having some extra cost items and they would need to get our approval and we can certainly make sure that the Council has to directly approve any of those changes by modifying the agreement. The other thing that you haven't dealt with is whether you would like the City Manager or the City Attorney to be the contract officer.

There was some further Council and staff discussion in regards to possible extra charges and having the City Manager as the contract officer rather than the City Attorney.

**Motion Moyer/Miller that the Council approve Consent Item No. 8, to approve the Professional Services Agreement with McIntyre Law Group approving a contingency fee contract for legal services in the collection of judgement due to City case of Smith v. Hanna (RSC Case No. RIC 474602, appellate Case No. E045670); along with the suggested two changes. Motion carried, all in favor.**

9. Resolution No. 2015-26, Rejecting the Lease of One (1) New Elgin CNG Crosswind J Sweeper with an Option to Purchase and Rescinding the Approval of Resolution No. 2015-01, and Rejecting Any and All Bids Solicited for the City Street Sweeper Lease or Purchase.

Acting Director Vela gave the staff report as contained in the agenda packet.

Councilmember Peterson said that back when this resolution was originally approved and under Rule 1186 he has since researched that rule a bit and that rule was utilized that we couldn't go forward with our existing machine and that we needed to buy a new machine. So in reading Rule 1186 we can rebuild that engine and keep it, right?

Acting Director Vela said that was correct. In the original staff report Rule 1186.1 was not correctly listed for this street sweeper and applied to the purchase of a new street sweeper. He said that there is a rule out there that requires that both motors on a two-motor street sweeper meet the particulate filter requirements. Currently the existing street sweeper has a particulate filter on the chassis motor but it does not have one on the auxiliary motor which powers the street sweeper component of the street sweeper. We can repair the existing motor and would have to put a particulate filter on it and they have received some informal bids to do that (have not gone out for formal bid process) and those numbers look to be about \$75,000 to repair the existing auxiliary motor. The manufacturer has told him that it would be difficult for a manufacturer to do that repair just for warranty reasons so would have to go out to a third party to do that.

Councilmember Peterson said in going back to the motor portion and it is a John Deere engine and he has looked at the internet and looked at the website for the Elgin Sweeper with a John Deere engine and he has found those engines completely rebuilt for less than \$7,000. How are we going to \$70,000 when we can get delivered to our door a completely rebuilt John Deere engine for \$7,000?

Acting Director Vela said he would be interested to see that bid and if that is something that they can look at he can definitely give them a call but he would be a little concerned again about those warranty periods. His question would be is that just for repair of the motor and may not include the particulate filter?

Councilmember Peterson said that he is just talking about the repair or the rebuilt of the engine.

Acting Director Vela said that another option that he spoke to the manufacturer about and some agencies go with this option is that they take off the entire auxiliary motor so basically what you are left with is a chassis and a motor. They come in with a brand new auxiliary unit that meets the particulate criteria and a brand new hopper and the quote was for about \$130,000 but he was also told that if we were to retire that unit 5 or 6 years down the line there would be some resale value to that unit.

Councilmember Peterson said that the freightliner chassis and engine only have 58,000 miles on it so it has 150,000 miles to go on the engine and chassis before you even begin to worry about it.

Acting Director Vela said the one last option would be to purchase a brand new one and if you do that we would have to meet the 1186.1 rule. That would cost about \$300,000 and that would be a CNG vehicle and that could be funded through grant funds so all these other repairs would come strictly through General Fund funds.

Councilmember Peterson said that since we are at 2001 we are not subject to the 1186 Rule through the AQMD or the other rules for the existing sweeper.

Mayor Franklin said that this item would come back to the Council since we are only rejecting the bid. Acting Director Vela said unless it is possible to get direction on which way to go with the solicitation of bids on either the replacement or a brand new unit.

City Attorney Aleshire said the only item on the agenda is the rejection of the bid. You have had some dialogue and staff can come back and make a recommendation in terms of other options.

Councilmember Miller thanked Councilmember Peterson for his research and the reason he is mentioning this is because he would like to emphasize that all of the money that we spend it not ours and it is the taxpayer's money and if you take a look at everything we do there is very careful discussions of whether or not any money should be spent.

City Attorney Aleshire said that there is a substitute resolution and it is more or less the same but there is an added paragraph that deals with the reasons for rejecting the bid. The prior resolution

sort of said it is being rejected in the best interest of the City. The added paragraph now talks about the fact that there were some inaccuracies in the bid specifications and that that is the reason we are rejecting the bid.

Mayor Franklin opened the item for public comments; there were none.

City Attorney Aleshire at this time read the second "Whereas" clause that was added to Resolution No. 2015-26 as follows, "Whereas, in response to the bid protest the City staff conducted a review of the procurement process, street sweeper specifications and regulatory compliance, and determined that the Elgin Sweeper Lease/Purchase was not the lowest responsible bidder, and the procurement process did not include written criteria to properly evaluate the different street sweepers considered for the award."

**Motion Moyer/Miller that the Council approve Consent Item No. 9, adopting Resolution No. 2015-26, Rejecting the Lease of One (1) New Elgin CNG Crosswind with an Option to Purchase and Rescinding the Approval of Resolution No. 2015-01, and rejecting any and all bids solicited for the City street sweeper lease or purchase, as revised. Motion carried, all in favor.**

11. Settlement Agreement with Hunter Consulting, Inc. ("HCI")

City Attorney Aleshire said that in the Dureau matter the City cleaned up an oil spill and spent approximately \$1.8 million cleaning it up. We sued various parties that were responsible and basically it was a homeless person who had turned over the barrels. We sued him as a Doe; we sued the property owner, and sued the former tenant who left the oil barrels there. As the litigation proceeded, it turned out that the only responsible party who had any funding was the property owner Dureau and as they were ready to go to trial they brought an expert in to help them and the expert's opinion was that the cleanup should have only cost \$600,000. So that was the expert testimony that they had to produce in the action. We actually won the lawsuit and the judgement was for \$625,000 which was the full amount that our experts SCS estimated the cleanup was going to cost. At that point the City had had a report in its possession from an independent expert at the time the \$1.8 million was approved. That independent report that was not shown to the Council indicated that the outside expert had looked at the \$1.8 million and questioned \$1.2 million of the charges that had been collected by HCI which was the entity that did the actual cleanup. The outside opinion did not necessarily say that all of those charges were bogus but said that there was insufficient documentation and asked a number of questions. The questions that were in that report were not presented to the Council when the Council voted to approve the payment of the \$1.8 million. With the conclusion of the Dureau case we commenced an action against HCI for basically overbilling, for not legitimately charging and for the excessive charges that our expert SCS indicated occurred. The problem was that as we did some background research and it turned out that there were some other litigation matters the firm had been involved with and there were some questions regarding their resources and ability to pay. Council wanted to be sure that as we proceeded with the matter and there was a question of insurance and they got into quite an exercise going after the insurance company to try and determine whether there was insurance and whether it could be triggered. They felt for a period of time that the insurance was triggered and they would be able to proceed against the insurance. The other side got quite aggressive so they started spending a lot of money in depositions. He

said that Councilmember Moyer indicated that the legal bills started going up and we came to believe that our chances on the insurance were less than 50/50 and when they checked out the resources of the entity itself they were quite limited. The Council was concerned with trying to control its legal budget and we were at a point where we were either going to have to do significant additional discovery and when it was presented back to the Council he said they were asked to find out if there was any potential settlement. HCI offered \$50,000 and various things were done to get the number higher but they wouldn't budge from that number so they have negotiated this settlement agreement and it has been put on the Council agenda for approval. They had projected if they went forward with trial the legal costs could have been a quarter of a million dollars if they went ahead with the trial. They also felt that they had some of their own witnesses that were deposed who's opinion was that the billing was reasonable and that the original charges by HCI were reasonable so their legal position was undercut in terms of litigating on that basis. The direction they received was in closed session but the actual agreement itself comes before the public in open session for approval so that we are being transparent and so that everyone knows what is going on.

Councilmember Miller said again, a previous City Council did not examine all the documents and therefore paid a bill that information said should not be paid. Again, all he can say is that it is the responsibility of the City Council to read every document carefully and this Council does.

City Attorney Aleshire said he doesn't disagree that it is important for the Council to read every document. He said that the independent opinion was not in the Council packet and the staff report said there was an "independent opinion" and since it did not reveal that there were any issues or questions it implied that that was satisfactory. So of course, the Council was alerted that there was a report and none of the Council people asked for a copy of the report and went back and read it but the Council does get a lot of information and he thinks that as staff we would provide relevant reports such as that and the report should have been included in the packet itself or staff should not have made the recommendation they did.

Mayor Franklin opened the item for public comments.

Frank Burgess addressed the Council stating that it is sad to think one more time our prior Council has cost us \$2.2 million dollars and based on what the attorney just said even though you didn't get a copy of that report you authorize it under your warrants in paying the bills which tells him that they were not examine the warrant register. Also you need a Finance Committee of two that checks the warrant registers and makes sure the purchase orders are in order. Also, in this report it says to go to trial July 15<sup>th</sup> and it sounds to him like your money is pretty well spent other than the day at the trial. Also these two gentlemen, if you go on the internet as he did, are still in business. If there is something dishonest in this company, don't let it fall on other city's backs or other people's homes that are being torn down or whatever. You have an obligation to protect the citizens of Banning. So these two fellows don't have the money but yet they are going to come up with \$50,000. You need to pay attention to what is in your agenda packet and put a stop to this waste of our money.

Linda Pippenger, resident of Banning said she doesn't understand how they could not have insurance. She said with their little, tiny American Air Service that they had the City would let us work for them but when they went to get paid she had to provide proof of insurance on the



vehicles, her workman's comp, her contractors liability and even had to have a waiver of subrogation which no one else every asked her for so she doesn't understand how HCI got that huge contact without proving they had insurance and why we couldn't collect on their insurance.

Mayor Franklin closed the item for further public comment.

City Attorney Aleshire said in regards to the insurance question it is not that they don't have any insurance; they do have insurance but you can't get insurance for fraud. For negligence and things like that you have insurance and the question here was whether these actions were intentional and basically there was fraud that was occurring here. Also there are questions on environmental coverage and insurance doesn't necessarily cover environmental liability, you have to get special insurance for that. So the problem was that the particular acts that we thought occurred were not covered by the insurance that they had. In regards to the comment that we have a judgement lien against property, we do. In the Dureau case we have a judgement lien against the Dureau property. Dureau actually had a number of parcels of property so in that case they felt they could pursue that to the end because there was real property that had value. Dureau had filed an appeal and gone through various steps but we have gotten paid for that so that case is not the problem at this point in time.

Councilmember Peterson said he has personally overturned every rock in this case and looked at every possible way to be able to collect money. The attorneys have tried to recover money. Through litigation the law firm has recovered approximately \$600,000 dollars from Dureau and then a settlement from HCI. That is all we are going to get. There have been some mistakes and unfortunately there is nothing we can do about them. You can beat the old Council, the old staff; you can beat them to death but it is not going to change it. He assured the public that this Council has done everything they can possibly do to recover what was wrongfully taken.

Councilmember Moyer said sometimes you just have to cut your losses and move on and agrees with Councilmember Peterson in that you just have to move on.

**Motion Welch/Peterson that the Council approves Consent Item No. 11, approving the Settlement with Hunter Consulting, Inc. ("HCI") and authorize the Interim City Manager to execute it. Motion carried, all in favor.**

#### PUBLIC HEARINGS

1. Consideration of Ordinance No. 1486, Approving the Categorical Exemption and Ordinance No. 1486 to Amend Chapter 5.52 (Shopping Carts) of Title 5 (Business Licenses and Regulations) of the Banning Municipal Code.  
(Staff Report - Brian Guillot, Acting Community Development Director)

Acting Director Guillot gave the staff report as contained in the agenda packet. At this time he highlighted two of the major changes in regards to this item with one being Section 5.52.010 D, Mandatory Plan to Prevent Cart Removal/Evaluation Report, and Section 5.52.080 related to Businesses Without Shopping Carts and this would also go along with our recycling centers. He said he was able to personally speak with the two recycling centers and they were welcoming of

this provision. The whole intent of this ordinance is that we do not want abandoned shopping carts on our streets.

Mayor Franklin opened the item for public comments; there were none.

There was some Council comments and staff dialogue in regards to the use of Waste Management trash cans being used for recycling goods.

Mayor Franklin asked the City Clerk to read the title of Ordinance No. 1486. City Clerk read: "An Ordinance of the City Council of the City of Banning, California, Approving a Categorical Exemption and Amending Chapter 5.52 (Shopping Carts) of Title 5 (Business Licenses and Regulations) of the Banning Municipal Code."

**Motion Welch/Peterson to waive further reading of Ordinance No. 1486. Motion carried, all in favor.**

**Motion Welch/Moyer that Ordinance No. 1486 pass its first reading and approval of the Categorical Exemption. Motion carried, all in favor.**

#### REPORTS OF OFFICERS

Mayor Franklin moved up Item No. 2 at this time.

2. Review of Banning Police Department – Informational Report  
(Staff Report – Alex Diaz, Chief of Police)

Chief Diaz gave his staff report as contained in the agenda packet going over the activities that they have been able to do since he took over the department last year starting with: reorganization of the department in regards to administration; sworn personnel, police reserve program; dispatch, code enforcement, records bureau, property/evidence room; chaplain program, citizen volunteer program. He also went over the Community Outreach Programs which include Banning Police Activities League (BPAL); Safe Streets Now; Neighborhood Watch; and WeTip. In regards to sworn personnel we are at about .87 officers per 1000 which is very well below the national norm of 2.5 officers per 1000 and despite those numbers they have been able to do an adequate job in providing safety for our citizens. Unfortunately they have a couple of programs that have affected how they do their job out in the community and it is not just particular to the city of Banning but particular to California. AB 109 has been one of those programs even though it hasn't had a profound effect yet they have had a substantial amount of low level prisoners have been released to our communities impacting how they do their work out to the community. Another program that has affected how they do business is Proposition 47 and he explained what that entailed. He has a proposal to start-up a Problem Oriented Policing (P.O.P.) Team with their main goal of going after the big crime and a lot of this goes back to drugs and the supplier and this team could also deal with quality of life issues. His proposal would be for three additional bodies to offset that team. He also talked to the Council about some technology based programs such as PSEC (Public Safety Enterprise Communication System), the upgrade of camera systems for their vehicles and also the use of body-worn cameras, and on-line crime reporting system. This can be accessed through their Banning Police

Department's website. They are trying to mitigate the fact that they don't have as many officers out on the street by providing some services for our citizens to self-report.

There were some Council questions and discussion with staff in regards to this written report being available to the public, Proposition 47 language and the problem with people showing up for court, police department stats and the need for more police officers, and community outreach. Council also thanked Chief Diaz and his department (sworn officers, non-sworn officers, volunteers and reserve officers) for doing the best with what they have. Chief Diaz also gave the Police Department web address: [www.banningpolice.org](http://www.banningpolice.org) and also where someone can report crimes and that is: [www.crimereports.com](http://www.crimereports.com). He also mentioned that we are going to be one of the few agencies in Riverside County and San Bernardino County that are going to the text "911" and that should be operational in the next three to four months. Also their police survey is still in progress and that will assist the department when they do their three-year plan.

Mayor Franklin opened the item for public comments.

Don Smith addressed the Council stating that our police department is now open to the public more days a week than city hall is and they are doing more with less. In 1992 the State was in a recession and like the State always does when they do not have enough money they said there is a whole bunch of money that the cities have that we can use and the cities can do with less so we were in a declining budget with less police officers than we would like to have had at the time. Over the next two years we added three and went from 28 to 31 so in 1992 with a smaller population we have more sworn officers than we have right now in 2015. At that time we went down to one lieutenant for budgeting reasons while increasing the amount of persons on the street and actually created a special enforcement patrol. The ability to have somebody not on a regular shift but can be assigned different hours or different weeks and they can hear a problem that we need to do something about so that team can have their hours and their efforts directed directly to that so how do we go about adding three extra officers. You are going to have to go through the budget and it is not easy and go line, by line, by line because this city deserves the police department to which we are entitled. Hopefully we will soon have good news on the Robertson's lawsuit and start discussing how we can spend that money. He said the police department is headed in the right direction and have a plan as to what to do five years from now and he appreciates that forward thinking.

Jerry Westholder addressed the Council stating that he is very pleased with Chief Diaz and feels we have the right guy. He also echoed what Councilmember Peterson said in regards to AB 109 being a problem and it has been proven it is a problem and will be more of a problem when we have probation here. Also, with that in mind we seriously need to consider the plight of our police department. He agreed with what Don Smith said in regards to the Measure J money and funding more officers. To draw from his human resource's background the number one cost that we pay for employees in any business is training and if you get somebody else and you train them the average life-span in a department is 3 to 5 years and then they move on. So what we might want to consider is more money upfront by funding our own officers through the academy because that would generate more loyalty and we could get them under contract and keep them for a longer period of time and general more loyalty in our department. Also, prior administrations were not really big on volunteers and at one time we had 85 to 87 volunteers in the police department that saved our City a million to a million and a half dollars a year and he

knows that Chief Diaz is working on beefing up the volunteers and one thing they used to do was to go around and pick-up the shopping carts. We had a very active volunteer group that was excellent in serving the City so we may want to consider encouraging in the community more volunteerism through the police department. He urged the Council that whatever money we can get for additional officers is only going to benefit us especially in the community we live in, along with the jail facility in the city and the releasing of prisoners into our area we need to basically fund the department to the best of our ability.

1. Resolution No. 2015-33, Approving the Agreement Relating to the Joint Audit Among the Boulder Canyon Project Contractors and the Southern California Public Power Authority Pursuant to the Boulder Canyon Project Electric Service Contract and the Boulder Project Implementation Agreement.  
(Staff Report – Fred Mason, Electric Utility Director)

Director Mason gave the staff report as contained in the agenda packet.

Mayor Franklin opened the item for public comment. There were none.

**Motion Peterson/Welch that the City Council adopt Resolution No. 2015-33, Approving the Agreement Relating to the Joint Audit Among the Boulder Canyon Project Contractors and the Southern California Public Power Authority Pursuant to the Boulder Canyon Project Electric Service Contract and the Boulder Canyon Project Implementation Agreement. Motion carried, all in favor.**

#### ANNOUNCEMENTS/REPORTS (Upcoming Events/Other Items if any)

##### City Council

Mayor Franklin –

- Reminder that the courthouse is opening on Monday, May 4, 2015.
- Thank you to all of the departments that participated and residents that came out for our 9<sup>th</sup> Annual Disaster Preparedness Expo. It was a true community event and all of the City departments participated to make it a success and to all of the residents that are trying to get prepared for an emergency that may occur.

#### ITEMS FOR FUTURE AGENDAS

City Committee Reports - None

City Attorney Report – Nothing at this time to report.

Report by City Manager – Nothing to report at this time.

#### ITEMS FOR FUTURE AGENDAS

New Items - None

Pending Items:

1. Discussion regarding City's ordinance dealing with sex offenders and child offenders. (6/2015)
2. Discussion on how the City Council handles donations to the City.
3. Discussion regarding Animal Control Services (7/2015)
4. Discussion regarding Police Staffing 4/28/15)
5. Golf Cart Lanes (4/28/15)
6. Bond Workshop (Midyear Budget) (4/28/15)
7. Discussion regarding change in time for Council Meetings (4/28/15 – Part 2 – Goals)

*(Dates attached to pending items are the dates anticipated when it will be on an agenda. The item(s) will be removed when completed.)*

### ADJOURNMENT

By common consent the meeting adjourned at 7:33 p.m.

---

Marie A. Calderon, City Clerk

**THE ACTION MINUTES REFLECT ACTIONS TAKEN BY THE CITY COUNCIL. A COPY OF THE MEETING IS AVAILABLE IN DVD FORMAT AND CAN BE REQUESTED IN WRITING TO THE CITY CLERK'S OFFICE.**

<u>City</u>	<u>Population</u>	<u>Median Income</u>	<u>Below Poverty</u>
Pasadena	139,731	\$ 65,000	02.8%
Anaheim	345,000	<del>\$ 46,000 to</del> \$143,000	01.2%
Modesto	205,000	\$ 45,000	10.0%
San Diego	1,355,896	\$ 62,000	05.3%
Banning	30,506	\$ 36,000	17.0%

**ORDINANCE NO. 1486****AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BANNING, CALIFORNIA APPROVING A CATEGORICAL EXEMPTION AND AMENDING CHAPTER 5.52 (SHOPPING CARTS) OF TITLE 5 (BUSINESS LICENSES AND REGULATIONS) OF THE BANNING MUNICIPAL CODE**

**WHEREAS**, on September 26, 1995, the City Council adopted Resolution No. 11995-150 regulating shopping carts used by local retailers in accordance with Business and Professions Code Section 22435-22435.8; and

**WHEREAS**, the increasing number of shopping carts abandoned in fields and along roadways does not contribute to a positive view of the City, and this issue counteracts the General Plan Economic Development Element Goal of providing “a balanced, broadly-based economy that provides a full range of economic and employment opportunities, while maintaining high standards of development and environmental protection,” and, in particular, the presence of abandoned shopping carts discourages business development and opportunities due to the perceived negative views and implications; and

**WHEREAS**, on August 6, 2014, during a regularly scheduled meeting, the Planning Commission conducted a Study Session to consider complaints from the community regarding abandoned shopping carts and upon the conclusion of the Study Session, the Planning Commission provided direction to City staff to meet with the businesses and other stakeholders to solicit their comments and concerns regarding this issue and to discuss possible solutions; and

**WHEREAS**, on September 24, 2014, City staff held a meeting with local retail businesses and other interested parties, and it was recognized by the group that there appears to be adequate ordinances in place, but there is a lack of enforcement to address the issues related to abandoned and stolen shopping carts; and

**WHEREAS**, on February 4, 2015, during a regularly scheduled meeting, the Planning Commission conducted a Study Session to discuss options for revising the shopping cart regulations that meets the needs of both the community and the economic interests of those involved and to seek direction from the Planning Commission as to how to proceed with in this issue and, upon the conclusion of the Study Session, the Planning Commission provided direction to City staff to prepare an Ordinance to address the issue of abandoned shopping carts within the City; and

**WHEREAS**, the City Council has authority pursuant to Section 1.04.040 (Amendatory Ordinances) of the City of Banning Municipal Code and California Government Code §50020 to approve, approve with modifications, or disapprove amendments to the Municipal Code; and

**WHEREAS**, on April 1, 2015, during a duly advertised public hearing, the Planning Commission adopted Resolution No. 2015-06 recommending to the City Council the adoption of Ordinance No. 1486 approving the Categorical Exemption and amending Chapter 5.52 (Shopping Carts) of Title 5 (Business Licenses and Regulations) of the Banning Municipal Code; and

**WHEREAS**, on the 17<sup>th</sup> day of April, 2015, the City gave public notice by advertising in the Record Gazette newspaper of the holding of a public hearing at which the Categorical Exemption and Ordinance No. 1486 would be considered; and

**WHEREAS**, on the 28<sup>th</sup> day of April, 2015, the City Council held the noticed public hearing at which interested persons had an opportunity to testify in support of, or opposition to the proposed ordinance, and at which time the City Council considered the Categorical Exemption and Ordinance No. 1486; and

**WHEREAS**, at this public hearing on the 28<sup>th</sup> day of April, 2015, the City Council considered and heard public comments on the proposed Categorical Exemption and Ordinance; and

**WHEREAS**, the City Council has carefully considered all pertinent documents and the staff report offered in this case as presented at the public hearing held on the 28<sup>th</sup> day of April, 2015.

**NOW THEREFORE, BE IT HEREBY ORDAINED** by the City Council of the City of Banning as follows:

#### **SECTION 1. ENVIRONMENTAL.**

##### California Environmental Quality Act (CEQA)

In accordance with the requirements of the California Environmental Quality Act (CEQA), the City Council has analyzed proposed Ordinance No. 1486 and has determined that it is Categorically Exempt from CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines which provides that CEQA only applies to projects that have the potential for causing a significant effect on the environment. *Where, it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment; the activity is not subject to CEQA.* The amendments to the Banning Municipal Code do not relate to any one physical project and will not result in any physical change to the environment. Therefore, it can be seen with certainty that there is no possibility that Ordinance No. 1486 may have a significant adverse effect on the environment, and thus the adoption of this Ordinance is exempt from CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines.

##### Multiple Species Habitat Conservation Plan (MSHCP)

The amendments to the Banning Municipal Code do not relate to any one physical project and are not subject to the MSHCP.



**SECTION 2. CITY COUNCIL ACTION.**

The City Council hereby takes the following actions:

1. Banning Municipal Code §5.52.010 is hereby amended adding §5.52.010.C as follows:

“Findings and Purpose. Abandoned shopping carts constitute a nuisance, create potential hazards to the health and safety of the public, and interfere with pedestrian and vehicular traffic within the City of Banning. The accumulation of wrecked, dismantled and abandoned shopping carts on public or private property also tends to create conditions that reduce property values, promoting blight and deterioration in the City. The intent of this Chapter is to insure that measures are taken by store owners to prevent the removal of shopping carts from store premises and parking lots, to make the removal of shopping carts a violation of this Code, and to facilitate the retrieval of abandoned carts as permitted by State law. Further, this Chapter is intended to supplement existing State law regarding shopping carts as set forth in California Business & Professions Code, section 22435, et seq.”

2. Banning Municipal Code §5.52.010 is hereby amended adding §5.52.010.D as follows:

“Enforcement of Chapter.

(a) Every cart owned or provided by any business establishment in the City of Banning must have a sign permanently affixed to it that contains the following information:

1) Identifies the owner of the cart or the name of the business establishment, or both;

2) Notifies the public of the procedure to be utilized for authorized removal of the cart from the business premises;

3) Notifies the public that the unauthorized removal of the cart from the premises or parking area of the business establishment is a violation of State and City of Banning law;

4) Lists a telephone number to contact to report the location of the abandoned cart; and

5) Lists an address for returning the cart to the owner or business establishment.

(b) Failure to comply may subject the violator to any civil, criminal, or administrative remedies as provided by law.”

21

3. Banning Municipal Code §5.52.010 is hereby amended adding §5.52.010.E as follows:

“Prohibiting Removal or Possession of Abandoned Shopping Carts.

(a) It shall be unlawful to either temporarily or permanently remove a cart from the premises or parking area of a business establishment without the express prior written approval of the owner or on-duty manager of the business establishment. Written permission shall be valid for a period not to exceed 72 hours.

(b) It shall be unlawful to be in possession of a cart that has been removed from the premises or parking area of a business establishment unless it is in the process of being immediately returned to the owner or business establishment.

(c) This section shall not apply to carts that are removed for the purposes of repair or maintenance.

(d) Failure to comply may subject the violator of the cart to any civil, criminal, or administrative remedies as provided by law.”

4. Banning Municipal Code §5.52.010 is hereby amended adding §5.52.010.F as follows:

“Mandatory Plan to Prevent Cart Removal/Evaluation Report. Every owner shall develop and implement a specific plan to prevent customers from removing carts from the business premises ("prevention plan"). The prevention plan must include the following elements and a detailed description of how they will be implemented:

(a) Notice to Customers. Written notification shall be provided to customers that removal of carts from the premises and parking lots are prohibited and a violation of state and local law. This notice may be provided in the form of flyers, warnings on shopping bags, or any other form of written notification that will effectively notify customers of the prohibition.

(b) Signs shall be placed in pertinent places near door exits and near parking lot exits that warn customers that cart removal is prohibited and constitute a violation of state and local law.

(c) Specific physical measures shall be implemented to prevent cart removal from the business premises. These measures may include, but are not limited to, disabling devices on all carts, posting of a security guard to deter and stop customers who attempt to remove carts from the business premises, bollards and chains around business premises to prevent cart removal, security deposits

required for use of all carts, or the rental or sale of carts that can be temporarily or permanently used for transport of purchases. As an alternative to implementing specific physical measures, a business shall contract with a cart retrieval service to retrieve carts removed from its premises within a forty eight (48) hour period.

(d) If a prevention plan was in place the previous year, a report shall be submitted to the City evaluating the measures that were used and approved in the prior calendar year. The report shall include, but not be limited to, the inventory of carts owned/used by the business establishment and the number of carts that had to be replaced due to loss, theft or abandonment.”

5. Banning Municipal Code §5.52.010 is hereby amended adding §5.52.010.G as follows:

“Prevention Plan/Evaluation Report Timelines and Approval Process.

(a) Existing Owners. The proposed prevention plan for preventing cart removal shall be submitted for approval to the City Manager or his/her designee within thirty (30) days of receiving notice from the City that such a plan is required pursuant to this Chapter. An evaluation report shall be submitted by January 1 of each year thereafter.

(b) New Businesses and Change in Ownership. If a new business begins conducting business in the City and provides carts to its customers, the new owner shall notify the City Manager or his/her designee within thirty (30) days of opening the business to the public and submit a new prevention plan or contract with a cart retrieval service. If an existing business changes ownership, the new owner shall notify the City Manager or his/her designee within thirty (30) days of the change and submit a new prevention plan, agree to adopt the existing prevention plan on file with the City for that business or contract with a cart retrieval service. An evaluation report shall be submitted by January 1 of each year thereafter.

(c) Approval. Within thirty (30) days of receipt of the prevention plan, the owner shall be notified whether the prevention plan is approved. If the plan is not approved, the notice shall state its reasons and provide recommendations to the owner to ensure plan approval. The owner shall submit a new prevention plan within fifteen (15) days of receiving this notice. Once a prevention plan is approved, the proposed measures shall be implemented by no later than thirty (30) days after City approval is given. If an evaluation report is submitted, the prevention measures shall be continued until and unless the City indicates that a measure(s) needs to be modified. Unless otherwise agreed, any modifications to the plan imposed by the City shall be implemented within thirty (30) days after the City notifies the owner of the needed modifications.

(d) Revocation. If more than sixty (60) carts are retrieved by the City within a six (6) month period, the owner's prevention plan will be revoked upon notification by the City and the owner will be required to submit a new prevention plan to the City Manager. Any owner failing to implement the new prevention plan within thirty (30) days of approval shall be subject to penalties under this Chapter."

6. Banning Municipal Code §5.52.020.A is hereby amended as follows:

"On and after the effective date hereof, any shopping cart, as defined herein, may be removed from the public right-of-way or public property of the city by any employee of the City of Banning upon actual or constructive notice to the owner that the shopping cart has been in such right-of-way for a period of twenty-four hours. Any shopping cart so removed shall be taken by the employee to the city yard. Such shopping cart shall remain there until claimed by the owner or the owner's authorized agent. Any cart remaining in the city yard for ninety one days or more shall be disposed of as lost property. The provisions of this Chapter shall be enforced by any enforcement personnel. To the extent otherwise permitted by law, said enforcement personnel may enter onto any public or private property in the City to retrieve, remove, store, and dispose of any lost, stolen, or abandoned shopping cart, or any part thereof. Any act authorized to be performed by the City of Banning pursuant to any provision of this Chapter may be performed by any enforcement personnel. Any enforcement personnel are authorized to issue an administrative citation upon any owner whom they have reasonable cause to believe has violated any provision of this Chapter."

7. Banning Municipal Code §5.52.040 is hereby added as follows:

"Administrative Costs and Fines. Pursuant to Business and Professions Code Section 22435.7, any owner that fails to retrieve its abandoned cart(s) within three (3) days of receiving actual notice from the City, shall pay the City's administrative costs for retrieving the cart(s) and providing the notification to the owner as may be established by resolution of the City Council. Any owner who fails to retrieve abandoned carts in accordance with this Chapter in excess of three times during a specified six month period, shall be subject to a \$50.00 fine for each occurrence. An occurrence includes all carts owned by the owner that are impounded by the City in a one-day period."

8. Banning Municipal Code §5.52.050 is hereby added as follows:

“Penalties for Failing to Submit a Prevention Plan or Evaluation Report or to Implement Prevention Measures. Any owner that fails to submit a prevention plan, implement the proposed plan measures, or implement any required modifications to the plan by the City within the time frames specified in this Chapter shall be required to place disabling devices on all carts owned/leased/used by the business to prevent removal of carts from the business premises and parking lots. Any owner that fails to submit an evaluation report or prevention plan by January 1 of each year or fails to place a disabling device on all carts, if applicable, shall be subject to a \$1,000.00 civil penalty, plus an additional penalty of \$50.00 for each day of non-compliance.”

9. Banning Municipal Code §5.52.060 is hereby added as follows:

“Notification for Retrieval of Abandoned Shopping Carts. Pursuant to Business and Professions Code Section 22435.7, the City shall notify the owner of any abandoned carts owned or used by the business establishment that have been located within the City of Banning, if the City intends to impound the cart(s) pursuant to Section 22435.7. The owner shall have three (3) days from the date the notification is given, to retrieve the carts from the City.”

10. Banning Municipal Code §5.52.070 is hereby added as follows:

“Disposition of Shopping Carts After Thirty Days. According to State Law, any cart not reclaimed from the City within thirty (30) days after notification to the owner shall be sold or otherwise disposed of by the City. Any cart that fails to have the identification required by State Law or this Chapter may be sold or otherwise immediately disposed of at the discretion of the City.”

11. Banning Municipal Code §5.52.080 is hereby added as follows:

“Businesses Without Shopping Carts. A business which does not own, rent, lease, or otherwise possess its own carts, but which receives a benefit by the use of carts owned by other businesses, merchants, grocers, or other similar establishments, shall provide a location upon its premises for the storage of carts and shall immediately contact a cart retrieval service to retrieve any carts that are left on the premises. This section specifically applies to recycling centers.”

**SECTION 3. SEVERABILITY.**

If any section, subsection, sentence, clause, or portion of this ordinance is, for any reason, held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision will not affect the validity of the remaining portions of this ordinance. The City Council of the City of Banning hereby declares that it would have passed this Ordinance and each and every section, subsection, sentence, clause, phrase or portion thereof, irrespective of the fact that any one or more sections, subsections sentences, clauses, phrases, or portions thereof may be declared invalid or unconstitutional.

**SECTION 4. PUBLICATION; EFFECTIVE DATE.**

The City Clerk shall certify to the passage and adoption of this ordinance, and shall make a minute of the passage and adoption thereof in the records of and the proceedings of the City Council at which the same is passed and adopted. This ordinance shall be in full force and effect thirty (30) days after its final passage and adoption, and within fifteen (15) days after its final passage, the City Clerk shall cause it to be published in a newspaper of general circulation and shall post the same at City Hall, 99 E. Ramsey Street, Banning, California.

**PASSED, APPROVED, AND ADOPTED** this \_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Deborah Franklin, Mayor  
City of Banning

**APPROVED AS TO FORM AND  
LEGAL CONTENT:**

\_\_\_\_\_  
David J. Aleshire, City Attorney  
Aleshire & Wynder, LLP

**ATTEST:**

\_\_\_\_\_  
Marie A. Calderon, City Clerk  
City of Banning, California

**CERTIFICATION:**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that Ordinance No. 1486 was duly introduced at a regular meeting of the City Council of the City of Banning, held on the \_\_\_\_\_ day of \_\_\_\_\_, 2015, and was duly adopted at a regular meeting of said City Council on the \_\_\_\_\_ day of \_\_\_\_\_, 2015, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

\_\_\_\_\_  
Marie A. Calderon, City Clerk  
City of Banning, California

## CITY COUNCIL AGENDA

**DATE:** May 12, 2015  
**TO:** CITY COUNCIL  
**FROM:** Dean Martin, Interim Administrative Services Director  
**SUBJECT:** Donations to the City

**RECOMMENDATION:** Approve the attached administrative policy governing donations to cash, goods, or services to the City.

**JUSTIFICATION:** Periodically, the City receives donations for specific purposes. It is in the best interests of the City to accept certain donations that provide value and which may reduce use of City resources.

**BACKGROUND:** From time to time citizens and others desire to make donations of materials, goods, services, or cash to the City in furtherance of a specific goal or purpose, or program. The City desires to accept such donations that contribute toward meeting a City goal or promoting the City to others. However, the donation must be clearly beneficial to the City and not create a burden. The attached policy outlines the guidelines for acceptance of a donation including accounting and reporting requirements.

The Policy has been reviewed and recommended for approval by the Budget and Finance Committee subject to the marked revisions.

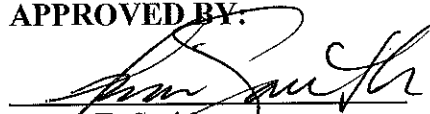
**FISCAL DATA:** There is no immediate fiscal impact to the City. Future donations could, in some cases, reduce the use of City resources for a specific project or event.

**RECOMMENDED BY:**



Dean-Martin  
Interim Administrative Services Director

**APPROVED BY:**



James E. Smith  
Interim City Manager





## City of Banning

### Donations to City Funds and Programs/Administration

Effective Date: 4/2015  
Review Date: 7/2018  
Prepared by: Administrative Services

Approved: \_\_\_\_\_

Department

City Manager

#### **PURPOSE:**

The City of Banning recognizes that there are programs administered by the City that residents may wish to support by donating cash, equipment, or materials and supplies. This policy outlines the parameters under which the City will accept a donation and how the funds will be administered and accounted for.

- Provide procedures related to the requirements for acceptance of cash donations.
- Ensure that City departments are accountable for proper documentation, administration and activities, in accordance with donor instructions and as a fiduciary custodian of such donations. .

#### **POLICY:**

##### **Approval of Donations**

Prior to acceptance of cash, equipment, or materials and supplies for any City fund, program or activity, the City Manager or the City Council (as outlined in this policy) must approve acceptance of the donation and establishment of a new trust fund (where required).

##### **Donation Requirements**

Any donations received must be from a reputable individual or organization. Donations must not reflect negatively positively on the City or its image (e.g., donations from an organization or individual known to promote or permit discriminatory practices or behavior would be unacceptable). Donations must relate to City approved programs, projects, or activities.

Donations in an amount less than \$51,000 will, at the discretion of the City Manager, be placed in an appropriate line item account and fund related to the purpose of the donation. Amounts greater than \$51,000 must be approved by the City Council and will be placed in a trust-fiduciary type (then existing or newly created) fund dedicated solely for the purpose of that donation. The city reserves the right to decline any donation with restrictions that would create an undue administrative burden upon the City.

Donations amounts greater than \$250 will be acknowledged in writing by the City. Consistent with IRS regulations, non-cash donations will not stipulate a value but will simply provide a description of what was donated. In the latter case, the donor should consult a tax expert, but in any event, is responsible for assigning a value for taxable write off purposes.

##### **Donation Submittal Process**

A donor may obtain a donation submittal form from the City or simply submit a letter to the City along with the

donation amount. The form or letter should indicate for what purpose the donation is made and any restrictions the donor would like placed on the donated funds. The City will provide written acknowledgement of the donation and related restrictions. The acknowledgement will also note how the City will account for the funds.

### **Maintenance and Monitoring of Donations**

Donations which are determined to not require a new fund, but instead are deposited into a fund already established for the purpose for which the donation was given, will receive the accounting and reporting accorded that particular fund. Any donation set up as its own distinct fund will be handled consistent with government fund accounting. Reporting on that fund will be provided with the annual audited financial statements. Any donor desiring information prior to issuance of the audited financial statements can request, on a quarterly basis, unaudited information by contacting the City Finance Department.

## CITY COUNCIL AGENDA

**DATE:** May 12, 2015  
**TO:** CITY COUNCIL  
**FROM:** Dean Martin, Interim Administrative Services Director  
**SUBJECT:** Selection of Financial Advisor

**RECOMMENDATION:** Approve the attached contract for financial advisory services for an amount not to exceed \$74,506 (includes expenses in an amount not to exceed \$3,000) for Urban Futures, Inc.

**JUSTIFICATION:** The City plans to issue refunding bonds for its 2005 Water Revenue Bonds and its 2007 Electric Utility Bonds. The financial advisor is a key consultant to assist with assuring the City's interests are well protected while managing the multiple of professionals necessary to accomplish the bond refunding transactions.

**BACKGROUND:** On December 8, 2005, the Banning Utility Authority issued \$35,635,000 in Water Enterprise Revenue Bonds, Refunding and Improvement projects. The proceeds of these Bonds were utilized to refund and defease \$2,475,000 in 1986 Water Utility Fund Certificates of Participation and \$1,890,000 in 1989 Water Utility Fund Certificates of Participation and to provide additional funds to pay for certain capital project improvements. At June 30, 2014, the outstanding balance on the refunding lease agreement was \$29,970,000.

In July 2007, the Banning Financing Authority issued \$45,790,000 in Revenue Bonds (Electric System Project) Series 2007. The proceeds of these bonds were to be used to finance certain improvements to the electric system of the City of Banning. In June 2010, the City bought back \$5,775,000 of the outstanding debt of the 2007 Electric Revenue Bonds and the liability for those bonds has been removed from long-term debt. The outstanding balance at June 30, 2014 amounted to \$35,205,000.

Municipal interest rates are at historical lows compared to the environment in which the City issued water and electric utility bonds in 2005 and 2007, respectively. A number of firms have approached the City in recent months recommending that the City refund those prior bonds for significant economic savings to the City. It is estimated that the present value savings to the City will be in excess of \$4 million dollars.

### Role of the Financial Advisor

In general the financial advisor (FA) will assist staff in selecting financing team members and will assist staff with overseeing the revenue bond debt refunding issuances. The FA will be expected to assist staff with organizing and coordinating the City's overall financing effort, various negotiations and presentations with the credit rating agencies, bond insurance

providers, and credit/liquidity facility providers. During negotiations, it will be the FA's responsibility to assist staff in maintaining the long-term viability and flexibility of City's capital structure by avoiding any products, structures or covenants that might be restrictive or otherwise detrimental to City. More specifically the FA will perform some or all of the following:

A. Primary Advisory Services

Financial Advisor shall provide primary advisory services that include but are not limited to:

- i) Preparation and structuring of debt issuance including determination of size, development of financing schedule, negotiation with regard to underwriters' discount; development of marketing plan, preparation and review of documents; oversight of bond sale and the final deal summary documentation.
- ii) Assistance and support with the City's credit ratings.

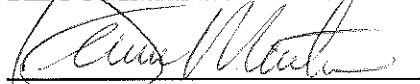
B. Miscellaneous Advisory Services

Financial Advisor shall provide miscellaneous advisory services that include but are not limited to:

- i) Assistance with the application for any Internal Revenue Service or Securities and Exchange Commission ruling related to the issuance of debt.
- ii) Consultation with rating agencies, bond insurance providers and/or any other agencies or institutions involved with the issuance of debt.
- iii) Attendance at any meetings as requested by the City or its consultants in regard to the issuance of debt.
- iv) Consultation with City's bond counsel or other special counsel.

**FISCAL DATA:** There is no direct fiscal impact to the City's budget. The fees for the financial advisor will be paid directly from the proceeds of the bond issues.

**RECOMMENDED BY:**



Dean Martin

Interim Administrative Services Director

**APPROVED BY:**



James E. Smith

Interim City Manager

**PROFESSIONAL SERVICES AGREEMENT**

**By and Between**

**CITY OF BANNING**

**and**

**URBAN FUTURES, INC.**

**AGREEMENT FOR PROFESSIONAL SERVICES  
BETWEEN THE CITY OF BANNING AND  
URBAN FUTURES, INCORPORATED**

THIS AGREEMENT FOR CONTRACT SERVICES (herein "Agreement") is made and entered into this 4 day of May, 2015 by and between the City of Banning, a general law city ("City") and Urban Futures, Inc, a California Corporation ("Consultant"). City and Consultant are sometimes hereinafter individually referred to as "Party" and hereinafter collectively referred to as the "Parties").

**RECITALS**

A. City has sought, by issuance of a request for proposals or invitation for bids, the performance of the services defined and described particularly in Article 1 of this Agreement.

B. Consultant, following submission of a proposal or bid for the performance of the services defined and described particularly in Article 1 of this Agreement, was selected by the City to perform those services.

C. Pursuant to the City's Municipal Code, City has authority to enter into and execute this Agreement.

D. The Parties desire to formalize the selection of Consultant for performance of those services defined and described particularly in Article 1 of this Agreement and desire that the terms of that performance be as particularly defined and described herein.

**OPERATIVE PROVISIONS**

NOW, THEREFORE, in consideration of the mutual promises and covenants made by the Parties and contained herein and other consideration, the value and adequacy of which are hereby acknowledged, the parties agree as follows:

**ARTICLE 1. SERVICES OF CONSULTANT**

**1.1 Scope of Services.**

In compliance with all terms and conditions of this Agreement, the Consultant shall provide those services specified in the "Scope of Services" attached hereto as Exhibit "A" and incorporated herein by this reference, which services may be referred to herein as the "services" or "work" hereunder. As a material inducement to the City entering into this Agreement, Consultant represents and warrants that it has the qualifications, experience, and facilities necessary to properly perform the services required under this Agreement in a thorough, competent, and professional manner, and is experienced in performing the work and services contemplated herein. Consultant shall at all times faithfully, competently and to the best of its ability, experience and talent, perform all services described herein. Consultant covenants that it shall follow the highest professional standards in performing the work and services required hereunder and that all materials will be of good quality, fit for the purpose intended. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized by one or more first-class firms performing similar work under similar circumstances.

### 1.2 Consultant's Proposal.

The Scope of Service shall include the Consultant's scope of work in Consultant's bid proposal shall be incorporated herein by this reference as though fully set forth herein. In the event of any inconsistency between the terms of such proposal and this Agreement, the terms of this Agreement shall govern.

