



## AGENDA

### REGULAR MEETING OF THE BANNING CITY COUNCIL CITY OF BANNING, CALIFORNIA

February 9, 2021

5:00 P.M.

**In Chamber and Video/Teleconference**

*The following information comprises the agenda for the regular meeting of the Banning City Council, the Banning City Council sitting in its capacity of the Banning Utility Authority, and the Banning City Council sitting in its capacity of the Successor Agency Board.*

***Due to the COVID-19 pandemic emergency, and to protect the health and safety of all participants, this meeting is being held in Chamber and via video/teleconference. Pursuant to Governor Newsom's Executive Orders, members of the Banning City Council, staff and public may observe and participate in this meeting electronically or telephonically as outlined below:***

To observe and participate in the on-line video portion of the meeting through your personal computer or device enter the following or click on the link:

<https://us02web.zoom.us/j/87415277765?pwd=dFVSOFBuMGpSeTBSREtPNytXYnhSQT09>

**Meeting ID: 874 1527 7765**

**Password: 870511**

One tap mobile: +16699009128,, 87415277765#

Dial in: +1 669 900 9128 US

Meeting ID: 874 1527 7765

Find your local number: <https://us02web.zoom.us/u/kb6rMlvB4i>

*Per City Council Resolution 2016-44, matters taken up by the Council before 10:00 p.m. may be concluded, but no new matters shall be taken up after 10:00 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.*

#### **1. CALL TO ORDER**

- 1.1. Invocation – Pastor Ryan Hussein of Calvary Chapel Sweet Hills
- 1.2. Pledge of Allegiance
- 1.3. God Bless America- Fusion
- 1.4. Roll Call - Council Members Hamlin, Happe, Pingree, Sanchez and Mayor Wallace

2.1. Approve Agenda

### **3. PRESENTATIONS**

3.1 Mayor's Special Recognition

3.2 Black History Month Presentations

### **4. REPORT ON CLOSED SESSION**

*City Attorney*

### **5. PUBLIC COMMENTS, CORRESPONDENCE, APPOINTMENTS, CITY COUNCIL COMMITTEE REPORTS, CITY MANAGER REPORT, AND CITY ATTORNEY REPORT**

#### **PUBLIC COMMENTS –Items Not on the Agenda**

*A three (3) 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. No member of the public shall be permitted to "share" his/her three minutes with any other member of the public. Usually, any items received under this heading are referred to staff for future study, research, completion and/or future Council Action (see last page). PLEASE STATE YOUR NAME 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.*

#### **APPOINTMENTS**

*None*

#### **CITY MANAGER REPORT**

*Doug Schulze, City Manager*

#### **CITY ATTORNEY REPORT**

*Kevin Ennis, City Attorney*

#### **CITY COUNCIL COMMITTEE REPORTS**

*Mayor and City Council*

### **6. CONSENT ITEMS**

*The following items have been recommended for approval and will be acted upon simultaneously, unless a member of the Banning City Council/Banning Utility Authority/Successor Agency Board wishes to remove an item for separate consideration.*

**Recommendation:** Approve Consent Items 6.1 – 6.5

6.1.	Minutes of the January 26, 2021 City Council Meetings .....	1
6.2.	Animal Services Agreement Termination .....	3
6.3.	Approve the Memorandum of Intent (MOI) between the City of Banning and the Riverside County Regional Park and Open-Space District Regarding Gilman Ranch and wagon Museum .....	5
6.4.	Resolution 2021-3, Awarding a Construction Agreement for Project 2020-07 Citywide Street Improvements” to All American Asphalt of Corona, CA in the Amount of \$678,501.50 and establishing a Total Project Budget of \$746,351.65 and Rejecting all Other Bids .....	7
6.5.	Resolution 2021-5 Approving an Agreement for Professional Services C000688 For Sunset Crossroads Specific Plan By and Between City of Banning and Michael Baker International, Inc. ....	11

**7. PUBLIC HEARINGS**

*None*

**8. REPORTS OF OFFICERS**

*None*

8.1.	Resolution 2021-4 Consideration and Approval of a Pre-Litigation Settlement Agreement with Tri Pointe Homes IE-SD, Inc. to Resolve Certain Disputes and Issues Regarding the Implementation of the Development Agreement for the Atwell Project .....	15
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*(Staff Report: Douglas Schulze, City Manager)*

**Recommendation:** Council adopt Resolution 2021-4, A Resolution of the City Council of the City of Banning Approving a Pre-Litigation Settlement Agreement with Tri Pointe Homes IE-SD, Inc. to Resolve Certain Disputes and Issues Regarding the Implementation of the Development Agreement for the Atwell Project.

