AGENDA
REGULAR MEETING
CITY OF BANNING
BANNING, CALIFORNIA

March 11, 2008
Council Chambers
6:30 p.m.

Banning Civic Center
99 E. Ramsey St.

Per City Council Resolution No. 1997-33 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 councilmembers present and voting.

I. CALL TO ORDER

. Pledge of Allegiance
. Invocation
. Roll Call – Councilmembers Botts, Franklin, Hanna, Machisic, Mayor Salas

II. PUBLIC COMMENTS/CORRESPONDENCE/PRESENTATIONS ANNOUNCEMENTS/APPOINTMENTS

Report by City Attorney

PUBLIC COMMENTS – *On Items Not on the Agenda*

A three-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 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 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

Our Mission as a City is to provide a safe, pleasant and prosperous community in which to live, work and play. We will achieve this in a cost effective, citizen friendly and open manner.

PRESENTATIONS

1. Proclamation - American Cancer Society's Relay for Life 1

ANNOUNCEMENTS/COUNCIL REPORTS:
(Upcoming Events/Other Items and Reports if any) (ORAL)

III. A. CONSENT ITEMS

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

Motion: That the City Council approve Consent Item 1 through 4
Items to be pulled _____, _____, _____, _____ for discussion.
(Resolutions require a recorded majority vote of the total membership of the City Council)

1. Resolution No. 2008-33, Amending the Memorandum of Understanding (MOU) with the City of Banning Association of Managers (CBAM) and the City of Banning 3
2. Resolution No. 2008-35, Approving the Electric Rate Schedule to Increase the Baseline Kilowatt Hour for All-Electric Residential Customers and Customers with Water Wells..... 8
3. Contract Amendment, Clarification of City Manager Contract..... 34
4. Notice of Completion for Remediation of Substandard Safety Conditions at the Banning Community Center..... 36

- **Open for Public Comments**
- **Make Motion**

IV. PUBLIC HEARINGS

(The Mayor will ask for the staff report from the appropriate staff member. The City Council will comment, if necessary on the item. The Mayor will open the public hearing for comments from the public. The Mayor will close the public hearing. The matter will then be discussed by members of the City Council prior to taking action on the item.)

1. Expiration/Revocation of Unclassified Use Permit #07-47501 for a Professional Drag Racing Facility on APN Nos. 532-130-008 and 532-130-018. Municipal Code.

Staff Report 40

Recommendation:
Staff respectfully recommends that the City Council:

1. **Open the public hearing, receive staff report, allow the applicant**

to give testimony regarding the appeal, allow the public to comment on the appeal, receive rebuttal, close the public hearing, and open deliberations on the appeal; and

2. **Adopt Resolution No. 2008-34 entitled: A Resolution of the City Council of the City of Banning, California, Affirming Planning Commission Resolution No. 2008-05 Revoking Unclassified Use Permit #01-47501.**

Alternatives:

Continuance: I move the City Council continue the public hearing for the Expiration/Revocation of Unclassified Use Permit #01-47501 for a Professional Drag Racing Facility to its March 25, 2008 meeting.

Denial: I move the City Council maintain the Unclassified Use Permit #01-47501 for a Professional Drag Racing Facility.

V. ITEMS FOR FUTURE AGENDAS

New Items –

Pending Items –

1. Review of "Green Plan" in All Departments *(Machisic-10/9/07) (Earhart) (ETA 4/08)*
2. Annual Review of General Plan *(Hanna- 10/9/07) (Orci) (ETA 3/25/08)*
3. Review of Lease with Armory by end of the year. *(Franklin- 10/9/07) (City Atty.)*
4. Schedule Special Meeting with the Beaumont City Council *(Salas– 11/27/07) (City Mgr.)*
5. Schedule Special Jt. Meeting the Banning United School District Board – *(Botts – 11/27/07) (City Mgr.)*
6. Schedule Special Jt. Meetings with the City's Various Committees (Planning Commission, Economic Development Committee, Parks & Recreation) – *(Franklin – 11/27/07)*
7. Review of Development Fees *(Hanna – 12/11/07) (Orci) (ETA 3/08)*
8. Ordinances in Regards to Group Homes *(Botts – 12/11/07) (Orci & Purvis) (ETA 3/25/08)*
9. Performance Review of City Attorney's Office *(Hanna – 1/22/08) (ETA 4/08)*
10. Need to Set Date for Meeting with Morongo Band of Mission Indians regarding The Banning Municipal Airport *(Hanna -2/12/08) (City Mgr.)*