### 1.3 Compliance with Law.

Consultant shall keep itself informed concerning, and shall render all services hereunder in accordance with all ordinances, resolutions, statutes, rules, and regulations of the City and any Federal, State or local governmental entity having jurisdiction in effect at the time service is rendered.

### 1.4 Licenses, Permits, Fees and Assessments.

Consultant shall obtain at its sole cost and expense such licenses, permits and approvals as may be required by law for the performance of the services required by this Agreement. Consultant shall have the sole obligation to pay for any fees, assessments and taxes, plus applicable penalties and interest, which may be imposed by law and arise from or are necessary for the Consultant's performance of the services required by this Agreement, and shall indemnify, defend and hold harmless City, its officers, employees or agents of City, against any such fees, assessments, taxes penalties or interest levied, assessed or imposed against City hereunder.

### 1.5 Familiarity with Work.

By executing this Agreement, Consultant warrants that Consultant (i) has thoroughly investigated and considered the scope of services to be performed, (ii) has carefully considered how the services should be performed, and (iii) fully understands the facilities, difficulties and restrictions attending performance of the services under this Agreement. If the services involve work upon any site, Consultant warrants that Consultant has or will investigate the site and is or will be fully acquainted with the conditions there existing, prior to commencement of services hereunder. Should the Consultant discover any latent or unknown conditions, which will materially affect the performance of the services hereunder, Consultant shall immediately inform the City of such fact and shall not proceed except at City's risk until written instructions are received from the Contract Officer.

### 1.6 Care of Work.

The Consultant shall adopt reasonable methods during the life of the Agreement to furnish continuous protection to the work, and the equipment, materials, papers, documents, plans, studies and/or other components thereof to prevent losses or damages, and shall be responsible for all such damages, to persons or property, until acceptance of the work by City, except such losses or damages as may be caused by City's own negligence.

### 1.7 Further Responsibilities of Parties.

Both parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Both parties agree to act in good faith to execute all instruments, prepare all

documents and take all actions as may be reasonably necessary to carry out the purposes of this Agreement. Unless hereafter specified, neither party shall be responsible for the service of the other.

#### 1.8 Additional Services.

City shall have the right at any time during the performance of the services, without invalidating this Agreement, to order extra work beyond that specified in the Scope of Services or make changes by altering, adding to or deducting from said work. No such extra work may be undertaken unless a written order is first given by the Contract Officer to the Consultant, incorporating therein any adjustment in (i) the Contract Sum for the actual cost of the extra work, and/or (ii) the time to perform this Agreement, which said adjustments are subject to the written approval of the Consultant. Any increase in compensation of up to ten percent (10%) of the Contract Sum or \$25,000, whichever is less; or in the time to perform of up to one hundred eighty (180) days may be approved by the City Manager. Any greater increases, taken either separately or cumulatively must be approved by the City Council. It is expressly understood by Consultant that the provisions of this Section shall not apply to services specifically set forth in the Scope of Services. Consultant hereby acknowledges that it accepts the risk that the services to be provided pursuant to the Scope of Services may be more costly or time consuming than Consultant anticipates and that Consultant shall not be entitled to additional compensation therefor. City may in its sole and absolute discretion have similar work done by other contractors. No claims for an increase in the Contract Sum or time for performance shall be valid unless the procedures established in this Section are followed.

#### 1.9 Special Requirements.

Additional terms and conditions of this Agreement, if any, which are made a part hereof are set forth in the "Special Requirements" attached hereto as Exhibit "B" and incorporated herein by this reference. In the event of a conflict between the provisions of Exhibit "B" and any other provisions of this Agreement, the provisions of Exhibit "B" shall govern.

### **ARTICLE 2. COMPENSATION AND METHOD OF PAYMENT.**

#### 2.1 Contract Sum.

Subject to any limitations set forth in this Agreement, City agrees to pay Consultant the amounts specified in the "Schedule of Compensation" attached hereto as Exhibit "C" and incorporated herein by this reference. The total compensation, including reimbursement for actual expenses, shall not exceed Seventy-four Thousand Five Hundred Six Dollars (\$74,506) (the "Contract Sum"), unless additional compensation is approved pursuant to Section 1.8.

#### 2.2 Method of Compensation.

The method of compensation may include: (i) a lump sum payment upon completion; (ii) payment in accordance with specified tasks or the percentage of completion of the services less contract retention; (iii) payment for time and materials based upon the Consultant's rates as specified in the Schedule of Compensation, provided that (a) time estimates are provided for the performance of sub tasks, (b) contract retention is maintained, and (c) the Contract Sum is not exceeded; or (iv) such other methods as may be specified in the Schedule of Compensation.



### 2.3 Reimbursable Expenses.

Compensation may include reimbursement for actual and necessary expenditures for reproduction costs, telephone expenses, and travel expenses approved in writing by the Contract Officer in advance, or actual subcontractor expenses of an approved subcontractor pursuant to Section 4.5, and only if specified in the Schedule of Compensation. The Contract Sum shall include the attendance of Consultant at all project meetings reasonably deemed necessary by the City. Coordination of the performance of the work with City is a critical component of the services. If Consultant is required to attend additional meetings to facilitate such coordination, Consultant shall not be entitled to any additional compensation for attending said meetings.

### 2.4 Invoices.

Each month Consultant shall furnish to City an original invoice for all work performed and expenses incurred during the preceding month in a form approved by City's Administrative Services Director. By submitting an invoice for payment under this Agreement, Consultant is certifying compliance with all provisions of the Agreement. The invoice shall detail charges for all necessary and actual expenses by the following categories: labor (by sub-category), travel, materials, equipment, supplies, and sub-contractor contracts. Sub-contractor charges shall also be detailed by such categories. Consultant shall not invoice City for any duplicate services performed by more than one person.

City shall independently review each invoice submitted by the Consultant to determine whether the work performed and expenses incurred are in compliance with the provisions of this Agreement. Except as to any charges for work performed or expenses incurred by Consultant which are disputed by City, or as provided in Section 7.3. City will use its best efforts to cause Consultant to be paid within thirty (30) days of receipt of Consultant's correct and undisputed invoice; however, Consultant acknowledges and agrees that due to City warrant run procedures, the City cannot guarantee that payment will occur within this time period. In the event any charges or expenses are disputed by City, the original invoice shall be returned by City to Consultant for correction and resubmission. Review and payment by the City of any invoice provided by the Consultant shall not constitute a waiver of any rights or remedies provided herein or any applicable law.

### 2.5 Waiver.

Payment to Consultant for work performed pursuant to this Agreement shall not be deemed to waive any defects in work performed by Consultant.

## **ARTICLE 3. PERFORMANCE SCHEDULE**

### 3.1 Time of Essence.

Time is of the essence in the performance of this Agreement.

### 3.2 Schedule of Performance.

Consultant shall commence the services pursuant to this Agreement upon receipt of a written notice to proceed and shall perform all services within the time period(s) established in the "Schedule of Performance" attached hereto as Exhibit "D" and incorporated herein by this reference. When requested by the Consultant, extensions to the time period(s) specified in the Schedule of

Performance may be approved in writing by the Contract Officer but not exceeding one hundred eighty (180) days cumulatively.

### 3.3 Force Majeure.

The time period(s) specified in the Schedule of Performance for performance of the services rendered pursuant to this Agreement shall be extended because of any delays due to unforeseeable causes beyond the control and without the fault or negligence of the Consultant, including, but not restricted to, acts of God or of the public enemy, unusually severe weather, fires, earthquakes, floods, epidemics, quarantine restrictions, riots, strikes, freight embargoes, wars, litigation, and/or acts of any governmental agency, including the City, if the Consultant shall within ten (10) days of the commencement of such delay notify the Contract Officer in writing of the causes of the delay. The Contract Officer shall ascertain the facts and the extent of delay, and extend the time for performing the services for the period of the enforced delay when and if in the judgment of the Contract Officer such delay is justified. The Contract Officer's determination shall be final and conclusive upon the parties to this Agreement. In no event shall Consultant be entitled to recover damages against the City for any delay in the performance of this Agreement, however caused, Consultant's sole remedy being extension of the Agreement pursuant to this Section.

### 3.4 Term.

Unless earlier terminated in accordance with Article 7 of this Agreement, this Agreement shall continue in full force and effect until completion of the services but not exceeding one (1) year from the date hereof, except as otherwise provided in the Schedule of Performance (Exhibit "D").

## ARTICLE 4. COORDINATION OF WORK

### 4.1 Representatives and Personnel of Consultant.

The following principals of Consultant ("Principals") are hereby designated as being the principals and representatives of Consultant authorized to act in its behalf with respect to the work specified herein and make all decisions in connection therewith:

<u>MARSHALL LUNA</u>	<u>Founder</u>
(Name)	(Title)
<u>Janee Lea</u>	<u>Principal</u>
(Name)	(Title)
_____	_____
(Name)	(Title)

It is expressly understood that the experience, knowledge, capability and reputation of the foregoing Principals were a substantial inducement for City to enter into this Agreement. Therefore, the Principals shall be responsible during the term of this Agreement for directing all activities of Consultant and devoting sufficient time to personally supervise the services hereunder. All personnel of Consultant, and any authorized agents, shall at all times be under the exclusive direction and control of the Principals. For purposes of this Agreement, the Principals may not be replaced nor may their responsibilities be substantially reduced by Consultant without the express written approval of City. Additionally, Consultant shall utilize only competent personnel to perform

services pursuant to this Agreement. Consultant shall make every reasonable effort to maintain the stability and continuity of Consultant's staff and subcontractors, if any, assigned to perform the services required under this Agreement. Consultant shall notify City of any changes in Consultant's staff and subcontractors, if any, assigned to perform the services required under this Agreement, prior to and during any such performance.

#### 4.2 Status of Consultant.

Consultant shall have no authority to bind City in any manner, or to incur any obligation, debt or liability of any kind on behalf of or against City, whether by contract or otherwise, unless such authority is expressly conferred under this Agreement or is otherwise expressly conferred in writing by City. Consultant shall not at any time or in any manner represent that Consultant or any of Consultant's officers, employees, or agents are in any manner officials, officers, employees or agents of City. Neither Consultant, nor any of Consultant's officers, employees or agents, shall obtain any rights to retirement, health care or any other benefits which may otherwise accrue to City's employees. Consultant expressly waives any claim Consultant may have to any such rights.

#### 4.3 Contract Officer.

The Contract Officer shall be the Administrative Services Director unless otherwise designated by the City Manager. It shall be the Consultant's responsibility to assure that the Contract Officer is kept informed of the progress of the performance of the services and the Consultant shall refer any decisions which must be made by City to the Contract Officer. Unless otherwise specified herein, any approval of City required hereunder shall mean the approval of the Contract Officer. The Contract Officer shall have authority, if specified in writing by the City Manager, to sign all documents on behalf of the City required hereunder to carry out the terms of this Agreement.

#### 4.4 Independent Consultant.

Neither the City nor any of its employees shall have any control over the manner, mode or means by which Consultant, its agents or employees, perform the services required herein, except as otherwise set forth herein. City shall have no voice in the selection, discharge, supervision or control of Consultant's employees, servants, representatives or agents, or in fixing their number, compensation or hours of service. Consultant shall perform all services required herein as an independent contractor of City and shall remain at all times as to City a wholly independent contractor with only such obligations as are consistent with that role. Consultant shall not at any time or in any manner represent that it or any of its agents or employees are agents or employees of City. City shall not in any way or for any purpose become or be deemed to be a partner of Consultant in its business or otherwise or a joint venture or a member of any joint enterprise with Consultant.

#### 4.5 Prohibition Against Subcontracting or Assignment.

The experience, knowledge, capability and reputation of Consultant, its principals and employees were a substantial inducement for the City to enter into this Agreement. Therefore, Consultant shall not contract with any other entity to perform in whole or in part the services required hereunder without the express written approval of the City. In addition, neither this Agreement nor any interest herein may be transferred, assigned, conveyed, hypothecated or encumbered voluntarily or by operation of law, whether for the benefit of creditors or otherwise,

without the prior written approval of City. Transfers restricted hereunder shall include the transfer to any person or group of persons acting in concert of more than twenty five percent (25%) of the present ownership and/or control of Consultant, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release the Consultant or any surety of Consultant of any liability hereunder without the express consent of City.

## **ARTICLE 5. INSURANCE, INDEMNIFICATION AND BONDS**

### **5.1 Insurance Coverages.**

The Consultant shall procure and maintain, at its sole cost and expense, in a form and content satisfactory to City, during the entire term of this Agreement including any extension thereof, the following policies of insurance which shall cover all elected and appointed officers, employees and agents of City:

(a) Commercial General Liability Insurance (ISO Occurrence Form CG0001 or equivalent). A policy of comprehensive general liability insurance written on a per occurrence basis for bodily injury, personal injury and property damage. The policy of insurance shall be in an amount not less than \$1,000,000.00 per occurrence or if a general aggregate limit is used, then the general aggregate limit shall be twice the occurrence limit.

(b) Workers Compensation Insurance. A policy of workers compensation insurance in such amount as will fully comply with the laws of the State of California and which shall indemnify, insure and provide legal defense for the Consultant against any loss, claim or damage arising from any injuries or occupational diseases occurring to any worker employed by or any persons retained by the Consultant in the course of carrying out the work or services contemplated in this Agreement.

(c) Automotive Insurance (Form CA 0001 (Ed 1/87) including "any auto" and endorsement CA 0025 or equivalent). A policy of comprehensive automobile liability insurance written on a per occurrence for bodily injury and property damage in an amount not less than \$1,000,000. Said policy shall include coverage for owned, non-owned, leased and hired cars.

(d) Professional Liability. Professional liability insurance appropriate to the Consultant's profession. This coverage may be written on a "claims made" basis, and must include coverage for contractual liability. The professional liability insurance required by this Agreement must be endorsed to be applicable to claims based upon, arising out of or related to services performed under this Agreement. The insurance must be maintained for at least 5 consecutive years following the completion of Consultant's services or the termination of this Agreement. During this additional 5-year period, Consultant shall annually and upon request of the City submit written evidence of this continuous coverage.

(e) Additional Insurance. Policies of such other insurance, as may be required in the Special Requirements.

(f) Subcontractors. Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

## 5.2 General Insurance Requirements.

All of the above policies of insurance shall be primary insurance and shall name the City, its elected and appointed officers, employees and agents as additional insureds and any insurance maintained by City or its officers, employees or agents shall apply in excess of, and not contribute with Consultant's insurance. The insurer is deemed hereof to waive all rights of subrogation and contribution it may have against the City, its officers, employees and agents and their respective insurers. The insurance policy must specify that where the primary insured does not satisfy the self-insured retention, any additional insured may satisfy the self-insured retention. All of said policies of insurance shall provide that said insurance may not be amended or cancelled by the insurer or any party hereto without providing thirty (30) days prior written notice by certified mail return receipt requested to the City. In the event any of said policies of insurance are cancelled, the Consultant shall, prior to the cancellation date, submit new evidence of insurance in conformance with Section 5.1 to the Contract Officer. No work or services under this Agreement shall commence until the Consultant has provided the City with Certificates of Insurance or appropriate insurance binders evidencing the above insurance coverages and said Certificates of Insurance or binders are approved by the City. City reserves the right to inspect complete, certified copies of all required insurance policies at any time. Any failure to comply with the reporting or other provisions of the policies including breaches or warranties shall not affect coverage provided to City.

All certificates shall name the City as additional insured (providing the appropriate endorsement) and shall conform to the following "cancellation" notice:

### CANCELLATION:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATED THEREOF, THE ISSUING COMPANY SHALL MAIL THIRTY (30)-DAY ADVANCE WRITTEN NOTICE TO CERTIFICATE HOLDER NAMED HEREIN.

[to be initialed]

\_\_\_\_\_  
Agent's Initials

City, its respective elected and appointed officers, directors, officials, employees, agents and volunteers are to be covered as additional insureds as respects: liability arising out of activities Consultant performs; products and completed operations of Consultant; premises owned, occupied or used by Consultant; or automobiles owned, leased, hired or borrowed by Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City, and their respective elected and appointed officers, officials, employees or volunteers. Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

Any deductibles or self-insured retentions must be declared to and approved by City. At the option of City, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City or its respective elected or appointed officers, officials, employees and volunteers or the Consultant shall procure a bond guaranteeing payment of losses and related investigations, claim administration, defense expenses and claims. The Consultant agrees that the requirement to provide insurance shall not be construed as limiting in any way the extent to which the Consultant may be

41

held responsible for the payment of damages to any persons or property resulting from the Consultant's activities or the activities of any person or persons for which the Consultant is otherwise responsible nor shall it limit the Consultant's indemnification liabilities as provided in Section 5.3.

In the event the Consultant subcontracts any portion of the work in compliance with Section 4.5 of this Agreement, the contract between the Consultant and such subcontractor shall require the subcontractor to maintain the same policies of insurance that the Consultant is required to maintain pursuant to Section 5.1, and such certificates and endorsements shall be provided to City.

### 5.3 Indemnification.

To the full extent permitted by law, Consultant agrees to indemnify, defend and hold harmless the City, its officers, employees and agents ("Indemnified Parties") against, and will hold and save them and each of them harmless from, any and all actions, either judicial, administrative, arbitration or regulatory claims, damages to persons or property, losses, costs, penalties, obligations, errors, omissions or liabilities whether actual or threatened (herein "claims or liabilities") that may be asserted or claimed by any person, firm or entity arising out of or in connection with the negligent performance of the work, operations or activities provided herein of Consultant, its officers, employees, agents, subcontractors, or invitees, or any individual or entity for which Consultant is legally liable ("indemnors"), or arising from Consultant's reckless or willful misconduct, or arising from Consultant's or indemnors' negligent performance of or failure to perform any term, provision, covenant or condition of this Agreement, and in connection therewith:

(a) Consultant will defend any action or actions filed in connection with any of said claims or liabilities and will pay all costs and expenses, including legal costs and attorneys' fees incurred in connection therewith;

(b) Consultant will promptly pay any judgment rendered against the City, its officers, agents or employees for any such claims or liabilities arising out of or in connection with the negligent performance of or failure to perform such work, operations or activities of Consultant hereunder; and Consultant agrees to save and hold the City, its officers, agents, and employees harmless therefrom;

(c) In the event the City, its officers, agents or employees is made a party to any action or proceeding filed or prosecuted against Consultant for such damages or other claims arising out of or in connection with the negligent performance of or failure to perform the work, operation or activities of Consultant hereunder, Consultant agrees to pay to the City, its officers, agents or employees, any and all costs and expenses incurred by the City, its officers, agents or employees in such action or proceeding, including but not limited to, legal costs and attorneys' fees.

Consultant shall incorporate similar, indemnity agreements with its subcontractors and if it fails to do so Consultant shall be fully responsible to indemnify City hereunder therefore, and failure of City to monitor compliance with these provisions shall not be a waiver hereof. This indemnification includes claims or liabilities arising from any negligent or wrongful act, error or omission, or reckless or willful misconduct of Consultant in the performance of professional services hereunder. The provisions of this Section do not apply to claims or liabilities occurring as a result of City's sole negligence or willful acts or omissions, but, to the fullest extent permitted by law, shall apply to claims and liabilities resulting in part from City's negligence, except that design

professionals' indemnity hereunder shall be limited to claims and liabilities arising out of the negligence, recklessness or willful misconduct of the design professional. The indemnity obligation shall be binding on successors and assigns of Consultant and shall survive termination of this Agreement.

#### 5.4 Sufficiency of Insurer.

Insurance required by this Agreement shall be satisfactory only if issued by companies qualified to do business in California, rated "A" or better in the most recent edition of Best Rating Guide, The Key Rating Guide or in the Federal Register, and only if they are of a financial category Class VII or better, unless such requirements are waived by the Risk Manager of the City ("Risk Manager") due to unique circumstances. If this Agreement continues for more than 3 years duration, or in the event the Risk Manager determines that the work or services to be performed under this Agreement creates an increased or decreased risk of loss to the City, the Consultant agrees that the minimum limits of the insurance policies may be changed accordingly upon receipt of written notice from the Risk Manager.

### **ARTICLE 6. RECORDS, REPORTS, AND RELEASE OF INFORMATION**

#### 6.1 Records.

Consultant shall keep, and require subcontractors to keep, such ledgers books of accounts, invoices, vouchers, canceled checks, reports, studies or other documents relating to the disbursements charged to City and services performed hereunder (the "books and records"), as shall be necessary to perform the services required by this Agreement and enable the Contract Officer to evaluate the performance of such services. Any and all such documents shall be maintained in accordance with generally accepted accounting principles and shall be complete and detailed. The Contract Officer shall have full and free access to such books and records at all times during normal business hours of City, including the right to inspect, copy, audit and make records and transcripts from such records. Such records shall be maintained for a period of 3 years following completion of the services hereunder, and the City shall have access to such records in the event any audit is required. In the event of dissolution of Consultant's business, custody of the books and records may be given to City, and access shall be provided by Consultant's successor in interest.

#### 6.2 Reports.

Consultant shall periodically prepare and submit to the Contract Officer such reports concerning the performance of the services required by this Agreement as the Contract Officer shall require. Consultant hereby acknowledges that the City is greatly concerned about the cost of work and services to be performed pursuant to this Agreement. For this reason, Consultant agrees that if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the work or services contemplated herein or, if Consultant is providing design services, the cost of the project being designed, Consultant shall promptly notify the Contract Officer of said fact, circumstance, technique or event and the estimated increased or decreased cost related thereto and, if Consultant is providing design services, the estimated increased or decreased cost estimate for the project being designed.

#### 6.3 Ownership of Documents.

All drawings, specifications, maps, designs, photographs, studies, surveys, data, notes, computer files, reports, records, documents and other materials (the "documents and materials") prepared by Consultant, its employees, subcontractors and agents in the performance of this Agreement shall be the property of City and shall be delivered to City upon request of the Contract Officer or upon the termination of this Agreement, and Consultant shall have no claim for further employment or additional compensation as a result of the exercise by City of its full rights of ownership use, reuse, or assignment of the documents and materials hereunder. Any use, reuse or assignment of such completed documents for other projects and/or use of uncompleted documents without specific written authorization by the Consultant will be at the City's sole risk and without liability to Consultant, and Consultant's guarantee and warranties shall not extend to such use, reuse or assignment. Consultant may retain copies of such documents for its own use. Consultant shall have the right to use the concepts embodied therein. All subcontractors shall provide for assignment to City of any documents or materials prepared by them, and in the event Consultant fails to secure such assignment, Consultant shall indemnify City for all damages resulting therefrom.

#### 6.4 Confidentiality and Release of Information.

(a) All information gained or work product produced by Consultant in performance of this Agreement shall be considered confidential, unless such information is in the public domain or already known to Consultant. Consultant shall not release or disclose any such information or work product to persons or entities other than City without prior written authorization from the Contract Officer.

(b) Consultant, its officers, employees, agents or subcontractors, shall not, without prior written authorization from the Contract Officer or unless requested by the City Attorney, voluntarily provide documents, declarations, letters of support, testimony at depositions, response to interrogatories or other information concerning the work performed under this Agreement. Response to a subpoena or court order shall not be considered "voluntary" provided Consultant gives City notice of such court order or subpoena.

(c) If Consultant, or any officer, employee, agent or subcontractor of Consultant, provides any information or work product in violation of this Agreement, then City shall have the right to reimbursement and indemnity from Consultant for any damages, costs and fees, including attorneys fees, caused by or incurred as a result of Consultant's conduct.

(d) Consultant shall promptly notify City should Consultant, its officers, employees, agents or subcontractors be served with any summons, complaint, subpoena, notice of deposition, request for documents, interrogatories, request for admissions or other discovery request, court order or subpoena from any party regarding this Agreement and the work performed there under. City retains the right, but has no obligation, to represent Consultant or be present at any deposition, hearing or similar proceeding. Consultant agrees to cooperate fully with City and to provide City with the opportunity to review any response to discovery requests provided by Consultant. However, this right to review any such response does not imply or mean the right by City to control, direct, or rewrite said response.

### **ARTICLE 7. ENFORCEMENT OF AGREEMENT AND TERMINATION**

#### 7.1 California Law.



This Agreement shall be interpreted, construed and governed both as to validity and to performance of the parties in accordance with the laws of the State of California. Legal actions concerning any dispute, claim or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Riverside, State of California, or any other appropriate court in such county, and Consultant covenants and agrees to submit to the personal jurisdiction of such court in the event of such action. In the event of litigation in a U.S. District Court, venue shall lie exclusively in the Central District of California, in Riverside.

#### 7.2 Disputes; Default.

In the event that Consultant is in default under the terms of this Agreement, the City shall not have any obligation or duty to continue compensating Consultant for any work performed after the date of default. Instead, the City may give notice to Consultant of the default and the reasons for the default. The notice shall include the timeframe in which Consultant may cure the default. This timeframe is presumptively thirty (30) days, but may be extended, though not reduced, if circumstances warrant. During the period of time that Consultant is in default, the City shall hold all invoices and shall proceed with payment on the invoices only when the default is cured. In the alternative, the City may, in its sole discretion, elect to pay some or all of the outstanding invoices during the period of default. If Consultant does not cure the default, the City may take necessary steps to terminate this Agreement under this Article. Any failure on the part of the City to give notice of the Consultant's default shall not be deemed to result in a waiver of the City's legal rights or any rights arising out of any provision of this Agreement.

#### 7.3 Retention of Funds.

Consultant hereby authorizes City to deduct from any amount payable to Consultant (whether or not arising out of this Agreement) (i) any amounts the payment of which may be in dispute hereunder or which are necessary to compensate City for any losses, costs, liabilities, or damages suffered by City, and (ii) all amounts for which City may be liable to third parties, by reason of Consultant's acts or omissions in performing or failing to perform Consultant's obligation under this Agreement. In the event that any claim is made by a third party, the amount or validity of which is disputed by Consultant, or any indebtedness shall exist which shall appear to be the basis for a claim of lien, City may withhold from any payment due, without liability for interest because of such withholding, an amount sufficient to cover such claim. The failure of City to exercise such right to deduct or to withhold shall not, however, affect the obligations of the Consultant to insure, indemnify, and protect City as elsewhere provided herein.

#### 7.4 Waiver.

Waiver by any party to this Agreement of any term, condition, or covenant of this Agreement shall not constitute a waiver of any other term, condition, or covenant. Waiver by any party of any breach of the provisions of this Agreement shall not constitute a waiver of any other provision or a waiver of any subsequent breach or violation of any provision of this Agreement. Acceptance by City of any work or services by Consultant shall not constitute a waiver of any of the provisions of this Agreement. No delay or omission in the exercise of any right or remedy by a non-defaulting party on any default shall impair such right or remedy or be construed as a waiver. Any waiver by either party of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of this Agreement.

#### 7.5 Rights and Remedies are Cumulative.

Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the parties are cumulative and the exercise by either party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

#### 7.6 Legal Action.

In addition to any other rights or remedies, either party may take legal action, in law or in equity, to cure, correct or remedy any default, to recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement. Notwithstanding any contrary provision herein, Consultant shall file a statutory claim pursuant to Government Code Sections 905 et seq. and 910 et. seq., in order to pursue a legal action under this Agreement.

#### 7.7 Termination Prior to Expiration of Term.

This Section shall govern any termination of this Contract except as specifically provided in the following Section for termination for cause. The City reserves the right to terminate this Contract at any time, with or without cause, upon thirty (30) days' written notice to Consultant, except that where termination is due to the fault of the Consultant, the period of notice may be such shorter time as may be determined by the Contract Officer. In addition, the Consultant reserves the right to terminate this Contract at any time, with or without cause, upon sixty (60) days' written notice to City, except that where termination is due to the fault of the City, the period of notice may be such shorter time as the Consultant may determine. Upon receipt of any notice of termination, Consultant shall immediately cease all services hereunder except such as may be specifically approved by the Contract Officer. Except where the Consultant has initiated termination, the Consultant shall be entitled to compensation for all services rendered prior to the effective date of the notice of termination and for any services authorized by the Contract Officer thereafter in accordance with the Schedule of Compensation or such as may be approved by the Contract Officer, except as provided in Section 7.3. In the event the Consultant has initiated termination, the Consultant shall be entitled to compensation only for the reasonable value of the work product actually produced hereunder. In the event of termination without cause pursuant to this Section, the terminating party need not provide the non-terminating party with the opportunity to cure pursuant to Section 7.2.

#### 7.8 Termination for Default of Consultant.

If termination is due to the failure of the Consultant to fulfill its obligations under this Agreement, City may, after compliance with the provisions of Section 7.2, take over the work and prosecute the same to completion by contract or otherwise, and the Consultant shall be liable to the extent that the total cost for completion of the services required hereunder exceeds the compensation herein stipulated (provided that the City shall use reasonable efforts to mitigate such damages), and City may withhold any payments to the Consultant for the purpose of set-off or partial payment of the amounts owed the City as previously stated.

#### 7.9 Attorneys' Fees.

If either party to this Agreement is required to initiate or defend or made a party to any action or proceeding in any way connected with this Agreement, the prevailing party in such action or proceeding, in addition to any other relief which may be granted, whether legal or equitable, shall be

entitled to reasonable attorney's fees. Attorney's fees shall include attorney's fees on any appeal, and in addition a party entitled to attorney's fees shall be entitled to all other reasonable costs for investigating such action, taking depositions and discovery and all other necessary costs the court allows which are incurred in such litigation. All such fees shall be deemed to have accrued on commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

## **ARTICLE 8. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION**

### **8.1     Non-liability of City Officers and Employees.**

No officer or employee of the City shall be personally liable to the Consultant, or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to the Consultant or to its successor, or for breach of any obligation of the terms of this Agreement.

### **8.2     Conflict of Interest.**

Consultant covenants that neither it, nor any officer or principal of its firm, has or shall acquire any interest, directly or indirectly, which would conflict in any manner with the interests of City or which would in any way hinder Consultant's performance of services under this Agreement. Consultant further covenants that in the performance of this Agreement, no person having any such interest shall be employed by it as an officer, employee, agent or subcontractor without the express written consent of the Contract Officer. Consultant agrees to at all times avoid conflicts of interest or the appearance of any conflicts of interest with the interests of City in the performance of this Agreement.

No officer or employee of the City shall have any financial interest, direct or indirect, in this Agreement nor shall any such officer or employee participate in any decision relating to the Agreement which effects his financial interest or the financial interest of any corporation, partnership or association in which he is, directly or indirectly, interested, in violation of any State statute or regulation. The Consultant warrants that it has not paid or given and will not pay or give any third party any money or other consideration for obtaining this Agreement.

### **8.3     Covenant Against Discrimination.**

Consultant covenants that, by and for itself, its heirs, executors, assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of race, color, creed, religion, sex, gender, sexual orientation, marital status, national origin, ancestry, or other protected class in the performance of this Agreement. Consultant shall take affirmative action to insure that applicants are employed and that employees are treated during employment without regard to their race, color, creed, religion, sex, marital status, national origin, ancestry, or other protected class.

### **8.4     Unauthorized Aliens.**

Consultant hereby promises and agrees to comply with all of the provisions of the Federal Immigration and Nationality Act, 8 U.S.C.A. §§ 1101, et seq., as amended, and in connection therewith, shall not employ unauthorized aliens as defined therein. Should Consultant so employ such unauthorized aliens for the performance of work and/or services covered by this Agreement,

and should the any liability or sanctions be imposed against City for such use of unauthorized aliens, Consultant hereby agrees to and shall reimburse City for the cost of all such liabilities or sanctions imposed, together with any and all costs, including attorneys' fees, incurred by City.

## **ARTICLE 9. MISCELLANEOUS PROVISIONS**

### **9.1     Notices.**

Any notice, demand, request, document, consent, approval, or communication either party desires or is required to give to the other party or any other person shall be in writing and either served personally or sent by prepaid, first-class mail, in the case of the City, to the City Manager and to the attention of the Contract Officer, City of Banning, 99 East Ramsey Street Banning, California 92220 and in the case of the Consultant, to the person at the address designated on the execution page of this Agreement. Either party may change its address by notifying the other party of the change of address in writing. Notice shall be deemed communicated at the time personally delivered or in seventy-two (72) hours from the time of mailing if mailed as provided in this Section.

### **9.2     Interpretation.**

The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of this Agreement or any other rule of construction which might otherwise apply.

### **9.3     Counterparts.**

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and such counterparts shall constitute one and the same instrument.

### **9.4     Integration; Amendment.**

This Agreement including the attachments hereto is the entire, complete and exclusive expression of the understanding of the parties. It is understood that there are no oral agreements between the parties hereto affecting this Agreement and this Agreement supersedes and cancels any and all previous negotiations, arrangements, agreements and understandings, if any, between the parties, and none shall be used to interpret this Agreement. No amendment to or modification of this Agreement shall be valid unless made in writing and approved by the Consultant and by the City Council. The parties agree that this requirement for written modifications cannot be waived and that any attempted waiver shall be void.

### **9.5     Severability.**

In the event that any one or more of the phrases, sentences, clauses, paragraphs, or sections contained in this Agreement shall be declared invalid or unenforceable by a valid judgment or decree of a court of competent jurisdiction, such invalidity or unenforceability shall not affect any of the remaining phrases, sentences, clauses, paragraphs, or sections of this Agreement which are hereby declared as severable and shall be interpreted to carry out the intent of the parties hereunder unless the invalid provision is so material that its invalidity deprives either party of the basic benefit of their bargain or renders this Agreement meaningless.

9.6 Corporate Authority.

The persons executing this Agreement on behalf of the parties hereto warrant that (i) such party is duly organized and existing, (ii) they are duly authorized to execute and deliver this Agreement on behalf of said party, (iii) by so executing this Agreement, such party is formally bound to the provisions of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other Agreement to which said party is bound. This Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the parties.

**[SIGNATURES ON FOLLOWING PAGE]**

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date and year first-above written.

CITY:  
CITY OF BANNING

\_\_\_\_\_  
\_\_\_\_\_, Mayor

ATTEST:

\_\_\_\_\_  
\_\_\_\_\_, City Clerk

APPROVED AS TO FORM:  
ALESHIRE & WYNDER, LLP

\_\_\_\_\_  
\_\_\_\_\_, City Attorney

CONSULTANT:

\_\_\_\_\_  
\_\_\_\_\_  
By: Marshall F. Linn  
Name: MARSHALL F. LINN  
Title: Founder

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Two signatures are required if a corporation.

NOTE: CONSULTANT'S SIGNATURES SHALL BE DULY NOTARIZED, AND APPROPRIATE ATTESTATIONS SHALL BE INCLUDED AS MAY BE REQUIRED BY THE BYLAWS, ARTICLES OF INCORPORATION, OR OTHER RULES OR REGULATIONS APPLICABLE TO CONSULTANT'S BUSINESS ENTITY.

**EXHIBIT "A"**

**SCOPE OF SERVICES**

- I. Consultant will perform the following Services:**
  - A. See attached Exhibit A-1
  - B.
  - C.
- II. As part of the Services, Consultant will prepare and deliver the following tangible work products to the City:**
  - A. See attached Exhibit A-1
  - B.
  - C.
- III. In addition to the requirements of Section 6.2, during performance of the Services, Consultant will keep the City appraised of the status of performance by delivering the following status reports:**
  - A. See attached Exhibit A-1
  - B.
  - C.
- IV. All work product is subject to review and acceptance by the City, and must be revised by the Consultant without additional charge to the City until found satisfactory and accepted by City.**
- V. Consultant will utilize the following personnel to accomplish the Services:**
  - A. Marshall Linn
  - B. John M. Phan
  - C. James K. Lee

*Please see the Appendix for a summary of advantages and disadvantages for each type of sale.*

**< SCOPE OF WORK >** Principal advisory team members are identified by task to demonstrate how UFI proposes to apply the firm's breadth and depth of expertise as they relate to the type of knowledge and experience that would best further the City's short and long-term goals and objectives.

Each major activity as it relates to a bond financing is followed by the data that would be requested of the City and deliverables to be expected from the advisory team. Initials of principal staff are included next to each topic by relevant specialty, and they include:

<sup>13</sup>	<b>ML</b>	Marshall Linn	<i>Founder</i>
<sup>14</sup>	<b>JP</b>	John M. Phan	<i>Principal</i>
<sup>14</sup>	<b>JL</b>	James K. Lee	<i>Principal</i>

**A. CONDUCT PRELIMINARY ANALYSES AND MAKE RECOMMENDATIONS FOR FINANCING ALTERNATIVES (ML, JP, JL)**

- <sup>15</sup> Verify economics of each financings and that, even in the presence of significant annual or net-present-value savings, financing(s) are in the City's long-term interest and reflect the City's goals and policy objectives
- <sup>16</sup> Comprehensive comparison of financing alternatives

UFI will conduct preliminary analyses and make recommendations for financing alternatives as they relate to market rates, timing of financing, impact of negative arbitrage, and long-term impacts to the City. In doing so, UFI will develop separate reviews of each financing with considerations that include:

- <sup>17</sup> Comparative analysis of various financing options – e.g. direct bank loan versus bonds issued through a public or private offering
- <sup>18</sup> Estimated costs of issuance – e.g. bond counsel, rating agencies, underwriter discounts, City attorney, etc.
- <sup>19</sup> Summary of existing debt issue with items such as debt service schedule, average coupon, true interest cost etc.
- <sup>20</sup> Pricing comparables for yield trends of comparable transactions based on date, size of issuance, credit rating, and credit name
- <sup>21</sup> Summary of proposed refunding issue with items such as refunding debt schedule, average annual savings, total net present value savings, escrow requirements etc.

These considerations will be summarized in tables and developed as one-page reports for each of the bond financings. The reports will be inclusive of recommendations whether to refund in the current market and other timing and financing considerations.

*Please refer to the Appendix for a sample of a refunding summary update for a recent refunding of a water system issuance.*



UFI will also be available to assist with the application for any IRS or SEC rulings related to the issuance of debt.

The viability and/or success of new financings are determined in large part by the long-term financial and other impacts on the City. We believe the most appropriate approach to developing financial impact analyses is to build those analyses around methods that facilitate communication of results in an interactive environment. This is because results from analyses are only as good as the understanding and acceptance of decision-makers who are familiarized with the advantages and risks of programs and potential borrowers who demand a comfort threshold in terms of implementing a new program and its policies according to the City's criteria. Mr. Lee is highly experienced in developing industry-leading cost-benefit financial models with interactive dashboards that present financial impacts in an easy-to-understand format which shows the impacts of various assumptions so that decisions regarding incentive levels, provisions and exceptions, internal funding etc. can all be made quickly and efficiently. UFI's analyses will facilitate discussion for quick consensus building. This has proven to be particularly useful when making presentations to decision-makers (e.g. agency staff, executive directors, subcommittees, and other stakeholders), allowing them to fully appreciate the impacts of their decisions instantly.

***Please refer to the Appendix for a snapshot of the sample Dashboard.***

DATA/INFORMATION REQUESTED: None

DELIVERABLES: Recommendations based on analysis of various financing options / Summary report for each proposed financing / Ongoing monitoring of the market / Maturity-by-maturity analyses / Sensitivity analyses

#### **B. MANAGING TRANSACTIONS (ML, JP, JL)**

- Underwriting and advisory experience is comprehensive and extensive
- Assist in developing financing team and developing sale calendar
- Assist with presentation of recommendations to City management and City Council
- Detailed road map outlining various tasks and steps for implementing the financing of desired projects along with the timeline schedule

Mr. Phan has 14 years of experience managing transactions from both the underwriting and advisory sides. His experience ranges from extensive work with state agencies such as UC Regents and State Public Works Board (SPWB), state authorities such as California School Financing Authority (CSFA) and California Educational Facilities Authority (CEFA) to private placements for clients such as charter schools and cities. This makes him familiar with the negotiation of transactions and management of investor bids from the underwriting side and with delivering independent advice to clients on the advisory side. He is very familiar with every aspect of managing a wide variety of transactions, from financial structuring and document review to pricing, investor relations, and the management of the financing party itself. Each of these areas will be discussed in further detail in the sections below.

Providing advice for effective administration of new and existing programs is one of our firm's specialties. For example, UFI continues to assist the California Statewide Communities Development Authority (CSCDA) with developing implementation recommendations for and administering the Authority's delinquent property tax program.

Finally, Mr. Lee, who has also managed transactions for cities, counties, and special districts from both the underwriting and advisory sides, will support the management of transactions for the City's ongoing projects.

DATA/INFORMATION REQUESTED: Any preferred vendors

DELIVERABLES: Financing schedule / RFPs for financing team, as necessary / Evaluation summary of all proposals received, as necessary / Financing team / Distribution list / Staff reports, as necessary / Meetings and presentation materials, as necessary / Term sheet with proposed legal structure of the bonds / Review and request of potential credit enhancement options

### C. REVIEWING PROPOSED CASH FLOWS, COVENANTS, SECURITY PROVISIONS & OTHER DOCUMENTS (JP, JL)

- Demonstrated trust as document preparer and reviewer – e.g. POS, OS etc.
- Rigorous verification of financing structures based on in-house analysis using DBC® and Excel
- Credit ratings process built on solid analyses

The advisory team has prepared and reviewed the documents prepared by numerous clients' bond, underwriting, and special counsels and related consultants, from preliminary official statements and official statements to tax certificates, loan agreements, and indentures. UFI has consistently gone above and beyond the requisite scope of advisory services with respect to document preparation and review, demonstrating our clients' trust in the rigor of our document review process. For example, Woodbury University requested UFI to prepare its tax due diligence questionnaire for its recent bond sale, an activity traditionally entrusted to borrower's counsel.

UFI's approach to reviewing financing structures of transactions – including redemption provisions, security provisions, bond covenants and other provisions – is built on a solid understanding of cash flows and the various provisions around which bonds are sized. Financing structures from underwriters are verified in-house using the industry's DBC® software, including calculations for yield-to-call and yield-to-maturity for premium and discount bonds when the underwriter changes the coupons and yields of the structure to meet investor demands. UFI also develops financing structures with Excel, which proves useful in the event that DBC® has not updated its software to accommodate new regulations, provisions, or financing structures. This will prove particularly relevant to the City as it considers new financing alternative.

While development of credit rating presentations are traditionally undertaken by underwriters, UFI often develops or drafts presentations for ratings agencies. That clients and underwriters look to UFI to lead credit ratings process is an indication of UFI's expertise with the various aspects of bond sales from document review to verification of financing structures.

DATA/INFORMATION REQUESTED: Information pertinent to credit rating presentations, such as up-to-date rate structures and rates, customer usage, largest customers, breakdown of water supply, water sustainability plans, prior rate studies, etc.

DELIVERABLES: Credit rating draft and final presentations / Review of all legal documents for transactions / Pricing comparables of relative market yields

**D. PRICING CALLS AND INVESTOR MONITORING FOR COST-EFFECTIVE FINANCINGS (ML, JP)**

- <sup>18</sup> Post-sale summary books ensure cost-effective financings
- <sup>19</sup> Pricings corroborated with network of underwriting sales desks
- <sup>20</sup> Market comparables developed from Bloomberg and TM3 (Thompson Reuters)

UFI's approach to the sale process begins with pre-pricing and pricing calls to monitor investor appetite and preferences. In addition, UFI will conduct a shadow underwriting call for every bond sale. Both UFI's approach and understanding of the retail and institutional investor market are based on extensive experience on the underwriting side. Our approach and understanding are corroborated on a deal-by-deal basis against UFI's wide array of underwriters who can provide up-to-the-minute verifications of where they believe interest rate scales should be.

Our approach also presents the client with a cost/benefit of different structuring and pricing options – fixed vs. variable-rate, public offerings, private placements etc. – to ensure not only that the agencies we represent receive the most cost-effective terms on their financings, but that the financing structure and arrangement they pursue best meets their goals and objectives. It is also customary for us to provide for each structuring or pricing option a sensitivity analysis in terms of hypothetical interest rates according to potential market movements.

Finally, UFI develops a scale of market comparables in-house using up-to-the-minute information from industry information resources such as Bloomberg and TM3 (Thompson Reuters), based on criteria such as par size, sale date, type and use of credit, and credit rating.

Retail and institutional investors are monitored throughout the process, culminating with a post-sale book that is provided to summarize the basis for investors approving or not approving a credit, the allotment sizes, and the orders themselves. We view this as an important step toward maintaining a strong understanding of movements in investor preferences which pays dividends for subsequent bond sales.

DATA/INFORMATION REQUESTED: None

DELIVERABLES: Pre-pricing and pricing calls / Investor matrices / Credit sale summaries for sales-and-trading desks of selected underwriters / Post-sale and closing report

**3. PROPOSED STAFFING PLAN**

The principal advisor for the City's financing and related needs. Mr. Linn is in the Orange office, which is UFI's principal place of business, and can best be reached by phone:

Marshall Linn, Founder

P: (714) 283-9334 | F: (714) 283-5465 | Marshall@UrbanFuturesInc.com

3111 N. Tustin Street | Orange, CA 92865

Proposed personnel possess deep insight into the public sector based on long and successful tenures in public service.