**9. DISCUSSION ITEMS**

*None*

**10. ITEMS FOR FUTURE AGENDAS**

New Items:

Pending Items:

1. Permanent Homeless Solution
2. Shopping Cart Ordinance Update
3. Cannabis Microbusiness Workshop

## **11. ADJOURNMENT**

**Next Meeting: Tuesday, February 9, 2021 at 5:00 P.M.**

**IT IS HEREBY CERTIFIED under the laws of the State of California that the above Agenda was posted on the Banning City Hall Bulletin Board and the City's Website by 5:00 P.M. on the 4<sup>st</sup> day of February 2021.**



Laurie Sampson, Executive Assistant

**NOTICE:** Any member of the public may address this meeting of the Mayor and City 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 regular meeting agenda but is of interest to the general public and is an item upon which the Mayor and Council may act. A three-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 three 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]**

*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 Friday, 8 a.m. to 5 p.m. Since City Hall is currently closed to the public due to COVID, please call (951) 922-4860 or email [lsampson@banninca.gov](mailto:lsampson@banninca.gov) to request information be mailed.*



## CITY OF BANNING CITY COUNCIL REPORT

**TO:** CITY COUNCIL  
**FROM:** Douglas Schulze, City Manager  
**PREPARED BY:** Laurie Sampson, Acting Deputy City Clerk  
**MEETING DATE:** February 9, 2021  
**SUBJECT:** Minutes of the January 26, 2021 City Council Meetings

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### **RECOMMENDED ACTION:**

Approve the Minutes of the January 26, 2021 City Council Meetings.

### **OPTIONS:**

1. Approve as recommended.
2. Approve with modifications.
3. Do not approve and provide alternative direction.

### **ATTACHMENTS:**

1. Minutes of the January 26, 2021 Regular City Council Meeting  
<https://banningca.gov/DocumentCenter/View/8373/01-26-2021-Regular-Meeting-Minutes>
2. Minutes of the January 26, 2021 Special City Council Meeting  
<https://banningca.gov/DocumentCenter/View/8374/01-26-2021-Special-Meeting-Minutes>

Approved by:

A handwritten signature in blue ink, appearing to read "ASH" and "Schulze".

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Douglas Schulze  
City Manager

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## CITY OF BANNING CITY COUNCIL REPORT

**TO:** CITY COUNCIL  
**FROM:** Douglas Schulze, City Manager  
**MEETING DATE:** February 9, 2021  
**SUBJECT:** Animal Services Agreement Termination

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### **RECOMMENDED ACTION:**

Authorize the City Manager, by motion, to notify Riverside County Animal Control of the City of Banning intent to terminate the Agreement for Animal Services effective June 30, 2021.

### **BACKGROUND:**

The City of Banning currently contracts with Riverside County for animal control services. The Agreement was initiated July 1, 2018 and includes automatic annual renewals through June 30, 2023, if mutually agreed to by both parties. In February 2020, the Riverside County Department of Animal Services sent a letter notifying the City of fee increases, which impact pet owners as well as the City of Banning. The contract cost increase to the City of Banning was over \$13,000 per month, which is close to a 100% increase. The 2020 annual contract cost was \$360,000.

As a result of the substantial increase, City staff began gathering information to establish a proposed budget for an internal animal control function and refurbishing the animal shelter owned by the City of Banning. The annual proposed budget for in-house animal control services is \$257,400, including one-time start-up costs for a vehicle, office furnishings, and animal control equipment. The budget does not include animal shelter services, which would be provided by a non-profit organization.

Councilmember Kyle Pingree has led an effort to refurbish the animal shelter through donations and volunteer service. The animal shelter restoration project is near completion and a non-profit organization with shelter operation experience has expressed interest in operating the Banning Animal Shelter. A lease agreement and contract are anticipated to come to the City Council for consideration in April.

The recruitment process for animal control officers is expected to begin in March with interviews likely to occur in April/May. A transition date of July 1, 2021 provides sufficient time for the City as well as the non-profit shelter operator to be fully prepared to take over animal control services and animal shelter services.

**JUSTIFICATION:**

Animal control and sheltering services can be provided at a lower cost with an increased level of service by terminating the Agreement with Riverside County Department of Animal Services.

**FISCAL IMPACT:**

Projected annual cost savings of \$50,000 - \$100,000.

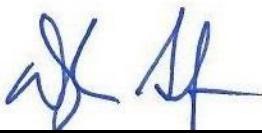
**OPTIONS:**

1. Approve as recommended.
2. Do not approve and provide alternative direction.

**ATTACHMENTS:**

1. Animal Services Agreement  
<https://banningca.gov/DocumentCenter/View/8356/20180701Riverside-County---Animal-Services---Annual---through-6-30-2023>
2. Letter Regarding Rate Increase  
<https://banningca.gov/DocumentCenter/View/8357/20200204Letter-re-Rate-Increase-to-Animal-Services>

Approved by:



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Douglas Schulze  
City Manager



## CITY OF BANNING CITY COUNCIL REPORT

**TO:** **CITY COUNCIL**

**FROM:** **Douglas Schulze, City Manager**

**PREPARED BY:** **Ralph Wright, Parks and Recreation Director**

**MEETING DATE:** **February 9, 2021**

**SUBJECT:** **Approve the Memorandum of Intent (MOI) between The City of Banning and the Riverside County Regional Park and Open-Space District Regarding Gilman Ranch and Wagon Museum**

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**RECOMMENDED ACTION:**

Staff recommends that the City Council approve the Memorandum of Intent between the City of Banning and the Riverside County Regional Park and Open-Space District regarding Gilman Ranch and the Wagon Museum.