VI. ADJOURNMENT

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 and Council. 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 three-minute limitation shall apply to each member of the public, unless such time is extended by the Mayor and Council. A thirty-minute time limit is placed on this section. 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 (909) 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 Tile II].

City of Banning
City Council

AMERICAN CANCER SOCIETY'S RELAY FOR LIFE
RETURNS TO BANNING!

The community of Banning and and your American Cancer Society are preparing for our fifth Annual ***Relay For Life*** to be held on May 3-4, 2008 Funds raised by this event will be utilized throughout the community to provide services for local cancer patients, community education programs and national research projects. We are asking the City Council of Banning to support this event by presenting a ***Proclamation*** on behalf of the event at our opening ceremony.

We expect more than 3000 will attend this year's event. It includes a 24-hour run/walk event, as well as entertainment, local bands, food, a Luminaria event to recognize cancer survivors and those who lost their battle, Kids Camp, and many other activities. Our goal is to have more than 80 teams participate.

At this time we are recruiting interested community leaders and businesses to help sponsor this event. Corporate sponsorships are available beginning at $500 up to $10,000 for a Presenting Sponsor. In-kind donations, i.e. (food, beverages, etc.) are also available.

With a donation from the City of $5,000.00 your City logo will be on all of the participant T-Shirts, in the programs and on posters through out the community. The City of Banning's logo would also be displayed on our website www.events.cancer.org/rflsangorgoniopassca

Please contact us at any of the numbers listed below if you have any questions regarding our request, your sponsorship, or your City Team. We have a ***Relay For Life*** video on how you and your family or sponsors can be part of our ***community that takes up the fight*** We appreciate your consideration and look forward to having you join the fight against cancer by supporting the ***Fifth Annual Banning Relay For Life. Thanks to the City of Banning for all of your support.***

We cordially invite the Mayor, Mayor Pro-Tem, City Council Members, and City Manager to be part of our Opening Ceremonies on May 3rd at 9 a.m. at Beaumont Sports Park to officially present the Proclamation on behalf of Banning.

Sincerely,

Nicole Wheelwright
Relay 2008 Volunteer Event Chair

BANNING, CA
STAGECOACH TOWN USA
ESTABLISHED 1913

PROCLAMATION

WHEREAS, *each year, across the nation, one event bring together entire communities to take part in the fight against cancer; and*

WHEREAS, *that event is the American Cancer Society Relay for Life®; and*

WHEREAS, *it is a time and place where people come to celebrate those who have survived cancer, remember those we've lost, and fight back against a disease that touches too many lives; and*

WHEREAS, *thanks in part to the donations from Relay for Life and other events, the American Cancer Society is saving lives, helping those touched by cancer, and empowering people to fight this disease all over the world; and*

WHEREAS, *funds raised by this event will be utilized throughout the community to provide services for local cancer patients, community education programs and national research projects; and*

WHEREAS, *the City of Banning has the pleasure of supporting the "Relay For Life", of which there are nearly 5,000 events nationwide, to honor cancer survivors.*

THEREFORE, *I, Brenda Salas, Mayor of the City of Banning along with the City Council do hereby proclaim the City of Banning to be a RELAY FOR LIFE community, and urge our citizens to participate in this effort to eradicate cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer, through research, education, advocacy and service.*