**EXHIBIT "B"**

**SPECIAL REQUIREMENTS  
(Superseding Contract Boilerplate)**

**EXHIBIT "C"**

**SCHEDULE OF COMPENSATION**

- I. The City will compensate Consultant for the Services performed upon submission of a valid invoice. Each invoice is to include:**
  - A.** Line items for all personnel describing the work performed, the number of hours worked, and the hourly rate.
  - B.** Line items for all materials and equipment properly charged to the Services.
  - C.** Line items for all other approved reimbursable expenses claimed, with supporting documentation.
  - D.** Line items for all approved subcontractor labor, supplies, equipment, materials, and travel properly charged to the Services.
- II. The total compensation for the Services shall not exceed the Contract Sum as provided in Section 2.1 of this Agreement.**
- III. The Consultant's billing rates for all personnel are attached as Exhibit C-1.**

## A-3 – NOT-TO-EXCEED TIME-AND-EXPENSE BREAKDOWN

The table below details the rationale for our proposed fees for each financing.

Task	Task Description	No. of Meetings	No. of Calls	Hours Required					Total Hours	Total Fee (\$)
				AM	PM	E	MO	TOTL		
ADMINISTRATIVE										
1	Project Kick-off Meeting with City Officials	1	1	1.0					1.0	\$100
2	Project Kick-off Meeting with City Officials	1	1	1.0					1.0	\$100
3	Checklist of Required Funding Tasks	1	1	1.0					1.0	\$100
4	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
5	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
6	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
7	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
8	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
9	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
10	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
11	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
12	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
13	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
14	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
15	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
16	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
17	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
18	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
19	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
20	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
21	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
22	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
23	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
24	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
25	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
26	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
27	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
28	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
29	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
30	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
31	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
32	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
33	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
34	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
35	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
36	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
37	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
38	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
39	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
40	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
41	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
42	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
43	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
44	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
45	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
46	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
47	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
48	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
49	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
50	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
51	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
52	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
53	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
54	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
55	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
56	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
57	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
58	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
59	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
60	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
61	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
62	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
63	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
64	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
65	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
66	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
67	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
68	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
69	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
70	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
71	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
72	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
73	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
74	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
75	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
76	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
77	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
78	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
79	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
80	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
81	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
82	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
83	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
84	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
85	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
86	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
87	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
88	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
89	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
90	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
91	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
92	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
93	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
94	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
95	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
96	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
97	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
98	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
99	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
100	Review of Project Funding Tasks	1	1	1.0					1.0	\$100
TOTAL				100	100	100	100	100	100	\$10,000
ADMINISTRATIVE				10	10	10	10	10	10	\$1,000
FINANCIAL				90	90	90	90	90	90	\$9,000
TOTAL				100	100	100	100	100	100	\$10,000
ADMINISTRATIVE				10	10	10	10	10	10	\$1,000
FINANCIAL				90	90	90	90	90	90	\$9,000
TOTAL				100	100	100	100	100	100	\$10,000

UFI is also available on a project or hourly basis to provide complementary services such as long-range financial plans, continuing disclosure and arbitrage rebate, staff reports, grant proposals, etc. Below are the hourly rates of proposed positions and their allocation of time to the project.

Staff	Position	Estimated Hours to be Spent on Financing	Allocation of Time to Project	Allocation of Individual's Total Capacity	Hourly Rate (\$ hourly)
Marshall Linn	Founder	59	27%	15%	\$235
John Phan	Principal	78	35%	20%	\$190
James Lee	Principal	73	33%	15%	\$190
Mark Kleinsmith	Analyst	71	32%	25%	\$120
Total:		222	100%		

**EXHIBIT "D"**

**SCHEDULE OF PERFORMANCE**

- I. Consultant shall deliver the following tangible work products to the City by the following dates.**
  - A. As per the bond financing schedule.**
  - B.**
  - C.**
- II. The Contract Officer may approve extensions for performance of the services in accordance with Section 3.2.**

## CITY COUNCIL AGENDA

**DATE:** May 12, 2015  
**TO:** CITY COUNCIL  
**FROM:** Dean Martin, Interim Administrative Services Director  
**SUBJECT:** Selection of Bond/Disclosure Counsel

**RECOMMENDATION:** Approve the attached contract for bond/disclosure counsel services with Norton Rose Fulbright for an amount not to exceed \$152,500 (includes expenses in an amount not to exceed \$2,500) for Norton Rose Fulbright US LLP.

**JUSTIFICATION:** The City plans to issue refunding bonds for its 2005 Water Revenue Bonds and its 2007 Electric Utility Bonds. The bond/disclosure counsel is a key consultant to assist with assuring the City's interests are well protected with appropriate legal documentation and issuing an opinion that the bonds qualify for exemption from federal income tax. They will also play a key role in ensuring proper disclosures to the bond market.

**BACKGROUND:** On December 8, 2005, the Banning Utility Authority issued \$35,635,000 in Water Enterprise Revenue Bonds, Refunding and Improvement projects. The proceeds of these Bonds were utilized to refund and defease \$2,475,000 in 1986 Water Utility Fund Certificates of Participation and \$1,890,000 in 1989 Water Utility Fund Certificates of Participation and to provide additional funds to pay for certain capital project improvements. At June 30, 2014, the outstanding balance on the refunding lease agreement was \$29,970,000.

In July 2007, the Banning Financing Authority issued \$45,790,000 in Revenue Bonds (Electric System Project) Series 2007. The proceeds of these bonds were to be used to finance certain improvements to the electric system of the City of Banning. In June 2010, the City bought back \$5,775,000 of the outstanding debt of the 2007 Electric Revenue Bonds and the liability for those bonds has been removed from long-term debt. The outstanding balance at June 30, 2014 amounted to \$35,205,000.

Municipal interest rates are at historical lows compared to the environment in which the City issued water and electric utility bonds in 2005 and 2007, respectively. A number of firms have approached the City in recent months recommending that the City refund those prior bonds for significant economic savings to the City. It is estimated that the present value savings to the City will be in excess of \$4 million dollars.



An RFP for role of the Bond/Disclosure Counsel was issued on April 2, 2015. Two firms responded to the RFP, Stradling Yocca Carlson & Rauth, and Norton Rose Fulbright. Staff assembled an internal panel to review and evaluate the two proposals. It was a unanimous outcome that Norton Rose be recommended to serve as the bond/disclosure counsel. The firm has been in existence for over 90 years and has one of the largest public finance practices in the United States with over 60 attorneys. In the past five years they have helped raised over \$60 billion dollars for more than 600 California municipalities. Norton Rose served as the City's bond and disclosure counsel for both the 2005 Water Revenue bonds and the 2007 Electric Utility bonds.

### Scope of Services

The scope of services for bond/disclosure counsel may include, but not be limited to, the following:

#### Bond Counsel Responsibilities

- Rendering the bond counsel opinion regarding the validity and binding effect of the bonds, the source of payment and security for the bonds, and the excludability of interest on the bonds from gross income for federal income tax purposes and/or state income tax purposes;
- Examining applicable laws, preparing authorizing documents, consulting with parties to the transaction, reviewing proceedings, and performing additional duties as necessary to render the opinion(s);
- Providing continuing advice regarding any actions necessary to ensure that interest on the bonds will continue to be tax-exempt;
- Preparation and review of documents necessary or appropriate to the authorization issuance, sale and delivery of the bonds, coordination of the authorization and execution of these documents, and review of enabling legislation;
- Assisting the City in seeking from other governmental authorities any approvals, permissions, and exemptions necessary or appropriate in connection with the authorization, issuance, sale, and delivery of the bonds;
- Reviewing legal issues relating to the structure of the bond issue;
- Reviewing or preparing those sections of the offering document to be disseminated in connection with the sale of the bonds that relate to the bonds, financing documents, bond counsel opinion, and tax exemption;
- Participating, when requested, in activities associated with presenting information to rating agencies and/or credit enhancement provider relating to legal issues affecting the issuance of the bonds;
- Reviewing or preparing the notice of sale or bond purchase contract for the bonds;
- Offering continuing legal advice, as needed, on issues related to the sale and the trustee administration of the bonds;
- Providing other legal opinions as required;
- Participating in meetings, as requested, relating to the issuance of the bonds;

*cel*

- Keeping the City informed of rulings issued by federal and state regulatory agencies, such as the U.S. Securities Exchange Commission and the Municipal Securities Rulemaking Board, which impact the City's bond financing process; and
- Performing the duties described under Disclosure Counsel Responsibilities.

#### Disclosure Counsel Responsibilities

- Preparing the preliminary and final official statements;
- Providing a "10b-5 Opinion" with respect to the preliminary and final official statements;
- Reviewing or preparing the continuing disclosure undertaking of the issuer;
- Reviewing, as necessary, applicable law and pertinent documents; and
- Participating, as requested, in informational meetings and discussions with various parties, including investors.

**FISCAL DATA:** There is no direct fiscal impact to the City's budget. The fees for the bond/disclosure counsel will be paid directly from the proceeds of the bond issues.

#### RECOMMENDED BY:



Dean Martin

Interim Administrative Services Director

#### APPROVED BY:



James E. Smith

Interim City Manager

**PROFESSIONAL SERVICES AGREEMENT**

**By and Between**

**CITY OF BANNING**

**and**

**NORTON ROSE FULBRIGHT US LLP**

**AGREEMENT FOR PROFESSIONAL SERVICES  
BETWEEN THE CITY OF BANNING AND  
NORTON ROSE FULBRIGHT LLP**

THIS AGREEMENT FOR CONTRACT SERVICES (herein "Agreement") is made and entered into this \_\_\_\_ day of May, 2015 by and between the City of Banning, a general law city ("City") and Norton Rose Fulbright US LLP, a California limited liability partnership ("Consultant"). City and Consultant are sometimes hereinafter individually referred to as "Party" and hereinafter collectively referred to as the "Parties").

**RECITALS**

A. City has sought, by issuance of a request for proposals or invitation for bids, the performance of the services defined and described particularly in Article 1 of this Agreement.

B. Consultant, following submission of a proposal or bid for the performance of the services defined and described particularly in Article 1 of this Agreement, was selected by the City to perform those services.

C. Pursuant to the City's Municipal Code, City has authority to enter into and execute this Agreement.

D. The Parties desire to formalize the selection of Consultant for performance of those services defined and described particularly in Article 1 of this Agreement and desire that the terms of that performance be as particularly defined and described herein.

**OPERATIVE PROVISIONS**

NOW, THEREFORE, in consideration of the mutual promises and covenants made by the Parties and contained herein and other consideration, the value and adequacy of which are hereby acknowledged, the parties agree as follows:

**ARTICLE 1. SERVICES OF CONSULTANT**

**1.1 Scope of Services.**

In compliance with all terms and conditions of this Agreement, the Consultant shall provide those services specified in the "Scope of Services" attached hereto as Exhibit "A" and incorporated herein by this reference, which services may be referred to herein as the "services" or "work" hereunder. As a material inducement to the City entering into this Agreement, Consultant represents and warrants that it has the qualifications, experience, and facilities necessary to properly perform the services required under this Agreement in a thorough, competent, and professional manner, and is experienced in performing the work and services contemplated herein. Consultant shall at all times faithfully, competently and to the best of its ability, experience and talent, perform all services described herein. Consultant covenants that it shall follow the highest professional standards in performing the work and services required hereunder and that all materials will be of good quality, fit for the purpose intended. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized by one or more first-class firms performing similar work under similar circumstances.

## 1.2 Consultant's Proposal.

The Scope of Service shall include the Consultant's scope of work in Consultant's bid proposal shall be incorporated herein by this reference as though fully set forth herein. In the event of any inconsistency between the terms of such proposal and this Agreement, the terms of this Agreement shall govern.

## 1.3 Compliance with Law.

Consultant shall keep itself informed concerning, and shall render all services hereunder in accordance with all ordinances, resolutions, statutes, rules, and regulations of the City and any Federal, State or local governmental entity having jurisdiction in effect at the time service is rendered.

## 1.4 Licenses, Permits, Fees and Assessments.

Consultant shall obtain at its sole cost and expense such licenses, permits and approvals as may be required by law for the performance of the services required by this Agreement. Consultant shall have the sole obligation to pay for any fees, assessments and taxes, plus applicable penalties and interest, which may be imposed by law and arise from or are necessary for the Consultant's performance of the services required by this Agreement, and shall indemnify, defend and hold harmless City, its officers, employees or agents of City, against any such fees, assessments, taxes penalties or interest levied, assessed or imposed against City hereunder.

## 1.5 Familiarity with Work.

By executing this Agreement, Consultant warrants that Consultant (i) has thoroughly investigated and considered the scope of services to be performed, (ii) has carefully considered how the services should be performed, and (iii) fully understands the facilities, difficulties and restrictions attending performance of the services under this Agreement. If the services involve work upon any site, Consultant warrants that Consultant has or will investigate the site and is or will be fully acquainted with the conditions there existing, prior to commencement of services hereunder. Should the Consultant discover any latent or unknown conditions, which will materially affect the performance of the services hereunder, Consultant shall immediately inform the City of such fact and shall not proceed except at City's risk until written instructions are received from the Contract Officer.

## 1.6 Care of Work.

The Consultant shall adopt reasonable methods during the life of the Agreement to furnish continuous protection to the work, and the equipment, materials, papers, documents, plans, studies and/or other components thereof to prevent losses or damages, and shall be responsible for all such damages, to persons or property, until acceptance of the work by City, except such losses or damages as may be caused by City's own negligence.

## 1.7 Further Responsibilities of Parties.

Both parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Both parties agree to act in good faith to execute all instruments, prepare all

documents and take all actions as may be reasonably necessary to carry out the purposes of this Agreement. Unless hereafter specified, neither party shall be responsible for the service of the other.

#### 1.8 Additional Services.

City shall have the right at any time during the performance of the services, without invalidating this Agreement, to order extra work beyond that specified in the Scope of Services or make changes by altering, adding to or deducting from said work. No such extra work may be undertaken unless a written order is first given by the Contract Officer to the Consultant, incorporating therein any adjustment in (i) the Contract Sum for the actual cost of the extra work, and/or (ii) the time to perform this Agreement, which said adjustments are subject to the written approval of the Consultant. Any increase in compensation of up to ten percent (10%) of the Contract Sum or \$25,000, whichever is less; or in the time to perform of up to one hundred eighty (180) days may be approved by the City Manager. Any greater increases, taken either separately or cumulatively must be approved by the City Council. It is expressly understood by Consultant that the provisions of this Section shall not apply to services specifically set forth in the Scope of Services. Consultant hereby acknowledges that it accepts the risk that the services to be provided pursuant to the Scope of Services may be more costly or time consuming than Consultant anticipates and that Consultant shall not be entitled to additional compensation therefor. City may in its sole and absolute discretion have similar work done by other contractors. No claims for an increase in the Contract Sum or time for performance shall be valid unless the procedures established in this Section are followed.

#### 1.9 Special Requirements.

Additional terms and conditions of this Agreement, if any, which are made a part hereof are set forth in the "Special Requirements" attached hereto as Exhibit "B" and incorporated herein by this reference. In the event of a conflict between the provisions of Exhibit "B" and any other provisions of this Agreement, the provisions of Exhibit "B" shall govern.

### **ARTICLE 2. COMPENSATION AND METHOD OF PAYMENT.**

#### 2.1 Contract Sum.

Subject to any limitations set forth in this Agreement, City agrees to pay Consultant the amounts specified in the "Schedule of Compensation" attached hereto as Exhibit "C" and incorporated herein by this reference. The total compensation, including reimbursement for actual expenses, shall not exceed One Hundred Fifty-two Thousand Five Hundred Dollars (\$152,500) (the "Contract Sum"), unless additional compensation is approved pursuant to Section 1.8.

#### 2.2 Method of Compensation.

The method of compensation may include: (i) a lump sum payment upon completion; (ii) payment in accordance with specified tasks or the percentage of completion of the services less contract retention; (iii) payment for time and materials based upon the Consultant's rates as specified in the Schedule of Compensation, provided that (a) time estimates are provided for the performance of sub tasks, (b) contract retention is maintained, and (c) the Contract Sum is not exceeded; or (iv) such other methods as may be specified in the Schedule of Compensation.

### 2.3 Reimbursable Expenses.

Compensation may include reimbursement for actual and necessary expenditures for reproduction costs, telephone expenses, and travel expenses approved in writing by the Contract Officer in advance, or actual subcontractor expenses of an approved subcontractor pursuant to Section 4.5, and only if specified in the Schedule of Compensation. The Contract Sum shall include the attendance of Consultant at all project meetings reasonably deemed necessary by the City. Coordination of the performance of the work with City is a critical component of the services. If Consultant is required to attend additional meetings to facilitate such coordination, Consultant shall not be entitled to any additional compensation for attending said meetings.

### 2.4 Invoices.

Each month Consultant shall furnish to City an original invoice for all work performed and expenses incurred during the preceding month in a form approved by City's Administrative Services Director. By submitting an invoice for payment under this Agreement, Consultant is certifying compliance with all provisions of the Agreement. The invoice shall detail charges for all necessary and actual expenses by the following categories: labor (by sub-category), travel, materials, equipment, supplies, and sub-contractor contracts. Sub-contractor charges shall also be detailed by such categories. Consultant shall not invoice City for any duplicate services performed by more than one person.

City shall independently review each invoice submitted by the Consultant to determine whether the work performed and expenses incurred are in compliance with the provisions of this Agreement. Except as to any charges for work performed or expenses incurred by Consultant which are disputed by City, or as provided in Section 7.3. City will use its best efforts to cause Consultant to be paid within thirty (30) days of receipt of Consultant's correct and undisputed invoice; however, Consultant acknowledges and agrees that due to City warrant run procedures, the City cannot guarantee that payment will occur within this time period. In the event any charges or expenses are disputed by City, the original invoice shall be returned by City to Consultant for correction and resubmission. Review and payment by the City of any invoice provided by the Consultant shall not constitute a waiver of any rights or remedies provided herein or any applicable law.

### 2.5 Waiver.

Payment to Consultant for work performed pursuant to this Agreement shall not be deemed to waive any defects in work performed by Consultant.

## **ARTICLE 3. PERFORMANCE SCHEDULE**

### 3.1 Time of Essence.

Time is of the essence in the performance of this Agreement.

### 3.2 Schedule of Performance.

Consultant shall commence the services pursuant to this Agreement upon receipt of a written notice to proceed and shall perform all services within the time period(s) established in the "Schedule of Performance" attached hereto as Exhibit "D" and incorporated herein by this reference. When requested by the Consultant, extensions to the time period(s) specified in the Schedule of

Performance may be approved in writing by the Contract Officer but not exceeding one hundred eighty (180) days cumulatively.

3.3 Force Majeure.

The time period(s) specified in the Schedule of Performance for performance of the services rendered pursuant to this Agreement shall be extended because of any delays due to unforeseeable causes beyond the control and without the fault or negligence of the Consultant, including, but not restricted to, acts of God or of the public enemy, unusually severe weather, fires, earthquakes, floods, epidemics, quarantine restrictions, riots, strikes, freight embargoes, wars, litigation, and/or acts of any governmental agency, including the City, if the Consultant shall within ten (10) days of the commencement of such delay notify the Contract Officer in writing of the causes of the delay. The Contract Officer shall ascertain the facts and the extent of delay, and extend the time for performing the services for the period of the enforced delay when and if in the judgment of the Contract Officer such delay is justified. The Contract Officer's determination shall be final and conclusive upon the parties to this Agreement. In no event shall Consultant be entitled to recover damages against the City for any delay in the performance of this Agreement, however caused, Consultant's sole remedy being extension of the Agreement pursuant to this Section.

3.4 Term.

Unless earlier terminated in accordance with Article 7 of this Agreement, this Agreement shall continue in full force and effect until completion of the services but not exceeding one (1) year from the date hereof, except as otherwise provided in the Schedule of Performance (Exhibit "D").

**ARTICLE 4. COORDINATION OF WORK**

4.1 Representatives and Personnel of Consultant.

The following principals of Consultant ("Principals") are hereby designated as being the principals and representatives of Consultant authorized to act in its behalf with respect to the work specified herein and make all decisions in connection therewith:

Donald L. Hunt  
(Name)

Partner  
(Title)

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

It is expressly understood that the experience, knowledge, capability and reputation of the foregoing Principals were a substantial inducement for City to enter into this Agreement. Therefore, the Principals shall be responsible during the term of this Agreement for directing all activities of Consultant and devoting sufficient time to personally supervise the services hereunder. All personnel of Consultant, and any authorized agents, shall at all times be under the exclusive direction and control of the Principals. For purposes of this Agreement, the Principals may not be replaced nor may their responsibilities be substantially reduced by Consultant without the express written approval of City. Additionally, Consultant shall utilize only competent personnel to perform



services pursuant to this Agreement. Consultant shall make every reasonable effort to maintain the stability and continuity of Consultant's staff and subcontractors, if any, assigned to perform the services required under this Agreement. Consultant shall notify City of any changes in Consultant's staff and subcontractors, if any, assigned to perform the services required under this Agreement, prior to and during any such performance.

#### 4.2 Status of Consultant.

Consultant shall have no authority to bind City in any manner, or to incur any obligation, debt or liability of any kind on behalf of or against City, whether by contract or otherwise, unless such authority is expressly conferred under this Agreement or is otherwise expressly conferred in writing by City. Consultant shall not at any time or in any manner represent that Consultant or any of Consultant's officers, employees, or agents are in any manner officials, officers, employees or agents of City. Neither Consultant, nor any of Consultant's officers, employees or agents, shall obtain any rights to retirement, health care or any other benefits which may otherwise accrue to City's employees. Consultant expressly waives any claim Consultant may have to any such rights.

#### 4.3 Contract Officer.

The Contract Officer shall be the Administrative Services Director unless otherwise designated by the City Manager. It shall be the Consultant's responsibility to assure that the Contract Officer is kept informed of the progress of the performance of the services and the Consultant shall refer any decisions which must be made by City to the Contract Officer. Unless otherwise specified herein, any approval of City required hereunder shall mean the approval of the Contract Officer. The Contract Officer shall have authority, if specified in writing by the City Manager, to sign all documents on behalf of the City required hereunder to carry out the terms of this Agreement.

#### 4.4 Independent Consultant.

Neither the City nor any of its employees shall have any control over the manner, mode or means by which Consultant, its agents or employees, perform the services required herein, except as otherwise set forth herein. City shall have no voice in the selection, discharge, supervision or control of Consultant's employees, servants, representatives or agents, or in fixing their number, compensation or hours of service. Consultant shall perform all services required herein as an independent contractor of City and shall remain at all times as to City a wholly independent contractor with only such obligations as are consistent with that role. Consultant shall not at any time or in any manner represent that it or any of its agents or employees are agents or employees of City. City shall not in any way or for any purpose become or be deemed to be a partner of Consultant in its business or otherwise or a joint venture or a member of any joint enterprise with Consultant.

#### 4.5 Prohibition Against Subcontracting or Assignment.

The experience, knowledge, capability and reputation of Consultant, its principals and employees were a substantial inducement for the City to enter into this Agreement. Therefore, Consultant shall not contract with any other entity to perform in whole or in part the services required hereunder without the express written approval of the City. In addition, neither this Agreement nor any interest herein may be transferred, assigned, conveyed, hypothecated or encumbered voluntarily or by operation of law, whether for the benefit of creditors or otherwise,

without the prior written approval of City. Transfers restricted hereunder shall include the transfer to any person or group of persons acting in concert of more than twenty five percent (25%) of the present ownership and/or control of Consultant, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release the Consultant or any surety of Consultant of any liability hereunder without the express consent of City.

## **ARTICLE 5. INSURANCE, INDEMNIFICATION AND BONDS**

### **5.1 Insurance Coverages.**

The Consultant shall procure and maintain, at its sole cost and expense, in a form and content satisfactory to City, during the entire term of this Agreement including any extension thereof, the following policies of insurance which shall cover all elected and appointed officers, employees and agents of City:

(a) Commercial General Liability Insurance (ISO Occurrence Form CG0001 or equivalent). A policy of comprehensive general liability insurance written on a per occurrence basis for bodily injury, personal injury and property damage. The policy of insurance shall be in an amount not less than \$1,000,000.00 per occurrence or if a general aggregate limit is used, then the general aggregate limit shall be twice the occurrence limit.

(b) Workers Compensation Insurance. A policy of workers compensation insurance in such amount as will fully comply with the laws of the State of California and which shall indemnify, insure and provide legal defense for the Consultant against any loss, claim or damage arising from any injuries or occupational diseases occurring to any worker employed by or any persons retained by the Consultant in the course of carrying out the work or services contemplated in this Agreement.

(c) Automotive Insurance (Form CA 0001 (Ed 1/87) including "any auto" and endorsement CA 0025 or equivalent). A policy of comprehensive automobile liability insurance written on a per occurrence for bodily injury and property damage in an amount not less than \$1,000,000. Said policy shall include coverage for owned, non-owned, leased and hired cars.

(d) Professional Liability. Professional liability insurance appropriate to the Consultant's profession. This coverage may be written on a "claims made" basis, and must include coverage for contractual liability. The professional liability insurance required by this Agreement must be endorsed to be applicable to claims based upon, arising out of or related to services performed under this Agreement. The insurance must be maintained for at least 5 consecutive years following the completion of Consultant's services or the termination of this Agreement. During this additional 5-year period, Consultant shall annually and upon request of the City submit written evidence of this continuous coverage.

(e) Additional Insurance. Policies of such other insurance, as may be required in the Special Requirements.

(f) Subcontractors. Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

## 5.2 General Insurance Requirements.

All of the above policies of insurance shall be primary insurance and shall name the City, its elected and appointed officers, employees and agents as additional insureds and any insurance maintained by City or its officers, employees or agents shall apply in excess of, and not contribute with Consultant's insurance. The insurer is deemed hereof to waive all rights of subrogation and contribution it may have against the City, its officers, employees and agents and their respective insurers. The insurance policy must specify that where the primary insured does not satisfy the self-insured retention, any additional insured may satisfy the self-insured retention. All of said policies of insurance shall provide that said insurance may not be amended or cancelled by the insurer or any party hereto without providing thirty (30) days prior written notice by certified mail return receipt requested to the City. In the event any of said policies of insurance are cancelled, the Consultant shall, prior to the cancellation date, submit new evidence of insurance in conformance with Section 5.1 to the Contract Officer. No work or services under this Agreement shall commence until the Consultant has provided the City with Certificates of Insurance or appropriate insurance binders evidencing the above insurance coverages and said Certificates of Insurance or binders are approved by the City. City reserves the right to inspect complete, certified copies of all required insurance policies at any time. Any failure to comply with the reporting or other provisions of the policies including breaches or warranties shall not affect coverage provided to City.

All certificates shall name the City as additional insured (providing the appropriate endorsement) and shall conform to the following "cancellation" notice:

### CANCELLATION:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATED THEREOF, THE ISSUING COMPANY SHALL MAIL THIRTY (30)-DAY ADVANCE WRITTEN NOTICE TO CERTIFICATE HOLDER NAMED HEREIN.

[to be initialed]

\_\_\_\_\_  
Agent's Initials

City, its respective elected and appointed officers, directors, officials, employees, agents and volunteers are to be covered as additional insureds as respects: liability arising out of activities Consultant performs; products and completed operations of Consultant; premises owned, occupied or used by Consultant; or automobiles owned, leased, hired or borrowed by Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City, and their respective elected and appointed officers, officials, employees or volunteers. Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

Any deductibles or self-insured retentions must be declared to and approved by City. At the option of City, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City or its respective elected or appointed officers, officials, employees and volunteers or the Consultant shall procure a bond guaranteeing payment of losses and related investigations, claim administration, defense expenses and claims. The Consultant agrees that the requirement to provide insurance shall not be construed as limiting in any way the extent to which the Consultant may be

held responsible for the payment of damages to any persons or property resulting from the Consultant's activities or the activities of any person or persons for which the Consultant is otherwise responsible nor shall it limit the Consultant's indemnification liabilities as provided in Section 5.3.

In the event the Consultant subcontracts any portion of the work in compliance with Section 4.5 of this Agreement, the contract between the Consultant and such subcontractor shall require the subcontractor to maintain the same policies of insurance that the Consultant is required to maintain pursuant to Section 5.1, and such certificates and endorsements shall be provided to City.

### 5.3 Indemnification.

To the full extent permitted by law, Consultant agrees to indemnify, defend and hold harmless the City, its officers, employees and agents ("Indemnified Parties") against, and will hold and save them and each of them harmless from, any and all actions, either judicial, administrative, arbitration or regulatory claims, damages to persons or property, losses, costs, penalties, obligations, errors, omissions or liabilities whether actual or threatened (herein "claims or liabilities") that may be asserted or claimed by any person, firm or entity arising out of or in connection with the negligent performance of the work, operations or activities provided herein of Consultant, its officers, employees, agents, subcontractors, or invitees, or any individual or entity for which Consultant is legally liable ("indemnors"), or arising from Consultant's reckless or willful misconduct, or arising from Consultant's or indemnors' negligent performance of or failure to perform any term, provision, covenant or condition of this Agreement, and in connection therewith:

(a) Consultant will defend any action or actions filed in connection with any of said claims or liabilities and will pay all costs and expenses, including legal costs and attorneys' fees incurred in connection therewith;

(b) Consultant will promptly pay any judgment rendered against the City, its officers, agents or employees for any such claims or liabilities arising out of or in connection with the negligent performance of or failure to perform such work, operations or activities of Consultant hereunder; and Consultant agrees to save and hold the City, its officers, agents, and employees harmless therefrom;

(c) In the event the City, its officers, agents or employees is made a party to any action or proceeding filed or prosecuted against Consultant for such damages or other claims arising out of or in connection with the negligent performance of or failure to perform the work, operation or activities of Consultant hereunder, Consultant agrees to pay to the City, its officers, agents or employees, any and all costs and expenses incurred by the City, its officers, agents or employees in such action or proceeding, including but not limited to, legal costs and attorneys' fees.

Consultant shall incorporate similar, indemnity agreements with its subcontractors and if it fails to do so Consultant shall be fully responsible to indemnify City hereunder therefore, and failure of City to monitor compliance with these provisions shall not be a waiver hereof. This indemnification includes claims or liabilities arising from any negligent or wrongful act, error or omission, or reckless or willful misconduct of Consultant in the performance of professional services hereunder. The provisions of this Section do not apply to claims or liabilities occurring as a result of City's sole negligence or willful acts or omissions, but, to the fullest extent permitted by law, shall apply to claims and liabilities resulting in part from City's negligence, except that design

professionals' indemnity hereunder shall be limited to claims and liabilities arising out of the negligence, recklessness or willful misconduct of the design professional. The indemnity obligation shall be binding on successors and assigns of Consultant and shall survive termination of this Agreement.

#### 5.4 Sufficiency of Insurer.

Insurance required by this Agreement shall be satisfactory only if issued by companies qualified to do business in California, rated "A" or better in the most recent edition of Best Rating Guide, The Key Rating Guide or in the Federal Register, and only if they are of a financial category Class VII or better, unless such requirements are waived by the Risk Manager of the City ("Risk Manager") due to unique circumstances. If this Agreement continues for more than 3 years duration, or in the event the Risk Manager determines that the work or services to be performed under this Agreement creates an increased or decreased risk of loss to the City, the Consultant agrees that the minimum limits of the insurance policies may be changed accordingly upon receipt of written notice from the Risk Manager.

### **ARTICLE 6. RECORDS, REPORTS, AND RELEASE OF INFORMATION**

#### 6.1 Records.

Consultant shall keep, and require subcontractors to keep, such ledgers books of accounts, invoices, vouchers, canceled checks, reports, studies or other documents relating to the disbursements charged to City and services performed hereunder (the "books and records"), as shall be necessary to perform the services required by this Agreement and enable the Contract Officer to evaluate the performance of such services. Any and all such documents shall be maintained in accordance with generally accepted accounting principles and shall be complete and detailed. The Contract Officer shall have full and free access to such books and records at all times during normal business hours of City, including the right to inspect, copy, audit and make records and transcripts from such records. Such records shall be maintained for a period of 3 years following completion of the services hereunder, and the City shall have access to such records in the event any audit is required. In the event of dissolution of Consultant's business, custody of the books and records may be given to City, and access shall be provided by Consultant's successor in interest.

#### 6.2 Reports.

Consultant shall periodically prepare and submit to the Contract Officer such reports concerning the performance of the services required by this Agreement as the Contract Officer shall require. Consultant hereby acknowledges that the City is greatly concerned about the cost of work and services to be performed pursuant to this Agreement. For this reason, Consultant agrees that if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the work or services contemplated herein or, if Consultant is providing design services, the cost of the project being designed, Consultant shall promptly notify the Contract Officer of said fact, circumstance, technique or event and the estimated increased or decreased cost related thereto and, if Consultant is providing design services, the estimated increased or decreased cost estimate for the project being designed.

#### 6.3 Ownership of Documents.

All drawings, specifications, maps, designs, photographs, studies, surveys, data, notes, computer files, reports, records, documents and other materials (the "documents and materials") prepared by Consultant, its employees, subcontractors and agents in the performance of this Agreement shall be the property of City and shall be delivered to City upon request of the Contract Officer or upon the termination of this Agreement, and Consultant shall have no claim for further employment or additional compensation as a result of the exercise by City of its full rights of ownership use, reuse, or assignment of the documents and materials hereunder. Any use, reuse or assignment of such completed documents for other projects and/or use of uncompleted documents without specific written authorization by the Consultant will be at the City's sole risk and without liability to Consultant, and Consultant's guarantee and warranties shall not extend to such use, reuse or assignment. Consultant may retain copies of such documents for its own use. Consultant shall have the right to use the concepts embodied therein. All subcontractors shall provide for assignment to City of any documents or materials prepared by them, and in the event Consultant fails to secure such assignment, Consultant shall indemnify City for all damages resulting therefrom.

#### 6.4 Confidentiality and Release of Information.

(a) All information gained or work product produced by Consultant in performance of this Agreement shall be considered confidential, unless such information is in the public domain or already known to Consultant. Consultant shall not release or disclose any such information or work product to persons or entities other than City without prior written authorization from the Contract Officer.

(b) Consultant, its officers, employees, agents or subcontractors, shall not, without prior written authorization from the Contract Officer or unless requested by the City Attorney, voluntarily provide documents, declarations, letters of support, testimony at depositions, response to interrogatories or other information concerning the work performed under this Agreement. Response to a subpoena or court order shall not be considered "voluntary" provided Consultant gives City notice of such court order or subpoena.

(c) If Consultant, or any officer, employee, agent or subcontractor of Consultant, provides any information or work product in violation of this Agreement, then City shall have the right to reimbursement and indemnity from Consultant for any damages, costs and fees, including attorneys fees, caused by or incurred as a result of Consultant's conduct.

(d) Consultant shall promptly notify City should Consultant, its officers, employees, agents or subcontractors be served with any summons, complaint, subpoena, notice of deposition, request for documents, interrogatories, request for admissions or other discovery request, court order or subpoena from any party regarding this Agreement and the work performed there under. City retains the right, but has no obligation, to represent Consultant or be present at any deposition, hearing or similar proceeding. Consultant agrees to cooperate fully with City and to provide City with the opportunity to review any response to discovery requests provided by Consultant. However, this right to review any such response does not imply or mean the right by City to control, direct, or rewrite said response.

### ARTICLE 7. ENFORCEMENT OF AGREEMENT AND TERMINATION

#### 7.1 California Law.

This Agreement shall be interpreted, construed and governed both as to validity and to performance of the parties in accordance with the laws of the State of California. Legal actions concerning any dispute, claim or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Riverside, State of California, or any other appropriate court in such county, and Consultant covenants and agrees to submit to the personal jurisdiction of such court in the event of such action. In the event of litigation in a U.S. District Court, venue shall lie exclusively in the Central District of California, in Riverside.

#### 7.2 Disputes; Default.

In the event that Consultant is in default under the terms of this Agreement, the City shall not have any obligation or duty to continue compensating Consultant for any work performed after the date of default. Instead, the City may give notice to Consultant of the default and the reasons for the default. The notice shall include the timeframe in which Consultant may cure the default. This timeframe is presumptively thirty (30) days, but may be extended, though not reduced, if circumstances warrant. During the period of time that Consultant is in default, the City shall hold all invoices and shall proceed with payment on the invoices only when the default is cured. In the alternative, the City may, in its sole discretion, elect to pay some or all of the outstanding invoices during the period of default. If Consultant does not cure the default, the City may take necessary steps to terminate this Agreement under this Article. Any failure on the part of the City to give notice of the Consultant's default shall not be deemed to result in a waiver of the City's legal rights or any rights arising out of any provision of this Agreement.

#### 7.3 Retention of Funds.

Consultant hereby authorizes City to deduct from any amount payable to Consultant (whether or not arising out of this Agreement) (i) any amounts the payment of which may be in dispute hereunder or which are necessary to compensate City for any losses, costs, liabilities, or damages suffered by City, and (ii) all amounts for which City may be liable to third parties, by reason of Consultant's acts or omissions in performing or failing to perform Consultant's obligation under this Agreement. In the event that any claim is made by a third party, the amount or validity of which is disputed by Consultant, or any indebtedness shall exist which shall appear to be the basis for a claim of lien, City may withhold from any payment due, without liability for interest because of such withholding, an amount sufficient to cover such claim. The failure of City to exercise such right to deduct or to withhold shall not, however, affect the obligations of the Consultant to insure, indemnify, and protect City as elsewhere provided herein.

#### 7.4 Waiver.

Waiver by any party to this Agreement of any term, condition, or covenant of this Agreement shall not constitute a waiver of any other term, condition, or covenant. Waiver by any party of any breach of the provisions of this Agreement shall not constitute a waiver of any other provision or a waiver of any subsequent breach or violation of any provision of this Agreement. Acceptance by City of any work or services by Consultant shall not constitute a waiver of any of the provisions of this Agreement. No delay or omission in the exercise of any right or remedy by a non-defaulting party on any default shall impair such right or remedy or be construed as a waiver. Any waiver by either party of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of this Agreement.

#### 7.5 Rights and Remedies are Cumulative.

Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the parties are cumulative and the exercise by either party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

#### 7.6 Legal Action.

In addition to any other rights or remedies, either party may take legal action, in law or in equity, to cure, correct or remedy any default, to recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement. Notwithstanding any contrary provision herein, Consultant shall file a statutory claim pursuant to Government Code Sections 905 et seq. and 910 et. seq., in order to pursue a legal action under this Agreement.

#### 7.7 Termination Prior to Expiration of Term.

This Section shall govern any termination of this Contract except as specifically provided in the following Section for termination for cause. The City reserves the right to terminate this Contract at any time, with or without cause, upon thirty (30) days' written notice to Consultant, except that where termination is due to the fault of the Consultant, the period of notice may be such shorter time as may be determined by the Contract Officer. In addition, the Consultant reserves the right to terminate this Contract at any time, with or without cause, upon sixty (60) days' written notice to City, except that where termination is due to the fault of the City, the period of notice may be such shorter time as the Consultant may determine. Upon receipt of any notice of termination, Consultant shall immediately cease all services hereunder except such as may be specifically approved by the Contract Officer. Except where the Consultant has initiated termination, the Consultant shall be entitled to compensation for all services rendered prior to the effective date of the notice of termination and for any services authorized by the Contract Officer thereafter in accordance with the Schedule of Compensation or such as may be approved by the Contract Officer, except as provided in Section 7.3. In the event the Consultant has initiated termination, the Consultant shall be entitled to compensation only for the reasonable value of the work product actually produced hereunder. In the event of termination without cause pursuant to this Section, the terminating party need not provide the non-terminating party with the opportunity to cure pursuant to Section 7.2.

#### 7.8 Termination for Default of Consultant.

If termination is due to the failure of the Consultant to fulfill its obligations under this Agreement, City may, after compliance with the provisions of Section 7.2, take over the work and prosecute the same to completion by contract or otherwise, and the Consultant shall be liable to the extent that the total cost for completion of the services required hereunder exceeds the compensation herein stipulated (provided that the City shall use reasonable efforts to mitigate such damages), and City may withhold any payments to the Consultant for the purpose of set-off or partial payment of the amounts owed the City as previously stated.

#### 7.9 Attorneys' Fees.

If either party to this Agreement is required to initiate or defend or made a party to any action or proceeding in any way connected with this Agreement, the prevailing party in such action or proceeding, in addition to any other relief which may be granted, whether legal or equitable, shall be



entitled to reasonable attorney's fees. Attorney's fees shall include attorney's fees on any appeal, and in addition a party entitled to attorney's fees shall be entitled to all other reasonable costs for investigating such action, taking depositions and discovery and all other necessary costs the court allows which are incurred in such litigation. All such fees shall be deemed to have accrued on commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

## **ARTICLE 8. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION**

### **8.1 Non-liability of City Officers and Employees.**

No officer or employee of the City shall be personally liable to the Consultant, or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to the Consultant or to its successor, or for breach of any obligation of the terms of this Agreement.

### **8.2 Conflict of Interest.**

Consultant covenants that neither it, nor any officer or principal of its firm, has or shall acquire any interest, directly or indirectly, which would conflict in any manner with the interests of City or which would in any way hinder Consultant's performance of services under this Agreement. Consultant further covenants that in the performance of this Agreement, no person having any such interest shall be employed by it as an officer, employee, agent or subcontractor without the express written consent of the Contract Officer. Consultant agrees to at all times avoid conflicts of interest or the appearance of any conflicts of interest with the interests of City in the performance of this Agreement.

No officer or employee of the City shall have any financial interest, direct or indirect, in this Agreement nor shall any such officer or employee participate in any decision relating to the Agreement which effects his financial interest or the financial interest of any corporation, partnership or association in which he is, directly or indirectly, interested, in violation of any State statute or regulation. The Consultant warrants that it has not paid or given and will not pay or give any third party any money or other consideration for obtaining this Agreement.

### **8.3 Covenant Against Discrimination.**

Consultant covenants that, by and for itself, its heirs, executors, assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of race, color, creed, religion, sex, gender, sexual orientation, marital status, national origin, ancestry, or other protected class in the performance of this Agreement. Consultant shall take affirmative action to insure that applicants are employed and that employees are treated during employment without regard to their race, color, creed, religion, sex, marital status, national origin, ancestry, or other protected class.

### **8.4 Unauthorized Aliens.**

Consultant hereby promises and agrees to comply with all of the provisions of the Federal Immigration and Nationality Act, 8 U.S.C.A. §§ 1101, et seq., as amended, and in connection therewith, shall not employ unauthorized aliens as defined therein. Should Consultant so employ such unauthorized aliens for the performance of work and/or services covered by this Agreement,

and should the any liability or sanctions be imposed against City for such use of unauthorized aliens, Consultant hereby agrees to and shall reimburse City for the cost of all such liabilities or sanctions imposed, together with any and all costs, including attorneys' fees, incurred by City.

## **ARTICLE 9. MISCELLANEOUS PROVISIONS**

### **9.1     Notices.**

Any notice, demand, request, document, consent, approval, or communication either party desires or is required to give to the other party or any other person shall be in writing and either served personally or sent by prepaid, first-class mail, in the case of the City, to the City Manager and to the attention of the Contract Officer, City of Banning, 99 East Ramsey Street Banning, California 92220 and in the case of the Consultant, to the person at the address designated on the execution page of this Agreement. Either party may change its address by notifying the other party of the change of address in writing. Notice shall be deemed communicated at the time personally delivered or in seventy-two (72) hours from the time of mailing if mailed as provided in this Section.

### **9.2     Interpretation.**

The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of this Agreement or any other rule of construction which might otherwise apply.

### **9.3     Counterparts.**

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and such counterparts shall constitute one and the same instrument.

### **9.4     Integration; Amendment.**

This Agreement including the attachments hereto is the entire, complete and exclusive expression of the understanding of the parties. It is understood that there are no oral agreements between the parties hereto affecting this Agreement and this Agreement supersedes and cancels any and all previous negotiations, arrangements, agreements and understandings, if any, between the parties, and none shall be used to interpret this Agreement. No amendment to or modification of this Agreement shall be valid unless made in writing and approved by the Consultant and by the City Council. The parties agree that this requirement for written modifications cannot be waived and that any attempted waiver shall be void.

### **9.5     Severability.**

In the event that any one or more of the phrases, sentences, clauses, paragraphs, or sections contained in this Agreement shall be declared invalid or unenforceable by a valid judgment or decree of a court of competent jurisdiction, such invalidity or unenforceability shall not affect any of the remaining phrases, sentences, clauses, paragraphs, or sections of this Agreement which are hereby declared as severable and shall be interpreted to carry out the intent of the parties hereunder unless the invalid provision is so material that its invalidity deprives either party of the basic benefit of their bargain or renders this Agreement meaningless.

9.6 Corporate Authority.

The persons executing this Agreement on behalf of the parties hereto warrant that (i) such party is duly organized and existing, (ii) they are duly authorized to execute and deliver this Agreement on behalf of said party, (iii) by so executing this Agreement, such party is formally bound to the provisions of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other Agreement to which said party is bound. This Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the parties.

**[SIGNATURES ON FOLLOWING PAGE]**

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date and year first-above written.

CITY:  
CITY OF BANNING

\_\_\_\_\_  
\_\_\_\_\_, Mayor

ATTEST:

\_\_\_\_\_  
\_\_\_\_\_, City Clerk

APPROVED AS TO FORM:  
ALESHIRE & WYNDER, LLP

\_\_\_\_\_  
\_\_\_\_\_, City Attorney

CONSULTANT:  
Norton Rose Fulbright US LLP

By: Donald E. Hunt  
Name: Donald E. Hunt  
Title: Partner

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Address: 555 South Flower Street 41st Fl  
Los Angeles Cal 90071

Two signatures are required if a corporation.