**BACKGROUND:**

Since 2018, the Banning Parks and Recreation Department has hosted our 5k Run and Health Fair at Gilman Ranch and co-hosted a Holiday Event with the site's non-profit support group, the Gilman Ranch Hands. Beginning in June of 2020, the two agencies entered formal discussions over how they could work more closely to maximize the potential of the site so that it serves as a resource for both agencies. This MOI will serve as a formal declaration of the intent of the Parties to explore, develop and implement a five-year strategic plan in order to meet the expressed goals.

The goals of this partnership and MOI are as follows:

- 1) Maximize access to the Gilman Ranch for the citizens of Banning;
- 2) Maximize use of Gilman Ranch for events co-sponsored by the Riverside County Regional Park and Open-Space District and Banning Parks and Recreation Department;
- 3) Align the Regional Park District's and Banning Parks and Recreation's visions for the site to more effectively realize the potential of Gilman Ranch;
- 4) Identify strategic public-private partnerships that will enhance the existing Gilman Ranch experience; and
- 5) Establish a five-year strategic plan, which aligns with the City of Banning's Parks and Recreation Master Plan, for meeting the above goals.

This Memorandum is a planning tool prepared by the Parties. The Parties do not make financial commitments by executing this Memorandum or by forming or participating in additional meetings to discuss the five-year strategic plan.

This Memorandum is intended solely as an expression of general intent and interest and is to be used for general coordination purposes only. The Parties agree that this Memorandum does not create any formal agreement, obligation, right, duty, or otherwise, to restrict the use of real property or to finance, develop or construct any of recreational projects or related facilities of any kind whatsoever. The Parties have no contractual duties to one another, and the Parties agree and acknowledge that no implied covenants attach to this Memorandum including, but not limited to, the implied covenant of good faith and fair dealing.

The term of this MOI is for an initial two (2) year period with the ability to extend the MOI for an additional two (2) years upon mutual agreement of both parties.

**JUSTIFICATION:**

Entering into the MOI is an expression of general intent and interest and is to be used for general coordination purposes. The MOI allows parties to unilaterally terminate all activities associates with this agreement for any reason and does not bind the City of Banning financially whatsoever.

**FISCAL IMPACT:**

There is no Fiscal impact associated with this item.

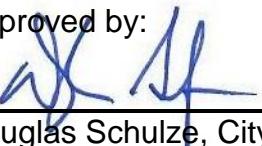
**ALTERNATIVE:**

Do not approve the MOI and staff will work with Riverside County Regional Park and Open-Space district for alternative opportunities to work together to increase programming at the facility and improve the Ranch.

**ATTACHMENTS:**

1. MOI between the City of Banning and Riverside County Regional Park and Open-Space District  
<https://banningca.gov/DocumentCenter/View/8358/MOI-CofBDPR---RivCoParks-Draft---Rivco-Parks>

Approved by:



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Douglas Schulze, City Manager



## CITY OF BANNING CITY COUNCIL REPORT

**TO:** CITY COUNCIL

**FROM:** Douglas Schulze, City Manager

**PREPARED BY:** Art Vela, Public Works Director  
Kevin Sin, Senior Civil Engineer

**MEETING DATE:** February 9, 2021

**SUBJECT:** Adopt Resolution 2021-3, Awarding a Construction Agreement for Project No 2020-07, "Citywide Street Improvements" to All American Asphalt of Corona, CA in the Amount of \$678,501.50 and Establishing a Total Project Budget of \$746,351.65 and Rejecting all Other Bids

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### **RECOMMENDATION:**

The City Council adopt Resolution 2021-3 approving the following actions:

1. Approving a Construction Agreement for Project No. 2020-07, "Citywide Street Improvements" to All American Asphalt of Corona, California in the amount of \$678,501.50 and a 10% contingency in the amount of \$67,850.15 for a total project budget of \$746,351.65 and rejecting all other bids.
2. Authorizing the City Manager or his designee to make necessary budget adjustments, appropriations, and transfers related to the Construction Agreement for Project No. 2020-07, "Citywide Street Improvements" and to approve change orders within the 10% contingency.
3. Authorize the City Manager to execute the Construction Agreement with All American Asphalt for Project No. 2020-07, "Citywide Street Improvements".

### **JUSTIFICATION:**

In addition to beautifying the City's street network, Project No. 2020-07, "Citywide Street Improvements" ("Project") assists in achieving the Public Works Department goal of effectively managing the City's street assets. The scope of work of Project will extend the useful life of the various street segments included in the Project.

All American Asphalt is the lowest responsive and responsible bidder to construct Project.

## **BACKGROUND:**

### Measure A

Voters in Riverside County approved Measure "A" in 1988, which authorized the Riverside County Transportation Commission to impose an additional one-half percent (0.5%) sales tax for the next 20 years to be used for improvements of state highways, public transit systems, and local streets. In 2002, voters in Riverside County approved a 30-year extension of the one-half percent sales tax for transportation improvements.

Annually, each City in Riverside County is required to submit a Five Year CIP, as approved by its governing board, to indicate how Measure "A" funding is to be utilized over the next five years. The list of streets to be improved as part of the Project are in accordance with the approved Five Year CIP adopted by City Council.

### Senate Bill 1

Senate Bill 1 (SB 1), the Road Repair and Accountability Act of 2017 (Chapter 5, Statutes of 2017) was passed by the Legislature and Signed into law by the Governor in April 2017 in order to address the significant multi-modal transportation funding shortfalls statewide.