NOW THEREFORE, BE IT RESOLVED THAT THE *City Council of Banning hereby proclaims "The Fifth Annual San Gorgonio Pass Relay for Life Event to be held on May 3rd & 4th, 2008 at Beaumont Sports Park" and urges the community to support this event.*

IN WITNESS WHEREOF, *I have set my hand and caused the seal of the City of Banning, California to be affixed this 11th day of March, 2008.*

ATTEST:

Marie A Calderon, City Clerk

Brenda Salas, Mayor

CITY COUNCIL AGENDA
CONSENT ITEM

DATE: **March 11, 2008**

TO: **Honorable Mayor and City Council**

FROM: **Chris Paxton, Director of Human Resources**

SUBJECT: **City of Banning Association of Managers (CBAM) Amendment to Memorandum of Understanding**

RECOMMENDATION: Adopt Resolution No. 2008-33 amending the Memorandum of Understanding (MOU) with the City of Banning Association of Managers which represents the bulk of the City's management personnel.

JUSTIFICATION: The City's existing MOU with CBAM provides for an increase in cafeteria contributions to unit members when another of the City's bargaining groups negotiates an increase to their plan.

BACKGROUND: The City has an existing MOU with CBAM for the period July 1, 2005 through June 30, 2008. Article 22.1 of the MOU provides that "During the term of this MOU, if any bargaining unit receives a Cafeteria Plan increase above CBAM's current amount of $5,725 per fiscal year, CBAM's Cafeteria Plan benefit will be increased to provide the same amount of the benefit and with the same effective date."

The City recently negotiated new MOUs with the IBEW Utility and General groups. As part of those negotiations, both groups received increases in their cafeteria contributions in excess of the amount currently provided for CBAM. The new contributions are as follows: $687.00 per month effective 10/1/07-6/30/08; $817.00 per month effective 7/1/08-6/30/09 and $947.00 per month effective 7/1/09-6/30/10.

This amendment to the CBAM MOU will provide the same benefit listed above to the CBAM members and will fulfill the City's obligation under the existing agreement.

FISCAL DATA: The adjustments for these costs have been incorporated into the mid-year budget adjustments.

RECOMMENDED BY:

Chris Paxton
Director of Human Resources

REVIEWED BY:

Bonnie Johnson
Director of Finance

APPROVED BY:

Brian Nakamura
City Manager

Resolution 2008-33 with amendment

RESOLUTION NO. 2008-33

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING AMENDING THE 2005-2008 MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF BANNING ASSOCIATION OF MANAGERS (CBAM) AND THE CITY OF BANNING

WHEREAS, the City of Banning has recognized the City of Banning Association of Managers (CBAM) as the bargaining unit representing a group of its employees; and,

WHEREAS, the City and CBAM entered into a Memorandum of Understanding (MOU) for a period of three years, which was approved by the City Council on October 11, 2005, by the adoption of Resolution No. 2005-110; and

WHEREAS, Section 22.1 of said MOU provides that whenever another City bargaining group receives a cafeteria plan contribution increase above the current CBAM contribution of $5,725 per year, then the CBAM cafeteria benefit shall be increased to the same amount negotiated by the other group; and

WHEREAS, the City and IBEW General and Utility Units recently entered into new MOUs that provided an increase to those cafeteria plans in the amount of: $687.00 per month effective October 1, 2007, $817.00 per month effective July 1, 2008 and $947.00 per month effective July 1, 2009.

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

1. The City Council approves the amendment to the CBAM MOU, a copy of which is attached hereto and by this reference made a part hereof.

2. The Mayor is authorized to execute the original document.

PASSED, APPROVED, AND ADOPTED this 11th day of March, 2008.