NOTE: CONSULTANT'S SIGNATURES SHALL BE DULY NOTARIZED, AND APPROPRIATE ATTESTATIONS SHALL BE INCLUDED AS MAY BE REQUIRED BY THE BYLAWS, ARTICLES OF INCORPORATION, OR OTHER RULES OR REGULATIONS APPLICABLE TO CONSULTANT'S BUSINESS ENTITY.

A NOTARY PUBLIC OR OTHER OFFICER COMPLETING THIS CERTIFICATE  
VERIFIES ONLY THE IDENTITY OF THE INDIVIDUAL WHO SIGNED THE  
DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED, AND NOT THE  
TRUTHFULNESS, ACCURACY, OR VALIDITY OF THAT DOCUMENT.

STATE OF CALIFORNIA

)

)

ss:

COUNTY OF LOS ANGELES

)

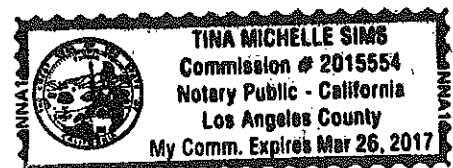
On May 1, 2015 before me, Tina Michelle Sims, Notary Public, personally appeared Donald L. Hunt, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

*Tina Michelle Sims*

[Seal]



**EXHIBIT "A"**

**SCOPE OF SERVICES**

- I. Consultant will perform the following Services:**
  - A. See attached Exhibit A-1
  - B.
  - C.
- II. As part of the Services, Consultant will prepare and deliver the following tangible work products to the City:**
  - A. See attached Exhibit A-1
  - B.
  - C.
- III. In addition to the requirements of Section 6.2, during performance of the Services, Consultant will keep the City appraised of the status of performance by delivering the following status reports:**
  - A. See attached Exhibit A-1
  - B.
  - C.
- IV. All work product is subject to review and acceptance by the City, and must be revised by the Consultant without additional charge to the City until found satisfactory and accepted by City.**
- V. Consultant will utilize the following personnel to accomplish the Services:**
  - A. Don Hunt, Partner
  - B. Russ Trice, Senior Counsel
  - C. Richard Kornblith, Tax Partner
  - D. Jonathan Guz, Senior Associate

**EXHIBIT "B"**

**SPECIAL REQUIREMENTS  
(Superseding Contract Boilerplate)**

**EXHIBIT "C"**

**SCHEDULE OF COMPENSATION**

- I. The City will compensate Consultant for the Services performed upon close of the bond refunding for the 2005 Water Revenue Bonds and the 2007 Electric Utility Bonds.**
- II. The total compensation for the Services shall not exceed the Contract Sum as provided in Section 2.1 of this Agreement.**



**EXHIBIT "D"**

**SCHEDULE OF PERFORMANCE**

- I. Consultant shall deliver the following tangible work products to the City by the following dates.**
  - A. As per the bond financing schedule.**
  - B.**
  - C.**
- II. The Contract Officer may approve extensions for performance of the services in accordance with Section 3.2.**

The scope of services for bond/disclosure counsel may include, but not be limited to, the following:

**A. Bond Counsel Responsibilities**

- a. Rendering the bond counsel opinion regarding the validity and binding effect of the bonds, the source of payment and security for the bonds, and the excludability of interest on the bonds from gross income for federal income tax purposes and/or state income tax purposes;
- b. Examining applicable laws, preparing authorizing documents, consulting with parties to the transaction, reviewing proceedings, and performing additional duties as necessary to render the opinion(s);
- c. Providing continuing advice regarding any actions necessary to ensure that interest on the bonds will continue to be tax-exempt;
- d. Preparation and review of documents necessary or appropriate to the authorization issuance, sale and delivery of the bonds, coordination of the authorization and execution of these documents, and review of enabling legislation;
- e. Assisting the City in seeking from other governmental authorities any approvals, permissions, and exemptions necessary or appropriate in connection with the authorization, issuance, sale, and delivery of the bonds;
- f. Reviewing legal issues relating to the structure of the bond issue;
- g. Reviewing or preparing those sections of the offering document to be disseminated in connection with the sale of the bonds that relate to the bonds, financing documents, bond counsel opinion, and tax exemption;
- h. Participating, when requested, in activities associated with presenting information to rating agencies and/or credit enhancement provider relating to legal issues affecting the issuance of the bonds;
- i. Reviewing or preparing the notice of sale or bond purchase contract for the bonds;
- j. Offering continuing legal advice, as needed, on issues related to the sale and the trustee administration of the bonds;
- k. Providing other legal opinions as required;
- l. Participating in meetings, as requested, relating to the issuance of the bonds;
- m. Keeping the City informed of rulings issued by federal and state regulatory agencies, such as the U.S. Securities Exchange Commission and the Municipal

86

Securities Rulemaking Board, which impact the City's bond financing process;  
and

- n. Performing the duties described under Disclosure Counsel Responsibilities.

**B. Disclosure Counsel Responsibilities**

- a. Preparing the preliminary and final official statements;
- b. Providing a "10b-5 Opinion" with respect to the preliminary and final official statements;
- c. Reviewing or preparing the continuing disclosure undertaking of the issuer;
- d. Reviewing, as necessary, applicable law and pertinent documents; and
- e. Participating, as requested, in informational meetings and discussions with various parties, including investors.

## CITY COUNCIL MEETING

**DATE:** May 12, 2015

**TO:** City Council

**FROM:** Brian Guillot, Acting Community Development Director

**SUBJECT:** Resolution No. 2015-34 Accepting the Interest in Real Property conveyed from the Amos J. Mathewson Trust dated November 13, 2007, for Assessor's Parcel Numbers (APN) 540-202-002 (260 W. Ramsey Street), 540-202-003 (60 S. 3rd Street), and 540-204-009 (33 S. San Geronio Avenue)

**RECOMMENDATION:** That the City Council adopt Resolution No. 2015-34 Accepting the Interest in Real Property conveyed from the Amos J. Mathewson Trust dated November 13, 2007, for Assessor's Parcel Numbers (APN) 540-202-002 (260 W. Ramsey Street), 540-202-003 (60 S. 3rd Street), and 540-204-009 (33 S. San Geronio Avenue).

**JUSTIFICATION:** Deeds or grants conveying any interest in or easement upon real estate to a political corporation or governmental agency shall be accepted in accordance with Government Code Section 27281.

**BACKGROUND:** The trustee and beneficiaries of the Mathewson trust agreed to deed to the City the subject real property assets of the trust. Interest in the properties was held by several entities as listed below:

Name	Instrument Type	Instrument Number
<b>Trustee/Beneficiary</b>		
Ruth Keith	Quitclaim Deed	DOC # 2013-0204643
<b>Beneficiaries</b>		
Banning American Legion Post	Quitclaim Deed	DOC # 2014-0230172
Banning Public Library	Quitclaim Deed	DOC # 2014-0365318
Masonic Home of California	Quitclaim Deed	DOC # 2014-0230170
Shriners Hospital for Children	Disclaimer	DOC # 2012-0107234
Banning United Methodist Church	Quitclaim Deed	DOC # 2014-0230173
Veterans of Foreign Affairs	Quitclaim Deed	DOC # 2014-0230171
Sue Coder	Quitclaim Deed	DOC # 2014-0230174

The instruments referenced in the above table are reproduced in Attachment 2. A recent Preliminary Title Report for each of the subject properties is reproduced in Attachment 3. Concurrently with the recordation of the certificates of acceptance, or resolution of acceptance, it is recommended that the City purchase a title policy insuring the City as the vested owner. It

is important that the City get a title policy to protect its interests. California law specifically provides that a preliminary title report is basically only for information purposes and the title company cannot be sued based on a preliminary report. If a party wants to be protected, it has to buy a title policy; therefore, the purchase of a title insurance is recommended. The purchase of title insurance will take place concurrently with the recordation of the certificates of acceptance, or resolution of acceptance.

### Real Property Descriptions

**260 W. Ramsey Street.** This site was commonly known as the Mathewson's Department Store. Unfortunately, the structure was lost in a fire and the site is now vacant land. The land area consists of approximately 0.23 acres or 10,225 square feet; and, is located within the Downtown Commercial zoning district. The legal description along with other information for the property is contained in the Preliminary Title Report as shown in Attachment 3.

**60 S. 3<sup>rd</sup> Street.** This site is vacant land with some asphalt paving. The site is located approximately 130 feet south of Ramsey Street and is adjacent to the 260 W. Ramsey Street lot. The land area consists of approximately 0.09 acres or 3,916 square feet; and, is located within the Downtown Commercial zoning district. The legal description along with other information for the property is contained in the Preliminary Title Report as shown in Attachment 3.

**33 S. San Geronio Avenue.** This site may be described as a Retail Building of approximately 2,000 square feet that was constructed in the early 1900's. The land area consists of approximately 0.07 acres or 2,945 square feet; and, is located within the Downtown Commercial zoning district. The legal description along with other information for the property is contained in the Preliminary Title Report as shown in Attachment 3.

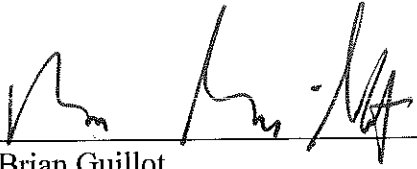
The Downtown Commercial (DC) zoning district occurs on Ramsey Street, between 8th Street and Hargrave Street on the west and east, by Interstate 10 on the south, and by Williams and Nicolet on the north. This area is the City's traditional commercial core, and has special significance to the community because small scale commercial retail and office uses, services, restaurants, and entertainment retail are the primary uses in this district. Mixed Use, residential land uses in combination with commercial businesses, are also encouraged. Bed & breakfasts, hotels and motels are also appropriate in this district.

**FISCAL DATA:** There are no direct fiscal impacts related to the acceptance of subject real property interests as the trustee and beneficiaries quitclaimed the subject properties to the City. However, the responsibility for property maintenance and all other burdens associated with the ownership of real property would be assumed. There will be costs associated with purchasing title insurance policies estimated to be approximately \$1,575.00. It is understood that the trustee and beneficiaries of the Mathewson Trust agreed to deed the subject real properties to the City because any value of the assets was offset by the poor condition of the properties.

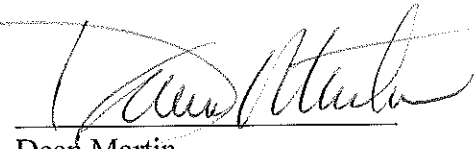
**APPROVED BY:**

  
James E. Smith  
Interim City Manager

**RECOMMENDED BY:**

  
Brian Guillot  
Acting Community Development Director

**REVIEWED BY:**

  
Dean Martin  
Interim Administrative Services Director

**PREPARED BY:**

**ATTACHMENTS:**

1. Resolution No. 2015-34
2. Copy of Instruments
3. Preliminary Title Report

# **Attachment 1**

(Resolution No. 2015-34)

**RESOLUTION NO. 2015-34**

**ACCEPTING THE INTEREST IN REAL PROPERTY  
CONVEYED FROM THE AMOS J. MATHEWSON TRUST  
DATED NOVEMBER 13, 2007, FOR ASSESSOR'S PARCEL  
NUMBERS (APN) 540-202-002 (260 W. RAMSEY STREET),  
540-202-003 (60 S. 3RD STREET), AND 540-204-009 (33 S.  
SAN GORGONIO AVENUE)**

**WHEREAS**, the trustee and beneficiaries of the Mathewson trust agreed to deed to the City the subject real property assets of the trust; and

**WHEREAS**, interest in the properties was held by several entities as listed herein; and

**WHEREAS**, deeds or grants conveying any interest in or easement upon real estate to a political corporation or governmental agency shall be accepted in accordance with Government Code Section 27281; and

**WHEREAS**, the City Council for the City of Banning desires to accept the interest in the real properties of the Amos J. Mathewson Trust dated November 13, 2007;

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Banning as follows:

SECTION 1. In accordance with California Government Code Section 27281, the City of Banning hereby accepts and assumes all right, title and interest to that certain real property, located at Assessor's Parcel Numbers (APN) 540-202-002 (260 W. Ramsey Street), 540-202-003 (60 S. 3rd Street), and 540-204-009 (33 S. San Gorgonio Avenue) City of Banning, California as further described below in the listed instruments:

<b>Name</b>	<b>Instrument Type</b>	<b>Instrument Number</b>
<b>Trustee/Beneficiary</b>		
Ruth Keith	Quitclaim Deed	DOC # 2013-0204643
<b>Beneficiaries</b>		
Banning American Legion Post	Quitclaim Deed	DOC # 2014-0230172
Banning Public Library	Quitclaim Deed	DOC # 2014-0365318
Masonic Home of California	Quitclaim Deed	DOC # 2014-0230170
Shriners Hospital for Children	Disclaimer	DOC # 2012-0107234
Banning United Methodist Church	Quitclaim Deed	DOC # 2014-0230173
Veterans of Foreign Affairs	Quitclaim Deed	DOC # 2014-0230171
Sue Coder	Quitclaim Deed	DOC # 2014-0230174



SECTION 2. The City Clerk is authorized to execute any certificate of acceptance or record this resolution in accordance with Government Code Section 27281.

**PASSED, ADOPTED AND APPROVED** this 12<sup>th</sup> day of May, 2015.

\_\_\_\_\_  
Deborah Franklin, Mayor  
City of Banning

ATTEST:

\_\_\_\_\_  
Marie A. Calderon, City Clerk

APPROVED AS TO FORM AND  
LEGAL CONTENT:

\_\_\_\_\_  
David J. Aleshire, City Attorney  
Aleshire & Wynder, LLP

**CERTIFICATION:**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2014-34, was duly adopted by the City Council of the City of Banning, California, at a regular meeting thereof held on the 12<sup>th</sup> day of May, 2015.

AYES:

NOES:

ABSTAIN:

ABSENT:

\_\_\_\_\_  
Marie A. Calderon, City Clerk  
City of Banning, California

# **Attachment 2**

(Copy of Instruments)

DOC # 2013-0204643

05/01/2013 08:00A Fee:NC

Page 1 of 4

Recorded in Official Records

County of Riverside

Larry W. Ward

Assessor, County Clerk &amp; Recorder

**FREE RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:**

CITY OF BANNING

99 E. Ramsey St.

Banning, CA 92220

Attn: Community Development Director

S	R	U	PAGE	SIZE	DA	MISC	LONG	RFD	COPY
1			4		1				
M	A	L	465	426	PCOR	NCOR	SMF	NCHG	EXAM
						T:	CTY	UNI	030

(Exempt from payment of a recording fee pursuant to Government Code Section 6103)

**QUITCLAIM DEED**

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the TRUSTEE OF THE AMOS J. MATHEWSON LIVING TRUST Ruth M Keith ("Grantor") hereby remises, releases and forever quitclaims to CITY OF BANNING, a California general law city ("Grantee"), all of Grantor's right, title and fee interest in that certain real property located in the City of Banning, County of Riverside, State of California, as described in Exhibits "A" and "B" attached hereto and incorporated herein by this reference.

IN WITNESS WHEREOF, the undersigned has executed this Quitclaim Deed on this 5<sup>th</sup> day of April, 2013.

GRANTOR:

By: Ruth Mathewson KeithName: Ruth Mathewson Keith

ATTEST:

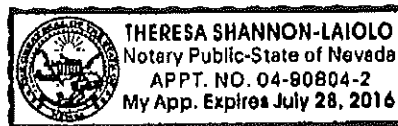
Richard A. ShannonRichard A. Shannon

STATE OF <sup>Nevada</sup> ~~CALIFORNIA~~ )  
 )ss.  
COUNTY OF <sup>Washoe</sup> ~~RIVERSIDE~~ )

On this 5 day of April, 2013, before me, the undersigned, a Notary Public in and for said State, personally appeared Ruth Mathewson Keith, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Theresa Shannon-Laiolo  
Notary Public in and for said State

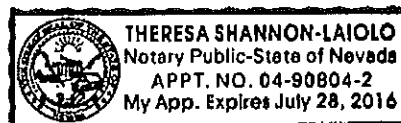


STATE OF <sup>Nevada</sup> ~~CALIFORNIA~~ )  
 )ss.  
COUNTY OF <sup>Washoe</sup> ~~RIVERSIDE~~ )

On this 5<sup>th</sup> day of April, 2013, before me, the undersigned, a Notary Public in and for said State, personally appeared Richard A. Shannon (witness), personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Theresa Shannon-Laiolo  
Notary Public in and for said State



## **EXHIBIT "A" TO QUITCLAIM DEED**

Property known as 60 South 3<sup>rd</sup> Street, Banning, CA 92220, also known as Assessor's Parcel Number 540-202-003-4 and 260 W. Ramsey Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-002-3, which are collectively described as follows:

The east 60 feet of Lots 11, 12, 13, 14 & 15 and all of Lots 16 and 17, and the North 10 feet of Lot 18, Block 222, Banning Land Company, recorded in Book 9, Page 44 of Maps, Records of Riverside County California.

### **EXHIBIT "B" TO QUITCLAIM DEED**

Property known as 33 South San Geronio Avenue, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-204-009-6 and more fully described as follows:

A portion of Lot 8 in Block 204 as shown by the Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, more particularly described as:

All that certain real property situated in the County of Riverside, State of California, described as follows:

The Northerly 24 feet of Lot 8, Block 204 of Banning, as shown on Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, as per Map recorded in Book 9, Page 44 of San Bernardino County Records. Also undivided one-half interest in and to the Northerly 8 inches of the Southerly 1 foot of the said Lot 8, Block 204 of Banning, with the right to use the Northerly 8 inches of the Southerly 1 foot of said Lot 8 for party wall purposes.

Excepting therefrom the Northerly 2 inches of said Lot 8.

RECORDING REQUESTED BY:

KEITH L. MEEKER, ATTORNEY

AND WHEN RECORDED MAIL TO:

Keith L. Meeker, Attorney  
7777 Alvarado Road, #720  
La Mesa, CA 91942

DOC # 2012-0107234

03/08/2012 11:08A Fee:30.00

Page 1 of 8

Recorded in Official Records

County of Riverside

Larry W. Ward

Assessor, County Clerk & Recorder



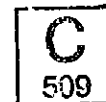
S	R	U	PAGE	SIZE	DA	MISC	LONG	RFD	COPY
1			6						1
M	A	L	465	426	PCOR	NCOR	SMF	NCHG	EXAM
					T:		CTY	UNI	509

31

Tax Parcel No: 540-204-009-6 (33 South San Geronio Avenue, Banning, CA)

Tax Parcel No: 540-202-003-4 (60 South 3<sup>rd</sup> Street, Banning, CA)

Tax Parcel No: 540-202-002-3 (260 W. Ramsey Street, Banning, CA)



#### DISCLAIMER

This Page Added to Provide Adequate Space for Recording Information  
(Additional recording fee applies)

99

## DISCLAIMER

The undersigned are the duly authorized agents and representatives of Shriners Hospitals for Children, a non-profit Colorado corporation, which is formerly known as Shriners Hospitals for Crippled Children and which owns and operates the hospital located at 3160 Geneva Street, Los Angeles, California. We have been authorized to execute this Disclaimer on behalf of Shriners Hospitals for Children.

1. This Disclaimer is made with reference to the following facts and circumstances:

1.1 The creator of the interest which is subject to this Disclaimer is Amos J. Mathewson (also known as Amos Joseph Mathewson) whose date of death is unknown to the undersigned. The interest is created through the Declaration of Trust of Amos J. Mathewson executed by him on November 13, 2007.

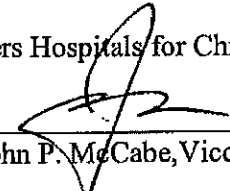
1.2 Said Trust provides in paragraph 2.B. of Article III a gift of Five (5) shares of the remainder of the trust estate to the Shriners Crippled Childrens Hospital in Los Angeles, California, which is owned by Shriners Hospitals for Children, which is entitled to all inheritances and beneficial gifts directed to the Shriners Crippled Childrens Hospital in Los Angeles, California.

1.3 This Disclaimer has been timely filed under the provisions of Probate Code §279(c) in that it has been filed within a reasonable time after the claimant acquired knowledge of the described beneficial interest in the Amos J. Mathewson Living Trust dated November 13, 2007; which such notice was acquired through letter dated June 29, 2011 received on July 5, 2011 by the Shriners Hospitals for Children in Los Angeles at 3160 Geneva Street, Los Angeles, CA, sent by Attorney D. Hershel Wilson of McClellan & Wilson, who then purported to be the attorney for the said Trust.

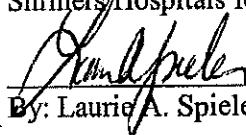
2. Disclaimant hereby declines, refuses, renounces and disclaims any and all rights, title and interest in and to 5 shares of the remainder of the Amos J. Mathewson Living Trust as described in Article III, paragraph 2.B.(4) thereof set forth for the "Shriners Crippled Childrens Hospital in Los Angeles, CA" and any other interest it may have under such Trust or in the Estate of Amos J. Mathewson and in any and all real and personal properties thereof, including, without limitation, the real properties described on Exhibits "A", "B", and "C" to this Disclaimer, which such exhibits are incorporated herein by reference as if set forth at length.

Shriners Hospitals for Children

Dated: March 2, 2012

  
By: John P. McCabe, Vice President, Finance

Shriners Hospitals for Children

  
By: Laurie A. Spieler, Vice President, Legal



2012-0107234  
03/02/2012 11:00AM  
2 of 6

100



STATE OF FLORIDA )  
 ) SS.:  
COUNTY OF HILLSBOROUGH )

On March 2, 2012, before me, Jody H. Hall, a Notary Public, personally appeared John P. McCabe, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS MY HAND AND OFFICIAL SEAL.



JODY H. HALL  
MY COMMISSION # EE 003737  
EXPIRES: August 23, 2014  
Bonded Thru Budget Notary Services

Jody H. Hall  
Notary Public

STATE OF FLORIDA )  
 ) SS.:  
COUNTY OF HILLSBOROUGH )

On March 2, 2012, before me, Jody H. Hall, a Notary Public, personally appeared Laurie A. Spieler, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS MY HAND AND OFFICIAL SEAL.



JODY H. HALL  
MY COMMISSION # EE 003737  
EXPIRES: August 23, 2014  
Bonded Thru Budget Notary Services

Jody H. Hall  
Notary Public



2012-0107234  
03/08/2012 11:08A  
3 of 8

101

Exhibit "A"

An interest in 39.94 acres in Coalinga, CA known as Tax Parcel No. 063-300-05 and 40 acres in Coalinga, CA known as Tax Parcel No. 063-300-06, which are collectively described as follows:

The NE 1/4 of the SW 1/4 and the SW 1/4 of the SE 1/4 of Section 9, Township 19 South, Range 12 East, Mount Diablo Base and Meridian, in the County of Fresno, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management.



2012-0107234  
03/03/2012 11:08AM  
4 of 6

102

Exhibit "B"

Property known as 33 South San Geronio Avenue, Banning, CA 92220, also known as APN: 540-204-009-6 and more fully described as follows:

A portion of Lot 8 in Block 204 as shown by the Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, more particularly described as:

All that certain real property situated in the County of Riverside, State of California, described as follows:

The Northerly 24 feet of Lot 8, Block 204 of Banning, as shown on Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, as per Map recorded in Book 9, Page 44 of San Bernardino County Records. Also an undivided one-half interest in and to the Northerly 8 inches of the Southerly 1 foot of the said Lot 8, Block 204 of Banning, with the right to use the Northerly 8 inches of the Southerly 1 foot of said Lot 8 for party wall purposes.

Excepting therefrom the Northerly 2 inches of said Lot 8.



2012-0107234  
03/08/2012 11:08A  
5 of 6

103

Exhibit "C"

Properties known as 60 South 3<sup>rd</sup> Street, Banning, CA 92220, also known as APN: 540-202-003-4, and 260 W. Ramsey Street, Banning, CA 92220, also known as APN: 540-202-002-3, which are collectively described as follows:

The East 60 feet of Lots 11, 12, 13, 14 & 15 and all of Lots 16 and 17, and the North 10 feet of Lot 18, Block 222, Banning Land Company, recorded in Book 9, Page 44 of Maps, Records of Riverside County, California.



2012-0107234  
03/08/2012 11:08A  
6 of 6

DOC # 2014-0365318

09/25/2014 01:43P Fee:NC

Page 1 of 8

Recorded in Official Records

County of Riverside

Larry W. Ward

Assessor, County Clerk &amp; Recorder

**FREE RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:**

CITY OF BANNING

99 E. Ramsey St.

Banning, CA 92220

Attn: Community Development Director



S	R	U	PAGE	SIZE	DA	MISC	LONG	RFD	COPY
1			6						
M	A	L	465	428	PCOR	NCOR	SMF	NCHG	EXAM
DTT-8						T:	CTY	UNI	013

Space Above this Line Reserved for Use by Recorder  
(Exempt from payment of a recording fee pursuant to Government Code Section 6103)**QUITCLAIM DEED**

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, BANNING PUBLIC LIBRARY ("Grantor"), hereby remises, releases and forever quitclaims to the CITY OF BANNING, a California general law city ("Grantee"), all of Grantor's right, title and fee interest in that certain real property located in the City of Banning, County of Riverside, State of California, as described in Exhibits "A" and "B" attached hereto and incorporated herein by this reference.

IN WITNESS WHEREOF, the undersigned has executed this Quitclaim Deed on this 15<sup>th</sup> day of September, 2014.

GRANTOR:

BANNING PUBLIC LIBRARY

By: 

Robert Lippman, Director  
Authorized Representative for the  
Banning Public Library

State of California }  
County of \_\_\_\_\_ }

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

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

WITNESS my hand and official seal.

\_\_\_\_\_  
Notary Public

Seal:

*DL Attached*

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**  
**CIVIL CODE § 1189**

State of California

County of Riverside

On 09/15/14

Date

before me,

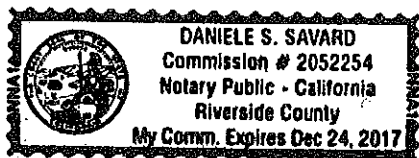
DANIELE S. SAVARD, Notary Public

Here Insert Name and Title of the Officer

personally appeared

Robert William Lippman

Name(s) of Signer(s)



Place Notary Seal Above

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

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

WITNESS my hand and official seal.

Signature: \_\_\_\_\_

Signature of Notary Public

**OPTIONAL**

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

**Description of Attached Document**

Title or Type of Document: Quitclaim Deed

Document Date: 9/15/14

Number of Pages: 4

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: Robert William Lippman

☒ Corporate Officer — Title(s): Director

☐ Partner — ☐ Limited ☐ General

☐ Individual ☐ Attorney in Fact

☐ Trustee ☐ Guardian or Conservator

☐ Other: \_\_\_\_\_

Signer's Name: \_\_\_\_\_

☐ Corporate Officer — Title(s): \_\_\_\_\_

☐ Partner — ☐ Limited ☐ General

☐ Individual ☐ Attorney in Fact

☐ Trustee ☐ Guardian or Conservator

☐ Other: \_\_\_\_\_

Signer Is Representing: Banning Public

Library

Signer Is Representing: \_\_\_\_\_

COUNTY OF RIVERSIDE )  
 )  
CITY OF BANNING )

The undersigned officer, on behalf of the City of Banning, a municipal corporation, consents to the hereinabove Quitclaim Deed; provided, however, that this consent does not constitute acceptance of said Quitclaim Deed at this time, but the City of Banning reserves all rights to accept said deed at any time hereafter.

Dated: 9-15-2014

CITY OF BANNING

By: 

Name: Homer Croy

Title: Interim City Manager



## **EXHIBIT "A" TO QUITCLAIM DEED**

### **LEGAL DESCRIPTION**

Property known as 60 South 3<sup>rd</sup> Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-003-4 and 260 W. Ramsey Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-002-3, which are collectively described as follows:

The east 60 feet of Lots 11, 12, 13, 14 & 15 and all of Lots 16 and 17, and the north 10 feet of Lot 18, Block 222, Banning Land Company, recorded in Book 9, Page 44 of Maps, Records of Riverside County, California

## **EXHIBIT "B" TO QUITCLAIM DEED**

### **LEGAL DESCRIPTION**

Property known as 33 South San Geronio Avenue, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-204-009-6 and more fully described as follows:

A portion of Lot 8 in Block 204 as shown by the Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, more particularly described as:

The northerly 24 feet of Lot 8, Block 204 of Banning, as shown on Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, as per Map recorded in Book 9, page 44 of San Bernardino County Records. Also undivided one-half interest in and to the northerly 8 inches of the southerly 1 foot of the said Lot 8, Block 204 of Banning, with the right to use the northerly 8 inches of the southerly 1 foot of said Lot 8 for party wall purposes.

Excepting therefrom the northerly 2 inches of said Lot 8.

DOC # 2014-0230170

06/23/2014 04:06P Fee:NC

Page 1 of 7

Recorded in Official Records

County of Riverside

Larry W. Ward

Assessor, County Clerk &amp; Recorder

**FREE RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:**

CITY OF BANNING  
99 E. Ramsey St.  
Banning, CA 92220  
Attn: Community Development Director

S	R	U	PAGE	SIZE	DA	MISC	LONG	RFD	COPY
1			7		1				
M	A	L	485	428	PCOR	NCOR	SMF	NCHG	EXAM
T:						CTY	UNI:	039	

Space Above this Line Reserved for Use by Recorder  
(Exempt from payment of a recording fee pursuant to Government Code Section 6103)

### QUITCLAIM DEED

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, MASONIC HOMES AND ENDOWMENT FUND ("Grantor"), hereby remises, releases and forever quitclaims to the CITY OF BANNING, a California general law city ("Grantee"), all of Grantor's right, title and fee interest in that certain real property located in the City of Banning, County of Riverside, State of California, as described in Exhibits "A" and "B" attached hereto and incorporated herein by this reference.

M  
039

IN WITNESS WHEREOF, the undersigned has executed this Quitclaim Deed on this 7 day of AUGUST, 2013.

GRANTOR:

MASONIC HOMES AND ENDOWMENT FUND

By:

*William L. Carlson*  
\_\_\_\_\_  
WILLIAM L. CARLSON  
(Print Name)

Authorized Representative for the  
Masonic Homes and Endowment Fund

111

COUNTY OF RIVERSIDE )  
 )  
CITY OF BANNING )

The undersigned officer, on behalf of the City of Banning, a municipal corporation, consents to the hereinabove Quitclaim Deed; provided, however, that this consent does not constitute acceptance of said Quitclaim Deed at this time, but the City of Banning reserves all rights to accept said deed at any time hereafter.

Dated: 5/19/14

CITY OF BANNING

By: J. Overholt  
Name: June Overholt  
Title: Administrative Services Director/Deputy City  
Manager

**EXHIBIT "A" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

**EXHIBIT "A"**

Property known as 60 South 3rd Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-003-4 and 260 W. Ramsey Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-002-3, which are collectively described as follows:

The east 60 feet of Lots 11, 12, 13, 14 & 15 and all of Lots 16 and 17, and the north 10 feet of Lot 18, Block 222, Banning Land Company, recorded in Book 9, Page 44 of Maps, Records of Riverside County, California

**EXHIBIT "B" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

**EXHIBIT "B"**

Property known as 33 South San Geronimo Avenue, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-204-009-6 and more fully described as follows:

A portion of Lot 8 in Block 204 as shown by the Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, more particularly described as:

All that certain real property situated in the County of Riverside, State of California, described as follows:

The northerly 24 feet of Lot 8, Block 204 of Banning, as shown on Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, as per Map recorded in Book 9, Page 44 of San Bernardino County Records. Also undivided one-half interest in and to the northerly 8 inches of the southerly 1 foot of the said Lot 8, Block 204 of Banning, with the right to use the northerly 8 inches of the southerly 1 foot of said Lot 8 for party wall purposes.

Excepting therefrom the northerly 2 inches of said Lot 8.



State of California }  
County of San Francisco

On August 7, 2013 before me, Lisa Urrizalqui, a Notary Public, personally appeared Allan L. Casaldu, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

  
\_\_\_\_\_  
Notary Public

Seal:



DOC # 2014-0230171

06/23/2014 04:06P Fee:NC

Page 1 of 7

Recorded in Official Records

County of Riverside

Larry W. Ward

Assessor, County Clerk &amp; Recorder

**FREE RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:**



CITY OF BANNING  
99 E. Ramsey St.  
Banning, CA 92220  
Attn: Community Development Director

S	R	U	PAGE	SIZE	DA	MISC	LONG	RFD	COPY
M	A	L	465	426	PCOR	NCOR	SMF	NCHG	EXAM
					T:		GTY	UNI	130

Space Above this Line Reserved for Use by Recorder  
(Exempt from payment of a recording fee pursuant to Government Code Section 6103)

### QUITCLAIM DEED

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, VETERANS OF FOREIGN WARS ("Grantor"), hereby remises, releases and forever quitclaims to the CITY OF BANNING, a California general law city ("Grantee"), all of Grantor's right, title and fee interest in that certain real property located in the City of Banning, County of Riverside, State of California, as described in Exhibits "A" and "B" attached hereto and incorporated herein by this reference.



IN WITNESS WHEREOF, the undersigned has executed this Quitclaim Deed on this 24 day of JUNE, 2013.

GRANTOR:

VETERANS OF FOREIGN WARS

By: David A. Tedrow  
David A. Tedrow  
Authorized Representative for the  
Veterans of Foreign Wars

COUNTY OF RIVERSIDE )  
 )  
CITY OF BANNING )

The undersigned officer, on behalf of the City of Banning, a municipal corporation, consents to the hereinabove Quitclaim Deed; provided, however, that this consent does not constitute acceptance of said Quitclaim Deed at this time, but the City of Banning reserves all rights to accept said deed at any time hereafter.

Dated: 5/19/14

CITY OF BANNING

By: J. A. Overholt  
Name: June Overholt  
Title: Administrative Services Director/Deputy City  
Manager

**EXHIBIT "A" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

### **EXHIBIT "A" TO QUITCLAIM DEED**

Property known as 60 South 3<sup>rd</sup> Street, Banning, CA 92220, also known as Assessor's Parcel Number 540-202-003-4 and 260 W. Ramsey Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-002-3, which are collectively described as follows:

The east 60 feet of Lots 11, 12, 13, 14 & 15 and all of Lots 16 and 17, and the North 10 feet of Lot 18, Block 222, Banning Land Company, recorded in Book 9, Page 44 of Maps, Records of Riverside County California.

**EXHIBIT "B" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

### EXHIBIT "B" TO QUITCLAIM DEED

Property known as 33 South San Geronimo Avenue, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-204-009-6 and more fully described as follows:

A portion of Lot 8 in Block 204 as shown by the Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, more particularly described as:

All that certain real property situated in the County of Riverside, State of California, described as follows:

The Northerly 24 feet of Lot 8, Block 204 of Banning, as shown on Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, as per Map recorded in Book 9, Page 44 of San Bernardino County Records. Also undivided one-half interest in and to the Northerly 8 inches of the Southerly 1 foot of the said Lot 8, Block 204 of Banning, with the right to use the Northerly 8 inches of the Southerly 1 foot of said Lot 8 for party wall purposes.

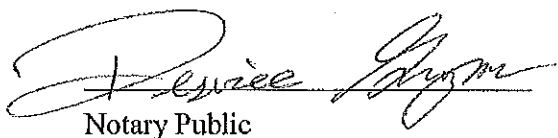
Excepting therefrom the Northerly 2 inches of said Lot 8.

State of California }  
County of Riverside }

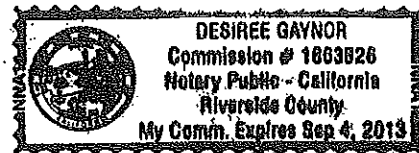
On 6-24-13 before me, Desiree Gaynor, a Notary Public, personally appeared David A. Tedrow, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

  
Notary Public

Seal:





DOC # 2014-0230172

06/23/2014 04:06P Fee:NC

Page 1 of 7

Recorded in Official Records

County of Riverside

Larry W. Ward

Assessor, County Clerk & Recorder

**FREE RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:**

CITY OF BANNING  
99 E. Ramsey St.  
Banning, CA 92220  
Attn: Community Development Director

S	R	U	PAGE	SIZE	DA	MISC	LONG	RFD	COPY
1			7		1				
M	A	L	465	426	PCOR	NCOR	SMF	NCHG	EXAM
T:						CTY	UNI	B9	

Space Above this Line Reserved for Use by Recorder  
(Exempt from payment of a recording fee pursuant to Government Code Section 6103)

### QUITCLAIM DEED

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, BANNING AMERICAN LEGION POST ("Grantor"), hereby remises, releases and forever quitclaims to the CITY OF BANNING, a California general law city ("Grantee"), all of Grantor's right, title and fee interest in that certain real property located in the City of Banning, County of Riverside, State of California, as described in Exhibits "A" and "B" attached hereto and incorporated herein by this reference.



IN WITNESS WHEREOF, the undersigned has executed this Quitclaim Deed on this 21 day of NOVEMBER, 2013.

GRANTOR:

BANNING AMERICAN LEGION POST

By: Donald R. Romero  
DONALD L. ROMERO  
(Print Name)  
Authorized Representative for the  
American Legion

COUNTY OF RIVERSIDE )  
 )  
CITY OF BANNING )

The undersigned officer, on behalf of the City of Banning, a municipal corporation, consents to the hereinabove Quitclaim Deed; provided, however, that this consent does not constitute acceptance of said Quitclaim Deed at this time, but the City of Banning reserves all rights to accept said deed at any time hereafter.

Dated: 5/19/14

CITY OF BANNING

By: J. A. Overholt  
Name: June Overholt  
Title: Administrative Services Director/Deputy City  
Manager

**EXHIBIT "A" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

**EXHIBIT "A" TO QUITCLAIM DEED**

Property known as 60 South 3<sup>rd</sup> Street, Banning, CA 92220, also known as Assessor's Parcel Number 540-202-003-4 and 260 W. Ramsey Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-002-3, which are collectively described as follows:

The east 60 feet of Lots 11, 12, 13, 14 & 15 and all of Lots 16 and 17, and the North 10 feet of Lot 18, Block 222, Banning Land Company, recorded in Book 9, Page 44 of Maps, Records of Riverside County California.

**EXHIBIT "B" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

**EXHIBIT "B" TO QUITCLAIM DEED**

Property known as 33 South San Geronimo Avenue, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-204-009-6 and more fully described as follows:

A portion of Lot 8 in Block 204 as shown by the Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, more particularly described as:

All that certain real property situated in the County of Riverside, State of California, described as follows:

The Northerly 24 feet of Lot 8, Block 204 of Banning, as shown on Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, as per Map recorded in Book 9, Page 44 of San Bernardino County Records. Also undivided one-half interest in and to the Northerly 8 inches of the Southerly 1 foot of the said Lot 8, Block 204 of Banning, with the right to use the Northerly 8 inches of the Southerly 1 foot of said Lot 8 for party wall purposes.

Excepting therefrom the Northerly 2 inches of said Lot 8.

# CALIFORNIA ALL-PURPOSE ACKNOWLEDGEMENT

STATE OF CALIFORNIA )  
COUNTY OF RIVERSIDE )

On 11-21-13 before me, TERRI ESCALANTE, Notary Public  
DATE INSERT NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared, Donald L. Romero

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

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

WITNESS my hand and official seal.



NOTARY PUBLIC SIGNATURE

(SEAL)



## OPTIONAL INFORMATION

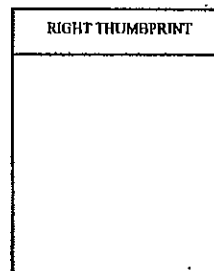
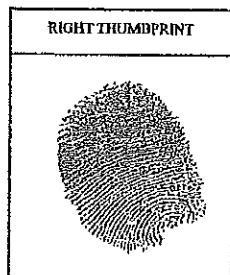
THIS OPTIONAL INFORMATION SECTION IS NOT REQUIRED BY LAW BUT MAY BE BENEFICIAL TO PERSONS RELYING ON THIS NOTARIZED DOCUMENT.

TITLE OR TYPE OF DOCUMENT Quitclaim DEED

DATE OF DOCUMENT 11-21-13 NUMBER OF PAGES (6)

SIGNERS(S) OTHER THAN NAMED ABOVE \_\_\_\_\_

SIGNER'S NAME Donald L. Romero SIGNER'S NAME \_\_\_\_\_



DOC # 2014-0230173

06/23/2014 04:06P Fee:NC

Page 1 of 7

Recorded in Official Records

County of Riverside

Larry W. Ward

Assessor, County Clerk &amp; Recorder

**FREE RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:**CITY OF BANNING  
99 E. Ramsey St.  
Banning, CA 92220  
Attn: Community Development Director

S	R	U	PAGE	SIZE	DA	MISC	LONG	RFD	COPY
1			7		1				
M.	A	L	465	426	PCOR	NCOR	SMF	NCHG	EXAM
						T:	CTY	UNI	039

Space Above this Line Reserved for Use by Recorder

(Exempt from payment of a recording fee pursuant to Government Code Section 6103)

**QUITCLAIM DEED**

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, BANNING UNITED METHODIST CHURCH ("Grantor"), hereby remises, releases and forever quitclaims to the CITY OF BANNING, a California general law city ("Grantee"), all of Grantor's right, title and fee interest in that certain real property located in the City of Banning, County of Riverside, State of California, as described in Exhibits "A" and "B" attached hereto and incorporated herein by this reference.

IN WITNESS WHEREOF, the undersigned has executed this Quitclaim Deed on this 26 day of June, 2013.

GRANTOR:

BANNING UNITED METHODIST CHURCH

By:



Richard W. Carris

Authorized Representative for the  
Banning United Methodist Church



COUNTY OF RIVERSIDE   )  
  )  
CITY OF BANNING         )

The undersigned officer, on behalf of the City of Banning, a municipal corporation, consents to the hereinabove Quitclaim Deed; provided, however, that this consent does not constitute acceptance of said Quitclaim Deed at this time, but the City of Banning reserves all rights to accept said deed at any time hereafter.

Dated: 5/19/14

CITY OF BANNING

By: J. A. Overholt

Name: June Overholt

Title: Administrative Services Director/Deputy City  
Manager

**EXHIBIT "A" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

**EXHIBIT "A" TO QUITCLAIM DEED**

Property known as 60 South 3<sup>rd</sup> Street, Banning, CA 92220, also known as Assessor's Parcel Number 540-202-003-4 and 260 W. Ramsey Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-002-3, which are collectively described as follows:

The east 60 feet of Lots 11, 12, 13, 14 & 15 and all of Lots 16 and 17, and the North 10 feet of Lot 18, Block 222, Banning Land Company, recorded in Book 9, Page 44 of Maps, Records of Riverside County California.

**EXHIBIT "B" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

**EXHIBIT "B" TO QUITCLAIM DEED**

Property known as 33 South San Geronimo Avenue, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-204-009-6 and more fully described as follows:

A portion of Lot 8 in Block 204 as shown by the Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, more particularly described as:

All that certain real property situated in the County of Riverside, State of California, described as follows:

The Northerly 24 feet of Lot 8, Block 204 of Banning, as shown on Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, as per Map recorded in Book 9, Page 44 of San Bernardino County Records. Also undivided one-half interest in and to the Northerly 8 inches of the Southerly 1 foot of the said Lot 8, Block 204 of Banning, with the right to use the Northerly 8 inches of the Southerly 1 foot of said Lot 8 for party wall purposes.

Excepting therefrom the Northerly 2 inches of said Lot 8.

State of California }  
Riverside }  
County of \_\_\_\_\_ }

On 6/26<sup>th</sup>/13 before me, GARY M. BARRON a Notary Public, personally appeared Richard W. Carris, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Gary M. Barron  
Notary Public Sept. 16, 2015  
GARY M. BARRON

Seal:



DOC # 2014-0230174

06/23/2014 04:06P Fee:NC

Page 1 of 7

Recorded in Official Records

County of Riverside

Larry W. Ward

Assessor, County Clerk &amp; Recorder

**FREE RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:**

CITY OF BANNING

99 E. Ramsey St.

Banning, CA 92220

Attn: Community Development Director

S	R	U	PAGE	SIZE	DA	MISC	LONG	RFD	COPY
1			7		1				
M	A	L	465	426	PCOR	NCOR	SMF	NCHG	EXAM
T:							CTY	UNI	039

Space Above this Line Reserved for Use by Recorder  
(Exempt from payment of a recording fee pursuant to Government Code Section 6103)

### QUITCLAIM DEED

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, SUE CODER ("Grantor"), hereby remises, releases and forever quitclaims to the CITY OF BANNING, a California general law city ("Grantee"), all of Grantor's right, title and fee interest in that certain real property located in the City of Banning, County of Riverside, State of California, as described in Exhibits "A" and "B" attached hereto and incorporated herein by this reference.



IN WITNESS WHEREOF, the undersigned has executed this Quitclaim Deed on this 8 day of Feb, 2014.

GRANTOR:

Sue Coder  
Sue Coder

COUNTY OF RIVERSIDE )  
 )  
CITY OF BANNING )

The undersigned officer, on behalf of the City of Banning, a municipal corporation, consents to the hereinabove Quitclaim Deed; provided, however, that this consent does not constitute acceptance of said Quitclaim Deed at this time, but the City of Banning reserves all rights to accept said deed at any time hereafter.