Each city must include a list of all projects proposed to receive funding from the Road Maintenance and Rehabilitation Account (RMRA) created by SB 1, which must include a description and the location of each proposed project, a proposed schedule for the project's completion, and the estimated useful life of the improvement. A list of the proposed projects was approved by City Council on April 9, 2019. The approved list of projects are part of the Project.

### Project

Public Works staff prepared plans and specifications for the Project which included the following items: grinding of existing asphalt concrete (AC) pavement; constructing new AC; crack sealing of existing AC pavement; apply slurry seals on various streets; remove and replace broken sidewalks, curb and gutters; remove and replace access ramps to comply with ADA requirements; repair potholes on various streets; and remove and replace all affected pavement markings and striping. A list of streets for the various improvements can be found attached hereto.

A Notice Inviting to Bid and the Bid Documents for the Project were posted and advertised on the City's electronic bidding system, "ProcureNow" on December 15,

2020. In response to these efforts, eight (8) bids were received on January 19, 2021 from the following contractors:

<u>Companies</u>	<u>Bid Amount</u>
1) All American Asphalt of Corona, CA	\$678,501.50
2) Onyx Paving Company, Inc. of Anaheim, CA	\$686,000.00
3) Matich Corporation of Highland, CA	\$712,377.83
4) Hardy and Harper of Lake Forest, CA	\$717,900.00
5) Frank and Son Paving Inc.	\$743,371.04
6) LC Paving and Sealing	\$796,579.28
7) Vance Corporation	\$896,698.00
8) Aid Builders, Inc.	\$1,405,924.50

The apparent lowest bidder is All American Asphalt of Corona, California.

All American Asphalt has successfully performed similar work with the City in the past as a subcontractor and a prime contractor in multiple contracts. The company has proven to be a responsive and responsible contractor.

As a result, staff recommends that the Construction Agreement be awarded to the lowest responsive and responsible bidder, All American Asphalt of Corona, California, in the amount of \$678,501.50. A copy of All American Asphalt's bid can be found attached hereto.

If awarded, staff anticipates the work to commence early March, 2021 and to be completed within sixty (60) working days or approximately three (3) months from the issuance of a Notice to Proceed.

#### **FISCAL IMPACT:**

The Construction Agreement with All American Asphalt is for an amount of \$678,501.50. Staff requests the approval of a 10% contingency in the amount of \$67,850.15 for a total project budget amount of \$746,351.65.

The project shall be funded by the following sources:

<u>Account No.</u>	<u>Amount</u>
101-4900-431.93-16 (Street Improvements – Measure A)	\$316,351.65
102-4904-431.93-15 (Street Improvements – SB1)	\$430,000.00
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	\$746,351.65

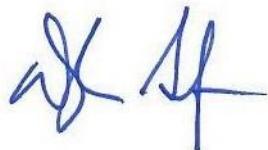
## **ALTERNATIVE**

Reject Resolution No. 2021-3 and provide direction to staff.

## **ATTACHMENTS:**

1. Resolution No. 2021-3  
<https://banningca.gov/DocumentCenter/View/8359/Attachment-1-Resolution-2021-3>
2. All American Asphalt Bid Schedule  
<https://banningca.gov/DocumentCenter/View/8360/Attachment-2---All-American-Asphalt-Bid-Proposal>
3. Project List of Street Improvements  
<https://banningca.gov/DocumentCenter/View/8361/Attach-3-Combined>

Approved by:



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Douglas Schulze  
City Manager



## CITY OF BANNING CITY COUNCIL REPORT

**TO:** CITY COUNCIL

**FROM:** Douglas Schulze, City Manager

**PREPARED BY:** Adam Rush, AICP, Community Development Director  
Shiloh Rogers, Purchasing Manager

**MEETING DATE:** February 9, 2021

**SUBJECT:** Resolution 2021-5, Approving the Professional Services Agreement in the amount of \$50,000 with Michael Baker International, Inc. to provide professional planning, environmental, and project management services as a Supplement to the City's Planning Division Staff.

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### **RECOMMENDED ACTION:**

City Council adopt Resolution 2021-5 approving the following:

1. Adopt Resolution 2021-5, Approving the Professional Services Agreement in the amount of \$50,000 with Michael Baker International, Inc. (MBI), to provide professional planning, environmental, and project management services as an adjunct to the City's Planning Division Staff.
2. Authorizing the City Manager or his designee to make necessary budget adjustments, appropriations and transfers related to the Professional Services Agreement.
3. Authorizing the City Manager to execute the Professional Services Agreement with Michael Baker International, Inc.

### **BACKGROUND:**

#### *Staff Augmentation for Project Management:*

On June 24, 2020, the City released a Request for Proposal (RFP) to expand and enhance the City's approved bench of on-call consulting firms. Solicitations were published and proposals were received that resulted in the selection of six firms subsequently placed on the City's updated list effective August 25, 2020.

In October of the same year, the Community Development Department received an application for a large master planned industrial and commercial development. The project will be called the Sunset Crossroads Specific Plan and is located easterly of Highland Home Road, westerly of Sunset Avenue, northerly of Bobcat Road and southerly the Interstate 10 freeway. Due to the proposed project scope and the potential for significant economic development, the Community Development Director requested the services of a dedicated project manager through the approved bench of consultants. The purpose of contracting with a dedicated project manager is primarily to assist and supplement the City's permanent planning division staff with the daily management and overall project processing of this large and complex development application.