_____

Brenda Salas, Mayor
City of Banning

APPROVED AS TO FORM
AND LEGAL CONTENT:

_____
Burke, Williams & Sorenson LLP
City Attorney

ATTEST:

_____
Marie A. Calderon, City Clerk
City of Banning

CERTIFICATION:

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution, No. 2008-33 was duly adopted by the City Council of the City of Banning, California, at a regular meeting thereof held on the 11th day of March, 2008, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

_____
Marie A. Calderon, City Clerk
City of Banning, California

AMENDMENT TO THE MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF BANNING ASSOCIATION OF MANAGERS (CBAM) AND THE CITY OF BANNING FOR THE PERIOD JULY 1, 2005 - JUNE 30, 2008

With regard to Article 22.1 (Cafeteria Plan), the City's monthly contribution to individual employee cafeteria accounts is increased as follows:

Effective October 1, 2007	$687.00 per month
Effective July 1, 2008	$817.00 per month
Effective July 1, 2009	$947.00 per month

All other provisions of this MOU remain unchanged.

FOR THE CITY OF BANNING

_____
Brenda Salas, Mayor

FOR CBAM

_____
Fred Mason, President

_____
Representative

CITY COUNCIL AGENDA
CONSENT ITEM

Date: **March 11, 2008**

TO: **City Council**

FROM: **James D. Earhart, Electric Utility Director**

SUBJECT: **Resolution No. 2008-35 Revising the Electric Utility Rate Schedule to Increase the Baseline Kilowatt Hour Allocation for All-Electric Residential Customers and Customers with Water Wells**

RECOMMENDATION: The City Council adopt Resolution No. 2008-35, approving the revisions to the Electric Utility Rate Schedule to increase the baseline kilowatt hour ("kWh") allocation, attached herewith as Exhibit "A".

JUSTIFICATION: It is essential that the City of Banning Electric Utility ("Utility") residential baseline kWh allocation reflect the quantity of electricity necessary to supply the minimum needs of residential customer with an all-electric home. In addition, the Utility must provide an additional baseline allocation for residential customers that are not connected to the City's water distribution system and must use electric pumps on their personal water wells.

BACKGROUND: Last year the City assessed its first electric rate increase in 11 years, and created a third tier on its residential rates to encourage conservation and thereby reduce green house gas emissions. This third tier has had the desired affect and the Utility has conducted numerous energy audits and has helped customers implement conservation measures. However, we have identified two customer classes that were overlooked in the initial process.

All Electric customers (customers that have all electric appliances including heating, cooking, clothes drying, and water heating) only receive an additional baseline allocation during the winter months (November – March) to cover the heating requirements. However, these customers use additional electricity above the average residential customer who uses gas to cook, heat water and dry clothes throughout the year. Staff is recommending that a monthly baseline allocation of 150 kWh be added for All Electric customers, in addition to the winter heating allocation they already receive.

The second customer class that is impacted are the customers that are not connected to the City's water distribution system and have water wells located on their property. These customers must use electric pumps to extract the water from the ground and distribute it throughout their property. They use significantly more electricity than customers connected to the City's water system. Staff is recommending a separate monthly baseline allocation of 500 kWh to accommodate the electricity used to operate the water pumps.

Staff recommends that the City Council approve the revisions to the Electric Residential Rate Schedule as outlined above and highlighted in Exhibit "A" attached. Staff recommends that the proposed Rate Schedule become effective with the April 2008 billing cycle. However, Staff

requests the authority to make retroactive adjustments for customers with water wells, as deemed appropriate (not to precede October 2007).

FISCAL DATA: The estimated reduction in Electric Utility revenues as a result of the proposed changes to the baseline allocation is $19,900 per year.

RECOMMENDED BY:

James D. Earhart
Electric Utility Director

APPROVED BY:

Brian Nakamura
City Manager

Bonnie Johnson
Finance Director

Prepared by: Fred Mason, Power Resource & Revenue Administrator

RESOLUTION NO. 2008-35

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING APPROVING THE ELECTRIC UTILITY RATE SCHEDULE TO INCREASE THE BASELINE KILOWATT HOUR ALLOCATION FOR ALL-ELECTRIC RESIDENTIAL CUSTOMERS AND CUSTOMERS WITH WATER WELLS

WHEREAS, the City of Banning owns and operates its Municipal Electric Utility; and