Dated: 6-16-2014

CITY OF BANNING

By: 

Name: HOMER CROY

Title: Acting City Manager



**EXHIBIT "A" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

### EXHIBIT "A"

Property known as 60 South 3rd Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-003-4 and 260 W. Ramsey Street, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-202-002-3, which are collectively described as follows:

The east 60 feet of Lots 11, 12, 13, 14 & 15 and all of Lots 16 and 17, and the north 10 feet of Lot 18, Block 222, Banning Land Company, recorded in Book 9, Page 44 of Maps, Records of Riverside County, California

**EXHIBIT "B" TO QUITCLAIM DEED**

**LEGAL DESCRIPTION**

## **EXHIBIT "B"**

Property known as 33 South San Geronimo Avenue, Banning, CA 92220, also known as Assessor's Parcel Number (APN) 540-204-009-6 and more fully described as follows:

A portion of Lot 8 in Block 204 as shown by the Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, more particularly described as:

All that certain real property situated in the County of Riverside, State of California, described as follows:

The northerly 24 feet of Lot 8, Block 204 of Banning, as shown on Amended Map of Banning Land Company, in the City of Banning, County of Riverside, State of California, as per Map recorded in Book 9, Page 44 of San Bernardino County Records. Also undivided one-half interest in and to the northerly 8 inches of the southerly 1 foot of the said Lot 8, Block 204 of Banning, with the right to use the northerly 8 inches of the southerly 1 foot of said Lot 8 for party wall purposes.

Excepting therefrom the northerly 2 inches of said Lot 8.

State of California }  
County of Riverside }

On 02-08-2014 before me, Erica Melgoza, a Notary Public, personally appeared Sue Coder, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is are subscribed to the within instrument and acknowledged to me that he she they executed the same in his her their authorized capacity(ies), and that by his her their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Erica Melgoza  
Notary Public



Seal:

# **Attachment 3**

(Preliminary Title Report)



## Fidelity National Title Company

1300 Dove Street, Suite 310, Newport Beach, CA 92660

Phone: (949) 622-5000 • Fax:

Issuing Policies of Fidelity National Title Insurance Company

Title Officer: Curtis Taplin (MA)

Order No.: 997-23056697--CT1

TO:

Aleshire & Wynder, LLP  
18881 Von Karman Avenue, Suite 1700  
Irvine, CA 92612

ATTN: Karen R. Becker

YOUR REFERENCE:

PROPERTY ADDRESS: 33 South San Geronio; 60 South 3rd Street; 260 West Ramsey Street, Banning, CA

### AMENDED PRELIMINARY REPORT

*In response to the application for a policy of title insurance referenced herein, Fidelity National Title Company hereby reports that it is prepared to issue, or cause to be issued, as of the date hereof, a policy or policies of title insurance describing the land and the estate or interest therein hereinafter set forth, insuring against loss which may be sustained by reason of any defect, lien or encumbrance not shown or referred to as an exception herein or not excluded from coverage pursuant to the printed Schedules, Conditions and Stipulations or Conditions of said policy forms.*

*The printed Exceptions and Exclusions from the coverage and Limitations on Covered Risks of said policy or policies are set forth in Attachment One. The policy to be issued may contain an arbitration clause. When the Amount of Insurance is less than that set forth in the arbitration clause, all arbitrable matters shall be arbitrated at the option of either the Company or the Insured as the exclusive remedy of the parties. Limitations on Covered Risks applicable to the CLTA and ALTA Homeowner's Policies of Title Insurance which establish a Deductible Amount and a Maximum Dollar Limit of Liability for certain coverages are also set forth in Attachment One. Copies of the policy forms should be read. They are available from the office which issued this report.*

*This report (and any supplements or amendments hereto) is issued solely for the purpose of facilitating the issuance of a policy of title insurance and no liability is assumed hereby. If it is desired that liability be assumed prior to the issuance of a policy of title insurance, a Binder or Commitment should be requested.*

*The policy(s) of title insurance to be issued hereunder will be policy(s) of Fidelity National Title Insurance Company, a Nebraska Corporation.*

*Please read the exceptions shown or referred to herein and the exceptions and exclusions set forth in Attachment One of this report carefully. The exceptions and exclusions are meant to provide you with notice of matters which are not covered under the terms of the title insurance policy and should be carefully considered.*

*It is important to note that this preliminary report is not a written representation as to the condition of title and may not list all liens, defects and encumbrances affecting title to the land.*

Countersigned by:

Authorized Signature

147



## **Fidelity National Title Company**

1300 Dove Street, Suite 310, Newport Beach, CA 92660

Phone: (949) 622-5000 • Fax:

### **AMENDED PRELIMINARY REPORT**

**EFFECTIVE DATE:** April 16, 2015 at 7:30 a.m., Amended: April 22, 2015, Amendment No.

**ORDER NO.:** 997-23056697--CT1

The form of policy or policies of title insurance contemplated by this report is:

**CLTA Standard Coverage Policy (04-08-14)**

1. THE ESTATE OR INTEREST IN THE LAND HEREINAFTER DESCRIBED OR REFERRED TO COVERED BY THIS REPORT IS:

**A FEE**

2. TITLE TO SAID ESTATE OR INTEREST AT THE DATE HEREOF IS VESTED IN:

**AMOS J. MATHEWSON, as Trustee, in Trust, UDT dated November 13, 2007 FBO the Amos J. Mathewson Living Trust, Subject to Item No. 14, as to Parcel A;**

**AMOS J. MATHEWSON, a married man, Subject to Item No. 14, as to a Parcel B**

3. THE LAND REFERRED TO IN THIS REPORT IS DESCRIBED AS FOLLOWS:

**See Exhibit A attached hereto and made a part hereof.**



**EXHIBIT A**  
**LEGAL DESCRIPTION**

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

**PARCEL A:**

THE EAST 60 FEET OF LOTS 11, 12, 13, 14 AND 15 AND ALL OF LOTS 16 AND 17 AND THE NORTH 10 FEET OF LOT 18, BLOCK 222, BANNING LAND COMPANY, IN THE CITY OF BANNING, COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, RECORDED IN BOOK 9, PAGE 44 OF MAPS, RECORDS OF SAN BERNARDINO COUNTY, CALIFORNIA.

APN: 540-202-002-3 AND 540-202-003-4

**PARCEL B:**

THE NORTHERLY 24 FEET OF LOT 8, BLOCK 204 OF BANNING, AS SHOWN ON AMENDED MAP OF BANNING LAND COMPANY, IN THE CITY OF BANNING, COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 9, PAGE 44 OF SAN BERNARDINO COUNTY RECORDS. ALSO AN UNDIVIDED ONE-HALF INTEREST IN AND TO THE NORTHERLY 8 INCHES OF THE SOUTHERLY 1 FOOT OF THE SAID LOT 8, BLOCK 204 OF BANNING, WITH THE RIGHT TO USE THE NORTHERLY 8 INCHES OF THE SOUTHERLY 1 FOOT OF SAID LOT 8 FOR PARTY WALL PURPOSES. EXCEPTING THEREFROM THE NORTHERLY 2 INCHES OF SAID LOT 8.

APN: 540-204-009-6

## EXCEPTIONS

AT THE DATE HEREOF, ITEMS TO BE CONSIDERED AND EXCEPTIONS TO COVERAGE IN ADDITION TO THE PRINTED EXCEPTIONS AND EXCLUSIONS IN SAID POLICY FORM WOULD BE AS FOLLOWS:

- A. General and special city and/or county taxes, bonds or assessments which may become due on said land, if and when title to said land is no longer vested in a Governmental or Quasigovernmental Agency. Tax parcel for said land is currently shown as: 540-202-002-3; 540-202-003-4; 540-204-009-6
- B. The Land lies within the boundaries of a Mello-Roos Community Facilities District ("CFD"), as follows:
- CFD No.: F91-21  
Formed by: Riverside County Board of Supervisors  
Recording Date: June 10, 1991  
Recording No.: 91-193749 of Official Records
- Recording Date: June 10, 1991  
Recording No.: 91-193750 of Official Records
- Recording Date: June 10, 1991  
Recording No.: 91-193751 of Official Records
- This property, along with all other parcels in the CFD, is liable for an annual special tax.
- Reference is made to said document for full particulars.
- C. Taxes and assessments levied by the San Geronio Pass Memorial Hospital District.
- D. Any liens or other assessments, bonds, or special district liens including without limitation, Community Facility Districts, that arise by reason of any local, City, Municipal or County Project or Special District.
- E. The lien of supplemental or escaped assessments of property taxes, if any, made pursuant to the provisions of Chapter 3.5 (commencing with Section 75) or Part 2, Chapter 3, Articles 3 and 4, respectively, of the Revenue and Taxation Code of the State of California as a result of the transfer of title to the vestee named in Schedule A or as a result of changes in ownership or new construction occurring prior to Date of Policy.
1. Water rights, claims or title to water, whether or not disclosed by the public records.

### THE FOLLOWING MATTERS AFFECT PARCEL A:

2. Easement(s) for the purpose(s) shown below and rights incidental thereto as reserved in a document;
- Reserved by: Banning Land Company, a corporation and Banning Water Company  
Purpose: ingress, egress, construction and maintenance of irrigation ditches, pipes or flumes
- The exact location and extent of said easement is not disclosed of record.
3. Easement(s) for the purpose(s) shown below and rights incidental thereto as reserved in a document;
- Reserved by: John George Repplier  
Purpose: laying water and gas pipes and the erection of electric light and telephone poles  
Recording Date: October 11, 1920  
Recording No.: In Book 534, Page 580 of Deeds

Reference is hereby made to said document for full particulars.

**EXCEPTIONS**  
**(Continued)**

4. Notice of Pendency of Administrative Proceedings and the lien of any assessment arising therefrom by the Department of Building and Safety of the County of Riverside, in the matter of unlawful or unsafe conditions on the herein described Land.

Property Owner: Mathewson, Amos J., their successors, heirs, assigns, beneficiaries, administrators and executors and Does 1 through 10 Owners  
Recording Date: April 19, 2010  
Recording No.: as Instrument No. 2010-0178646 of Official Records

Reference is hereby made to said document for full particulars.

5. Intentionally deleted.

**THE FOLLOWING MATTERS AFFECT PARCEL B:**

6. Covenants, conditions and reservations contained in Deed from Southern Pacific Railroad Company, a Corporation, to Gideon Scott dated March 3, 1884 and recorded in Book 37, Page 234 of Deeds, San Bernardino County Records.

7. Easement(s) for the purpose(s) shown below and rights incidental thereto as reserved in a document;

Reserved by: Banning Land Company, a corporation and Banning Water Company  
Purpose: ingress, egress, construction and maintenance of irrigation ditches, pipes or flumes

The exact location and extent of said easement is not disclosed of record.

8. Matters contained in that certain document

Entitled: Agreement  
Dated: Not Set Out  
Executed by: Jack Hopkins and William J. Phillips and Banning Odd Fellows Hall Association  
Recording Date: March 19, 1923  
Recording No: In Book 577, Page 199 of Deeds

Reference is hereby made to said document for full particulars.

9. Easement(s) for the purpose(s) shown below and rights incidental thereto as reserved in a document;

Reserved by: Frank M. Rhomberg and Dixie D. Rhomberg, husband and wife  
Purpose: party wall  
Recording Date: March 20, 1923  
Recording No: In Book 580, Page 128 of Deeds

Reference is hereby made to said document for full particulars.

**EXCEPTIONS**  
**(Continued)**

10. Notice of Pendency of Administrative Proceedings and the lien of any assessment arising therefrom by the Department of Building and Safety of the County of Riverside, in the matter of unlawful or unsafe conditions on the herein described Land.

Property Owner: Amos J. Mathewson their successors, heirs, assigns, beneficiaries, administrators and executors; and Does 1 through 10 Owners  
Recording Date: April 16, 1992  
Recording No.: as Instrument No. 135132 of Official Records

Reference is hereby made to said document for full particulars.

11. Intentionally deleted.

12. The Land described herein is included within a project area of the Redevelopment Agency shown below, and that proceedings for the redevelopment of said project have been instituted under the Redevelopment Law (such redevelopment to proceed only after the adoption of the Redevelopment Plan) as disclosed by a document.

Redevelopment Agency: Community Redevelopment Agency of the City of Banning  
Recording Date: January 28, 2008  
Recording No.: as Instrument No. 2008-0041511 of Official Records

13. Matters contained in that certain document

Entitled: Disclaimer  
Dated: March 2, 2012  
Executed by: Shriners Hospital for Children, a non-profit Colorado corporation, which is formerly known as Shriners Hospitals for Crippled Children  
Recording Date: March 8, 2012  
Recording No.: as Instrument No. 2012-0107234 of Official Records

Reference is hereby made to said document for full particulars.

Affects: The herein described Land and other land.

14. The effect of a Quitclaim Deed

From: Trustee of the Amos J. Mathewson Living Trust, Ruth M. Keith  
To: City of Banning, a California general law city  
Dated: April 5, 2013  
Recording Date: May 1, 2013  
Recording No.: 2013-0204643 of Official Records

15. Intentionally deleted.

16. Intentionally deleted.

17. Intentionally deleted.

18. Intentionally deleted.

**EXCEPTIONS**  
**(Continued)**

19. Any easements not disclosed by the public records as to matters affecting title to real property, whether or not said easements are visible and apparent.
20. Matters which may be disclosed by an inspection and/or by a correct ALTA/ACSM Land Title Survey of said Land that is satisfactory to the Company, and/or by inquiry of the parties in possession thereof.

**PLEASE REFER TO THE "INFORMATIONAL NOTES" AND "REQUIREMENTS" SECTIONS WHICH  
FOLLOW FOR INFORMATION NECESSARY TO COMPLETE THIS TRANSACTION.**

---

**END OF EXCEPTIONS**

---

## REQUIREMENTS SECTION

1. Any rights of the parties in possession of a portion of, or all of, said Land, which rights are not disclosed by the public records.

The Company will require, for review, a full and complete copy of any unrecorded agreement, contract, license and/or lease, together with all supplements, assignments and amendments thereto, before issuing any policy of title insurance without excepting this item from coverage.

The Company reserves the right to except additional items and/or make additional requirements after reviewing said documents.

3. Unrecorded matters which may be disclosed by an Owner's Affidavit or Declaration. A form of the Owner's Affidavit/Declaration is attached to this Preliminary Report/Commitment. This Affidavit/Declaration is to be completed by the record owner of the land and submitted for review prior to the closing of this transaction. Your prompt attention to this requirement will help avoid delays in the closing of this transaction. Thank you.

The Company reserves the right to add additional items or make further requirements after review of the requested Affidavit/Declaration.

---

END OF REQUIREMENTS

---

## INFORMATIONAL NOTES SECTION

1. None of the items shown in this report will cause the Company to decline to attach CLTA Endorsement Form 100 to an Extended Coverage Loan Policy, when issued.
2. Note: The policy of title insurance will include an arbitration provision. The Company or the insured may demand arbitration. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. Please ask your escrow or title officer for a sample copy of the policy to be issued if you wish to review the arbitration provisions and any other provisions pertaining to your Title Insurance coverage.
3. Note: The only conveyance(s) affecting said Land, which recorded within 24 months of the date of this report, are as follows:

Grantor:	Trustee of The Amos J. Mathewson Living Trust, Ruth M. Keith
Grantee:	City of Banning, a California general law city
Recording Date:	May 5, 2013
Recording No:	<u>2013-0204643 of Official Records</u>

---

END OF INFORMATIONAL NOTES

---

Curtis Taplin (MA)/jh

155

## FIDELITY NATIONAL FINANCIAL PRIVACY NOTICE

Fidelity National Financial, Inc. and its majority-owned subsidiary companies providing real estate- and loan-related services (collectively, "FNF", "our" or "we") respect and are committed to protecting your privacy. This Privacy Notice lets you know how and for what purposes your Personal Information (as defined herein) is being collected, processed and used by FNF. We pledge that we will take reasonable steps to ensure that your Personal Information will only be used in ways that are in compliance with this Privacy Notice.

This Privacy Notice is only in effect for any generic information and Personal Information collected and/or owned by FNF, including collection through any FNF website and any online features, services and/or programs offered by FNF (collectively, the "Website"). This Privacy Notice is not applicable to any other web pages, mobile applications, social media sites, email lists, generic information or Personal Information collected and/or owned by any entity other than FNF.

### Collection and Use of Information

The types of personal information FNF collects may include, among other things (collectively, "Personal Information"): (1) contact information (e.g., name, address, phone number, email address); (2) demographic information (e.g., date of birth, gender marital status); (3) Internet protocol (or IP) address or device ID/UDID; (4) social security number (SSN), student ID (SIN), driver's license, passport, and other government ID numbers; (5) financial account information; and (6) information related to offenses or criminal convictions.

In the course of our business, we may collect Personal Information about you from the following sources:

- Applications or other forms we receive from you or your authorized representative;
- Information we receive from you through the Website;
- Information about your transactions with or services performed by us, our affiliates, or others; and
- From consumer or other reporting agencies and public records maintained by governmental entities that we either obtain directly from those entities, or from our affiliates or others.

Information collected by FNF is used for three main purposes:

- To provide products and services to you or one or more third party service providers (collectively, "Third Parties") who are obtaining services on your behalf or in connection with a transaction involving you.
- To improve our products and services that we perform for you or for Third Parties.
- To communicate with you and to inform you about FNF's, FNF's affiliates and third parties' products and services.

### Additional Ways Information is Collected Through the Website

**Browser Log Files.** Our servers automatically log each visitor to the Website and collect and record certain information about each visitor. This information may include IP address, browser language, browser type, operating system, domain names, browsing history (including time spent at a domain, time and date of your visit), referring/exit web pages and URLs, and number of clicks. The domain name and IP address reveal nothing personal about the user other than the IP address from which the user has accessed the Website.

**Cookies.** From time to time, FNF or other third parties may send a "cookie" to your computer. A cookie is a small piece of data that is sent to your Internet browser from a web server and stored on your computer's hard drive and that can be re-sent to the serving website on subsequent visits. A cookie, by itself, cannot read other data from your hard disk or read other cookie files already on your computer. A cookie, by itself, does not damage your system. We, our advertisers and other

third parties may use cookies to identify and keep track of, among other things, those areas of the Website and third party websites that you have visited in the past in order to enhance your next visit to the Website. You can choose whether or not to accept cookies by changing the settings of your Internet browser, but some functionality of the Website may be impaired or not function as intended. See the Third Party Opt Out section below.

**Web Beacons.** Some of our web pages and electronic communications may contain images, which may or may not be visible to you, known as Web Beacons (sometimes referred to as "clear gifs"). Web Beacons collect only limited information that includes a cookie number; time and date of a page view; and a description of the page on which the Web Beacon resides. We may also carry Web Beacons placed by third party advertisers. These Web Beacons do not carry any Personal Information and are only used to track usage of the Website and activities associated with the Website. See the Third Party Opt Out section below.

**Unique Identifier.** We may assign you a unique internal identifier to help keep track of your future visits. We may use this information to gather aggregate demographic information about our visitors, and we may use it to personalize the information you see on the Website and some of the electronic communications you receive from us. We keep this information for our internal use, and this information is not shared with others.

**Third Party Opt Out.** Although we do not presently, in the future we may allow third-party companies to serve advertisements and/or collect certain anonymous information when you visit the Website. These companies may use non-personally identifiable information (e.g., click stream information, browser type, time and date, subject of advertisements clicked or scrolled over) during your visits to the Website in order to provide advertisements about products and services likely to be of greater interest to you. These companies typically use a cookie or third party Web Beacon to collect this information, as further described above. Through these technologies, the third party may have access to and use non-personalized information about your online usage activity.

You can opt-out of online behavioral services through any one of the ways described below. After you opt-out, you may continue to receive advertisements, but those advertisements will no longer be as relevant to you.

- You can opt-out via the Network Advertising Initiative industry opt-out at <http://www.networkadvertising.org/>.
- You can opt-out via the Consumer Choice Page at [www.aboutads.info](http://www.aboutads.info).
- For those in the U.K., you can opt-out via the IAB UK's industry opt-out at [www.youronlinechoices.com](http://www.youronlinechoices.com).
- You can configure your web browser (Chrome, Firefox, Internet Explorer, Safari, etc.) to delete and/or control the use of cookies.

More information can be found in the Help system of your browser. Note: If you opt-out as described above, you should not delete your cookies. If you delete your cookies, you will need to opt-out again.

### When Information Is Disclosed By FNF

We may provide your Personal Information (excluding information we receive from consumer or other credit reporting agencies) to various individuals and companies, as permitted by law, without obtaining your prior authorization. Such laws do not allow consumers to restrict these disclosures. Disclosures may include, without limitation, the following:

- To agents, brokers, representatives, or others to provide you with services you have requested, and to enable us to detect or prevent criminal activity, fraud, material misrepresentation, or nondisclosure in connection with an insurance transaction;



- To third-party contractors or service providers who provide services or perform marketing services or other functions on our behalf;
- To law enforcement or other governmental authority in connection with an investigation, or civil or criminal subpoenas or court orders; and/or
- To lenders, lien holders, judgment creditors, or other parties claiming an encumbrance or an interest in title whose claim or interest must be determined, settled, paid or released prior to a title or escrow closing.

In addition to the other times when we might disclose information about you, we might also disclose information when required by law or in the good-faith belief that such disclosure is necessary to: (1) comply with a legal process or applicable laws; (2) enforce this Privacy Notice; (3) respond to claims that any materials, documents, images, graphics, logos, designs, audio, video and any other information provided by you violates the rights of third parties; or (4) protect the rights, property or personal safety of FNF, its users or the public.

We maintain reasonable safeguards to keep the Personal Information that is disclosed to us secure. We provide Personal Information and non-Personal Information to our subsidiaries, affiliated companies, and other businesses or persons for the purposes of processing such information on our behalf and promoting the services of our trusted business partners, some or all of which may store your information on servers outside of the United States. We require that these parties agree to process such information in compliance with our Privacy Notice or in a similar, industry-standard manner, and we use reasonable efforts to limit their use of such information and to use other appropriate confidentiality and security measures. The use of your information by one of our trusted business partners may be subject to that party's own Privacy Notice. We do not, however, disclose information we collect from consumer or credit reporting agencies with our affiliates or others without your consent, in conformity with applicable law, unless such disclosure is otherwise permitted by law.

We also reserve the right to disclose Personal Information and/or non-Personal Information to take precautions against liability, investigate and defend against any third-party claims or allegations, assist government enforcement agencies, protect the security or integrity of the Website, and protect the rights, property, or personal safety of FNF, our users or others.

We reserve the right to transfer your Personal Information, as well as any other information, in connection with the sale or other disposition of all or part of the FNF business and/or assets. We also cannot make any representations regarding the use or transfer of your Personal Information or other information that we may have in the event of our bankruptcy, reorganization, insolvency, receivership or an assignment for the benefit of creditors, and you expressly agree and consent to the use and/or transfer of your Personal Information or other information in connection with a sale or transfer of some or all of our assets in any of the above described proceedings. Furthermore, we cannot and will not be responsible for any breach of security by any third parties or for any actions of any third parties that receive any of the information that is disclosed to us.

#### **Information from Children**

We do not collect Personal Information from any person that we know to be under the age of thirteen (13). Specifically, the Website is not intended or designed to attract children under the age of thirteen (13). You affirm that you are either more than 18 years of age, or an emancipated minor, or possess legal parental or guardian consent, and are fully able and competent to enter into the terms, conditions, obligations, affirmations, representations, and warranties set forth in this Privacy Notice, and to abide by and comply with this Privacy Notice. In

any case, you affirm that you are over the age of 13, as **THE WEBSITE IS NOT INTENDED FOR CHILDREN UNDER 13 THAT ARE UNACCOMPANIED BY HIS OR HER PARENT OR LEGAL GUARDIAN.**

Parents should be aware that FNF's Privacy Notice will govern our use of Personal Information, but also that information that is voluntarily given by children – or others – in email exchanges, bulletin boards or the like may be used by other parties to generate unsolicited communications. FNF encourages all parents to instruct their children in the safe and responsible use of their Personal Information while using the Internet.

#### **Privacy Outside the Website**

The Website may contain various links to other websites, including links to various third party service providers. FNF is not and cannot be responsible for the privacy practices or the content of any of those other websites. Other than under agreements with certain reputable organizations and companies, and except for third party service providers whose services either we use or you voluntarily elect to utilize, we do not share any of the Personal Information that you provide to us with any of the websites to which the Website links, although we may share aggregate, non-Personal Information with those other third parties. Please check with those websites in order to determine their privacy policies and your rights under them.

#### **European Union Users**

If you are a citizen of the European Union, please note that we may transfer your Personal Information outside the European Union for use for any of the purposes described in this Privacy Notice. By providing FNF with your Personal Information, you consent to both our collection and such transfer of your Personal Information in accordance with this Privacy Notice.

#### **Choices with Your Personal Information**

Whether you submit Personal Information to FNF is entirely up to you. You may decide not to submit Personal Information, in which case FNF may not be able to provide certain services or products to you.

You may choose to prevent FNF from disclosing or using your Personal Information under certain circumstances ("opt out"). You may opt out of any disclosure or use of your Personal Information for purposes that are incompatible with the purpose(s) for which it was originally collected or for which you subsequently gave authorization by notifying us by one of the methods at the end of this Privacy Notice. Furthermore, even where your Personal Information is to be disclosed and used in accordance with the stated purposes in this Privacy Notice, you may elect to opt out of such disclosure to and use by a third party that is not acting as an agent of FNF. As described above, there are some uses from which you cannot opt-out.

Please note that opting out of the disclosure and use of your Personal Information as a prospective employee may prevent you from being hired as an employee by FNF to the extent that provision of your Personal Information is required to apply for an open position.

If FNF collects Personal Information from you, such information will not be disclosed or used by FNF for purposes that are incompatible with the purpose(s) for which it was originally collected or for which you subsequently gave authorization unless you affirmatively consent to such disclosure and use.

You may opt out of online behavioral advertising by following the instructions set forth above under the above section "Additional Ways That Information Is Collected Through the Website," subsection "Third Party Opt Out."

### **Access and Correction**

To access your Personal Information in the possession of FNF and correct inaccuracies of that information in our records, please contact us in the manner specified at the end of this Privacy Notice. We ask individuals to identify themselves and the information requested to be accessed and amended before processing such requests, and we may decline to process requests in limited circumstances as permitted by applicable privacy legislation.

### **Your California Privacy Rights**

Under California's "Shine the Light" law, California residents who provide certain personally identifiable information in connection with obtaining products or services for personal, family or household use are entitled to request and obtain from us once a calendar year information about the customer information we shared, if any, with other businesses for their own direct marketing uses. If applicable, this information would include the categories of customer information and the names and addresses of those businesses with which we shared customer information for the immediately prior calendar year (e.g., requests made in 2013 will receive information regarding 2012 sharing activities).

To obtain this information on behalf of FNF, please send an email message to [privacy@fnf.com](mailto:privacy@fnf.com) with "Request for California Privacy Information" in the subject line and in the body of your message. We will provide the requested information to you at your email address in response.

Please be aware that not all information sharing is covered by the "Shine the Light" requirements and only information on covered sharing will be included in our response.

Additionally, because we may collect your Personal Information from time to time, California's Online Privacy Protection Act requires us to

disclose how we respond to "do not track" requests and other similar mechanisms. Currently, our policy is that we do not recognize "do not track" requests from Internet browsers and similar devices.

### **Your Consent to This Privacy Notice**

By submitting Personal Information to FNF, you consent to the collection and use of information by us as specified above or as we otherwise see fit, in compliance with this Privacy Notice, unless you inform us otherwise by means of the procedure identified below. If we decide to change this Privacy Notice, we will make an effort to post those changes on the Website. Each time we collect information from you following any amendment of this Privacy Notice will signify your assent to and acceptance of its revised terms for all previously collected information and information collected from you in the future. We may use comments, information or feedback that you may submit in any manner that we may choose without notice or compensation to you.

If you have additional questions or comments, please let us know by sending your comments or requests to:

Fidelity National Financial, Inc.  
601 Riverside Avenue  
Jacksonville, Florida 32204  
Attn: Chief Privacy Officer  
(888) 934-3354  
[privacy@fnf.com](mailto:privacy@fnf.com)

Copyright © 2014. Fidelity National Financial, Inc. All Rights Reserved.

EFFECTIVE AS OF: JANUARY 24, 2014

LAST UPDATED: JANUARY 24, 2014

## Notice of Available Discounts

Pursuant to Section 2355.3 in Title 10 of the California Code of Regulations Fidelity National Financial, Inc. and its subsidiaries ("FNF") must deliver a notice of each discount available under our current rate filing along with the delivery of escrow instructions, a preliminary report or commitment. Please be aware that the provision of this notice does not constitute a waiver of the consumer's right to be charged the field rate. As such, your transaction may not qualify for the below discounts.

You are encouraged to discuss the applicability of one or more of the below discounts with a Company representative. These discounts are generally described below; consult the rate manual for a full description of the terms, conditions and requirements for each discount. These discounts only apply to transaction involving services rendered by the FNF Family of Companies. This notice only applies to transactions involving property improved with a one-to-four family residential dwelling.

### FNF Underwritten Title Company

FNTC - Fidelity National Title Company

FNTCCA - Fidelity National Title Company of California

### FNF Underwriter

FNTIC - Fidelity National Title Insurance Company

### Available Discounts

#### **CREDIT FOR PRELIMINARY REPORTS AND/OR COMMITMENTS ON SUBSEQUENT POLICIES (FNTIC)**

Where no major change in the title has occurred since the issuance of the original report or commitment, the order may be reopened within 12 or 36 months and all or a portion of the charge previously paid for the report or commitment may be credited on a subsequent policy charge.

#### **DISASTER LOANS (FNTIC)**

The charge for a lender's Policy (Standard or Extended coverage) covering the financing or refinancing by an owner of record, within 24 months of the date of a declaration of a disaster area by the government of the United States or the State of California on any land located in said area, which was partially or totally destroyed in the disaster, will be 50% of the appropriate title insurance rate.

#### **CHURCHES OR CHARITABLE NON-PROFIT ORGANIZATIONS (FNTIC)**

On properties used as a church or for charitable purposes within the scope of the normal activities of such entities, provided said charge is normally the church's obligation the charge for an owner's policy shall be 50% to 70% of the appropriate title insurance rate, depending on the type of coverage selected. The charge for a lender's policy shall be 40% to 50% of the appropriate title insurance rate, depending on the type of coverage selected.

**Attachment One (Revised 06-05-14)**

**CALIFORNIA LAND TITLE ASSOCIATION  
STANDARD COVERAGE POLICY – 1990 (04-08-14)**

**EXCLUSIONS FROM COVERAGE**

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building or zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien, or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
- (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters:
  - (a) whether or not recorded in the public records at Date of Policy, but created, suffered, assumed or agreed to by the insured claimant;
  - (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
  - (c) resulting in no loss or damage to the insured claimant;
  - (d) attaching or created subsequent to Date of Policy; or
  - (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage or for the estate or interest insured by this policy.
4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with the applicable doing business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.
6. Any claim, which arises out of the transaction vesting in the insured the estate of interest insured by this policy or the transaction creating the interest of the insured lender, by reason of the operation of federal bankruptcy, state insolvency or similar creditors' rights laws.

**EXCEPTIONS FROM COVERAGE—SCHEDULE B, PART I**

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.  
Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.
2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of the land or which may be asserted by persons in possession thereof.
3. Easements, liens or encumbrances, or claims thereof, not shown by the public records.
4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.
5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b) or (c) are shown by the public records.
6. Any lien or right to a lien for services, labor or material not shown by the public records.

**CLTA HOMEOWNER'S POLICY OF TITLE INSURANCE (12-02-13)  
ALTA HOMEOWNER'S POLICY OF TITLE INSURANCE**

**EXCLUSIONS**

In addition to the Exceptions in Schedule B, You are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of those portions of any law or government regulation concerning:
  - a. building;
  - b. zoning;

---

© California Land Title Association. All rights reserved.

The use of this Form is restricted to CLTA subscribers in good standing as of the date of use. All other uses are prohibited. Reprinted under license or express permission from the California Land Title Association.

160

- c. land use;
- d. improvements on the Land;
- e. land division; and
- f. environmental protection.

This Exclusion does not limit the coverage described in Covered Risk 8.a., 14, 15, 16, 18, 19, 20, 23 or 27.

2. The failure of Your existing structures, or any part of them, to be constructed in accordance with applicable building codes. This Exclusion does not limit the coverage described in Covered Risk 14 or 15.
3. The right to take the Land by condemning it. This Exclusion does not limit the coverage described in Covered Risk 17.
4. Risks:
  - a. that are created, allowed, or agreed to by You, whether or not they are recorded in the Public Records;
  - b. that are Known to You at the Policy Date, but not to Us, unless they are recorded in the Public Records at the Policy Date;
  - c. that result in no loss to You; or
  - d. that first occur after the Policy Date - this does not limit the coverage described in Covered Risk 7, 8.e., 25, 26, 27 or 28.
5. Failure to pay value for Your Title.
6. Lack of a right:
  - a. to any land outside the area specifically described and referred to in paragraph 3 of Schedule A; and
  - b. in streets, alleys, or waterways that touch the Land.

This Exclusion does not limit the coverage described in Covered Risk 11 or 21.

7. The transfer of the Title to You is invalid as a preferential transfer or as a fraudulent transfer or conveyance under federal bankruptcy, state insolvency, or similar creditors' rights laws.
8. Contamination, explosion, fire, flooding, vibration, fracturing, earthquake, or subsidence.
9. Negligence by a person or an Entity exercising a right to extract or develop minerals, water, or any other substances.

#### LIMITATIONS ON COVERED RISKS

Your insurance for the following Covered Risks is limited on the Owner's Coverage Statement as follows:

- For Covered Risk 16, 18, 19, and 21 Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

The deductible amounts and maximum dollar limits shown on Schedule A are as follows:

	<u>Your Deductible Amount</u>	<u>Our Maximum Dollar Limit of Liability</u>
	1.00% of Policy Amount Shown in Schedule A or \$2,500.00	
Covered Risk 16:	(whichever is less)	\$10,000.00
	1.00% of Policy Amount Shown in Schedule A or \$5,000.00	
Covered Risk 18:	(whichever is less)	\$25,000.00
	1.00% of Policy Amount Shown in Schedule A or \$5,000.00	
Covered Risk 19:	(whichever is less)	\$25,000.00
	1.00% of Policy Amount Shown in Schedule A or \$2,500.00	
Covered Risk 21:	(whichever is less)	\$5,000.00

#### 2006 ALTA LOAN POLICY (06-17-06) EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
  - (i) the occupancy, use, or enjoyment of the Land;
  - (ii) the character, dimensions, or location of any improvement erected on the Land;
  - (iii) the subdivision of land; or
  - (iv) environmental protection;
 or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
- (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
  - (a) created, suffered, assumed, or agreed to by the Insured Claimant;
  - (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
  - (c) resulting in no loss or damage to the Insured Claimant;

161

- (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 13 or 14); or
- (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
- 4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.
- 5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.
- 6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is
  - (a) a fraudulent conveyance or fraudulent transfer, or
  - (b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.
- 7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This Exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

The above policy form may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following Exceptions from Coverage:

#### EXCEPTIONS FROM COVERAGE

Except as provided in Schedule B - Part II, this policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees or expenses, that arise by reason of:

#### PART I

The above policy form may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following Exceptions from Coverage:

- 1. (a) Taxes or assessments that are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records; (b) proceedings by a public agency that may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the Public Records.
- 2. Any facts, rights, interests, or claims that are not shown by the Public Records but that could be ascertained by an inspection of the Land or that may be asserted by persons in possession of the Land.
- 3. Easements, liens or encumbrances, or claims thereof, not shown by the Public Records.
- 4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land and not shown by the Public Records.
- 5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b), or (c) are shown by the Public Records.
- 6. Any lien or right to a lien for services, labor or material not shown by the Public Records.

#### PART II

In addition to the matters set forth in Part I of this Schedule, the Title is subject to the following matters, and the Company insures against loss or damage sustained in the event that they are not subordinate to the lien of the Insured Mortgage:

#### 2006 ALTA OWNER'S POLICY (06-17-06)

#### EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

- 1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
  - (i) the occupancy, use, or enjoyment of the Land;
  - (ii) the character, dimensions, or location of any improvement erected on the Land;
  - (iii) the subdivision of land; or
  - (iv) environmental protection;or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
- (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
- 2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
- 3. Defects, liens, encumbrances, adverse claims, or other matters
  - (a) created, suffered, assumed, or agreed to by the Insured Claimant;
  - (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
  - (c) resulting in no loss or damage to the Insured Claimant;
  - (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or
  - (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.

4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is
  - (a) a fraudulent conveyance or fraudulent transfer; or
  - (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.
5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The above policy form may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following Exceptions from Coverage:

#### EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees or expenses, that arise by reason of:

The above policy form may be issued to afford either Standard Coverage or Extended Coverage. In addition to the above Exclusions from Coverage, the Exceptions from Coverage in a Standard Coverage policy will also include the following Exceptions from Coverage:

1. (a) Taxes or assessments that are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records; (b) proceedings by a public agency that may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the Public Records.
2. Any facts, rights, interests, or claims that are not shown in the Public Records but that could be ascertained by an inspection of the Land or that may be asserted by persons in possession of the Land.
3. Easements, liens or encumbrances, or claims thereof, not shown by the Public Records.
4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land and that are not shown by the Public Records.
5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b), or (c) are shown by the Public Records.
6. Any lien or right to a lien for services, labor or material not shown by the Public Records.
7. Variable exceptions such as taxes, easements, CC&R's, etc. shown here.

#### ALTA EXPANDED COVERAGE RESIDENTIAL LOAN POLICY (12-02-13)

#### EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
  - (i) the occupancy, use, or enjoyment of the Land;
  - (ii) the character, dimensions, or location of any improvement erected on the Land;
  - (iii) the subdivision of land; or
  - (iv) environmental protection;or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5, 6, 13(c), 13(d), 14 or 16.
- (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 5, 6, 13(c), 13(d), 14 or 16.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
  - (a) created, suffered, assumed, or agreed to by the Insured Claimant;
  - (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
  - (c) resulting in no loss or damage to the Insured Claimant;
  - (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27 or 28); or
  - (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.
5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury, or any consumer credit protection or truth-in-lending law. This Exclusion does not modify or limit the coverage provided in Covered Risk 26.
6. Any claim of invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage as to Advances or modifications made after the Insured has Knowledge that the vestee shown in Schedule A is no longer the owner of the estate or interest covered by this policy. This Exclusion does not modify or limit the coverage provided in Covered Risk 11.
7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching subsequent to Date of Policy. This Exclusion does not modify or limit the coverage provided in Covered Risk 11(b) or 25.
8. The failure of the residential structure, or any portion of it, to have been constructed before, on or after Date of Policy in accordance with applicable building codes. This Exclusion does not modify or limit the coverage provided in Covered Risk 5 or 6.

© California Land Title Association. All rights reserved.

The use of this Form is restricted to CLTA subscribers in good standing as of the date of use. All other uses are prohibited. Reprinted under license or express permission from the California Land Title Association.

163

9. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is
  - (a) a fraudulent conveyance or fraudulent transfer, or
  - (b) a preferential transfer for any reason not stated in Covered Risk 27(b) of this policy.
10. Contamination, explosion, fire, flooding, vibration, fracturing, earthquake, or subsidence.
11. Negligence by a person or an Entity exercising a right to extract or develop minerals, water, or any other substances.



**CITY COUNCIL AGENDA  
CONSENT ITEM**

**DATE:** May 12, 2015

**TO:** City Council

**FROM:** Art Vela, Acting Director of Public Works

**SUBJECT:** Resolution No. 2015-35, "Renewing the Contract for the Operation and Maintenance of the City of Banning Landscape Maintenance District ("LMD") No. 1"

**RECOMMENDATION:** That the City Council adopt Resolution No. 2015-35, "Renewing the Contract for the Operation and Maintenance of the City of Banning Landscape Maintenance District ("LMD") No. 1" with Artistic Maintenance, Inc. of Lake Forest, California, in the amount of \$71,440.00 for Fiscal Year 2015/16.

**JUSTIFICATION:** Artistic Maintenance, Inc., of Lake Forest, California, has provided satisfactory landscape operation and maintenance services this past year and agreed to not increase the contract amount by a Consumer Price Index ("CPI") this upcoming Fiscal Year.

**BACKGROUND:** The City Council approved the formation of LMD No. 1 by adopting Resolution No. 1990-59 on August 14, 1990. An additional five tracts and three tentative tracts were annexed into LMD No. 1 ("Annexation No. 1") when the City Council approved Resolution No. 2005-36 on May 10, 2005.

LMD No. 1 currently consists of sixteen (16) accepted tracts: Tract Nos. 21882, 22810, 22811, 22913, 23446 (including the median on Highland Home Road), 23598, 28252, 29721, 30186, 30222 (including Richard Sanchez Park), 30793, 31833, 31834, 31835, 32109, and 30906. Tract No. 30642 has not been accepted thus far. The purpose of LMD No. 1 is for the maintenance and servicing of landscape medians and parkways, perimeter strips and backup walls, landscaped hillsides with high visibility, side slopes adjacent to sidewalks, and the irrigation of the above facilities. LMD No. 1, by special benefit assessments, provides funding for the servicing and maintenance of designated landscape areas within the City of Banning. A map displaying LMD No. 1 and boundaries of each tract is attached herewith as Exhibit "A".

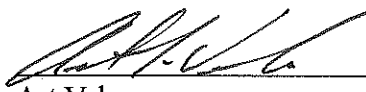
From July 1, 2009, through June 30, 2014, the Public Works Department maintained LMD No.1. A Request for Proposals ("RFP") was prepared in March of 2014 and advertised to determine if using a contractor would provide cost savings. Artistic Maintenance, Inc. provided a Bid that was less than half of the second lowest bid. Additionally, their annual contract amount of \$61,440.00 was over \$24,000.00 less than the cost of using Public Works Department staff. On May 13, 2014, the City Council approved Resolution No. 2014-24, awarding the contract for the operation and maintenance of LMD No. 1 to Artistic Maintenance, Inc.

The proposed Contract Agreement is for a term of twelve (12) months (\$5,120.00/month; \$61,440.00/year) with the possibility of an option to renew for up to four (4) single additional years (for a total of five (5) single years) upon a satisfactory yearly review of the previously provided services. If approved, extensions to the agreement will terminate no later than June 30, 2019.

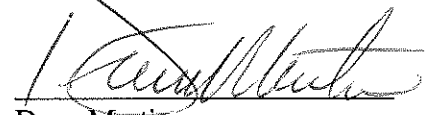
The scope of work includes providing all of the labor, tools, materials, and equipment necessary to provide weekly complete landscape maintenance services of LMD No.1. This includes performing weekly maintenance and inspection, checking the operation of all irrigation systems and for any required repairs and, if necessary, the labor for replacing trees or shrubs within landscaped areas that are maintained under the contract. Irrigation materials, tree, shrub, ground cover and plant material replacements are always paid for as an added cost, separate from this contract. Consequently, staff is requesting \$10,000.00 be included in this contract renewal providing an allowance for irrigation materials and landscaping as part of the agreement with Artistic Maintenance, Inc.

**FISCAL DATA:** Fund No. 111 (Landscape Maintenance Assessment District No.1) will be utilized to fund the agreement for Fiscal Year 2015/16 with Artistic Maintenance for LMD No. 1 Services in the amount of \$71,440.00. Account No. 111-4900-432-23.29 (Landscape Maintenance) in the amount of \$61,440.00 will fund the monthly operation and maintenance portion of the agreement. Account No. 111-4900-432-30.01 (Repair/Maintenance-Grounds/Fields) in the amount of \$10,000.00 will be used to fund miscellaneous operations related to irrigation repairs and landscaping.

**RECOMMENDED BY:**

  
Art Vela,  
Acting Director of Public Works

**REVIEWED BY:**

  
Dean Martin,  
Interim Administrative Services Director  
Deputy City Manager

**APPROVED BY:**

  
James E. Smith,  
Interim City Manager

**RESOLUTION NO. 2015-35**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING, CALIFORNIA, RENEWING THE CONTRACT FOR THE OPERATION AND MAINTENANCE OF LANDSCAPE MAINTENANCE DISTRICT NO. 1 TO ARTISTIC MAINTENANCE, INC. OF LAKE FOREST, CALIFORNIA**

**WHEREAS**, at its regularly scheduled meeting on August 14, 1990, the City Council adopted Resolution No. 1990-59, authorizing the formation of Landscape Maintenance District ("LMD") No. 1; and

**WHEREAS**, at its regularly scheduled meeting on May 10, 2005, the City Council adopted Resolution No. 2005-36, ordering the annexation of an additional five tracts and three tentative tracts ("Annexation No. 1") to the City's LMD No. 1; and

**WHEREAS**, at its regularly scheduled meeting on May 13, 2014, the City Council adopted Resolution No. 2014-24, awarding a contract for the operation and maintenance of the City of Banning's LMD No.1 for a term of one (1) year with the option to renew the Contract Agreement for up to four (4) additional single years upon a satisfactory yearly review of the previously provided services; and

**WHEREAS**, Artistic Maintenance, Inc. ("Artistic"), of Lake Forest, California, has provided satisfactory service to the City over the past fiscal year; and

**WHEREAS**, the Contract Agreement with Artistic was for a term of twelve (12) months (\$5,120.00/month; \$61,440.00/year) with the possibility of an option to renew for up to four (4) single additional years upon a satisfactory yearly review of the previously provided services; and

**WHEREAS**, staff recommends the renewal of the contract agreement with Artistic for an additional year and requests the addition of \$10,000.00 be made on the annual contract to fund miscellaneous irrigation repairs and landscape replacement; and

**WHEREAS**, Account No. 111-4900-432-23.29 (Landscape Maintenance) in the amount of \$61,440.00 will fund the monthly operation and maintenance portion of the agreement and Account No. 111-4900-432-30.01 (Repair/Maintenance-Grounds/Fields) in the amount of \$10,000.00 will be used to fund miscellaneous operations related to irrigation repairs and landscape replacement.