#### RFP and Selection Process:

The Community Development Department released a Request for Proposal (RFP) on October 23, 2020 where four firms submitted responsive and responsible proposals. An evaluation team, drawn from three separate city departments (including Community Development), reviewed all proposals and determined to be the most qualified and responsive firm was Michael Baker International, Inc. More specifically, Ms. Emily Elliot was selected as the City's contract project manager to serve as the dedicated staff contact for the duration of the entitlement process. Therefore, City staff is requesting the Council approve a professional services agreement, with Michael Baker International, Inc., to provide project management services specifically for the Sunset Crossroads Specific Plan.

#### **JUSTIFICATION:**

The Sunset Crossroads Specific Plan presents a potential "turning point" in the City's development activity and includes multiple land use entitlement applications all which are being evaluated under a single Environmental Impact Report. It is the opinion of staff that a qualified and experienced project manager is the most efficient option for the City to provide efficient and direct customer service to the applicant and development team. The project planner selected is proficient in both the application of land use planning combined with several years of managing, drafting, and processing environmental documents of various sizes and scopes.

#### **FISCAL IMPACT:**

Upon Council approval, the City will request an initial deposit in the amount of \$50,000 from the project applicant to cover the costs of this dedicated project manager. All City consulting costs will be the responsibility of the project applicant. In addition, if additional funds are required then staff will submit a budget increase request to the City Council for consideration.

**OPTIONS:**

1. Approve as recommended.
2. Provide an alternative recommendation, e.g., reject the RFP selection and republish
3. Do not approve and provide alternative direction.

**ATTACHMENTS:**

1. Resolution 2021-5  
[https://banningca.gov/DocumentCenter/View/8367/ATTACHMENT-1-Resolution-2021-5\\_PSA-Adoption\\_20201013](https://banningca.gov/DocumentCenter/View/8367/ATTACHMENT-1-Resolution-2021-5_PSA-Adoption_20201013)
2. Draft Professional Services Agreement with Michael Baker Intl., Inc.  
<https://banningca.gov/DocumentCenter/View/8368/ATTACHMENT-2---PSA-MICHAEL-BAKER-INTERNATIONAL-INC>
3. Request for Proposal (RFP)  
<https://banningca.gov/DocumentCenter/View/8369/ATTACHMENT-3---RFP-for-Project-Mgr-on-call>
4. Proposal Submitted by Michael Baker Int'l., Inc.  
[https://banningca.gov/DocumentCenter/View/8370/ATTACHMENT-4---Banning\\_PM\\_Services\\_Proposal\\_Michael\\_Baker\\_International-2](https://banningca.gov/DocumentCenter/View/8370/ATTACHMENT-4---Banning_PM_Services_Proposal_Michael_Baker_International-2)

Approved by:



Douglas Schulze  
City Manager

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## CITY OF BANNING CITY COUNCIL STAFF REPORT

**TO:** **CITY COUNCIL**

**FROM:** **Douglas Schulze, City Manager**

**PREPARED BY:** **Doug Schulze, City Manager**  
**Kevin G. Ennis, City Attorney**  
**Saskia T. Asamura, City Attorney's Office**

**MEETING DATE:** **February 9, 2021**

**SUBJECT:** **Consideration and Approval of a Pre-Litigation Settlement Agreement with Tri Pointe Homes IE-SD, Inc. to Resolve Certain Disputes and Issues regarding the Implementation of the Development Agreement for the Atwell Project**

**RECOMMENDED ACTION:**

Staff recommends the City Council adopt Resolution 2021-4, A Resolution of the City Council of the City of Banning Approving a Pre-Litigation Settlement Agreement with Tri Pointe Homes IE-SD, Inc. to Resolve Certain Disputes and Issues regarding the Implementation of the Development Agreement for the Atwell Project.

**BACKGROUND:**

This agenda item is to allow the City Council to resolve by agreement a series of issues and disputes that have arisen over the last year with Tri Pointe Homes IE-SD, Inc. (formerly known as Pardee Homes) related to the development of the Atwell Project.

The Atwell Project is one of the largest and most important housing development projects in the City's history. It covers a land area of 1,543 acres and is planned to contain as many as 4,862 dwelling units, as well as parks, schools, commercial shopping areas and other public and private improvements.

Sales of homes in the Atwell Project are off to a fast start, with building permits for 479 homes already issued in 2020. As many as 83 single-family homes in the first phase have been completed, sold and are now occupied by new residents and families. The infusion of new residents and families that this development project is bringing to the City will have welcome long-term positive impacts on the City's economy by helping to bring consumer demand that will attract new businesses to serve the needs of the new residents in the Project as well as those residing in other areas of the City. It is important

to the City that the Atwell Project be a successful addition to the City so that all of Banning can grow more prosperous.

The City and Tri Pointe have worked hard to develop and maintain a cooperative and productive working relationship through the planning and development process. Many issues have been easily resolved as they arise. However, a few issues have taken additional effort to find appropriate resolution, especially in the wake of new laws that were adopted in 2020 as a result of the COVID-19 pandemic, which went into effect on January 1 of this year, that no court has yet interpreted or applied.