WHEREAS, the City of Banning Electric Utility ("Utility") created a third tier in its residential rate schedule to encourage energy conservation and thereby reduce green house gas emissions, which became effective June 1, 2007; and

WHEREAS, the City of Banning wishes to ensure that fair and equitable baseline allocations are assessed to all customer classes; and

WHEREAS, Utility residential customers with all-electric homes consume more electricity than homes that use gas to heat, cook , heat water and dry clothes; and

WHEREAS, Utility residential customers with personal waters wells using electric pumps to extract and distribute water throughout their property, use more electricity than homes connected to the City's water system ;

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

1. Adopt Resolution No. 2008-35 approving the Electric Utility Rate Schedule, attached herewith as Exhibit "A".
2. Said Electric Utility Rate Schedule will become effective April 1, 2008.
3. Authorize retroactive adjustments for customers with water wells, as deemed appropriate by Staff, not to precede October 2007.

PASSED, APPROVED, AND ADOPTED this 11th day of March 2008.

_____
Brenda Salas, Mayor
City of Banning

APPROVED AS TO FORM
AND LEGAL CONTENT:

_____
Burke, Williams & Sorensen, LLP
City Attorney

ATTEST:

_____
Marie A. Calderon, City Clerk
City of Banning

CERTIFICATION

I, MARIE A. CALDERON, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution No. 2008-35 was duly adopted by the City Council of the City of Banning, California at a regular meeting thereof held on the 11th day of March, 2008 by the following vote, to wit:

AYES:

NOES:

ABSTAIN:

ABSENT:

_____
Marie A. Calderon, City Clerk
City of Banning, California

Exhibit "A"

CITY OF BANNING

ELECTRIC UTILITY RATE SCHEDULE

March 2008

TABLE OF CONTENTS

CITY OF BANNING
Electric Division

GENERAL PROVISIONS

SYSTEM COST ADJUSTMENT FACTOR

The System Cost Adjustment Factor (SCAF) is a charge per kWh that is used to ensure an adequate revenue stream to cover all costs incurred by Banning's electric system, and will be assessed to all customer classes. System costs will include: Power purchases, debt service, transmission, distribution and O&M expense, as well as all overhead costs of the electric system including inter-fund transfers.

The SCAF shall be calculated quarterly for the periods (January-March, April-June, July-September, and October-December) and shall become effective the first day of the 2nd quarter following the calculated period (i.e. January-March SCAF would become effective July 1st).

The SCAF shall be determined using the following formula and be expressed to the nearest $0.0001 per kWh:

$$SCAF = (a+b+c+d-e)/f$$

Where:
a = revenue from retail sales during the period.
b = revenue from bulk sales to other utilities.
c = fees collected from contractors in aid of construction or for other services provided.
d = miscellaneous revenues.
e = total cost of Banning's electric system including power purchases, debt service, transmission, distribution and operating expense, as well as all overhead costs of the electric system including inter-fund transfers.
f = the retail energy sales during the period in kWh.

SCAF will not exceed $0.02/kWh during any quarter. The uncollected revenue in excess of the $0.02 cap, if any, will be carried over as an expense in the next quarter. The Electric Utility shall maintain an operating reserve of $3M. Surplus revenue, if any, collected during any fiscal year, will be set aside in the Capital Improvement fund for system upgrades and future improvements.

PUBLIC BENEFITS CHARGE

All bills rendered under the above rate shall be subject to the Public Benefits Charge as established by the City Council.

SEASONS

The Summer season shall commence at 12:00 a.m. on the first Sunday in June and continue until 12:00 a.m. on the first Sunday in October of each year. The Winter season shall commence at 12:00 a.m. on the first Sunday in October of each year and continue until 12:00 a.m. on the first Sunday in June of the following year.

CITY OF BANNING
Electric Division

SCHEDULE A

RESIDENTIAL SERVICE

APPLICABILITY

This schedule is applicable to single family and multiple family accommodations devoted primarily to domestic use, and includes services for lighting, cooking, heating and power consuming appliances.