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Banning as follows:

**SECTION 1.** That the operation and maintenance services Contract for LMD No. 1 is hereby renewed and awarded to Artistic Maintenance, Inc. of Lake Forest, California, in the amount of \$71,440.00.

SECTION 2. That the Administrative Services Director is authorized to make all necessary budget adjustments, appropriations and transfers.

SECTION 3. That the City Manager is authorized to execute the Contract Agreement renewal for a one year term with Artistic Maintenance, Inc. of Lake Forest, California. This authorization will be rescinded if the parties do not execute the Contract Agreement within thirty (30) days of the date of this resolution.

**PASSED, ADOPTED AND APPROVED** this 12<sup>th</sup> day of May, 2015.

---

Deborah Franklin,  
Mayor

**ATTEST:**

---

Marie A. Calderon,  
City Clerk of the City of Banning

**APPROVED AS TO FORM  
AND LEGAL CONTENT:**

---

David J. Aleshire, City Attorney  
Aleshire & Wynder, LLP

**CERTIFICATION:**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2015-35 was adopted by the City Council of the City of Banning at a regular meeting thereof held on the 12<sup>th</sup> day of May, 2015, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

---

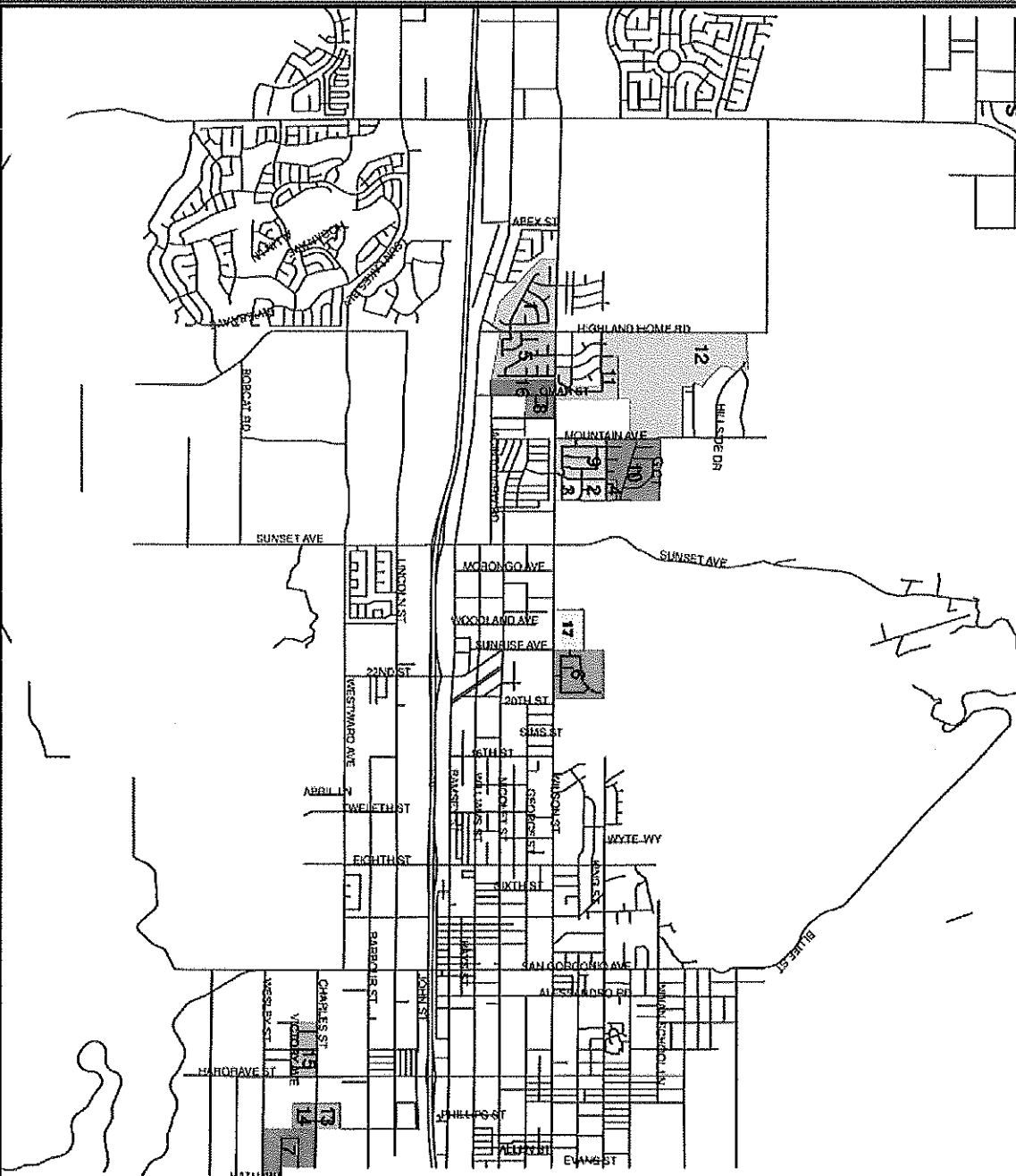
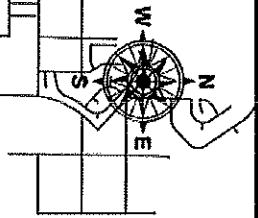
Marie A. Calderon, City Clerk  
City of Banning  
Banning, California

**EXHIBIT "A"**

**MAP OF LANDSCAPE MAINTENANCE  
DISTRICT NO. 1**

# Map of Landscape Maintenance District No. 1

2015/2016



## Legend

### Existing Tracts

1. 21882 Snow Creek I
2. 22810 Dev. Corp
3. 22811 Dev. Corp
4. 22913 Arce Bros.
5. 23446 Highland Estates
6. 23598 Snow Creek II
7. 28252 Fair Oaks
8. 29721 The Pines
9. 30186 Wilson Homes
10. 30222 Wilson Homes
11. 30793 Fiesta Collection
12. 30906 Evergreen Estates
13. 31833 Fair Oaks
14. 31834 Fair Oaks
15. 31835 Fair Oaks
16. 32109 Sunset Ridge
17. 31642 Diversified Pacific Opportunity Fund

## CITY COUNCIL AGENDA

**DATE:** May 12, 2015

**TO:** City Council

**FROM:** Art Vela, Acting Director of Public Works

**SUBJECT:** Resolution No. 2015-39, "Approving the Reprogramming of Community Development Block Grant Funds for Construction of Lions Park Accessibility Upgrades"

**RECOMMENDATION:** The City Council adopt Resolution No. 2015-39, "Approving the Reprogramming of Community Development Block Grant Funds for Construction of Lions Park Accessibility Upgrades."

**JUSTIFICATION:** Per the terms of a Settlement Agreement, accessibility upgrades at Lions Park are needed in order to obtain compliance with the Americans with Disabilities Act ("ADA").

**BACKGROUND:** The City and an undisclosed party entered into a Settlement Agreement and Release dated February 13, 2014. As terms of the agreement, the City has committed to addressing accessibility concerns related to Lions Park facilities which are required to be completed by February 13, 2016.

Prior to the execution of this agreement, Disability Access Consultants prepared a Lions Park Accessibility Survey dated September 5, 2013. The survey identified upgrades that are needed in order for the park facilities to meet the standard compliance requirements of the Americans with Disabilities Act Accessibility Guidelines and Title 24 of the California Code of Regulations. As a result of this survey and agreement, plans and specifications are currently being developed to address accessibility related to the following: parking lot; curbs, ramps, landings and transitions; handrails and stairways; walking surfaces; restrooms; signage; drinking fountains; snack bar; and assembly seating.

On February 27, 2015 a request for proposals was advertised soliciting bids for project design services and six proposals were received. Staff assembled a committee consisting of three members and evaluated the proposals based on project approach, technical competency, project team and experience, and overall responsiveness to the RFP and cost. The highest scored proposal was provided by BOA Architecture in the amount of \$24,600.00 and a contract was awarded in April of 2015. Design services are underway and are projected to be completed in July of 2015. The design services portion of the project is funded by Parkland Development Funds.

In order to fund the construction portion of the project, staff is requesting to reprogram previously awarded Community Development Block Grant ("CDBG") funds allocated for the Repplier Park Bowl Improvement project and Playground Equipment Improvement project at various parks including Repplier, Sylvan, Roosevelt, Lions and Richard Sanchez in the amount of \$262,561.03

as shown below. City Council approval is necessary in order to reprogram said funds and is also required by the Riverside County Economic Development Agency (EDA).

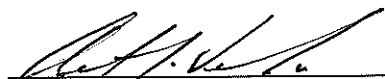
Activity Number	Description	Amount
5.BN.26-12	Repplier Park Bowl Improvement Project	\$107,634.03
5.BN.30-14	Playground Equipment Improvements	\$154,927.00
	<b>Total request</b>	<b>\$262,561.03</b>

On an annual basis, the City of Banning obtains CDBG federal grant funds for various projects. Staff will resubmit a request for Activity Number 5.BN.30-14 to the EDA in the upcoming year. If the construction project budget allows, staff plans to include the replacement of the playground equipment at Lions Park with the accessibility upgrade project. If City Council approves the reprogramming of said funds, the construction budget will be approximately \$400,000.00. In addition to CDBG Funds, Parkland Development Funds will also be utilized. The current Park Land Development Fund balance is approximately \$137,789.00.

Upon completion of the design services, staff intends to advertise the notice inviting bids for construction in August of 2015. Following the formal bid and selection process, a recommendation for award of the construction project will be presented to City Council for review and approval.

**FISCAL DATA:** The total amount of Community Development Block Grant funds to be reprogrammed to the construction of "Lions Park Accessibility Upgrades" project is \$262,561.03.

**RECOMMENDED BY:**




Art Vela,  
Acting Director of Public Works

**REVIEWED BY:**



Dean Martin  
Interim Administrative Services Director  
Deputy City Manager

**APPROVED BY:**



James E. Smith  
Interim City Manager



**RESOLUTION NO. 2015-39**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING, CALIFORNIA, APPROVING THE REPROGRAMMING OF COMMUNITY DEVELOPMENT BLOCK GRANT FUNDS FOR CONSTRUCTION OF LIONS PARK ACCESSIBILITY UPGRADES**

**WHEREAS**, the City and an undisclosed party entered into a Settlement Agreement and Release dated February 13, 2014 obligating the City to provide accessibility upgrades at Lions Park by February 13, 2016; and

**WHEREAS**, Disability Access Consultants prepared a Lions Park Accessibility Survey dated September 5, 2013 which is being utilized along with the Settlement Agreement and Release to develop the scope of work for the project; and

**WHEREAS**, the design portion of the project is currently underway and is projected to be completed by July of 2015; and

**WHEREAS**, the reprogramming of Community Development Block Grant ("CDBG") funds is necessary in order to fund the construction of the project which is scheduled to be advertised for bidding in August of 2015; and

**WHEREAS**, per the approval of this resolution funds in the amount of \$107,634.03 allocated to Riverside County Economic Development Agency ("EDA") Activity Number 5.BN.26-12, Repplier Park Bowl Improvement project and Activity Number 5.BN.30-14, Playground Equipment Improvement project at various parks including Repplier, Sylvan, Roosevelt, Lions and Richard Sanchez in the amount of \$154,927.00 will be reprogrammed to the construction of Lions Park Accessibility Upgrades; and

**WHEREAS**, the City of Banning obtains federal grant money annually for various projects and non-profit organizations from the CDBG, which is administered by the Riverside County EDA; and

**WHEREAS**, City Council approval is necessary in order to reprogram said funds and is also required by the EDA.

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Banning as follows:

SECTION 1. The City Council hereby authorizes the reprogramming of \$262,561.03 in Community Development Block Grant funds to be used for the construction of Lions Park Accessibility Upgrades.

SECTION 2. The Administrative Services Director is authorized to make necessary adjustments and appropriations.

SECTION 3. The City Manager is authorized to execute contract documents related to the reprogramming of CDBG funds.

**PASSED, APPROVED AND ADOPTED** this 12<sup>th</sup> day of May, 2015.

\_\_\_\_\_  
Deborah Franklin, Mayor  
City of Banning

**ATTEST:**

\_\_\_\_\_  
Marie A. Calderon, City Clerk  
City of Banning

**APPROVED AS TO FORM  
AND LEGAL CONTENT:**

\_\_\_\_\_  
David J. Aleshire, City Attorney  
Aleshire & Wynder, LLP

**CERTIFICATION:**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2015-39 was duly adopted by the City Council of the City of Banning at a regular meeting thereof held on the 12<sup>th</sup> day of May, 2015, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

\_\_\_\_\_  
Marie A. Calderon, City Clerk  
City of Banning, California

**CITY COUNCIL AGENDA  
CONSENT CALENDAR**

**DATE:** May 12, 2015

**TO:** City Council

**FROM:** Colin Tanner, Deputy City Attorney

**SUBJECT:** Approve the Settlement Agreement And General Release Between the City  
and Former City Manager Andrew Takata

**RECOMMENDATION:** Approve and authorize Interim City Manager Jim Smith to execute the attached Settlement Agreement And General Release between the City and former City Manager Andrew Takata.

**JUSTIFICATION:** The City participates in pooled risk sharing as a member of the Employment Risk Management Authority ("ERMA"). Pursuant to its current Memorandum of Coverage, ERMA has authority to defend and settle claims and has assigned litigation defense counsel from the law firm of Liebert Cassidy Whitmore to defend all claims asserted by former City Manager Andrew Takata. The parties participated in mediation on April 3, 2015, which resulted in a tentative short form settlement between the parties subject to a long form agreement and approval by both ERMA and the City. The attached Settlement Agreement And General Release has already been approved by ERMA. The ERMA representatives, along with its assigned defense counsel, recommend approval of same by the City.

The Settlement Agreement And General Release has been executed by Mr. Takata and the time for Mr. Takata to revoke same has passed. The Settlement Agreement And General Release obligates the City to make the severance payment provided for in Mr. Takata's original Employment Agreement dated January 12, 2010, which equates to the sum of \$275,951.00. This payment must be made by May 31, 2015. In addition, Mr. Takata shall receive \$159,000.00 from ERMA, which payment is also due May 31, 2015. Lastly, ERMA will cover the entire cost of the mediation that the parties participated in and forgive the cost bills resulting from the dismissal of Mr. Takata's original lawsuit against the City entitled *Takata et.al. v. City of Banning, et.al.*, Riverside Superior Court Case No. RIC 1408547.

In exchange for the above payments and agreements, Mr. Takata forever releases and waives any claims related to his employment with the City that he has against the City and its employees and related entities or parties. He also is required to dismiss the civil lawsuit he currently has pending against the City entitled *Takata v City of Banning*, Riverside Superior Court Case No. RIC 1502374.

**BACKGROUND:** Former City Manager Andrew Takata was employed with the City pursuant to an at-will written Employment Agreement entered into as of January 12, 2010 with his employment commencing February 15, 2010. The term of the agreement was for six years. If Mr. Takata subsequently resigned his employment or was terminated by the City for cause, then he would receive no severance payment under his employment contract. If he was terminated by the City for no cause, then he would receive a severance payment based upon a formula of when the termination occurred and how much time was left on his contract.


In or about January 2014, the City Council was determined to make a change in City Managers and explored options with Mr. Takata, which led to his execution of a tentative settlement agreement dated February 20, 2014. In sum, the City agreed to pay Mr. Takata his contractual severance payment in the amount of \$275,951.67. Mr. Takata subsequently revoked his agreement to the settlement. Accordingly, the City had to decide whether to terminate Mr. Takata with or without cause and determine whether it owed any severance based upon the manner of the termination. Mr. Takata was terminated for cause on or about March 25, 2014 and no severance was therefore paid.

Mr. Takata had filed a complaint with the Department of Fair Employment and Housing ("DFEH") against the City on or about February 7, 2014 alleging that before his termination he experienced unlawful discrimination and retaliation. He would subsequently file a lawsuit on or about September 3, 2014 against the City along with other former and current employees entitled *Takata et.al. v. City of Banning, et.al.*, Riverside Superior Court Case No. RIC 1408547. The City ultimately obtained a dismissal of that lawsuit through the work of ERMA's assigned defense counsel, the law firm of Liebert Cassidy Whitmore. The cost of the defense of the lawsuit to both the City and to ERMA was not insubstantial. Mr. Takata then refiled his lawsuit solely in his own name and solely against the City in the civil lawsuit entitled *Takata v City of Banning*, Riverside Superior Court Case No. RIC 1502374.

At the suggestion of the parties and with approval from ERMA, the parties participated in mediation with JAMS in Los Angeles on April 3, 2015. The mediation resulted in a short form settlement agreement subject to execution of a long form settlement agreement and subject to approval of ERMA and the Banning City Council. Mr. Takata executed the long form Settlement Agreement And General Release on April 19, 2015. ERMA approved the settlement terms at its meeting on or about April 20, 2015.

**FISCAL DATA:** The City settlement payment obligation is \$275,951.00. The payments will be charged according to the fund splits as defined for the position to fiscal year 2015. An appropriation of \$275,951 is being requested for authorization through the attached Resolution No. 2015-43.

**RECOMMENDED BY:**



Colin Tanner  
Deputy City Attorney

**APPROVED BY:**



Jim Smith  
Interim City Manager

Attachment: Settlement Agreement And General Release dated April 19, 2015  
Resolution No. 2015-43, Requesting Authority for Appropriation of Funds

**RESOLUTION NO. 2015-43**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING  
REQUESTING AUTHORITY FOR APPROPRIATION OF FUNDS FOR THE  
PAYMENT OF THE SETTLEMENT AGREEMENT AND GENERAL RELEASE  
BETWEEN THE CITY AND FORMER CITY MANAGER ANDREW TAKATA**

**WHEREAS**, the City Council of the City of Banning will approve and authorize Interim City Manager Jim Smith to execute the Settlement Agreement and General Release between the City and Former City Manager Andrew Takata; and

**WHEREAS**, the Settlement Agreement And General Release obligates the City to make the severance payment provided for in Mr. Takata's original Employment Agreement dated January 12, 2010, which equates to the sum of \$275,951 with payment to be made by May 31, 2015; and

**WHEREAS**, Andrew Takata shall receive \$159,000.00 from the Employment Risk Management Authority ("ERMA"), which payment is also due May 31, 2015; and

**WHEREAS**, ERMA will cover the entire cost of the mediation that the parties participated in and forgive the cost bills resulting from the dismissal of Mr. Takata's original lawsuit against the City entitled Takata et.al. v. City of Banning, et.al., Riverside Superior Court Case No. RIC 1408547.

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Banning, California, as follows:

**SECTION 1.** Adopt Resolution No 2015-43, authorizing the appropriation of \$275,951 to the funds as defined in the former City Manager's position FY2015 fund splits.

**SECTION 2.** Authorize the Administrative Services Director to make the necessary budget adjustments, requested appropriations, and transfers related to the action.

**PASSED, APPROVED AND ADOPTED** this 12<sup>th</sup> day of May, 2015.

---

Deborah Franklin, Mayor  
City of Banning, California

**ATTEST:**

---

Marie A. Calderon, City Clerk  
City of Banning

**APPROVED AS TO FORM AND  
LEGAL CONTENT:**

---

David J. Aleshire, City Attorney  
Aleshire & Wynder, LLP

**CERTIFICATION:**

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution, No. 2015-43 was duly adopted by the City Council of the City of Banning, California, at a regular meeting thereof held on the 12<sup>th</sup> day of May, 2015, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

---

Marie A. Calderon, City Clerk  
City of Banning, California

## SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement") is entered into between the City of Banning, a municipal corporation (hereinafter the "City"), and Andrew Takata (hereinafter "Takata") (hereinafter the City and Takata are also collectively referred to as the "Parties" or "Party") for the following purposes and with reference to the following facts.

### **I. RECITALS**

A. WHEREAS, Takata was previously employed by the City of Banning as its City Manager pursuant to an Employment Agreement, dated January 12, 2010, and a First Amendment to the Employment Agreement, dated May 14, 2013 (the January 12, 2010, Employment Agreement and May 14, 2013, First Amendment to the Employment Agreement are hereinafter collectively referred to as the "Contract");

B. WHEREAS, on or about February 7, 2014, Takata filed a complaint with the Department of Fair Employment and Housing ("DFEH") against the City, alleging that he was denied a good faith interactive process and discriminated and retaliated against (hereinafter the "DFEH Complaint") and, on or about February 7, 2014, the DFEH issued Takata an immediate Right to Sue notice;

C. WHEREAS, Takata's Contract permitted the City Council to terminate Takata's employment with or without cause at any time;

D. WHEREAS, on or about March 25, 2014, Takata was terminated for cause.

E. WHEREAS, Takata denies that there existed any cause to terminate his employment;

F. WHEREAS, on or about March 25, 2014, Takata filed a government claims act Claim for Money or Damages against the City (hereinafter "Gov't Claim") and the City rejected same by operation of law;

G. WHEREAS, on or about September 3, 2014, Takata, along with Duane Burk and Leonard Purvis, filed a lawsuit against the City and City Councilmember Don Peterson in Riverside County Superior Court, Case No. RIC 1408547 (hereinafter "Original Lawsuit"), alleging causes of action for: (1) defamation; (2) FEHA retaliation; (3) whistleblower retaliation; (4) discrimination; (6) failure to take corrective action; and (7) breach of contract;

H. WHEREAS, on January 29, 2015, the Court entered a judgment of dismissal in the City's favor in the Lawsuit, and Takata, Burk and Purvis thereafter dismissed the remainder of the Lawsuit;

I. WHEREAS, on or about February 27, 2015, Takata, filed a second lawsuit against the City in Riverside County Superior Court, Case No. RIC 1502374 (hereinafter "Second Lawsuit"), alleging causes of action for: (1) breach of contract; (2) FEHA retaliation; and (3) failure to take corrective action;



J. WHEREAS, the City denies any and all of the claims and allegations asserted by Takata against it;

K. WHEREAS, on April 3, 2015, the Parties engaged in a mediation regarding Takata's claims and allegations and the Parties entered into and agreed to a Stipulation for Settlement dated April 3, 2015;

L. WHEREAS, the purpose of this Agreement is to settle and compromise all disputes and controversies existing between the City on the one hand, and Takata on the other, including, but not limited to, the Contract, the Gov't Claim, the DFEH Complaint, the Original Lawsuit, the Second Lawsuit, and any other "claims" by Takata, including but not limited to all claims arising out of, or in any way related to Takata's employment with the City and/or the termination of such employment, and/or all claims arising from any other facts or causes existing prior to the execution date of this Agreement, whether known or unknown, without limitation, and, those described in more detail hereafter.

NOW THEREFORE, and in consideration for the promises contained herein, the Parties agree as follows:

## **II. DISPOSITION OF CLAIMS**

A. This Agreement shall not in any way be construed as an admission by the City or Takata of any unlawful or wrongful acts or other liability whatsoever against each other or against any other person or entity. The City and Takata specifically disclaim any liability to, or wrongful acts against each other, or against any other person or entity, on the part of themselves, any related person or any related predecessor corporation or its or their agents, representatives or successors in interest and assigns.

B. Takata hereby releases on behalf of himself and his heirs, representatives, successors, and assigns, and hereby irrevocably and unconditionally releases and discharges the City and any of its related persons, corporations, past or present officers, directors, governing bodies, elected officials, employees, agents, predecessors, attorneys, divisions, affiliates, representatives, successors in interest and assigns and/or all persons acting by, through, under, or in concert with any of the City, and all other persons or entities that were or could have been named as defendants in the claims, including, but not limited to, Councilmember Don Peterson, (hereinafter "City Releasees"), absolutely and forever from any and all claims, charges, complaints, lawsuits, liabilities, claims for relief, obligations, promises, agreements, contracts, interests, controversies, injuries, damages, actions, causes of actions, suits, rights, demands, costs, losses, debts, liens, judgments, indebtedness, and expenses (including attorneys' fees and costs actually incurred), and all other claims and rights of action of all kinds and descriptions, whether KNOWN OR UNKNOWN, suspected or unsuspected, actual or potential, which Takata now has, owns or holds, or claims to have, own or hold against the City or City Releasees, at common law or under any statute, rule, regulations, order or law, whether federal, state, or local, or on any grounds whatsoever, with respect to any act, omission, event, matter, claim, damage, loss, or injury arising out of the employment of and/or the termination of such employment between Takata and the City, and/or with respect to any other claims, matters, or events arising prior to the execution of this Agreement by the Parties.

C. Takata understands and agrees that he is waiving any rights he has, may have had, or may have, to pursue any and all remedies available to him under any employment-related cause of action against the City and City Releasees, including, without limitation, any claims for discrimination, harassment and/or retaliation, claims under the California Fair Employment and Housing Act (California Government Code section 12900, et seq.), the California Family Rights Act (California Government Code section 12945.2), the Unruh and George Civil Rights Acts (California Civil Code section 51, et seq.), all provisions of the California Labor Code and any wage orders or similar directives or authorities issued by any federal or state authority having enforcement powers, the Constitution of the United States, the Constitution of the State of California, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.), the Age Discrimination in Employment Act (29 U.S.C. § 621, et seq.), the Equal Pay Act (29 U.S.C. § 206(d)), the Fair Labor Standards Act (29 U.S.C. § 201, et seq.), the Family and Medical Leave Act (29 U.S.C. § 2601, et seq.), the Employment Retirement Income Security Act of 1974 (29 U.S.C. § 1001, et seq.), Sections 1981-88 of Title 42 of the United States Code (42 U.S.C. § 1981, et seq.), the American with Disabilities Act (42 U.S.C. § 12101, et seq.), claims of retaliation or whistle-blowing (including but not limited to California Labor Code section 1102.5, et seq. and Government Code section 12653), claims for breach of any type of contract, including written, oral or implied and, including, but not limited to the Contract, breach of any covenant, promise or representation pertaining to Takata's employment, whether expressed or implied, and all other claims arising in contract, tort or equity or under any other statute, federal, state or local up to the date of execution of this Agreement.

D. **CIVIL CODE SECTION 1542 WAIVER.** Takata, on behalf of himself and his heirs, agents, representatives, successors, and assigns, hereby waives any and all rights that he may have pursuant to California Civil Code section 1542, which reads as follows:

**A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.**

1. Takata hereby expressly waives the provisions of California Civil Code section 1542 and further expressly waives any right to invoke said provisions now or at any time in the future.
2. Takata recognizes and acknowledges that factors which have induced him to enter into this Agreement may turn out to be incorrect or to be different from what he had previously anticipated, and he hereby expressly assumes any and all of the risks thereof and further expressly assumes the risks of waiving the rights provided by California Civil Code section 1542.

E. Takata represents that, other than the claims described herein, he has not filed any lawsuits, complaints, appeals, claims, applications or charges against City or any related persons or corporations or against any of its or their past or present officers, directors, governing bodies, employees, agents, predecessors, attorneys, divisions, affiliates, representatives, successors in interest and assigns and/or all persons acting by, through, under, or in concert with any of them,

with any state or federal court, or local, state or federal agency, or administrative or quasi-administrative tribunal or person, based on any events occurring on or prior to the date of execution of this Agreement.

F. Takata specifically agrees that he shall not in the future file, instigate or encourage the filing of any lawsuits, complaints, appeals, charges or any other proceedings in any state or federal court or before any local, state or federal agency, administrative tribunal, quasi-administrative tribunal or person, claiming that City has violated any local, state or federal laws, statutes, ordinances or regulations or claiming that City has engaged in any tortious, other state, or other federal based misconduct of any kind, based upon any events occurring on or prior to the date of execution of this Agreement unless required by subpoena or court order. Further, Takata agrees that immediately upon executing this Agreement, he will withdraw in writing and cause to be dismissed with prejudice in its entirety any and all complaints, charges or claims against City regardless of whether they are specifically referred to herein.

G. Nothing herein shall be interpreted to in any way prohibit or prevent Takata from participating in any claims or administrative actions brought by a state or federal agency. However, Takata acknowledges and understands that he shall not be entitled to recover any additional compensation, settlement funds, damages or money as a result of such participation.

H. **SPECIFIC ACKNOWLEDGMENT OF WAIVER OF CLAIMS UNDER ADEA AND OWBPA.** The Age Discrimination in Employment Act of 1967 ("ADEA"; 29 U.S.C. §§ 621-634) makes it illegal for an employer to discharge any individual or otherwise discriminate with respect to the nature and privileges of an individual's employment on the basis that the individual is age forty (40) or older. The Older Workers Benefit Protection Act ("OWBPA"; 29 U.S.C. §§ 626, et seq.) augments the ADEA and prohibits the waiver of any right or claim under the ADEA unless the waiver is knowing and voluntary. By entering into this Agreement, Takata acknowledges that, in exchange for consideration stated herein, he knowingly and voluntarily waives and releases any rights that he may have under the ADEA and/or OWBPA. Takata further acknowledges that he has been advised and understands, pursuant to the provisions of the ADEA and OWBPA that:

1. This waiver/release is written in a manner understood by Takata.
2. Takata is aware of, and has been advised by a representative or legal counsel of his own choosing, of his rights under the ADEA and OWBPA and the legal significance of his waiver of any possible claims he currently may have under the ADEA, OWBPA, or similar age discrimination laws.
3. Takata is entitled to a reasonable time of at least twenty-one (21) days within which to review and consider this Agreement, and the waiver and release of any rights he may have under the ADEA, the OWBPA, or similar age discrimination laws, but he may, in the exercise of his own discretion, sign or reject this Agreement at any time before the expiration of the twenty-one (21) day period, in which case Takata expressly waives this twenty-one (21) day review period.

4. The waivers and releases set forth in this Agreement shall not apply to any rights or claims that may arise after the effective date of this Agreement. The effective date of this Agreement is seven (7) calendar days after Takata signs this Agreement. Takata must sign this Agreement no later than April 24, 2015, making the effective date of this Agreement seven (7) calendar days after he signs it and no later than May 1, 2015.
5. Takata has had an opportunity to discuss this waiver and release with, and to be advised with respect thereto, by an attorney of his choice, and that he does not need any additional time within which to review and consider this Agreement.
6. Takata has seven (7) calendar days following his execution of this Agreement to revoke it. If Takata desires to revoke the Agreement, he must give express and actual written notice of revocation to the City within seven (7) calendar days after he executes this Agreement. Such notice of revocation shall be effective only if and when received in writing by the City Manager's Office before the close of business on the seventh (7th) calendar day after Takata signs this Agreement.

TAKATA ACKNOWLEDGES BY HIS SIGNATURE THAT HE FULLY UNDERSTANDS HIS RIGHT TO DISCUSS THIS WAIVER WITH LEGAL COUNSEL, THAT HE HAS CAREFULLY READ AND FULLY UNDERSTANDS THE WAIVER, AND THAT HE IS VOLUNTARILY AGREEING TO WAIVE ANY CLAIMS THAT HE HAS OR MAY HAVE UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE OLDER WORKERS BENEFIT PROTECTION ACT, AND ANY OTHER LAWS PROHIBITING AGE DISCRIMINATION IN EMPLOYMENT ARISING FROM OR RELATED OR ATTRIBUTABLE TO THE PARTIES' ALLEGATIONS OR CLAIMS.

I. The Parties agree that upon execution of this Agreement and following the seven (7) calendar day revocation period, the City and Takata shall perform the following acts:

1. Takata and/or his counsel, Goldberg & Gage, shall sign and forward to the City's attorneys, Liebert Cassidy Whitmore, a request for dismissal of the Second Lawsuit with prejudice. Liebert Cassidy Whitmore shall not file the dismissal until payment of the Settlement Proceeds, described in Section 1-2, below. The payment of settlement proceeds is contingent on Liebert Cassidy Whitmore's receipt of the request for dismissal with prejudice.
2. Takata shall be entitled to a severance payment and a settlement payment (collectively referred to herein as the "Settlement Proceeds") to be paid as directed below:
  - a. The Settlement Proceeds shall be issued in two separate checks as follows:

- i. Two hundred seventy-five thousand, nine hundred fifty-one dollars and no cents (\$275,951.00) from the City made payable to Takata and Goldberg & Gage, as severance (hereinafter "Severance Payment") pursuant to Takata's Contract, to be reported on a Form W-2 and subject to normal and appropriate federal and state withholding taxes pursuant to law.

If legally and practicably permissible, the City will deduct \$106,000 from the Severance Payment to return/pay to deferred compensation that Takata withdrew. If the City cannot pay \$106,000 to deferred compensation, it will pay the maximum allowed by law.

- ii. One hundred fifty nine thousand dollars and no cents (\$159,000.00) from the Employment Risk Management Authority (hereinafter "ERMA") made payable to Goldberg & Gage (hereinafter "ERMA Payment"), to be reported on Form 1099s issued to both Takata and the law firm Goldberg & Gage. Form W-9s shall be provided by Takata and the law firm Goldberg & Gage prior to delivery of the funds.

- iii. \$144,000.00 of the Settlement Proceeds (i.e., the total of the Severance Payment and ERMA Payment, above) shall be paid to Goldberg & Gage as attorneys' fees. The \$144,000.00 in attorneys' fees is already included in the total Settlement Proceeds, above, not in addition to it.

- b. The payment of the Settlement Proceeds shall be made by May 31, 2015, provided that: both the City and ERMA have approved the Agreement; Takata or Goldberg & Gage has tendered the signed request for dismissal; and both Takata and Goldberg & Gage have provided completed Form W-9s.

- c. No Party, including the attorneys for any Party, shall make any representations or warranty regarding whether the ERMA Payment is subject to taxation. The City does not bear any responsibility for tax liability that may arise as a result of the ERMA Payment. Takata agrees to assume any responsibility for payment of taxes for any of the ERMA Payment. Takata agrees to indemnify and hold the City, its agents, attorneys and assigns, harmless from any and all tax liability which may become due as a result of the ERMA Payment under this Agreement.

3. The City/Councilmember Peterson/ERMA will forgive the cost bills in the Original Lawsuit.

4. The City/ERMA will pay to JAMS Takata's half of the costs for the April 3, 2015, mediation (\$3,775.00).
5. The City will defend and/or indemnify Takata for any claims arising from his employment to the extent required under the Government Code.
6. This Agreement and all promises and releases contained herein are expressly conditioned upon the approval of the Agreement by the City Council and the ERMA Board.

J. Takata hereby expressly waives any and all claims now and forever that he has or may have for reinstatement to his position with the City. Takata further agrees that he will not seek or maintain employment, independent contractor status, or any other business relationship with the City in any position or capacity whatsoever and that the City is entitled to reject, with or without cause, any application for employment or agreement for independent contractor status or any other business relationship with the City made by Takata. Takata further agrees that any rejection of any such application or offer made is not for a discriminatory or any other illegal purpose. Takata further agrees that this Agreement constitutes a legitimate, non-discriminatory, non-retaliatory business reason for any and all refusals by the City to employ him at the City in any capacity.

### III. GENERAL PROVISIONS

A. Aside from what is specifically provided for in this Agreement, each Party shall bear its/his own costs, expenses and attorneys'/representatives' fees incurred in connection with the proceedings and/or events resulting in and/or preceding this Agreement, or in connection with any other claims made or investigated by either Party against the other in any forum (civil, criminal, administrative or quasi-administrative), and each of the Parties hereto expressly waives any claim for recovery of any such costs, expenses or attorneys'/representatives' fees from the other Party. Attorneys'/representatives' for all Parties to this Agreement do likewise expressly waive any claim for recovery of costs, expenses and/or attorney's/representatives' fees from the opposing Party(ies).

B. Takata represents that he has not heretofore assigned or transferred, or purported to assign or transfer, to any person or entity, any claim or any portion thereof or interest therein against the City.

C. This Agreement is made and entered into in the State of California, and shall be governed, interpreted, and enforced under the laws of the State of California. The Parties agree that jurisdiction and/or venue of any action involving the validity, interpretation, or enforcement of this Agreement or any of its terms, provisions, or obligations, or claiming breach thereof, shall exist exclusively in a court or government agency located within the County of Riverside, State of California. The Parties further agree that this Agreement may be used as evidence in any subsequent proceeding in which any of the Parties allege a breach of this Agreement or seeks to enforce its terms, conditions, provisions, or obligations.

D. Each Party hereto agrees to do all things and execute and deliver all instruments and documents necessary to fulfill and effect the provisions of this Agreement and to protect the respective rights of the Parties to this Agreement. It is further understood and agreed that if, at any time, a breach of any term of this Agreement is asserted by any Party hereto, that Party shall have the right to seek specific performance of that term and/or any other necessary and proper relief, including, but not limited to, damages, initially by way of mediation with Ret. Judge Dickran Tevrizian and, if necessary, from any court of competent jurisdiction in Riverside County.

E. No waiver by any Party of any breach of any term or provision of this Agreement shall be construed to be, nor be, a waiver of any preceding, concurrent or succeeding breach of the same, or any other term or provision hereof. No waiver shall be binding unless in writing and signed by the Party to be charged or held bound.

F. Each Party hereto represents and agrees that he or it has carefully read and fully understands all of the provisions of this Agreement, and that he or it is voluntarily, without any duress or undue influence on the part of or on behalf of any Party, entering into this Agreement.

G. Takata affirms that, prior to execution of this Agreement, he has consulted with his legal counsel/representative concerning the terms and conditions set forth herein, and that he understands the advice provided to him.

H. City affirms that, prior to the execution of this Agreement, it has consulted with its legal counsel concerning the terms and conditions set forth herein, and that it understands the counsel provided to it.

I. This Agreement contains all of the terms and conditions agreed upon by the Parties hereto regarding the subject matter of this Agreement. Any prior agreements, promises, negotiations, or representations, either oral or written, relating to the subject matter of this Agreement, not expressly set forth in this Agreement, are of no force or effect.

J. This Agreement has been jointly negotiated and drafted by counsel for the Parties. The language in this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any of the Parties.

K. In the event that any one or more provisions of this Agreement shall be declared to be illegal, invalid, unenforceable, and/or void by a court of competent jurisdiction, such provision or portion of this Agreement shall be deemed to be severed and deleted from this Agreement but this Agreement shall in all other respects remain unmodified and continue in force and effect.

L. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A photocopy or facsimile transmission of the Agreement, including signatures, shall be deemed to constitute evidence of the Agreement having been executed.

[SETTLEMENT AGREEMENT CONCLUDES ON NEXT PAGE]

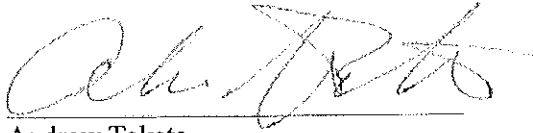
M. This Agreement supersedes the April 3, 2015, Stipulation for Settlement.

**PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE INCLUDES A RELEASE BY TAKATA OF ALL KNOWN AND UNKNOWN CLAIMS.**

IN WITNESS WHEREOF, the Parties hereto have executed the Settlement Agreement and General Release.

Dated: 4-19-2015

By:

  
Andrew Takata

CITY OF BANNING

Dated: \_\_\_\_\_

By:

\_\_\_\_\_  
Jim Smith  
Interim City Manager

APPROVED AS TO FORM:


Dated: \_\_\_\_\_

By:

\_\_\_\_\_  
Melanie M. Poturica  
Liebert Cassidy Whitmore  
Attorneys for the City of Banning

Dated: 4/20/15

By:

  
~~Bradley Gage~~ <sup>Ms. Patricia Smith</sup>  
Goldberg & Gage  
Attorneys for Takata



**CITY COUNCIL AGENDA  
CONSENT CALENDAR**

**DATE:** May 12, 2015

**TO:** City Council

**FROM:** Colin Tanner, Deputy City Attorney

**SUBJECT:** Approve the Settlement Agreement And General Release Between the City  
and current Public Works Director Duane Burk

**RECOMMENDATION:** Approve and authorize Interim City Manager Jim Smith to execute the attached Settlement Agreement And General Release between the City and current Public Works Director Duane Burk.

**JUSTIFICATION:** The City participates in pooled risk sharing as a member of the Employment Risk Management Authority ("ERMA"). Pursuant to its current Memorandum of Coverage, ERMA has authority to defend and settle claims and has assigned litigation defense counsel from the law firm of Liebert Cassidy Whitmore to defend all claims asserted by current Public Works Director Duane Burk. The parties participated in mediation on April 3, 2015, which resulted in a tentative short form settlement between the parties subject to a long form agreement and approval by both ERMA and the City. The attached Settlement Agreement And General Release has already been approved by ERMA. ERMA's representatives, along with its assigned defense counsel, recommend approval of same by the City.

The Settlement Agreement And General Release has been executed by Mr. Burk on April 30, 2015 and he has until May 7, 2015 to revoke his agreement. The Settlement Agreement And General Release separates Mr. Burk from his employment and obligates the City to make the severance payment provided for in Mr. Burk's original Employment Agreement For the Position of Public Works Director dated July 28, 2009, which equates to the sum of \$167,024.83. This payment must be made by May 31, 2015. In addition, Mr. Burk will receive his accrued leave benefits as required by law in an amount of \$109,814.01 plus any accrued leave from April 7, 2014 through his final day of employment, May 16, 2015.

Furthermore, Mr. Burk shall receive \$154,000.00 from ERMA, which payment is also due May 31, 2015. Lastly, ERMA will cover the entire cost of the mediation that the parties participated in and forgive the cost bills resulting from the dismissal of Mr. Burk's original lawsuit against the City entitled *Takata et.al. v. City of Banning, et.al.*, Riverside Superior Court Case No. RIC 1408547.

In exchange for the above payments and agreements, Mr. Burk shall resign his employment and forever release and waive any claims related to his employment with the City that he has against the City and its employees and related entities or parties.

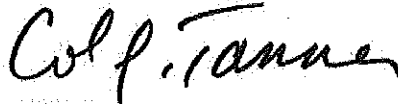
**BACKGROUND:** Mr. Burk is a long time employee of the City. He began his employment as the City's Public Works Director pursuant to an at-will written Employment Agreement entered into and effective as of July 28, 2009, with no set term expiration. If Mr. Burk subsequently resigned his employment or was terminated by the City for cause, then he would receive no severance payment under his employment contract. If he was terminated by the City for no cause, then he would receive a 12 month base salary severance payment.

Mr. Burk made a government claims act Claim for Money or Damages against the City and filed a complaint with the Department of Fair Employment and Housing ("DFEH") against the City both on or about July 23, 2014 alleging unlawful discrimination, harassment and retaliation. He would subsequently file a lawsuit on or about September 3, 2014 against the City along with former City employees entitled *Takata et.al. v. City of Banning, et.al.*, Riverside Superior Court Case No. RIC 1408547. The City ultimately obtained a dismissal of that lawsuit through the work of ERMA's assigned defense counsel, the law firm of Liebert Cassidy Whitmore. The cost of the defense of the lawsuit to both the City and to ERMA was not insubstantial.

On February 24, 2015, Mr. Burk was placed on paid administrative leave pending investigation into allegations of misconduct. At the suggestion of the ERMA assigned defense counsel and with approval from ERMA, the parties participated in mediation with JAMS in Los Angeles on April 3, 2015. Mr. Burk and the City elected to terminate their relationship. The mediation resulted in a short form settlement agreement subject to execution of a long form settlement agreement and to approval of ERMA and the Banning City Council. ERMA approved the settlement at its meeting on or about April 20, 2015. Mr. Burk executed the attached Settlement Agreement And General Release on April 30, 2015 and has until May 7<sup>th</sup> to revoke it. Presuming that this item remains on calendar on May 12, 2015, then the revocation period has passed without Mr. Burk's revocation and all that remains is City Council approval.

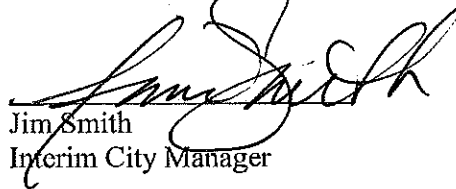
**FISCAL DATA:** The City severance settlement payment obligation is \$167,024.83 with another \$109,814.01 plus any accrued leave from April 7, 2014 through his final day of employment, May 16, 2015, owed upon his separation for his accrued benefits. The payments will be charged according to the fund splits as defined for the position to the fiscal year 2014-2015.

**RECOMMENDED BY:**



Colin Tanner  
Deputy City Attorney

**APPROVED BY:**



Jim Smith  
Interim City Manager

Attachment: Settlement Agreement And General Release dated April 30, 2015

## SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement") is entered into between the City of Banning, a municipal corporation (hereinafter the "City"), and Duane Burk (hereinafter "Burk") (hereinafter the City and Burk are also collectively referred to as the "Parties" or "Party") for the following purposes and with reference to the following facts.