In the last year, four disputes and issues have required extra efforts by both the City and Tri Pointe to solve. Some of these arose because of ambiguities in the entitlements granted by the City for the Project, including missing definitions or ambiguous text in the Development Agreement between Tri Pointe and the City that was approved in 2012. Others arose because of early delays in the start of construction, due to events beyond the control of either party, and then more recent delays, and economic and legal impacts caused by the COVID-19 pandemic. Still other issues have occurred because of the changing commercial economy between the time the Development Agreement was approved and today. Because these issues were not foreseen and addressed in those 2012 entitlements, the City and Tri Pointe seek to now resolve these ambiguities and disputes amicably and to achieve a balance of benefits for each party without the need to resort to the courts or outside mediators.

That is why the City and Tri Pointe have developed and negotiated what is titled a “Pre-Litigation Settlement Agreement” so that these disputes and issues can be resolved without either party pursuing litigation. At the same time, the parties desire to leave the entitlements as previously approved and not change the elements, features and benefits of the Project (with the exception of reducing the potential intensity of uses on the 23-acre commercial site), and instead focus on addressing ambiguities that principally involve timing, permit processing, and financial issues.

#### **A. Summary of Pre-Litigation Settlement Agreement Terms**

The Pre-Litigation Settlement Agreement (“Settlement Agreement”) addresses and resolves three disputes and two other issues between Tri Pointe and the City. The disputes involve: (1) the terms under which Development Impact Fee (“DIF”) Credits or waivers are earned for the first 479 dwelling units for which building permits were issued in 2020; (2) the type of major tenant that would be allowed to be developed on the 23-acre commercial site in Planning Area 18; and (3) whether the 2016 or 2019 California Building Code (“CBC”) applies to a planned additional 355 dwelling units that are to be commenced prior to the end of 2022. The additional issues are: (4) the terms and conditions by which the City would provide a dedicated building inspector for the Atwell Project; and (5) the amount and timing of General Fund payments to the City that provide benefits to the City for the resolution of the disputed items and issues.

A summary of each issue and how it is resolved in the Settlement Agreement is set forth below:

**1. Extension of time for Tri Pointe to earn credits or “waivers” of City Development Impact Fees (“DIF”) for the first 479 dwelling units at the Project.**

This dispute arose in February and March 2020 when Tri Pointe applied for and obtained building permits for 479 dwelling units but had not commenced construction of each of those dwelling units by February 10, 2020, which was the deadline for Tri Pointe to do so in order to obtain a credit or “waiver” of the City’s DIF on those units. Tri Pointe claimed the Parties did not intend the term “commencement of construction” to mean physical construction of each unit but just the approval of plans and issuance of a building permit for those units. The City disagreed with that interpretation, and also asserted that a precondition to earning those credits was the completion of streets and utilities for a 23-acre commercial site, which also was not satisfied by February 10, 2020.

This dispute is resolved by: (i) establishing a definition for commencement of construction to be the completion of the first City inspection on the foundation for a unit; and (ii) the commencement of construction of all those 479 dwelling units no later than December 31, 2022. Resolution of this dispute also involves Tri Pointe agreeing to make monthly payments to the City’s General Fund for a total of \$3 million over a ten-month period for this compromise and for other terms of the Settlement Agreement.

The benefits to the City of this compromise are that potential litigation over this dispute is avoided and the City receives needed General Fund contributions in this fiscal year and the next fiscal year. In return, Tri Pointe obtains the benefit of avoiding the payment of DIF on those initial housing units which allows Tri Pointe more ability to keep housing sale prices in the development lower at this initial phase of the Atwell Project than may otherwise be the case by not requiring Tri Pointe to pay DIF on each of those 479 units. It also allows Tri Pointe to shift to later phases of its development, its use of public infrastructure credits against its overall DIF obligations. This arrangement is not anticipated to result in an overall significant loss of DIF to the City for public infrastructure projects because Tri Pointe already has the opportunity to qualify for so much public infrastructure it is installing in and around the Atwell Project site as a credit against its DIF obligations.

**2. Allowance of a Supermarket Shopping Center on the 23-acre commercial site at the corner of Highland Springs and Wilson (“Commercial Site”) rather than a 75,000 square foot “big box” retailer.**

The 2012 Development Agreement articulated that one of the City’s original goals for the Atwell Project was to secure a “big box” retailer as the major tenant of the Commercial Site in Phase I of the development. Under the Development Agreement, the City retains the right to approve the major tenant. Tri Pointe was also required to show a good faith effort over five years to market the Commercial Site for sale or lease to a suitable user. Tri Pointe asserts that it has made good faith efforts to secure a “big box” retailer over an

extended period of time, but was unable to do so. In addition, by 2020, significant changes in economic and other circumstances caused by the COVID-19 pandemic made it clear to the City that the original goal was no longer feasible or desirable.

To address the realities of current and future needs of the community, and the inability to secure a big box tenant as originally contemplated over eight years ago, and having expressly retained the right to approve the major tenant at the Commercial Site, the City desires, and Tri Pointe agrees, to develop the site with an appropriate type of neighborhood commercial center, such as a regional or national grocery store anchor tenant with adjacent smaller retail facilities. The City retains the right under the Development Agreement to approve the major anchor tenant, and the Settlement Agreement provides that this right is to be exercised by the City Council. All other provisions relating to the Commercial Site remain unchanged.