CHARACTER OF SERVICE

Alternating current with regulated frequency of 60 hertz, delivered at 120 or 240 volts, single phase, as may be specified by the Division.

TERRITORY

Within the area served by the City of Banning

RATES

		Per Meter Per Month
1.	Standard Residential Service	
	Customer Charge	$ 3.00
	Energy Charge	Per kWh
	Baseline Service	
	All kWh	$.1098
	Low Income Qualified Baseline Service	
	All kWh as described below	$.0672
	Non-baseline Service (Winter)	
	All kWh above baseline through 1,000	$.1935
	All kWh above 1,000	$.3180
	Non-baseline Service (Summer)	
	All kWh above baseline through 1,500	$.1935
	All kWh above 1,500	$.3180

Non-baseline service includes all kWh in excess of applicable baseline allowance as described below.

MINIMUM CHARGE

The Customer Charge plus the Energy Charge shall be subject to a minimum charge of $0.10 per day.

MINIMUM REQUIREMENTS

All services through one meter.

Multiple Family Dwellings

Whenever two or more individual family accommodations (in an apartment house, duplex, court, mobile home park, etc.) receive electric service from the Division through a master meter, the service shall be billed under this Schedule, with the Customer Charge and first 308 kWh per month multiplied by the number of individual accommodations served, plus additional baseline kWh as specified below. Base rate charges shall be reduced by $0.10 per sub-metered customer per day. In no case shall the base rate billing be less than the Minimum Charge.

Energy Surcharge

The charges in the above rate are subject to California State Energy surcharge tax and shall be adjusted accordingly.

LOW INCOME SENIOR CITIZEN SERVICE

Upon application to the City, each eligible low-income senior citizen residential customer shall pay a customer charge of $1.00 only. The customer shall notify the City when the conditions of the application are no longer valid.

LOW INCOME QUALIFIED BASELINE SERVICE

Upon application to the City, each approved low-income residential customer shall be placed on the Low Income Qualified Baseline rate as described below. The customer shall be required to recertify their eligibility on an annual basis. Failure to recertify will result in removal from the Low Income Qualified Baseline rate.

BASELINE SERVICE

All domestic customers on this schedule are entitled to an allocation of a baseline quantity of electricity that is necessary to supply the minimum energy needs of the average residential user. The total baseline allocation to a customer is the sum of all

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applicable baseline quantities described in items A through D shown below. However, the Low Income Qualified Baseline rate will only be applied to items A and B. If a Low Income Qualified customer is also eligible for items C and/or D, any baseline allocation in excess of A and B will be charged at the regular Baseline Service rate:

		kWh Per Month
A.	For basic standard residential use	308
B.	For air conditioning use during June through September.	250
C.	For life support devices	500
D.	For all-electric residential heat use during November through March	498

[redacted]

The all-electric residential heat allowance applies only to residences in which the sole source of heat consists of electric resistance heating installed prior to January 2000. Upon application to the City, the account of each eligible customer shall be provided with the all-electric allocation, [redacted].

LIFE SUPPORT DEVICES

Medical Baseline Allocation: Upon application to the City, the account of each eligible residential customer will be provided a year-around Medical Baseline Allocation.

A. Eligibility

For an account to be eligible for the standard Medical Baseline Allocation, the residential customer will provide certification as set forth in Paragraph E below to the City that:

(1) Regular use in the customer's home of one or more medical life support devices is essential to maintain the life of a full-time resident of the household; and/or

(2) A full-time resident of the household is a paraplegic, hemiplegic, quadriplegic, multiple sclerosis, or scherodemic patient.

B. Life-support Devices

The account of each eligible residential customer will be provided a standard Medical Baseline Allocation following certification acceptable to the City that a full-time resident of the household requires the regular use in the customer's home of one or more life-support devices.