### **I. RECITALS**

A. WHEREAS, Burk is employed by the City of Banning as the City's Public Works Director pursuant to an Employment Agreement, dated July 28, 2009, and a First Amendment to the Employment Agreement, dated May 21, 2013 (the July 28, 2009, Employment Agreement and May 21, 2013, First Amendment to the Employment Agreement are hereinafter collectively referred to as the "Contract");

B. WHEREAS, on or about July 23, 2014, Burk filed a government claims act Claim for Money or Damages against the City (hereinafter "Gov't Claim") which the City rejected on or about August 26, 2014;

C. WHEREAS, on or about July 23, 2014, Burk filed a complaint with the Department of Fair Employment and Housing ("DFEH") against the City, alleging that he was harassed and discriminated and retaliated against (hereinafter the "DFEH Complaint") and, on or about July 23, 2014, the DFEH issued Burk an immediate Right to Sue notice;

D. WHEREAS, on or about September 3, 2014, Burk, along with Andrew Takata and Leonard Purvis, filed a lawsuit against the City and City Councilmember Don Peterson in Riverside County Superior Court, Case No. RIC 1408547 (hereinafter "Lawsuit"), alleging causes of action for: (1) defamation; (2) FEHA retaliation; (3) whistleblower retaliation; (4) discrimination; (6) failure to take corrective action; and (7) breach of contract;

E. WHEREAS, on January 29, 2015, the Court entered a judgment of dismissal in the City's favor in the Lawsuit, and Burk, Takata and Purvis thereafter dismissed the remainder of the Lawsuit;

F. WHEREAS, the City denies any and all of the claims and allegations asserted by Burk against it;

G. WHEREAS, Burk was placed on paid administrative leave on February 24, 2015, pending investigation into allegations of misconduct;

H. WHEREAS, Burk's Contract permits the City Manager to terminate Burk's employment with or without cause at any time, and, based upon the City's investigation, the City Manager believes there exists cause to terminate Burk's employment;

I. WHEREAS, Burk denies that there exists any cause to terminate his employment;

J. WHEREAS, on April 3, 2015, the Parties engaged in a mediation regarding the Parties' claims against each other and the Parties entered into and agreed to a Stipulation for Settlement dated April 3, 2015;

K. WHEREAS, the purpose of this Agreement is to settle and compromise all disputes and controversies existing between the City on the one hand, and Burk on the other, including, but not limited to, the Contract, the Gov't Claim, the DFEH Complaint, the Lawsuit, and any other "claims" by Burk, including but not limited to all claims arising out of, or in any way related to Burk's employment with the City, and/or all claims arising from any other facts or causes existing prior to the execution date of this Agreement, whether known or unknown, without limitation, and, those described in more detail hereafter.

NOW THEREFORE, and in consideration for the promises contained herein, the Parties agree as follows:

## II. DISPOSITION OF CLAIMS

A. This Agreement shall not in any way be construed as an admission by the City or Burk of any unlawful or wrongful acts or other liability whatsoever against each other or against any other person or entity. The City and Burk specifically disclaim any liability to, or wrongful acts against each other, or against any other person or entity, on the part of themselves, any related person or any related predecessor corporation or its or their agents, representatives or successors in interest and assigns.

B. Burk hereby releases on behalf of himself and his heirs, representatives, successors, and assigns, and hereby irrevocably and unconditionally releases and discharges the City and any of its related persons, corporations, past or present officers, directors, governing bodies, elected officials, employees, agents, predecessors, attorneys, divisions, affiliates, representatives, successors in interest and assigns and/or all persons acting by, through, under, or in concert with any of the City, and all other persons or entities that were or could have been named as defendants in the claims, including, but not limited to, Councilmember Don Peterson, (hereinafter "City Releasees"), absolutely and forever from any and all claims, charges, complaints, lawsuits, liabilities, claims for relief, obligations, promises, agreements, contracts, interests, controversies, injuries, damages, actions, causes of actions, suits, rights, demands, costs, losses, debts, liens, judgments, indebtedness, and expenses (including attorneys' fees and costs actually incurred), and all other claims and rights of action of all kinds and descriptions, whether KNOWN OR UNKNOWN, suspected or unsuspected, actual or potential, which Burk now has, owns or holds, or claims to have, own or hold against the City or City Releasees, at common law or under any statute, rule, regulations, order or law, whether federal, state, or local, or on any grounds whatsoever, with respect to any act, omission, event, matter, claim, damage, loss, or injury arising out of the employment of and/or the termination of such employment between Burk and the City, and/or with respect to any other claims, matters, or events arising prior to the execution of this Agreement by the Parties.

C. Burk understands and agrees that he is waiving any rights he has, may have had, or may have, to pursue any and all remedies available to him under any employment-related cause of action against the City and City Releasees, including, without limitation, any claims for

discrimination, harassment and/or retaliation, claims under the California Fair Employment and Housing Act (California Government Code section 12900, et seq.), the California Family Rights Act (California Government Code section 12945.2), the Unruh and George Civil Rights Acts (California Civil Code section 51, et seq.), all provisions of the California Labor Code and any wage orders or similar directives or authorities issued by any federal or state authority having enforcement powers, the Constitution of the United States, the Constitution of the State of California, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.), the Age Discrimination in Employment Act (29 U.S.C. § 621, et seq.), the Equal Pay Act (29 U.S.C. § 206(d)), the Fair Labor Standards Act (29 U.S.C. § 201, et seq.), the Family and Medical Leave Act (29 U.S.C. § 2601, et seq.), the Employment Retirement Income Security Act of 1974 (29 U.S.C. § 1001, et seq.), Sections 1981-88 of Title 42 of the United States Code (42 U.S.C. § 1981, et seq.), the American with Disabilities Act (42 U.S.C. § 12101, et seq.), claims of retaliation or whistle-blowing (including but not limited to California Labor Code section 1102.5, et seq. and Government Code section 12653), claims for breach of any type of contract, including written, oral or implied and, including, but not limited to the Contract, breach of any covenant, promise or representation pertaining to Burk's employment, whether expressed or implied, and all other claims arising in contract, tort or equity or under any other statute, federal, state or local up to the date of execution of this Agreement.

D. **CIVIL CODE SECTION 1542 WAIVER.** Burk, on behalf of himself and his heirs, agents, representatives, successors, and assigns, hereby waives any and all rights that he may have pursuant to California Civil Code section 1542, which reads as follows:

**A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.**

1. Burk hereby expressly waives the provisions of California Civil Code section 1542 and further expressly waives any right to invoke said provisions now or at any time in the future.
2. Burk recognizes and acknowledges that factors which have induced him to enter into this Agreement may turn out to be incorrect or to be different from what he had previously anticipated, and he hereby expressly assumes any and all of the risks thereof and further expressly assumes the risks of waiving the rights provided by California Civil Code section 1542.

E. Burk represents that, other than the claims described herein, he has not filed any lawsuits, complaints, appeals, claims, applications or charges against City or any related persons or corporations or against any of its or their past or present officers, directors, governing bodies, employees, agents, predecessors, attorneys, divisions, affiliates, representatives, successors in interest and assigns and/or all persons acting by, through, under, or in concert with any of them, with any state or federal court, or local, state or federal agency, or administrative or quasi-administrative tribunal or person, based on any events occurring on or prior to the date of execution of this Agreement.

F. Burk specifically agrees that he shall not in the future file, instigate or encourage the filing of any lawsuits, complaints, appeals, charges or any other proceedings in any state or federal court or before any local, state or federal agency, administrative tribunal, quasi-administrative tribunal or person, claiming that City has violated any local, state or federal laws, statutes, ordinances or regulations or claiming that City has engaged in any tortious, other state, or other federal based misconduct of any kind, based upon any events occurring on or prior to the date of execution of this Agreement unless required by subpoena or court order. Further, Burk agrees that immediately upon executing this Agreement, he will withdraw in writing and cause to be dismissed with prejudice in its entirety any and all complaints, charges or claims against City regardless of whether they are specifically referred to herein.

G. Nothing herein shall be interpreted to in any way prohibit or prevent Burk from participating in any claims or administrative actions brought by a state or federal agency. However, Burk acknowledges and understands that he shall not be entitled to recover any additional compensation, settlement funds, damages or money as a result of such participation.

H. **SPECIFIC ACKNOWLEDGMENT OF WAIVER OF CLAIMS UNDER ADEA AND OWBPA.** The Age Discrimination in Employment Act of 1967 ("ADEA"; 29 U.S.C. §§ 621-634) makes it illegal for an employer to discharge any individual or otherwise discriminate with respect to the nature and privileges of an individual's employment on the basis that the individual is age forty (40) or older. The Older Workers Benefit Protection Act ("OWBPA"; 29 U.S.C. §§ 626, et seq.) augments the ADEA and prohibits the waiver of any right or claim under the ADEA unless the waiver is knowing and voluntary. By entering into this Agreement, Burk acknowledges that, in exchange for consideration stated herein, he knowingly and voluntarily waives and releases any rights that he may have under the ADEA and/or OWBPA. Burk further acknowledges that he has been advised and understands, pursuant to the provisions of the ADEA and OWBPA that:

1. This waiver/release is written in a manner understood by Burk.
2. Burk is aware of, and has been advised by a representative or legal counsel of his own choosing, of his rights under the ADEA and OWBPA and the legal significance of his waiver of any possible claims he currently may have under the ADEA, OWBPA, or similar age discrimination laws.
3. Burk is entitled to a reasonable time of at least twenty-one (21) days within which to review and consider this Agreement, and the waiver and release of any rights he may have under the ADEA, the OWBPA, or similar age discrimination laws, but he may, in the exercise of his own discretion, sign or reject this Agreement at any time before the expiration of the twenty-one (21) day period, in which case Burk expressly waives this twenty-one (21) day review period.
4. The waivers and releases set forth in this Agreement shall not apply to any rights or claims that may arise after the effective date of this Agreement. The effective date of this Agreement is seven (7) calendar days after Burk signs this Agreement. Burk must sign this Agreement no later than April

24, 2015, making the effective date of this Agreement seven (7) calendar days after he signs it and no later than May 1, 2015.

5. Burk has had an opportunity to discuss this waiver and release with, and to be advised with respect thereto, by an attorney of his choice, and that he does not need any additional time within which to review and consider this Agreement.
6. Burk has seven (7) calendar days following his execution of this Agreement to revoke it. If Burk desires to revoke the Agreement, he must give express and actual written notice of revocation to the City within seven (7) calendar days after he executes this Agreement. Such notice of revocation shall be effective only if and when received in writing by the City Manager's Office before the close of business on the seventh (7th) calendar day after Burk signs this Agreement.

BURK ACKNOWLEDGES BY HIS SIGNATURE THAT HE FULLY UNDERSTANDS HIS RIGHT TO DISCUSS THIS WAIVER WITH LEGAL COUNSEL, THAT HE HAS CAREFULLY READ AND FULLY UNDERSTANDS THE WAIVER, AND THAT HE IS VOLUNTARILY AGREEING TO WAIVE ANY CLAIMS THAT HE HAS OR MAY HAVE UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE OLDER WORKERS BENEFIT PROTECTION ACT, AND ANY OTHER LAWS PROHIBITING AGE DISCRIMINATION IN EMPLOYMENT ARISING FROM OR RELATED OR ATTRIBUTABLE TO THE PARTIES' ALLEGATIONS OR CLAIMS.

I. The Parties agree that upon execution of this Agreement and following the seven (7) calendar day revocation period, the City and Burk shall perform the following acts:

1. Burk shall be entitled to his severance payment, cash out of his accrued leave balances earned up to the date of his resignation, and a settlement payment (collectively referred to herein as the "Settlement Proceeds") to be paid as directed below:
  - a. The Settlement Proceeds shall be issued in two or more separate checks as follows:
    - i. One hundred sixty-seven thousand dollars and no cents (\$167,024.83) from the City made payable to Burk and Burk's counsel, Goldberg & Gage, as severance (hereinafter "Severance Payment") pursuant to Burk's Contract, to be reported on a Form W-2 and subject to normal and appropriate federal and state withholding taxes pursuant to law.
    - ii. One hundred nine thousand dollars and no cents (\$109,814.01), plus the value of any additional leave benefits earned from April 7, 2015, up to the effective date

of Burk's resignation (May 16, 2015), from the City made payable to Burk and Goldberg & Gage, representing the cash out of Burk's accrued leave balances ("Leave Payment"), to be reported on a Form W-2 and subject to normal and appropriate federal and state withholding taxes pursuant to law.

- iii. One hundred fifty four thousand dollars and no cents (\$154,000.00) from the Employment Risk Management Authority (hereinafter "ERMA") made payable to Goldberg & Gage as attorneys' fees (hereinafter "ERMA Payment"), to be reported on Form 1099s issued to both Burk and the law firm Goldberg & Gage. Form W-9s shall be provided by Burk and the law firm Goldberg & Gage prior to delivery of the funds.
- iv. Burk shall pay \$7,000.00 of the net amount he receives from the City to his counsel, Goldberg & Gage, as additional attorneys' fees.
- b. The payment of the Settlement Proceeds shall be made by May 31, 2015, provided that: both the City and ERMA have approved the Agreement; Burk has tendered his resignation; and both Burk and Goldberg & Gage have provided completed Form W-9s.
- c. No Party, including the attorneys for any Party, shall make any representations or warranty regarding whether the ERMA Payment is subject to taxation. The City does not bear any responsibility for tax liability that may arise as a result of the ERMA Payment. Burk agrees to assume any responsibility for payment of taxes for any of the ERMA Payment. Burk agrees to indemnify and hold the City, its agents, attorneys and assigns, harmless from any and all tax liability which may become due as a result of the ERMA Payment under this Agreement.
- 2. Burk shall resign his employment with the City, effective May 16, 2015. Burk shall remain on paid administrative leave until the effective date of his resignation. Prior to the payment of any of the Settlement Proceeds set forth in Section I-1, above, Burk shall tender an irrevocable letter of resignation, which shall be deemed accepted as of May 16, 2015.
- 3. Burk shall return all City property, including, but not limited to, his City identification card.
- 4. No investigations into Burk's conduct shall be placed in his personnel file and Burk's personnel file shall remain as-is with the exception of his resignation.



5. The City/Councilmember Peterson/ERMA will forgive the cost bills in the Lawsuit.
6. To the extent Burk paid any mediation costs to JAMS for the April 3, 2015, mediation, ERMA will reimburse those costs.
7. Any reference inquiries shall be directed to, and responded to, by City Manager Jim Smith and/or the City Attorneys' office.
8. The City will defend and/or indemnify Burk for any claims arising from his employment to the extent required under the Government Code.
9. This Agreement and all promises and releases contained herein are expressly conditioned upon the approval of the Agreement by the City Council and the ERMA Board.

J. Burk hereby expressly waives any and all claims now and forever that he has or may have for reinstatement to his position with the City. Burk further agrees that he will not seek or maintain employment, independent contractor status, or any other business relationship with the City in any position or capacity whatsoever and that the City is entitled to reject, with or without cause, any application for employment or agreement for independent contractor status or any other business relationship with the City made by Burk. Burk further agrees that any rejection of any such application or offer made is not for a discriminatory or any other illegal purpose. Burk further agrees that this Agreement constitutes a legitimate, non-discriminatory, non-retaliatory business reason for any and all refusals by the City to employ him at the City in any capacity. However, nothing in this agreement precludes Burk from obtaining employment, independent contractor status, or any other business relationship, with an agency, contractor or any entity that has a relationship or does business with the City.

### III. GENERAL PROVISIONS

A. Aside from what is specifically provided for in this Agreement, each Party shall bear its/his own costs, expenses and attorneys'/representatives' fees incurred in connection with the proceedings and/or events resulting in and/or preceding this Agreement, or in connection with any other claims made or investigated by either Party against the other in any forum (civil, criminal, administrative or quasi-administrative), and each of the Parties hereto expressly waives any claim for recovery of any such costs, expenses or attorneys'/representatives' fees from the other Party. Attorneys/representatives for all Parties to this Agreement do likewise expressly waive any claim for recovery of costs, expenses and/or attorney's/representatives' fees from the opposing Party(ies).

B. Burk represents that he has not heretofore assigned or transferred, or purported to assign or transfer, to any person or entity, any claim or any portion thereof or interest therein against the City.

C. This Agreement is made and entered into in the State of California, and shall be governed, interpreted, and enforced under the laws of the State of California. The Parties agree that jurisdiction and/or venue of any action involving the validity, interpretation, or enforcement of this Agreement or any of its terms, provisions, or obligations, or claiming breach thereof, shall exist exclusively in a court or government agency located within the County of Riverside, State of California. The Parties further agree that this Agreement may be used as evidence in any subsequent proceeding in which any of the Parties allege a breach of this Agreement or seeks to enforce its terms, conditions, provisions, or obligations.

D. Each Party hereto agrees to do all things and execute and deliver all instruments and documents necessary to fulfill and effect the provisions of this Agreement and to protect the respective rights of the Parties to this Agreement. It is further understood and agreed that if, at any time, a breach of any term of this Agreement is asserted by any Party hereto, that Party shall have the right to seek specific performance of that term and/or any other necessary and proper relief, including, but not limited to, damages, initially by way of mediation with Ret. Judge Dickran Tevrizian and, if necessary, from any court of competent jurisdiction in Riverside County.

E. No waiver by any Party of any breach of any term or provision of this Agreement shall be construed to be, nor be, a waiver of any preceding, concurrent or succeeding breach of the same, or any other term or provision hereof. No waiver shall be binding unless in writing and signed by the Party to be charged or held bound.

F. Each Party hereto represents and agrees that he or it has carefully read and fully understands all of the provisions of this Agreement, and that he or it is voluntarily, without any duress or undue influence on the part of or on behalf of any Party, entering into this Agreement.

G. Burk affirms that, prior to execution of this Agreement, he has consulted with his legal counsel/representative concerning the terms and conditions set forth herein, and that he understands the advice provided to him.

H. City affirms that, prior to the execution of this Agreement, it has consulted with its legal counsel concerning the terms and conditions set forth herein, and that it understands the counsel provided to it.

I. This Agreement contains all of the terms and conditions agreed upon by the Parties hereto regarding the subject matter of this Agreement. Any prior agreements, promises, negotiations, or representations, either oral or written, relating to the subject matter of this Agreement, not expressly set forth in this Agreement, are of no force or effect.

J. This Agreement has been jointly negotiated and drafted by counsel for the Parties. The language in this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any of the Parties.

K. In the event that any one or more provisions of this Agreement shall be declared to be illegal, invalid, unenforceable, and/or void by a court of competent jurisdiction, such provision or portion of this Agreement shall be deemed to be severed and deleted from this

Agreement but this Agreement shall in all other respects remain unmodified and continue in force and effect.

L. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A photocopy or facsimile transmission of the Agreement, including signatures, shall be deemed to constitute evidence of the Agreement having been executed.

M. This Agreement supersedes the April 3, 2015, Stipulation for Settlement.

**PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE INCLUDES A RELEASE BY BURK OF ALL KNOWN AND UNKNOWN CLAIMS.**

IN WITNESS WHEREOF, the Parties hereto have executed the Settlement Agreement and General Release.

Dated: 4/10/2015

By: [Signature]  
Duane Burk

CITY OF BANNING

Dated:

By: \_\_\_\_\_  
Jim Smith  
Interim City Manager

APPROVED AS TO FORM:

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Melanie M. Poturica  
Liebert Cassidy Whitmore  
Attorneys for the City of Banning

Dated: 5/1/15

By: [Signature]  
~~Bradley Gage~~ Milad Gadr  
Goldberg & Gage  
Attorneys for Burk

## **CITY COUNCIL/BANNING UTILITY AUTHORITY AGENDA**

**DATE:** May 12, 2015

**TO:** Banning Utility Authority

**FROM:** Art Vela, Acting Director of Public Works

**SUBJECT:** Resolution No. 2015-06 UA, "Approving the Construction of Modifications to Well No. 25 and Associated Cost Share"

**RECOMMENDATION:** Adopt Resolution No. 2015-06 UA, approving the construction of modifications to Well No. 25 and associated cost share in the amount of \$33,233.00.

**JUSTIFICATION:** The joint agreement between Beaumont-Cherry Valley Water District ("BCVWD") and the City of Banning ("City") obligates the City to share operation, maintenance, repair and replacement costs of Well Nos. 25 and 26.

**BACKGROUND:** BCVWD and the City serve the largest number of domestic water users in the San Geronio Pass area and collectively rely in substantial part on the Beaumont Basin as a source for water. The agencies desire to promote conjunctive use of the Basin and to jointly address the long-term reliability of the Basin as a source of portable water, including the use of water recycling and the treatment and use of imported water.

As a result, in December of 2003, BCVWD and the City entered into an agreement for the construction of production Well Nos. 25 and 26. The agencies agreed to equally share the cost of constructing the referenced wells. These wells are jointly operated and owned with BCVWD, who is the lead agency with primary responsibility for the operation and maintenance of the joint facilities.

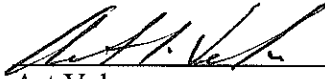
As part of its maintenance responsibility, BCVWD recently performed a round of chromium-6 monitoring of all of its groundwater sources. This monitoring was conducted in response to the recent adoption of the Maximum Contaminant Level ("MCL") for chromium-6 by the California Department of Public Health which became effective July 1, 2014. Consequently, it was discovered that Well Nos. 25 and 26 have tested over the MCL.

On January 13, 2015 City Council approved Resolution No. 2015-02UA, "Approving the Dynamic Survey of Well No. 25 and Well No. 26 to Address High Contaminant Levels." As a result of the dynamic survey BCVWD has identified two options for reducing the chromium-6 levels, see attached Exhibit "A".

On May 4, 2015, BCVWD held a bid opening for the proposed work and as a result the City's share of the cost associated with the recommended option is \$33,233.00. The total cost of construction is \$66,466.00, which includes a 10% contingency.

**FISCAL DATA:** Water Capital Facility Funds are available in the amount of \$33,233.00  
Account No. 660-6300-471.45-06 (Wells/Pumping Equipment).

**RECOMMENDED BY:**



Art Vela  
Acting Director of Public Works

**REVIEWED BY:**



Dean Martin  
Administrative Services Director/  
Deputy City Manager

**APPROVED BY:**



James E. Smith  
Interim City Manager

**Attachments:**

1. Exhibit "A" – BCVWD Letter Dated April 6, 2015

**RESOLUTION NO. 2015-06 UA**

**A RESOLUTION OF THE BANNING UTILITY AUTHORITY OF THE CITY OF BANNING, CALIFORNIA, APPROVING THE CONSTRUCTION OF MODIFICATIONS TO WELL NO. 25 AND ASSOCIATED COST SHARE**

**WHEREAS**, in December of 2003, Beaumont Cherry Valley Water District ("BCVWD") and the City of Banning ("City") entered into an agreement for the construction of production Well Nos. 25 & 26 and the agencies agreed to equally share the cost of constructing the referenced wells; and

**WHEREAS**, these wells are jointly operated and owned with BCVWD who is the lead agency with primary responsibility for the operation and maintenance of the joint facilities; and

**WHEREAS**, as part of its maintenance responsibility, BCVWD recently performed a round of chromium-6 monitoring of all of its groundwater sources which was conducted in response to the recent adoption of the Maximum Contaminant Level ("MCL") for chromium-6 by the California Department of Public Health; and

**WHEREAS**, it was discovered that chromium-6 levels in Well Nos. 25 and 26 exceed the MCL; and

**WHEREAS**, on January 13, 2015 City Council approved Resolution No. 2015-02UA, "Approving the Dynamic Survey of Well No. 25 and Well No. 26 to Address High Contaminant Levels" and as a result of the dynamic survey BCVWD has identified two options for reducing the chromium-6 levels of which they recommend moving forward with Option 1, as attached Exhibit "A"; and

**WHEREAS**, the City of Banning's share of the cost of the construction of the modifications to Well 25 are estimated to be \$33,233.00; and

**WHEREAS**, Water Capital Facility Funds are available in the amount of \$33,233.00, Account No. 660-6300-471.45-06 (Wells/Pumping Equipment).

**NOW, THEREFORE, BE IT RESOLVED** by the Banning Utility Authority of the City of Banning as follows:

**SECTION 1.** The City Council approves the construction modifications to Well No. 25 and associated cost share in the amount of \$33,233.00.

**PASSED, ADOPTED AND APPROVED** this 12<sup>th</sup> day of May, 2015.

\_\_\_\_\_  
Deborah Franklin, Chairman  
Banning Utility Authority

**ATTEST:**

\_\_\_\_\_  
Marie A. Calderon, Secretary

**APPROVED AS TO FORM  
AND LEGAL CONTENT:**

\_\_\_\_\_  
David J. Aleshire, Authority Counsel  
Aleshire & Wynder, LLP

**CERTIFICATION:**

I, Marie A. Calderon, Secretary to the Utility Authority of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2015-06 UA was adopted by the Banning Utility Authority of the City of Banning at its Joint Meeting thereof held on the 12th day of May, 2015.

AYES:

NOES:

ABSENT:

ABSTAIN:

\_\_\_\_\_  
Marie A. Calderon, Secretary  
Banning Utility Authority

**Attachment 1 - Exhibit "A"**

**BCVWD Letter Dated April 6, 2015**





www.bcvwd.org

# Beaumont-Cherry Valley Water District

Phone: (951) 845-9581 Fax: (951) 845-0159

April 6, 2015

## Board of Directors

David Hoffman  
Division 5

John Covington  
Division 4

Daniel Slawson  
Division 3

Ken Ross  
Division 2

Jeffrey Cottrell  
Division 1

Art Vela  
Interim Public Works Director  
City of Banning  
99 East Ramsey St.  
P.O. Box 998  
Banning, CA 92220

### **SUBJECT: COST SHARING PROVISIONS RELATED TO JOINTLY OWNED AND OPERATED FACILITIES IN ACCORDANCE WITH 2003 JOINT FINANCING AGREEMENT, WELL NO'S. 25 AND 26**

Dear Mr. Vela:

The field work portion of the Dynamic Well Profiling Project approved by the Beaumont Cherry Valley Water District (District) Board of Directors and the Banning City Council in January 2015 for Well No's. 25 and 26 has been completed.

A preliminary analysis of the data provided by the consultant has also been completed for Well 25. The analysis indicates that concentrations of hexavalent chromium (CrVI) above the MCL are present at a couple of different levels within the well, as well as the lower 250 feet of the well. This information correlates with water quality monitoring results taken during the initial well zone testing and development pumping during each well's construction.

Based on the preliminary review of the data, the District has identified that there appears to be a couple of non-treatment based solutions available to bring the CrVI concentration in these two wells to a level below the MCL. These identified options are as follows:

**Option 1:** This solution consists of filling the bottom 200-250 feet of each well with a gravel pack, topped with an 8 foot bentonite seal and 5 foot cement slurry cap. This option would also require the removal and replacement of the pumping unit. The Engineer's Estimate to complete this work is \$30,000 per well.

**Option 2:** This option would include all of the work identified in Option 1 plus swagging a blank casing to isolate approximately 100 feet of the screened portion of the well casings where high CrVI concentrations have been detected. The estimated cost for this solution is between \$150,000 and

205



www.bcvwd.org

# Beaumont-Cherry Valley Water District

Phone: (951) 845-9581 Fax: (951) 845-0159

## Board of Directors

David Hoffman  
Division 5

John Covington  
Division 4

Daniel Slawson  
Division 3

Ken Ross  
Division 2

Jeffrey Cottrell  
Division 1

\$180,000 based upon the amount of work that is identified in the final dynamic profiling analysis for each well.

It should be noted that any modification to the well screen could impact each well's production capacity which may require additional modification to the pumping unit, resulting in additional costs.

The District is recommending that we move forward with Option 1 at Well 25 to determine whether or not this methodology will provide us with an economic solution to reduce the CrVI concentrations in each of these wells. This option, if successful, will provide a low cost reversible solution which provides flexibility in the event that the wells performance is impacted and a return to the original well capacity is desired, if treatment options are pursued in the future.

The options outlined above and their associated costs (estimates) will be presented to the District's Board of Directors for approval at the regular meeting on April 8, 2015. The District is requesting that this item be placed before the Banning City Council for approval in accordance with the cost sharing provisions outlined in the Joint Financing Agreement between the District and the City, dated December 2003. Please respond in writing that the City concurs with commencing well modification work as identified in Option 1. In the event Option 2 swagging work is deemed necessary subsequent to completion of Option 1 work, the District will contact the City for further approval.

Should you have any questions or need any further information, please contact me at (951) 845-9581, or [tony.lara@bcvwd.org](mailto:tony.lara@bcvwd.org)

Sincerely,

Anthony L. Lara  
Director of Operations  
Beaumont Cherry Valley Water District

**CITY COUNCIL AGENDA  
REPORT OF DIRECTORS  
INFORMATIONAL REPORT**

**DATE:** May 12, 2015  
**TO:** Honorable Mayor and City Council  
**FROM:** Alex Diaz, Chief of Police  
**SUBJECT:** Animal Control Services Update

**BACKGROUND:**

On January 24, 2006, the City of Banning retained the services of the Inland Valley Humane Society to conduct a review of the city's animal control services program. An Animal Care and Control Review and Assessment Review Report was completed by the Inland Valley Humane Society. Based on the study, the firm recommended the following to the City Council:

**(1) The City Council can choose to completely renovate the facility which would cost \$1,110,462 + \$29,200 (oversee recommendations of the assessment report) + \$200,000 (equipment for animal shelter). Total: \$1,339,662. The estimated yearly cost for California Animal Care to provide animal control services would be \$299,000.**

**(2) The City Council can choose to wait to install new fencing and irrigation/landscaping for the property which would cost \$710,462 + \$29,200 (oversee recommendations of the assessment report) + \$200,000 (equipment for animal shelter). Total: \$939,662. The estimated yearly cost for California Animal Care to provide animal control services would be \$299,000.**

**(3) The City Council can also choose to close the animal shelter and contract for animal control and shelter services with the Riverside County Department of Animal Services. Yearly approximate total: \$382,000 (which would move shelter services to the City of San Jacinto).**

During Fiscal Year 2006-2007, the City of Banning contracted with California Animal Care and the San Geronio Animal Care agencies, at a budget of \$139,314.00. The agencies provided all matter of animal care and maintenance at the Banning Shelter.

During Fiscal Year 2008, the City of Banning contracted Animal Control Services with the County of Riverside (Community Health Agency), at a budget of \$262,295.00.

In June of 2010, the Banning Shelter sustained major damage due to ongoing rainstorms. The shelter was permanently closed, and during Fiscal Year 2010-2011 the City of Beaumont was awarded the Animal Control Services contract, at a budget of \$142,000.00.

207

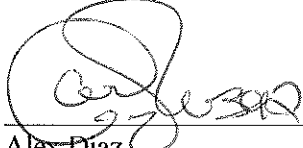
The City of Beaumont has provided Animal Control Field Services for the City of Banning since July 1, 2010. The contract is billed on a per-call basis, and initially it entailed a cost of \$30 per call. In April 2012, the fee increased to \$50 per-call. Our current contract is scheduled for renewal with an increase to \$75 per-call. Based on prior year's activity, it is estimated that our annual costs might increase from \$100,000 onward up to \$170,000.

**FISCAL DATA:** N/A

**RECOMMENDED BY:**

  
James E. Smith  
Interim City Manager

**PREPARED BY:**

  
Alex Diaz  
Chief of Police

## CITY COUNCIL AGENDA

**DATE:** May 12, 2015  
**TO:** CITY COUNCIL  
**FROM:** Dean Martin, Interim Administrative Services Director  
**SUBJECT:** Selection of City Auditor

**RECOMMENDATION:** Staff recommends the selection of Lance, Soll, and Lunghard, LLP as the City's external auditors for the audit periods covering June 30, 2015 through June 30, 2017 (with the option of extending through June 30, 2020), and authorize the City Manager to execute the attached contract for a three year total of \$175,872.

**JUSTIFICATION:** Per City ordinance No.1445, Municipal Code, Chapter 3, Section 21.030, an audit is to be made of the City records annually by a certified public accountant. The audit will ensure that the City complies with this code requirement as well as maintains fiscal accountability and transparency to its citizens.

**BACKGROUND:** Annually the City is required per ordinance and State law to have an audit conducted of all City funds and accounts. The purpose of the audit is to ensure that the City is handling its accounts consistent with generally accepted accounting principles and regulations as promulgated by state and federal guidelines. Additionally, in order to qualify to receive federal funds, a local agency must comply with the federal Single Audit Act and must retain a certified public accountant to prepare an annual audit of its financial records. This also requires the city to comply with generally accepted accounting principles and government accounting and audit standards.

Staff issued an RFP for audit services on February 2, 2015. The RFP was issued to firms that had indicated an interest in performing work for the City and was also posted on the web site for the California Society of Municipal Finance Officers. Six firms responded to the RFP, with one of them disqualified due to failure to meet the submittal requirements of the RFP. An evaluation team consisting of two internal staff members and one external party with previous audit experience was used to rate the respondents. The firms were primarily ranked on the background and experience of the firm and its staff with price being considered after an initial ranking on qualitative factors.

The result of the ranking process produced two top firms that were nearly equal in ranking. The top two firms were White Nelson Diehl and Evans and Lance, Soll, and Lunghard, LLP. Given the closeness of the scoring, staff elected to interview the top two firms. This was primarily to become acquainted with the actual staff responsible for managing and performing the day to day audit (i.e., the manager and the senior-in-charge). After the oral interviews, staff felt that the edge went to LSL due to the experience demonstrated by the LSL day to day staff.

For the past several years, the audit of the City has been performed by the firm of Lance, Soll, and Lunghard, LLP. Industry best practices published by the Government Finance Officers Association of the United States and Canada recommends every five years either changing firms or rotating partners and key staff (i.e., manager and senior-in-charge). The LSL engagement partner was rotated within the last three years. The Manager assigned to Banning was changed last year, and the senior-in-charge, responsible for the onsite day to day completion of the audit procedures, will be working with the City for the first time.

Staff's recommendation was presented to the Budget and Finance Committee on May 4, 2015. The Budget and Finance Committee unanimously approved the staff recommendation to select Lance, Soll, and Lunghard LLP as the City's auditor.

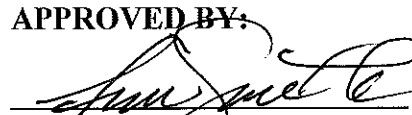
**FISCAL DATA:** The General Fund and the Utility Services Fund have a remaining budget of \$23,888 for Fiscal Year 2015, and a combined budget of \$50,000 included in fiscal year 2016.

**RECOMMENDED BY:**



Dean Martin  
Interim Administrative Services Director

**APPROVED BY:**



James E. Smith  
Interim City Manager

**PROFESSIONAL SERVICES AGREEMENT**

**By and Between**

**CITY OF BANNING**

**and**

**LANCE, SOLL, & LUNGHARD, LLP**

211

**AGREEMENT FOR PROFESSIONAL SERVICES  
BETWEEN THE CITY OF BANNING AND  
LANCE, SOLL, & LUNGHARD, LLP**

THIS AGREEMENT FOR CONTRACT SERVICES (herein "Agreement") is made and entered into this \_\_\_\_ day of May, 2015 by and between the City of Banning, a general law city ("City") and Lance, Soll, & Lunghard, LLP, a California limited liability partnership ("Consultant"). City and Consultant are sometimes hereinafter individually referred to as "Party" and hereinafter collectively referred to as the "Parties").

**RECITALS**

A. City has sought, by issuance of a request for proposals or invitation for bids, the performance of the services defined and described particularly in Article 1 of this Agreement.

B. Consultant, following submission of a proposal or bid for the performance of the services defined and described particularly in Article 1 of this Agreement, was selected by the City to perform those services.

C. Pursuant to the City's Municipal Code, City has authority to enter into and execute this Agreement.

D. The Parties desire to formalize the selection of Consultant for performance of those services defined and described particularly in Article 1 of this Agreement and desire that the terms of that performance be as particularly defined and described herein.

**OPERATIVE PROVISIONS**

NOW, THEREFORE, in consideration of the mutual promises and covenants made by the Parties and contained herein and other consideration, the value and adequacy of which are hereby acknowledged, the parties agree as follows:

**ARTICLE 1. SERVICES OF CONSULTANT**

**1.1 Scope of Services.**

In compliance with all terms and conditions of this Agreement, the Consultant shall provide those services specified in the "Scope of Services" attached hereto as Exhibit "A" and incorporated herein by this reference, which services may be referred to herein as the "services" or "work" hereunder. As a material inducement to the City entering into this Agreement, Consultant represents and warrants that it has the qualifications, experience, and facilities necessary to properly perform the services required under this Agreement in a thorough, competent, and professional manner, and is experienced in performing the work and services contemplated herein. Consultant shall at all times faithfully, competently and to the best of its ability, experience and talent, perform all services described herein. Consultant covenants that it shall follow the highest professional standards in performing the work and services required hereunder and that all materials will be of good quality, fit for the purpose intended. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized by one or more first-class firms performing similar work under similar circumstances.

212



### 1.2 Consultant's Proposal.

The Scope of Service shall include the Consultant's scope of work in Consultant's bid proposal shall be incorporated herein by this reference as though fully set forth herein. In the event of any inconsistency between the terms of such proposal and this Agreement, the terms of this Agreement shall govern.

### 1.3 Compliance with Law.

Consultant shall keep itself informed concerning, and shall render all services hereunder in accordance with all ordinances, resolutions, statutes, rules, and regulations of the City and any Federal, State or local governmental entity having jurisdiction in effect at the time service is rendered.

### 1.4 Licenses, Permits, Fees and Assessments.

Consultant shall obtain at its sole cost and expense such licenses, permits and approvals as may be required by law for the performance of the services required by this Agreement. Consultant shall have the sole obligation to pay for any fees, assessments and taxes, plus applicable penalties and interest, which may be imposed by law and arise from or are necessary for the Consultant's performance of the services required by this Agreement, and shall indemnify, defend and hold harmless City, its officers, employees or agents of City, against any such fees, assessments, taxes penalties or interest levied, assessed or imposed against City hereunder.

### 1.5 Familiarity with Work.

By executing this Agreement, Consultant warrants that Consultant (i) has thoroughly investigated and considered the scope of services to be performed, (ii) has carefully considered how the services should be performed, and (iii) fully understands the facilities, difficulties and restrictions attending performance of the services under this Agreement. If the services involve work upon any site, Consultant warrants that Consultant has or will investigate the site and is or will be fully acquainted with the conditions there existing, prior to commencement of services hereunder. Should the Consultant discover any latent or unknown conditions, which will materially affect the performance of the services hereunder, Consultant shall immediately inform the City of such fact and shall not proceed except at City's risk until written instructions are received from the Contract Officer.

### 1.6 Care of Work.

The Consultant shall adopt reasonable methods during the life of the Agreement to furnish continuous protection to the work, and the equipment, materials, papers, documents, plans, studies and/or other components thereof to prevent losses or damages, and shall be responsible for all such damages, to persons or property, until acceptance of the work by City, except such losses or damages as may be caused by City's own negligence.

### 1.7 Further Responsibilities of Parties.

Both parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Both parties agree to act in good faith to execute all instruments, prepare all

documents and take all actions as may be reasonably necessary to carry out the purposes of this Agreement. Unless hereafter specified, neither party shall be responsible for the service of the other.

#### 1.8 Additional Services.

City shall have the right at any time during the performance of the services, without invalidating this Agreement, to order extra work beyond that specified in the Scope of Services or make changes by altering, adding to or deducting from said work. No such extra work may be undertaken unless a written order is first given by the Contract Officer to the Consultant, incorporating therein any adjustment in (i) the Contract Sum for the actual cost of the extra work, and/or (ii) the time to perform this Agreement, which said adjustments are subject to the written approval of the Consultant. Any increase in compensation of up to ten percent (10%) of the Contract Sum or \$25,000, whichever is less; or in the time to perform of up to one hundred eighty (180) days may be approved by the City Manager. Any greater increases, taken either separately or cumulatively must be approved by the City Council. It is expressly understood by Consultant that the provisions of this Section shall not apply to services specifically set forth in the Scope of Services. Consultant hereby acknowledges that it accepts the risk that the services to be provided pursuant to the Scope of Services may be more costly or time consuming than Consultant anticipates and that Consultant shall not be entitled to additional compensation therefor. City may in its sole and absolute discretion have similar work done by other contractors. No claims for an increase in the Contract Sum or time for performance shall be valid unless the procedures established in this Section are followed.

#### 1.9 Special Requirements.

Additional terms and conditions of this Agreement, if any, which are made a part hereof are set forth in the "Special Requirements" attached hereto as Exhibit "B" and incorporated herein by this reference. In the event of a conflict between the provisions of Exhibit "B" and any other provisions of this Agreement, the provisions of Exhibit "B" shall govern.

### **ARTICLE 2. COMPENSATION AND METHOD OF PAYMENT.**

#### 2.1 Contract Sum.

Subject to any limitations set forth in this Agreement, City agrees to pay Consultant the amounts specified in the "Schedule of Compensation" attached hereto as Exhibit "C" and incorporated herein by this reference. The total compensation, including reimbursement for actual expenses, shall not exceed One Hundred Seventy-five Thousand Eight Hundred Seventy-two Dollars (\$175,872) (the "Contract Sum"), unless additional compensation is approved pursuant to Section 1.8. d

#### 2.2 Method of Compensation.

The method of compensation may include: (i) a lump sum payment upon completion; (ii) payment in accordance with specified tasks or the percentage of completion of the services less contract retention; (iii) payment for time and materials based upon the Consultant's rates as specified in the Schedule of Compensation, provided that (a) time estimates are provided for the performance of sub tasks, (b) contract retention is maintained, and (c) the Contract Sum is not exceeded; or (iv) such other methods as may be specified in the Schedule of Compensation.

### 2.3 Reimbursable Expenses.

Compensation may include reimbursement for actual and necessary expenditures for reproduction costs, telephone expenses, and travel expenses approved in writing by the Contract Officer in advance, or actual subcontractor expenses of an approved subcontractor pursuant to Section 4.5, and only if specified in the Schedule of Compensation. The Contract Sum shall include the attendance of Consultant at all project meetings reasonably deemed necessary by the City. Coordination of the performance of the work with City is a critical component of the services. If Consultant is required to attend additional meetings to facilitate such coordination, Consultant shall not be entitled to any additional compensation for attending said meetings.

### 2.4 Invoices.

Each month Consultant shall furnish to City an original invoice for all work performed and expenses incurred during the preceding month in a form approved by City's Administrative Services Director. By submitting an invoice for payment under this Agreement, Consultant is certifying compliance with all provisions of the Agreement. The invoice shall detail charges for all necessary and actual expenses by the following categories: labor (by sub-category), travel, materials, equipment, supplies, and sub-contractor contracts. Sub-contractor charges shall also be detailed by such categories. Consultant shall not invoice City for any duplicate services performed by more than one person.

City shall independently review each invoice submitted by the Consultant to determine whether the work performed and expenses incurred are in compliance with the provisions of this Agreement. Except as to any charges for work performed or expenses incurred by Consultant which are disputed by City, or as provided in Section 7.3. City will use its best efforts to cause Consultant to be paid within thirty (30) days of receipt of Consultant's correct and undisputed invoice; however, Consultant acknowledges and agrees that due to City warrant run procedures, the City cannot guarantee that payment will occur within this time period. In the event any charges or expenses are disputed by City, the original invoice shall be returned by City to Consultant for correction and resubmission. Review and payment by the City of any invoice provided by the Consultant shall not constitute a waiver of any rights or remedies provided herein or any applicable law.

### 2.5 Waiver.

Payment to Consultant for work performed pursuant to this Agreement shall not be deemed to waive any defects in work performed by Consultant.

## **ARTICLE 3. PERFORMANCE SCHEDULE**

### 3.1 Time of Essence.

Time is of the essence in the performance of this Agreement.

### 3.2 Schedule of Performance.

Consultant shall commence the services pursuant to this Agreement upon receipt of a written notice to proceed and shall perform all services within the time period(s) established in the "Schedule of Performance" attached hereto as Exhibit "D" and incorporated herein by this reference. When requested by the Consultant, extensions to the time period(s) specified in the Schedule of

Performance may be approved in writing by the Contract Officer but not exceeding one hundred eighty (180) days cumulatively.

### 3.3 Force Majeure.

The time period(s) specified in the Schedule of Performance for performance of the services rendered pursuant to this Agreement shall be extended because of any delays due to unforeseeable causes beyond the control and without the fault or negligence of the Consultant, including, but not restricted to, acts of God or of the public enemy, unusually severe weather, fires, earthquakes, floods, epidemics, quarantine restrictions, riots, strikes, freight embargoes, wars, litigation, and/or acts of any governmental agency, including the City, if the Consultant shall within ten (10) days of the commencement of such delay notify the Contract Officer in writing of the causes of the delay. The Contract Officer shall ascertain the facts and the extent of delay, and extend the time for performing the services for the period of the enforced delay when and if in the judgment of the Contract Officer such delay is justified. The Contract Officer's determination shall be final and conclusive upon the parties to this Agreement. In no event shall Consultant be entitled to recover damages against the City for any delay in the performance of this Agreement, however caused, Consultant's sole remedy being extension of the Agreement pursuant to this Section.