The benefits to the City of this compromise are that the Commercial Site will provide a valuable and much-needed neighborhood commercial resource in the heart of the Atwell Project, benefiting its residents while not exacerbating traffic congestion in the area that could be created by a more regional “big box” retailer. It allows development of the Commercial Site to proceed on pace with development of Phase 1 and 2, with no further delays caused by the inability to secure a big box tenant (further pursuit of which would almost certainly be unfruitful). It also reflects a practical response to changed economic and social conditions, consistent with the flexibility built-in to the Development Agreement.

### **3. Allowance for Tri Pointe to build up to a total of 834 dwelling units under the 2016 rather than the 2019 version of the California Building Code (“CBC”).**

This dispute involves whether the 2016 CBC, which expired on December 31, 2019, or the 2019 CBC, which is in effect from January 1, 2020 to December 31, 2022, applies to up to 355 additional dwelling units for which Tri Pointe projects it will seek building permits in 2021 and 2022. These 355 dwelling units will all be built in accordance with plans for 15 “model homes” that were approved in October and December of 2019, under the 2016 CBC in effect at the time. Construction of the first group of 479 dwelling units in accordance with the model plans is well underway, and application for permits and commencement of construction of the additional 355 units is anticipated to proceed at a relatively steady pace.

Tri Pointe contends that because the additional 355 units will also be built in accordance with the approved model plans, the 2016 CBC should equally apply to these additional units. Tri Pointe points to a recent law, Assembly Bill 1561 (“AB 1561”), that went into effect on January 1 of this year, which extends the expiration date of already-approved housing entitlements to prevent the COVID-19 pandemic from negatively affecting the production of housing. To reduce pressure on housing development projects, AB 1561 automatically extends the deadlines related to specified housing entitlements by 18 months. Housing entitlements are defined in the new law to include a “ministerial approval, permit, or entitlement by a local agency required as a prerequisite to issuance of a building permit for a housing development project” and also a “requirement to submit

an application for a building permit within a period of time after the effective date" of such ministerial approval. The reasonable legal interpretation and application of these definitions is that the approval of the 15 model plans in 2019, under the 2016 CBC then in effect, and the deadline to seek permits based on those plans, are "housing entitlements" under AB 1561, for which the 18-month extension applies. Tri Pointe contends the Building Official has the discretion and the authority to interpret applicable provisions of law, including AB 1561, to extend the deadline to apply for permits on the additional 355 units by 18 months from approval of the 15 model plans, such that the 2016 CBC applies to those additional units.

This dispute is resolved by agreement that: (1) Tri Pointe is permitted to build up to 355 additional dwelling units under the 2016 CBC as long as (a) they are built in conformance with one of the 15 approved model plans, (b) Tri Pointe applies for permits within 18 months of approval of the model plans (i.e. by April 29, 2021 for six of the model plans, or June 17, 2021 for the other nine), and (c) Tri Pointe must commence construction on each of the 355 dwelling units, by completing the first foundation inspection, no later than December 31, 2022; and (2) before issuing each building permit or group of permits, Tri Pointe must provide assurance, and the Building Official, in consultation with the City Engineer/Public Works Director, shall determine that adequate water and sewer capacity exists or will exist to serve each of the dwelling units to be constructed under the permit or permits. The Parties acknowledge that the Building Official is acting in good faith and within the proper scope of his discretion and authority under the CBC in interpreting and applying applicable laws and the 2016 CBC in the manner described. The Parties further acknowledge that the 2016 CBC shall not apply to any of the 355 additional dwelling units if either (a) commencement of construction occurs after December 31, 2022, or (b) the dwelling unit is not built in accordance with one of the 15 model plans that were approved in 2019.

The benefits to the City of resolving this issue in the manner provided are that potential litigation over this dispute - and the inevitable expense and delay this would cause - are avoided and development of Phase 2 and 3 of the Project can continue at a steady and uninterrupted pace without the significant delay that could otherwise occur by having to develop and then implement new model home plans.

#### **4. City Hiring Building Inspector Dedicated to the Atwell Project.**

Tri Pointe asked the City to hire or engage an inspector to be assigned to work full-time on inspections of homes in the Atwell Community. This request is made pursuant to Section 9.5 of the Development Agreement, which provides, in pertinent part: "In the event that the City is unable to provide inspectors or plan checkers capable of meeting the demand for inspections or plan checks required for the Development of the Project in a timely fashion, the City shall, if requested to do so by the Developer and at the Developer's expense, employ additional private entities or persons to perform such services."

In accordance with Section 9.5 of the Development Agreement, Tri Pointe has requested, and the City has agreed, that the City shall employ or retain a person or persons who shall serve as a dedicated full-time, or full-time equivalent, building inspector (“Dedicated Inspector”) to perform building inspections, and related duties, exclusively for the Atwell Project. The Dedicated Inspector shall perform this work through the final inspection of all dwelling units in Phases I, II, III and IV, or ten (10) years from the effective date of the Settlement Agreement, whichever occurs earlier (the “Dedicated Inspector Period”). The City will endeavor to have the Dedicated Inspector employed or retained by April 1, 2021, and to be available thereafter throughout the Dedicated Inspector Period. While Tri-Pointe may provide its input to the City regarding selection of the Dedicated Inspector and during the probationary period, the hiring decision will be made by the City and the Dedicated Inspector will be a City employee, under the direction, supervision, and control of the City.