Life-support devices means those devices or equipment which utilize mechanical or artificial means to sustain, restore, or supplement a vital function, or mechanical equipment which is relied upon for mobility both within and outside of buildings. Life-support devices or equipment include the following:

Aerosol Tent	Electrostatic Nebulizer
Compressor	Electric Nerve Stimulator
Iron Lung	Ultrasonic Nebulizer
Pressure Pump	Motorized Wheel Chair
IPPB Machine	Kidney Dialysis Machine
Suction Machine	Respirator (all types)

Oxygen Generator (Electrically Operated)

C. Paraplegic, Hemiplegic, Quadriplegic, Multiple Sclerosis or Scherodemic Patients

The account of each eligible residential customer, who provides certification that a full-time resident of the household is a paraplegic, hemiplegic, quadriplegic, multiple sclerosis or scherodemic patient or suffers from abnormality of centrally controlled body thermostat will be provided a standard Medical Baseline Allocation in consideration of special heating and/or cooling needs.

D. Hardship Cases

If the customer believes that the life-support device and/or a patient's space conditioning equipment (as set forth in Paragraph B and C above) requires more than 500 kWh per month to operate, the customer may apply for a higher allocation than the standard Medical Baseline Allocation. Upon receipt of such application, the City shall make a determination if any additional monthly baseline quantity is required to operate the device or equipment based on the nameplate rating and operating hours. The monthly amount of the Medical Baseline Allocation shall be increased to the number of kWh so determined.

E. Certification

The City may require the following Certification:

(1) The Customer shall have a medical doctor or osteopath licensed to practice medicine in the State of California provide the City with a certification letter, acceptable to the City. The letter shall describe in detail the type of life-support device(s) regularly required by the patient and the utilization requirements, and/or certify that the full-time resident is a paraplegic, hemiplegic, quadriplegic, multiple sclerosis, or scherodemic patient; or

(2) County, State, or Federal agencies, using an established notification letter to electric utilities, shall provide the City with information relative to a patient who regularly requires the use of a life-support device in a customer's residence.

Within 15 days after acceptance of the above certification, the City will provide a Medical Baseline Allocation to the customer's account. The City may require a new or renewed application and/or certification when needed, in the opinion of the City.

F. Termination of Use

The Customer shall notify the City of termination of use of equipment or devices set forth above.

WATER WELL PUMP

This allocation is for Banning Electric Utility customers that are not connected to the City's water distribution system, and have a water well onsite. Customer must register destination, and an onsite inspection must be completed before the allocation is authorized.

CITY OF BANNING
Electric Division

SCHEDULE B

SMALL GENERAL SERVICE

APPLICABILITY

Applicable to service for all types of uses, including lighting, power and heating, alone or combined.

CHARACTER OF SERVICE

Alternating current with regulated frequency of 60 hertz single-phase, three-phase, or a combination single and three-phase served through one meter, at a standard voltage not to exceed 240 volts, or as may be specified by the Electric Division. When the energy use for this service exceeds 5,000 kWh per month, the City will install a demand meter. If the maximum demand exceeds 20.0 kW in any three months during the preceding 12 months, the service will be transferred to Schedule C.

TERRITORY

Within the area served by the City of Banning.

RATES

	Per Meter Per Month
Customer Charge	$ 9.00
Energy Charge (to be added to Customer charge)	
All kWh, per kWh	$.1408

MINIMUM CHARGE

The Customer Charge plus the Energy Charge shall be subject to a minimum charge of $0.30 per day.

SPECIAL CONDITIONS

1. Voltage will be supplied at one standard voltage.

2. BILLING DEMAND: Billing demand shall be the kilowatts of measured maximum demand, but no less than 50 percent of the highest demand established in the preceding eleven (11) months. Billing demand shall be determined to the nearest 1/10 kW.

3. MAXIMUM DEMAND MEASUREMENT: in any month shall be the maximum average kilowatt input, indicated or recorded by instruments to be supplied by the Electric Division, during any 15 minute interval in the month. Where demands are intermittent or subject to violent fluctuations, a five minute interval may be used.