### 3.4 Term.

Unless earlier terminated in accordance with Article 7 of this Agreement, this Agreement shall continue in full force and effect until completion of the services but not exceeding three (3) years from the date hereof, except as otherwise provided in the Schedule of Performance (Exhibit "D").

## **ARTICLE 4. COORDINATION OF WORK**

### 4.1 Representatives and Personnel of Consultant.

The following principals of Consultant ("Principals") are hereby designated as being the principals and representatives of Consultant authorized to act in its behalf with respect to the work specified herein and make all decisions in connection therewith:

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

It is expressly understood that the experience, knowledge, capability and reputation of the foregoing Principals were a substantial inducement for City to enter into this Agreement. Therefore, the Principals shall be responsible during the term of this Agreement for directing all activities of Consultant and devoting sufficient time to personally supervise the services hereunder. All personnel of Consultant, and any authorized agents, shall at all times be under the exclusive direction and control of the Principals. For purposes of this Agreement, the Principals may not be replaced nor may their responsibilities be substantially reduced by Consultant without the express written

approval of City. Additionally, Consultant shall utilize only competent personnel to perform services pursuant to this Agreement. Consultant shall make every reasonable effort to maintain the stability and continuity of Consultant's staff and subcontractors, if any, assigned to perform the services required under this Agreement. Consultant shall notify City of any changes in Consultant's staff and subcontractors, if any, assigned to perform the services required under this Agreement, prior to and during any such performance.

#### 4.2 Status of Consultant.

Consultant shall have no authority to bind City in any manner, or to incur any obligation, debt or liability of any kind on behalf of or against City, whether by contract or otherwise, unless such authority is expressly conferred under this Agreement or is otherwise expressly conferred in writing by City. Consultant shall not at any time or in any manner represent that Consultant or any of Consultant's officers, employees, or agents are in any manner officials, officers, employees or agents of City. Neither Consultant, nor any of Consultant's officers, employees or agents, shall obtain any rights to retirement, health care or any other benefits which may otherwise accrue to City's employees. Consultant expressly waives any claim Consultant may have to any such rights.

#### 4.3 Contract Officer.

The Contract Officer shall be the Administrative Services Director unless otherwise designated by the City Manager. It shall be the Consultant's responsibility to assure that the Contract Officer is kept informed of the progress of the performance of the services and the Consultant shall refer any decisions which must be made by City to the Contract Officer. Unless otherwise specified herein, any approval of City required hereunder shall mean the approval of the Contract Officer. The Contract Officer shall have authority, if specified in writing by the City Manager, to sign all documents on behalf of the City required hereunder to carry out the terms of this Agreement.

#### 4.4 Independent Consultant.

Neither the City nor any of its employees shall have any control over the manner, mode or means by which Consultant, its agents or employees, perform the services required herein, except as otherwise set forth herein. City shall have no voice in the selection, discharge, supervision or control of Consultant's employees, servants, representatives or agents, or in fixing their number, compensation or hours of service. Consultant shall perform all services required herein as an independent contractor of City and shall remain at all times as to City a wholly independent contractor with only such obligations as are consistent with that role. Consultant shall not at any time or in any manner represent that it or any of its agents or employees are agents or employees of City. City shall not in any way or for any purpose become or be deemed to be a partner of Consultant in its business or otherwise or a joint venture or a member of any joint enterprise with Consultant.

#### 4.5 Prohibition Against Subcontracting or Assignment.

The experience, knowledge, capability and reputation of Consultant, its principals and employees were a substantial inducement for the City to enter into this Agreement. Therefore, Consultant shall not contract with any other entity to perform in whole or in part the services required hereunder without the express written approval of the City. In addition, neither this Agreement nor any interest herein may be transferred, assigned, conveyed, hypothecated or

encumbered voluntarily or by operation of law, whether for the benefit of creditors or otherwise, without the prior written approval of City. Transfers restricted hereunder shall include the transfer to any person or group of persons acting in concert of more than twenty five percent (25%) of the present ownership and/or control of Consultant, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release the Consultant or any surety of Consultant of any liability hereunder without the express consent of City.

## **ARTICLE 5. INSURANCE, INDEMNIFICATION AND BONDS**

### **5.1 Insurance Coverages.**

The Consultant shall procure and maintain, at its sole cost and expense, in a form and content satisfactory to City, during the entire term of this Agreement including any extension thereof, the following policies of insurance which shall cover all elected and appointed officers, employees and agents of City:

(a) Commercial General Liability Insurance (ISO Occurrence Form CG0001 or equivalent). A policy of comprehensive general liability insurance written on a per occurrence basis for bodily injury, personal injury and property damage. The policy of insurance shall be in an amount not less than \$1,000,000.00 per occurrence or if a general aggregate limit is used, then the general aggregate limit shall be twice the occurrence limit.

(b) Workers Compensation Insurance. A policy of workers compensation insurance in such amount as will fully comply with the laws of the State of California and which shall indemnify, insure and provide legal defense for the Consultant against any loss, claim or damage arising from any injuries or occupational diseases occurring to any worker employed by or any persons retained by the Consultant in the course of carrying out the work or services contemplated in this Agreement.

(c) Automotive Insurance (Form CA 0001 (Ed 1/87) including "any auto" and endorsement CA 0025 or equivalent). A policy of comprehensive automobile liability insurance written on a per occurrence for bodily injury and property damage in an amount not less than \$1,000,000. Said policy shall include coverage for owned, non-owned, leased and hired cars.

(d) Professional Liability. Professional liability insurance appropriate to the Consultant's profession. This coverage may be written on a "claims made" basis, and must include coverage for contractual liability. The professional liability insurance required by this Agreement must be endorsed to be applicable to claims based upon, arising out of or related to services performed under this Agreement. The insurance must be maintained for at least 5 consecutive years following the completion of Consultant's services or the termination of this Agreement. During this additional 5-year period, Consultant shall annually and upon request of the City submit written evidence of this continuous coverage.

(e) Additional Insurance. Policies of such other insurance, as may be required in the Special Requirements.

(f) Subcontractors. Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

## 5.2 General Insurance Requirements.

All of the above policies of insurance shall be primary insurance and shall name the City, its elected and appointed officers, employees and agents as additional insureds and any insurance maintained by City or its officers, employees or agents shall apply in excess of, and not contribute with Consultant's insurance. The insurer is deemed hereof to waive all rights of subrogation and contribution it may have against the City, its officers, employees and agents and their respective insurers. The insurance policy must specify that where the primary insured does not satisfy the self-insured retention, any additional insured may satisfy the self-insured retention. All of said policies of insurance shall provide that said insurance may not be amended or cancelled by the insurer or any party hereto without providing thirty (30) days prior written notice by certified mail return receipt requested to the City. In the event any of said policies of insurance are cancelled, the Consultant shall, prior to the cancellation date, submit new evidence of insurance in conformance with Section 5.1 to the Contract Officer. No work or services under this Agreement shall commence until the Consultant has provided the City with Certificates of Insurance or appropriate insurance binders evidencing the above insurance coverages and said Certificates of Insurance or binders are approved by the City. City reserves the right to inspect complete, certified copies of all required insurance policies at any time. Any failure to comply with the reporting or other provisions of the policies including breaches or warranties shall not affect coverage provided to City.

All certificates shall name the City as additional insured (providing the appropriate endorsement) and shall conform to the following "cancellation" notice:

### CANCELLATION:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATED THEREOF, THE ISSUING COMPANY SHALL MAIL THIRTY (30)-DAY ADVANCE WRITTEN NOTICE TO CERTIFICATE HOLDER NAMED HEREIN.

[to be initialed]

\_\_\_\_\_  
Agent's Initials

City, its respective elected and appointed officers, directors, officials, employees, agents and volunteers are to be covered as additional insureds as respects: liability arising out of activities Consultant performs; products and completed operations of Consultant; premises owned, occupied or used by Consultant; or automobiles owned, leased, hired or borrowed by Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City, and their respective elected and appointed officers, officials, employees or volunteers. Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

Any deductibles or self-insured retentions must be declared to and approved by City. At the option of City, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City or its respective elected or appointed officers, officials, employees and volunteers or the Consultant shall procure a bond guaranteeing payment of losses and related investigations, claim administration, defense expenses and claims. The Consultant agrees that the requirement to provide insurance shall not be construed as limiting in any way the extent to which the Consultant may be

219

held responsible for the payment of damages to any persons or property resulting from the Consultant's activities or the activities of any person or persons for which the Consultant is otherwise responsible nor shall it limit the Consultant's indemnification liabilities as provided in Section 5.3.

In the event the Consultant subcontracts any portion of the work in compliance with Section 4.5 of this Agreement, the contract between the Consultant and such subcontractor shall require the subcontractor to maintain the same policies of insurance that the Consultant is required to maintain pursuant to Section 5.1, and such certificates and endorsements shall be provided to City.

### 5.3 Indemnification.

To the full extent permitted by law, Consultant agrees to indemnify, defend and hold harmless the City, its officers, employees and agents ("Indemnified Parties") against, and will hold and save them and each of them harmless from, any and all actions, either judicial, administrative, arbitration or regulatory claims, damages to persons or property, losses, costs, penalties, obligations, errors, omissions or liabilities whether actual or threatened (herein "claims or liabilities") that may be asserted or claimed by any person, firm or entity arising out of or in connection with the negligent performance of the work, operations or activities provided herein of Consultant, its officers, employees, agents, subcontractors, or invitees, or any individual or entity for which Consultant is legally liable ("indemnors"), or arising from Consultant's reckless or willful misconduct, or arising from Consultant's or indemnors' negligent performance of or failure to perform any term, provision, covenant or condition of this Agreement, and in connection therewith:

(a) Consultant will defend any action or actions filed in connection with any of said claims or liabilities and will pay all costs and expenses, including legal costs and attorneys' fees incurred in connection therewith;

(b) Consultant will promptly pay any judgment rendered against the City, its officers, agents or employees for any such claims or liabilities arising out of or in connection with the negligent performance of or failure to perform such work, operations or activities of Consultant hereunder; and Consultant agrees to save and hold the City, its officers, agents, and employees harmless therefrom;

(c) In the event the City, its officers, agents or employees is made a party to any action or proceeding filed or prosecuted against Consultant for such damages or other claims arising out of or in connection with the negligent performance of or failure to perform the work, operation or activities of Consultant hereunder, Consultant agrees to pay to the City, its officers, agents or employees, any and all costs and expenses incurred by the City, its officers, agents or employees in such action or proceeding, including but not limited to, legal costs and attorneys' fees.

Consultant shall incorporate similar, indemnity agreements with its subcontractors and if it fails to do so Consultant shall be fully responsible to indemnify City hereunder therefore, and failure of City to monitor compliance with these provisions shall not be a waiver hereof. This indemnification includes claims or liabilities arising from any negligent or wrongful act, error or omission, or reckless or willful misconduct of Consultant in the performance of professional services hereunder. The provisions of this Section do not apply to claims or liabilities occurring as a result of City's sole negligence or willful acts or omissions, but, to the fullest extent permitted by law, shall apply to claims and liabilities resulting in part from City's negligence, except that design



professionals' indemnity hereunder shall be limited to claims and liabilities arising out of the negligence, recklessness or willful misconduct of the design professional. The indemnity obligation shall be binding on successors and assigns of Consultant and shall survive termination of this Agreement.

#### 5.4 Sufficiency of Insurer.

Insurance required by this Agreement shall be satisfactory only if issued by companies qualified to do business in California, rated "A" or better in the most recent edition of Best Rating Guide, The Key Rating Guide or in the Federal Register, and only if they are of a financial category Class VII or better, unless such requirements are waived by the Risk Manager of the City ("Risk Manager") due to unique circumstances. If this Agreement continues for more than 3 years duration, or in the event the Risk Manager determines that the work or services to be performed under this Agreement creates an increased or decreased risk of loss to the City, the Consultant agrees that the minimum limits of the insurance policies may be changed accordingly upon receipt of written notice from the Risk Manager.

### **ARTICLE 6. RECORDS, REPORTS, AND RELEASE OF INFORMATION**

#### 6.1 Records.

Consultant shall keep, and require subcontractors to keep, such ledgers books of accounts, invoices, vouchers, canceled checks, reports, studies or other documents relating to the disbursements charged to City and services performed hereunder (the "books and records"), as shall be necessary to perform the services required by this Agreement and enable the Contract Officer to evaluate the performance of such services. Any and all such documents shall be maintained in accordance with generally accepted accounting principles and shall be complete and detailed. The Contract Officer shall have full and free access to such books and records at all times during normal business hours of City, including the right to inspect, copy, audit and make records and transcripts from such records. Such records shall be maintained for a period of 3 years following completion of the services hereunder, and the City shall have access to such records in the event any audit is required. In the event of dissolution of Consultant's business, custody of the books and records may be given to City, and access shall be provided by Consultant's successor in interest.

#### 6.2 Reports.

Consultant shall periodically prepare and submit to the Contract Officer such reports concerning the performance of the services required by this Agreement as the Contract Officer shall require. Consultant hereby acknowledges that the City is greatly concerned about the cost of work and services to be performed pursuant to this Agreement. For this reason, Consultant agrees that if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the work or services contemplated herein or, if Consultant is providing design services, the cost of the project being designed, Consultant shall promptly notify the Contract Officer of said fact, circumstance, technique or event and the estimated increased or decreased cost related thereto and, if Consultant is providing design services, the estimated increased or decreased cost estimate for the project being designed.

#### 6.3 Ownership of Documents.

All drawings, specifications, maps, designs, photographs, studies, surveys, data, notes, computer files, reports, records, documents and other materials (the "documents and materials") prepared by Consultant, its employees, subcontractors and agents in the performance of this Agreement shall be the property of City and shall be delivered to City upon request of the Contract Officer or upon the termination of this Agreement, and Consultant shall have no claim for further employment or additional compensation as a result of the exercise by City of its full rights of ownership use, reuse, or assignment of the documents and materials hereunder. Any use, reuse or assignment of such completed documents for other projects and/or use of uncompleted documents without specific written authorization by the Consultant will be at the City's sole risk and without liability to Consultant, and Consultant's guarantee and warranties shall not extend to such use, reuse or assignment. Consultant may retain copies of such documents for its own use. Consultant shall have the right to use the concepts embodied therein. All subcontractors shall provide for assignment to City of any documents or materials prepared by them, and in the event Consultant fails to secure such assignment, Consultant shall indemnify City for all damages resulting therefrom.

#### 6.4 Confidentiality and Release of Information.

(a) All information gained or work product produced by Consultant in performance of this Agreement shall be considered confidential, unless such information is in the public domain or already known to Consultant. Consultant shall not release or disclose any such information or work product to persons or entities other than City without prior written authorization from the Contract Officer.

(b) Consultant, its officers, employees, agents or subcontractors, shall not, without prior written authorization from the Contract Officer or unless requested by the City Attorney, voluntarily provide documents, declarations, letters of support, testimony at depositions, response to interrogatories or other information concerning the work performed under this Agreement. Response to a subpoena or court order shall not be considered "voluntary" provided Consultant gives City notice of such court order or subpoena.

(c) If Consultant, or any officer, employee, agent or subcontractor of Consultant, provides any information or work product in violation of this Agreement, then City shall have the right to reimbursement and indemnity from Consultant for any damages, costs and fees, including attorneys fees, caused by or incurred as a result of Consultant's conduct.

(d) Consultant shall promptly notify City should Consultant, its officers, employees, agents or subcontractors be served with any summons, complaint, subpoena, notice of deposition, request for documents, interrogatories, request for admissions or other discovery request, court order or subpoena from any party regarding this Agreement and the work performed there under. City retains the right, but has no obligation, to represent Consultant or be present at any deposition, hearing or similar proceeding. Consultant agrees to cooperate fully with City and to provide City with the opportunity to review any response to discovery requests provided by Consultant. However, this right to review any such response does not imply or mean the right by City to control, direct, or rewrite said response.

### **ARTICLE 7. ENFORCEMENT OF AGREEMENT AND TERMINATION**

#### 7.1 California Law.

This Agreement shall be interpreted, construed and governed both as to validity and to performance of the parties in accordance with the laws of the State of California. Legal actions concerning any dispute, claim or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Riverside, State of California, or any other appropriate court in such county, and Consultant covenants and agrees to submit to the personal jurisdiction of such court in the event of such action. In the event of litigation in a U.S. District Court, venue shall lie exclusively in the Central District of California, in Riverside.

#### 7.2 Disputes; Default.

In the event that Consultant is in default under the terms of this Agreement, the City shall not have any obligation or duty to continue compensating Consultant for any work performed after the date of default. Instead, the City may give notice to Consultant of the default and the reasons for the default. The notice shall include the timeframe in which Consultant may cure the default. This timeframe is presumptively thirty (30) days, but may be extended, though not reduced, if circumstances warrant. During the period of time that Consultant is in default, the City shall hold all invoices and shall proceed with payment on the invoices only when the default is cured. In the alternative, the City may, in its sole discretion, elect to pay some or all of the outstanding invoices during the period of default. If Consultant does not cure the default, the City may take necessary steps to terminate this Agreement under this Article. Any failure on the part of the City to give notice of the Consultant's default shall not be deemed to result in a waiver of the City's legal rights or any rights arising out of any provision of this Agreement.

#### 7.3 Retention of Funds.

Consultant hereby authorizes City to deduct from any amount payable to Consultant (whether or not arising out of this Agreement) (i) any amounts the payment of which may be in dispute hereunder or which are necessary to compensate City for any losses, costs, liabilities, or damages suffered by City, and (ii) all amounts for which City may be liable to third parties, by reason of Consultant's acts or omissions in performing or failing to perform Consultant's obligation under this Agreement. In the event that any claim is made by a third party, the amount or validity of which is disputed by Consultant, or any indebtedness shall exist which shall appear to be the basis for a claim of lien, City may withhold from any payment due, without liability for interest because of such withholding, an amount sufficient to cover such claim. The failure of City to exercise such right to deduct or to withhold shall not, however, affect the obligations of the Consultant to insure, indemnify, and protect City as elsewhere provided herein.

#### 7.4 Waiver.

Waiver by any party to this Agreement of any term, condition, or covenant of this Agreement shall not constitute a waiver of any other term, condition, or covenant. Waiver by any party of any breach of the provisions of this Agreement shall not constitute a waiver of any other provision or a waiver of any subsequent breach or violation of any provision of this Agreement. Acceptance by City of any work or services by Consultant shall not constitute a waiver of any of the provisions of this Agreement. No delay or omission in the exercise of any right or remedy by a non-defaulting party on any default shall impair such right or remedy or be construed as a waiver. Any waiver by either party of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of this Agreement.

#### 7.5 Rights and Remedies are Cumulative.

Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the parties are cumulative and the exercise by either party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

#### 7.6 Legal Action.

In addition to any other rights or remedies, either party may take legal action, in law or in equity, to cure, correct or remedy any default, to recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement. Notwithstanding any contrary provision herein, Consultant shall file a statutory claim pursuant to Government Code Sections 905 et seq. and 910 et. seq., in order to pursue a legal action under this Agreement.

#### 7.7 Termination Prior to Expiration of Term.

This Section shall govern any termination of this Contract except as specifically provided in the following Section for termination for cause. The City reserves the right to terminate this Contract at any time, with or without cause, upon thirty (30) days' written notice to Consultant, except that where termination is due to the fault of the Consultant, the period of notice may be such shorter time as may be determined by the Contract Officer. In addition, the Consultant reserves the right to terminate this Contract at any time, with or without cause, upon sixty (60) days' written notice to City, except that where termination is due to the fault of the City, the period of notice may be such shorter time as the Consultant may determine. Upon receipt of any notice of termination, Consultant shall immediately cease all services hereunder except such as may be specifically approved by the Contract Officer. Except where the Consultant has initiated termination, the Consultant shall be entitled to compensation for all services rendered prior to the effective date of the notice of termination and for any services authorized by the Contract Officer thereafter in accordance with the Schedule of Compensation or such as may be approved by the Contract Officer, except as provided in Section 7.3. In the event the Consultant has initiated termination, the Consultant shall be entitled to compensation only for the reasonable value of the work product actually produced hereunder. In the event of termination without cause pursuant to this Section, the terminating party need not provide the non-terminating party with the opportunity to cure pursuant to Section 7.2.

#### 7.8 Termination for Default of Consultant.

If termination is due to the failure of the Consultant to fulfill its obligations under this Agreement, City may, after compliance with the provisions of Section 7.2, take over the work and prosecute the same to completion by contract or otherwise, and the Consultant shall be liable to the extent that the total cost for completion of the services required hereunder exceeds the compensation herein stipulated (provided that the City shall use reasonable efforts to mitigate such damages), and City may withhold any payments to the Consultant for the purpose of set-off or partial payment of the amounts owed the City as previously stated.

#### 7.9 Attorneys' Fees.

If either party to this Agreement is required to initiate or defend or made a party to any action or proceeding in any way connected with this Agreement, the prevailing party in such action or proceeding, in addition to any other relief which may be granted, whether legal or equitable, shall be

entitled to reasonable attorney's fees. Attorney's fees shall include attorney's fees on any appeal, and in addition a party entitled to attorney's fees shall be entitled to all other reasonable costs for investigating such action, taking depositions and discovery and all other necessary costs the court allows which are incurred in such litigation. All such fees shall be deemed to have accrued on commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

## **ARTICLE 8. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION**

### **8.1     Non-liability of City Officers and Employees.**

No officer or employee of the City shall be personally liable to the Consultant, or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to the Consultant or to its successor, or for breach of any obligation of the terms of this Agreement.

### **8.2     Conflict of Interest.**

Consultant covenants that neither it, nor any officer or principal of its firm, has or shall acquire any interest, directly or indirectly, which would conflict in any manner with the interests of City or which would in any way hinder Consultant's performance of services under this Agreement. Consultant further covenants that in the performance of this Agreement, no person having any such interest shall be employed by it as an officer, employee, agent or subcontractor without the express written consent of the Contract Officer. Consultant agrees to at all times avoid conflicts of interest or the appearance of any conflicts of interest with the interests of City in the performance of this Agreement.

No officer or employee of the City shall have any financial interest, direct or indirect, in this Agreement nor shall any such officer or employee participate in any decision relating to the Agreement which effects his financial interest or the financial interest of any corporation, partnership or association in which he is, directly or indirectly, interested, in violation of any State statute or regulation. The Consultant warrants that it has not paid or given and will not pay or give any third party any money or other consideration for obtaining this Agreement.

### **8.3     Covenant Against Discrimination.**

Consultant covenants that, by and for itself, its heirs, executors, assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of race, color, creed, religion, sex, gender, sexual orientation, marital status, national origin, ancestry, or other protected class in the performance of this Agreement. Consultant shall take affirmative action to insure that applicants are employed and that employees are treated during employment without regard to their race, color, creed, religion, sex, marital status, national origin, ancestry, or other protected class.

### **8.4     Unauthorized Aliens.**

Consultant hereby promises and agrees to comply with all of the provisions of the Federal Immigration and Nationality Act, 8 U.S.C.A. §§ 1101, et seq., as amended, and in connection therewith, shall not employ unauthorized aliens as defined therein. Should Consultant so employ such unauthorized aliens for the performance of work and/or services covered by this Agreement,

and should the any liability or sanctions be imposed against City for such use of unauthorized aliens, Consultant hereby agrees to and shall reimburse City for the cost of all such liabilities or sanctions imposed, together with any and all costs, including attorneys' fees, incurred by City.

## **ARTICLE 9. MISCELLANEOUS PROVISIONS**

### **9.1     Notices.**

Any notice, demand, request, document, consent, approval, or communication either party desires or is required to give to the other party or any other person shall be in writing and either served personally or sent by prepaid, first-class mail, in the case of the City, to the City Manager and to the attention of the Contract Officer, City of Banning, 99 East Ramsey Street Banning, California 92220 and in the case of the Consultant, to the person at the address designated on the execution page of this Agreement. Either party may change its address by notifying the other party of the change of address in writing. Notice shall be deemed communicated at the time personally delivered or in seventy-two (72) hours from the time of mailing if mailed as provided in this Section.

### **9.2     Interpretation.**

The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of this Agreement or any other rule of construction which might otherwise apply.

### **9.3     Counterparts.**

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and such counterparts shall constitute one and the same instrument.

### **9.4     Integration; Amendment.**

This Agreement including the attachments hereto is the entire, complete and exclusive expression of the understanding of the parties. It is understood that there are no oral agreements between the parties hereto affecting this Agreement and this Agreement supersedes and cancels any and all previous negotiations, arrangements, agreements and understandings, if any, between the parties, and none shall be used to interpret this Agreement. No amendment to or modification of this Agreement shall be valid unless made in writing and approved by the Consultant and by the City Council. The parties agree that this requirement for written modifications cannot be waived and that any attempted waiver shall be void.

### **9.5     Severability.**

In the event that any one or more of the phrases, sentences, clauses, paragraphs, or sections contained in this Agreement shall be declared invalid or unenforceable by a valid judgment or decree of a court of competent jurisdiction, such invalidity or unenforceability shall not affect any of the remaining phrases, sentences, clauses, paragraphs, or sections of this Agreement which are hereby declared as severable and shall be interpreted to carry out the intent of the parties hereunder unless the invalid provision is so material that its invalidity deprives either party of the basic benefit of their bargain or renders this Agreement meaningless.

9.6 Corporate Authority.

The persons executing this Agreement on behalf of the parties hereto warrant that (i) such party is duly organized and existing, (ii) they are duly authorized to execute and deliver this Agreement on behalf of said party, (iii) by so executing this Agreement, such party is formally bound to the provisions of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other Agreement to which said party is bound. This Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the parties.

**[SIGNATURES ON FOLLOWING PAGE]**

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date and year first-above written.

CITY:  
CITY OF BANNING

\_\_\_\_\_  
\_\_\_\_\_, Mayor

ATTEST:

\_\_\_\_\_  
\_\_\_\_\_, City Clerk

APPROVED AS TO FORM:  
ALESHIRE & WYNDER, LLP

\_\_\_\_\_  
\_\_\_\_\_, City Attorney

CONSULTANT:  
Lande, Soll, & Lunghard, LLP  
203 N. Brea Blvd #203, Brea, Ca 92821

By: Debbie A. Harper  
Name: Debbie A. Harper  
Title: Partner

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Two signatures are required if a corporation.

NOTE: CONSULTANT'S SIGNATURES SHALL BE DULY NOTARIZED, AND APPROPRIATE ATTESTATIONS SHALL BE INCLUDED AS MAY BE REQUIRED BY THE BYLAWS, ARTICLES OF INCORPORATION, OR OTHER RULES OR REGULATIONS APPLICABLE TO CONSULTANT'S BUSINESS ENTITY.



# CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA

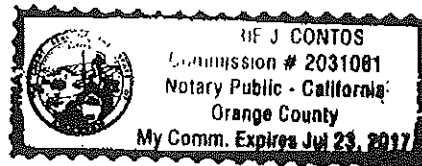
COUNTY OF LOS ANGELES

On May 6, 2015 before me, Victor J. Contos, personally appeared Deborah Lopez, proved to me on the basis of satisfactory evidence to be the person(s) whose names(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature: Victor J. Contos



## OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form

### CAPACITY CLAIMED BY SIGNER

- ☐  
☐

INDIVIDUAL  
CORPORATE OFFICER

TITLE(S)

- ☐  
☐

PARTNER(S) ☐ LIMITED  
☐ GENERAL

- ☐  
☐  
☐

ATTORNEY-IN-FACT  
TRUSTEE(S)  
GUARDIAN/CONSERVATOR  
OTHER

### DESCRIPTION OF ATTACHED DOCUMENT

TITLE OR TYPE OF DOCUMENT

NUMBER OF PAGES

DATE OF DOCUMENT

**SIGNER IS REPRESENTING:**  
(NAME OF PERSON(S) OR ENTITY(IES))

SIGNER(S) OTHER THAN NAMED ABOVE

## CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

On \_\_\_\_\_, 201\_ before me, \_\_\_\_\_, personally appeared \_\_\_\_\_, proved to me on the basis of satisfactory evidence to be the person(s) whose names(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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

WITNESS my hand and official seal.

Signature: \_\_\_\_\_

### OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form

#### CAPACITY CLAIMED BY SIGNER

#### DESCRIPTION OF ATTACHED DOCUMENT

☐ INDIVIDUAL  
☐ CORPORATE OFFICER  
\_\_\_\_\_  
TITLE(S)

\_\_\_\_\_  
TITLE OR TYPE OF DOCUMENT

☐ PARTNER(S) ☐ LIMITED  
☐ GENERAL

\_\_\_\_\_  
NUMBER OF PAGES

☐ ATTORNEY-IN-FACT  
☐ TRUSTEE(S)

☐ GUARDIAN/CONSERVATOR  
☐ OTHER \_\_\_\_\_

\_\_\_\_\_  
DATE OF DOCUMENT

#### SIGNER IS REPRESENTING:

(NAME OF PERSON(S) OR ENTITY(IES))

\_\_\_\_\_  
SIGNER(S) OTHER THAN NAMED ABOVE

**EXHIBIT "A"**

**SCOPE OF SERVICES**

- I. Consultant will perform the following Services:**
  - A. See attached Exhibit A-1
  - B.
  - C.
- II. As part of the Services, Consultant will prepare and deliver the following tangible work products to the City:**
  - A. See attached Exhibit A-1
  - B.
  - C.
- III. In addition to the requirements of Section 6.2, during performance of the Services, Consultant will keep the City apprised of the status of performance by delivering the following status reports:**
  - A. See attached Exhibit A-1
  - B.
  - C.
- IV. All work product is subject to review and acceptance by the City, and must be revised by the Consultant without additional charge to the City until found satisfactory and accepted by City.**
- V. Consultant will utilize the following personnel to accomplish the Services:**
  - A. Debbie Harper, Partner
  - B. Bryan Gruber, Concurring Partner
  - C. Jon Dennis, Manager
  - D. Ryan Dover, Senior

**EXHIBIT "B"**

**SPECIAL REQUIREMENTS  
(Superseding Contract Boilerplate)**

**EXHIBIT "C"**

**SCHEDULE OF COMPENSATION**

- I. The City will compensate Consultant for the Services performed upon submission of a valid invoice. Each invoice is to include:**
  - A.** Line items for all personnel describing the work performed, the number of hours worked, and the hourly rate.
  - B.** Line items for all materials and equipment properly charged to the Services.
  - C.** Line items for all other approved reimbursable expenses claimed, with supporting documentation.
  - D.** Line items for all approved subcontractor labor, supplies, equipment, materials, and travel properly charged to the Services.
- II. The total compensation for the Services shall not exceed the Contract Sum as provided in Section 2.1 of this Agreement.**
- III. The Consultant's billing rates for all personnel are attached as Exhibit C-1.**

**EXHIBIT "D"**

**SCHEDULE OF PERFORMANCE**

- I. Consultant shall deliver the following tangible work products to the City by the following dates.**
  - A. As per Exhibit A-1**
  - B.**
  - C.**
- II. The Contract Officer may approve extensions for performance of the services in accordance with Section 3.2.**

## A. Scope of Work to be Performed

The City desires the auditor to express an opinion on the fair presentation of its basic financial statements and the combining and individual fund financial statements and schedules in conformity with generally accepted accounting principles (GAAP). The auditor is not required to audit the supporting schedules contained in the comprehensive annual financial report. However, the auditor is to provide an "in-relation-to" opinion on the supporting schedules based on the auditing procedures applied during the audit of the basic financial statements and the combining and individual fund financial statements and schedules. The auditor is not required to audit the introductory section of the report or the statistical section of the report.

The auditor is not required to audit the schedule of expenditures of federal awards. However, the auditor is to provide an "in-relation-to" report on that schedule based on the auditing procedures applied during the audit of the financial statements.

The auditor will be required to perform agreed upon procedures applied to the City's appropriations limit prescribed by Article XIIB of the California Constitution as well the following:

1. Assistance with the preparation of the City's initial Comprehensive Annual Financial Report (CAFR) for Fiscal Year ending June 30, 2015 and subsequent years thereafter, and Successor Agency's basic financial statements. (SCOPE)
2. Assistance with preparation of State controller's Report.
3. All reports required for compliance with the provisions of *OMB Circular A-133* and the *Single Audit Act Amendments of 1996*.

## B. Auditing Standards to be Followed:

These audits are to be performed in accordance with generally accepted government auditing standards (GAAS), the standards for financial audits set forth in the U.S. General Accounting Office's *Government Auditing Standards* (1994), the provisions of the Federal Single Audit Act of 1984 (as amended in 1996) and the provisions of U.S. Office of Management and Budget (OMB) Circular A-133, Audits of State, Local Governments, and Non-Profit Organizations or latest versions thereof. The financial statements are prepared in accordance with the latest Governmental Accounting Standard Board (GASB) pronouncements, as required.

## C. Reports to be Issued:

Upon completion of the audit for each fiscal year, the auditor shall issue the

following reports:

1. An audit opinion on the fair presentation of the City's financial statements (CAFR) in conformity with generally accepted accounting principles, including an opinion on the fair presentation of the supplementary schedule of expenditures of federal awards in relation to the audited financial statements.
2. An audit opinion on the fair presentation of the financial statements in conformity with generally accepted accounting principles for the following City related entities:
  - a. Banning Utility Authority
  - b. Banning Housing Authority
  - c. Banning Successor Agency
3. A report on compliance and internal control over financial reporting based on an audit of the financial statements.

In the required report[s] on compliance and internal controls, the auditor shall communicate any reportable conditions found during the audit. A reportable condition shall be defined as a significant deficiency in the design or operation of the internal control structure, which could adversely affect the organization's ability to record, process, summarize and report financial data consistent with the assertions of management in the financial statements.

Reportable conditions that are also material weaknesses shall be identified as such in the report. Nonreportable conditions discovered by the auditors shall be reported in a separate letter to management, which shall be referred to in the report[s] on compliance and internal controls.

The report shall include all material instances of noncompliance. All nonmaterial instances of noncompliance shall be reported in a separate management letter, which shall be referred to in the report on compliance and internal controls.

4. A report of Agreed-Upon Procedures relative to the City's calculation of its Appropriation Limit in accordance with the *Article XIII B Appropriations Limit Uniform Guidelines* and as mandated by the California Constitution.

Irregularities and illegal acts. Auditors shall be required to make an immediate, written report of all irregularities and illegal acts or indications of illegal acts of which they become aware to the following parties:



- Administrative Services Director (except for acts involving or pertaining to the director)
- City Manager (except for acts involving or pertaining to the city manager)
- City Council

Reporting to the City Council. Auditors shall assure themselves that the City of Banning's City Council is informed of each of the following:

1. The auditor's responsibility under generally accepted auditing standards significant accounting policies
2. Management judgments and accounting estimates
3. Significant audit adjustments
4. Other information in documents containing audited financial statements
5. Disagreements with management
6. Management consultation with other accountants
7. Major issues discussed with management prior to retention
8. Difficulties encountered in performing the audit

D. Special Considerations

The City will send its comprehensive annual financial report to the Government Finance Officers Association of the United States and Canada for review in their Certificate of Achievement for Excellence in Financial Reporting program. It is anticipated that the auditor will be required to provide special assistance to the City of Banning to meet the requirements and time deadline of this program.

The City routinely prepares one or more official statements in connection with the sale of debt securities which may contain the basic financial statements and the auditor's report thereon. The auditor shall be required at no additional cost, if requested by the financial advisor and/or the underwriter, to issue a "consent and citation of expertise" as the auditor and any necessary "comfort letters."

The Schedule of Expenditures of Federal Awards and related auditor's report, as well as the reports on compliance and internal controls are not to be included in the comprehensive annual financial report, but are to be issued separately.

E. Working Paper Retention and Access to Working Papers

All working papers and reports must be retained, at the auditor's expense, for a minimum of three (3) years, unless the proposer is notified in writing by the City of the need to extend the retention period. The auditor will be required to make working papers available, upon request, to parties designated by the City. In addition, the proposer shall respond to the reasonable inquiries of successor auditors and allow successor auditors to review working papers relating to matters of continuing accounting significance.

**F. Additional Consulting Hours**

It is expected that the selected proposer will keep the City informed of new state and national developments affecting municipal finance and reporting, standards and trends including changes in federal/state grant program accounting and reporting requirements. This shall include at least one formal updating session per year with financial/accounting staff.

The scope of the audit must also include consulting time on subjects that could affect financial reports such as reviewing official statements for bond sales or answering payroll taxation issues, (this is in addition to consultations on matters directly relating to the audit and reports).



## LANCE, SOLL &amp; LUNGHARD, LLP

**SCHEDULE OF PROFESSIONAL FEES AND EXPENSES  
FOR THE AUDIT OF THE 2015 FINANCIAL STATEMENTS:**

## COMBINING SCHEDULE - ALL SERVICES

For the purpose of this proposal, Deborah A. Harper, Partner, is authorized to make representations for our firm, empowered to submit this bid and authorized to sign a contract with the City of Banning. I can be reached at the address above, by phone at (714) 672-0022 or through email at deborah.harper@lsllpas.com.

\_\_\_\_\_  
Deborah A. Harper, Partner  
LANCE, SOLL & LUNGHARD, LLP

Nature of Service to be Provided	Schedule	Total Price
City audit and Related Reports	I	\$ 33,550
Single Audit Act Report**	II	3,425
Appropriations Limit Review	None	Incl*
Banning Utility Authority Audit	III	3,425
Housing Compliance	IV	3,600
Successor Agency	V	5,500
State Controller's Report - City	VI	3,000
State Controller's Report - BUA	VII	1,500
Total for Fiscal Year (not to exceed)		\$ 53,900

## SCHEDULE OF PROFESSIONAL FEES AND EXPENSES - ALL SUBSEQUENT FISCAL YEARS

Nature of Service to be Provided	2015/16	2016/17	Optional		
			2017/18	2018/19	2019/20
City audit and Related Reports	\$ 34,557	\$ 35,593	\$ 36,661	\$ 37,761	\$ 38,894
Single Audit Act Report	3,528	3,634	3,743	3,855	3,971
Appropriations Limit Review	Incl*	Incl*	Incl*	Incl*	Incl*
Banning Utility Authority Audit	3,528	3,634	3,743	3,855	3,971
Housing Compliance	3,605	3,713	3,825	3,939	4,057
Successor Agency	5,665	5,835	6,010	6,190	6,376
State Controller's Report - City	3,090	3,183	3,278	3,377	3,478
State Controller's Report - BUA	1,545	1,591	1,639	1,688	1,739
Total for Fiscal Year (not to exceed)	\$ 55,518	\$ 57,183	\$ 58,899	\$ 60,665	\$ 62,486

Incl\* - Cost is included in the total cost for City audit and related reports.

\*\* Quoted at one major program, \$1,300 for each additional major program.



LANCE, SOLL & LUNGHARD, LLP

Schedule I

**SCHEDULE OF PROFESSIONAL FEES AND EXPENSES  
FOR THE AUDIT OF THE 2015 FINANCIAL STATEMENTS**

Service	Hours	Standard Hourly Rate	Quoted Hourly Rate	Total
Partners	18.00	\$ 280	\$ 250	\$ 4,500
Manager	44.00	185	180	7,920
Senior	116.00	140	115	13,340
Staff	82.00	125	95	7,790
Clerical	<u>incl</u>	incl	incl	<u>incl</u>
Subtotal	260.00			<u>\$ 33,550</u>
Out-of-Pocket Expenses				<u>incl</u>
Meals and lodging				<u>incl</u>
Transportation				<u>incl</u>
Total all-inclusive maximum price for 2015 audit				<u><u>\$ 33,550</u></u>

240



LANCE, SOLL & LUNGHARD, LLP

Schedule II

**SCHEDULE OF PROFESSIONAL FEES AND EXPENSES  
FOR THE AUDIT OF THE 2015 FINANCIAL STATEMENTS  
SUPPORTING SCHEDULE FOR BANNING SINGLE AUDIT**

Service	Hours <sup>*</sup>	Standard Hourly Rate	Quoted Hourly Rate	Total <sup>*</sup>
Partners	2.00	\$ 280	\$ 275	\$ 550
Manager	5.00	185	175	875
Senior	8.80	140	125	1,000
Staff	8.00	125	125	1,000
Clerical	<u>incl</u>	incl	incl	<u>incl</u>
Subtotal	23.00			<u>\$ 3,425</u>
Out-of-Pocket Expenses				<u>incl</u>
Meals and lodging				<u>incl</u>
Transportation				<u>incl</u>
Total all-inclusive maximum price for Banning Utility Authority				<u>\$ 3,425</u>

\* For one major program, \$1,300 for each additional major program

241



LANCE, SOLL & LUNGHARD, LLP

Schedule III

SCHEDULE OF PROFESSIONAL FEES AND EXPENSES  
FOR THE AUDIT OF THE 2015 FINANCIAL STATEMENTS  
SUPPORTING SCHEDULE FOR BANNING UTILITY AUTHORITY

Service	Hours	Standard Hourly Rate	Quoted Hourly Rate	Total
Partners	2.00	\$ 280	\$ 275	\$ 550
Manager	5.00	185	175	875
Senior	8.00	140	125	1,000
Staff	8.00	125	125	1,000
Clerical	<u>Incl</u>	incl	incl	<u>incl</u>
Subtotal	23.00			<u>\$ 3,425</u>
Out-of-Pocket Expenses				<u>incl</u>
Meals and lodging				<u>incl</u>
Transportation				<u>incl</u>
Total all-inclusive maximum price for Banning Utility Authority				<u>\$ 3,425</u>

242



LANCE, SOLL & LUNGHARD, LLP

Schedule IV

**SCHEDULE OF PROFESSIONAL FEES AND EXPENSES  
FOR THE AUDIT OF THE 2015 FINANCIAL STATEMENTS  
SUPPORTING SCHEDULE FOR BANNING HOUSING AUTHORITY**

Service	Hours	Standard Hourly Rate	Quoted Hourly Rate	Total
Partners	5.00	\$ 280	\$ 275	\$ 1,375
Manager	5.00	185	175	875
Senior	10.00	140	125	1,250
Staff	-	125	125	-
Clerical	<u>incl</u>	incl	incl	<u>incl</u>
Subtotal	20.00			<u>\$ 3,500</u>
Out-of-Pocket Expenses				<u>incl</u>
Meals and lodging				<u>incl</u>
Transportation				<u>incl</u>
Total all-inclusive maximum price for Banning Housing Authority				<u>\$ 3,500</u>



LANCE, SOLL & LUNGHARD, LLP

Schedule V

**SCHEDULE OF PROFESSIONAL FEES AND EXPENSES  
FOR THE AUDIT OF THE 2015 FINANCIAL STATEMENTS  
SUPPORTING SCHEDULE FOR SUCCESSOR AGENCY**

Service	Hours	Standard Hourly Rate	Quoted Hourly Rate	Total
Partners	5.00	\$ 280	\$ 275	\$ 1,375
Manager	10.00	185	175	1,750
Senior	19.00	140	125	2,375
Staff	-	125	125	-
Clerical	<u>incl</u>	incl	incl	<u>incl</u>
Subtotal	34.00			<u>\$ 5,500</u>
Out-of-Pocket Expenses				<u>incl</u>
Meals and lodging				<u>incl</u>
Transportation				<u>incl</u>
<b>Total all-inclusive maximum price for Successor Agency</b>				<u><u>\$ 5,500</u></u>





LANCE, SOLL & LUNGHARD, LLP

Schedule VI

SCHEDULE OF PROFESSIONAL FEES AND EXPENSES

FOR THE AUDIT OF THE 2015 FINANCIAL STATEMENTS

SUPPORTING SCHEDULE FOR STATE CONTROLLER REPORT - CITY

Service	Hours	Standard Hourly Rate	Quoted Hourly Rate	Total
Consultants	10.00	\$ 300	\$ 300	\$ 3,000
Clerical	<u>incl</u>	incl	incl	<u>incl</u>
Subtotal	10.00			<u>\$ 3,000</u>
Out-of-Pocket Expenses				<u>incl</u>
Meals and lodging				<u>incl</u>
Transportation				<u>incl</u>
Total all-inclusive maximum price for State Controller Report - City				<u>\$ 3,000</u>



LANCE, SOLL & LUNGHARD, LLP

Schedule VII

**SCHEDULE OF PROFESSIONAL FEES AND EXPENSES**

**FOR THE AUDIT OF THE 2015 FINANCIAL STATEMENTS**

**SUPPORTING SCHEDULE FOR STATE CONTROLLER REPORT - BUA**

Service	Hours	Standard Hourly Rate	Quoted Hourly Rate	Total
Consultants	5.00	\$ 300	\$ 300	\$ 1,500
Clerical	<u>incl</u>	incl	incl	<u>incl</u>
Subtotal	5.00			<u>\$ 1,500</u>
Out-of-Pocket Expenses				<u>incl</u>
Meals and lodging				<u>incl</u>
Transportation				<u>incl</u>
Total all-inclusive maximum price for State Controller Report - BUA				<u><u>\$ 1,500</u></u>



## **LANCE, SOLL & LUNGHARD, LLP**

### **MANNER OF PAYMENT**

Progress billing will be made on the basis of hours of work completed during the course of the engagement. Interim billings will cover a period of not less than a calendar month. The final ten percent (10%) of the total all-inclusive maximum price will be billed upon delivery of the final reports.

### **CONTRACT PROVISIONS**

We reviewed the copy of the City's Professional Services Agreement attached to the Request for Proposals for Professional auditing Services and have no exception to the terms of the agreement.