To promote efficiency in the performance of the Dedicated Inspector’s duties, Tri Pointe will maintain a construction trailer onsite at the Atwell Project, at its own expense, furnished with office equipment, furniture, supplies, and other apparatus, which will be available for use by the Dedicated Inspector as a primary base of operations, in addition to City Hall. The Parties agree that if the pace of construction slows in any given calendar year during the Dedicated Inspection Period below an agreed-upon minimum number of building permits or inspections of dwelling units in that year set forth in the Settlement Agreement, and/or the work required of the Dedicated Inspector is not sufficient to occupy him/her full-time at the Atwell Project, then the Dedicated Inspector may devote any downtime to other City business. Tri Pointe inspection work takes priority if that occurs.

City staff has concluded this is workable and financially feasible because the anticipated revenues from building permit fees from the Atwell Project are estimated to be sufficient to pay the salary and benefits of a Dedicated Inspector for that project.

## **5. Payments to the City totaling \$3 million plus the City’s costs of negotiating the Settlement Agreement.**

Tri Pointe has agreed to pay \$3 million to the City as part of the consideration for the Settlement Agreement, which will be paid in ten monthly installments of \$300,000 to the City’s General Fund, commencing in March 2021 through and including December 2021. In addition, Tri Pointe has agreed to pay the City’s costs of negotiating the Settlement Agreement so that the City does not spend City resources to pay for the legal expense related to resolving this threat of litigation on multiple complex issues of interpretation of state and local laws and regulations.

The above payment schedule may be modified slightly if the following occurs: if the City does not have the Dedicated Inspector for the Atwell Project ready to commence work on April 1, 2021, and/or the Dedicated Inspector does not work on the Atwell Project for any calendar month for which a monthly installment is due as set forth above, either at the request of Tri Pointe or due to the inability or unavailability of the Dedicated Inspector for such calendar month, then \$100,000 of the \$300,000 monthly installment payment for that month will be deferred (“Deferred Payment”). Any \$100,000 Deferred Payment(s)

shall be paid to the City in \$100,000 installments, commencing on January 1, 2022, until all Deferred Payments are paid.

### **JUSTIFICATION:**

The Settlement Agreement is appropriate to accomplish several goals. First, the Settlement Agreement will allow Tri-Pointe and the City to know how each side will interpret and apply certain provisions of the Development Agreement going forward so as to avoid disputes in the future. Second, it will allow for and provide terms for the prompt approval of additional building permits and building inspections so as to maintain the steady and successful pace of the development. Third, it will provide for a more appropriate and less intensive type commercial development on the 23-acre Commercial Site. Fourth, it will bring needed and important General Fund revenue to the City during a period of budgetary constraints. Finally, it will resolve a year-long series of disputes and avoid the delays, uncertainties, and costs of potential litigation between the parties.

### **FISCAL IMPACT:**

The Settlement Agreement will result in a lesser amount of Development Impact Fees from the beginning phases of the Atwell Project (the first 479 units), and the likely greater amount of such fees for later phases as the City adjusts its fees in the future to generate needed revenue for backbone City infrastructure projects. With respect to the Commercial Site, modifying the City's outdated 2012 goal to allow uses other than a 75,000 SF big box retailer will likely make the site more marketable, and bring needed and neighborhood related development and amenities to that site sooner. This can result in build-out of the Commercial Site sooner and generate the City's indirect share of property tax and sales tax sooner than may have otherwise been the case in these challenging economic times. With respect to allowing up to a 834 units to be built under the 2016 CBC, this issue is not anticipated to have a fiscal impact on the City. The employment of a Dedicated Inspector for the Project is anticipated to be cost neutral as the employee salary and benefits are anticipated to be paid for out of building permit fees paid by Tri Pointe. Lastly, the \$3 million payment in monthly installments is anticipated to have an important and positive effect on the City General Fund and on its overall financial condition during this current fiscal year and the first half of the next fiscal year, thereby lessening, but not eliminating, the need for certain budget cuts.

### **CEQA DETERMINATION:**

City Staff has reviewed the terms of the Settlement Agreement and finds that the Settlement Agreement interprets and implements the Development Agreement and does not make any physical changes to the Atwell Project previously reviewed and approved by the City pursuant to the Final Environmental Impact Report (SCH No. 2007091149) that would cause any new or more severe impacts than what were previously reviewed in the Final EIR. The terms of the Settlement Agreement are principally administrative and financial in nature, and the City Staff therefore finds that the Settlement Agreement does

not require, and is not subject to, additional environmental review under the California Environmental Quality Act (CEQA).

**ATTACHMENTS:**

1. City Council Resolution 2021-4  
<https://banningca.gov/DocumentCenter/View/8371/Att-1-Resolution-2021-4>
2. Pre-Litigation Settlement Agreement with Tri Pointe Homes  
<https://banningca.gov/DocumentCenter/View/8372/Att-2-Pardee-v-Banning-Settlement-Agreement-FINAL>

Approved by:



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Douglas Schulze  
City Manager