4. TEMPORARY DISCONTINUANCE OF SERVICE: Where the use of energy is seasonal or intermittent, no adjustment will be made for a temporary discontinuance of service. Any customer prior to resuming service within twelve months after such service was discontinued will be required to pay all charges which would have been billed if service had not been discontinued.

5. X-RAY INSTALLATIONS: Where the utility installs standard transformer capacity requested by the customer to serve an x-ray installation, the customer charge will be increased by $1.00 per kva of transformer capacity requested.

6. ENERGY SURCHARGE: The charges in the above rate are subject to California State Energy surcharge tax and shall be adjusted accordingly.

CITY OF BANNING
Electric Division

SCHEDULE C

GENERAL AND INDUSTRIAL SERVICE

APPLICABILITY

Applicable to service for large general and industrial establishments. This schedule is limited to customers with demands below 500.0 kW. Customers with demands exceeding 500.0 kW must receive service under Schedule TOU.

CHARACTER OF SERVICE

Alternating current with regulated frequency of 60 hertz, three-phase, or a combination single and three-phase served through one meter, at a standard voltage not to exceed 480 volts, or as may be specified by the Electric Division. All customers will have a demand meter. If the Maximum Demand drops below 20.0 kW for 12 consecutive months, the customer will be transferred to Schedule B.

TERRITORY

Within the area served by the City of Banning.

RATES

	Per Meter Per Month Summer	Per Meter Per Month Winter
Customer Charge	$12.00	$12.00
Demand Charge (to be added to the Customer Charge)		
All kW of billing demand, per kW	$12.00	$ 6.45
Energy Charge (to be added to the Demand Charge)		
All kWh, per kWh	$.1090	$.0975

MINIMUM CHARGE

The monthly minimum charge shall be the Demand Charge.

SPECIAL CONDITIONS

1. Voltage will be supplied at one standard voltage.

2. BILLING DEMAND: Billing demand shall be the kilowatts of measured maximum demand, but no less than 50 percent of the highest demand established in the preceding eleven (11) months. Billing demand shall be determined to the nearest 1/10 kW.

3. MAXIMUM DEMAND MEASUREMENT: The measured maximum demand in any month shall be the maximum average kilowatt input, indicated or recorded by instruments to be supplied by the Electric Division, during any 15 minute interval in the month. Where demands are intermittent or subject to violent fluctuations, a five minute interval may be used.

4. TEMPORARY DISCONTINUANCE OF SERVICE: Where the use of energy is seasonal or intermittent, no adjustment will be made for a temporary discontinuance of service. Any customer prior to resuming service within twelve months after such service was discontinued will be required to pay all charges which would have been billed if service had not been discontinued.

5. X-RAY INSTALLATIONS: Where the utility installs standard transformer capacity requested by the customer to serve an x-ray installation, the customer charge will be increased by $1.00 per kva of transformer capacity requested.

6. POWER FACTOR ADJUSTMENT: When the billing demand has exceeded 200.0 kW for three consecutive months, a kilovar hour meter will be installed as soon as practicable and thereafter until the billing demand has been less than 150 kW for twelve (12) consecutive months. The charges will be adjusted each month for the power factor as follows:

   The monthly charges will be decreased by $0.20 per kW of measured maximum demand and will be increased by $0.20 per kilovar of reactive demand. In no case will the kilovars used for the adjustment be less than 20 % of the number of kW the kilovars of reactive demand shall be calculated by multiplying the kW of measured maximum demand by the ratio of kilovar hours to the kWh. Demands in kW and kilovars shall be determined to the nearest 1/10 unit. A ratchet device will be installed on the kilovar meter to prevent its reverse operation on leading power factors.

7. ENERGY SURCHARGE The charges in the above rate are subject to California State Energy surcharge tax and shall be adjusted accordingly.

CITY OF BANNING
Electric Division

SCHEDULE TOU

LARGE GENERAL AND INDUSTRIAL SERVICE

APPLICABILITY

Applicable to service for all types of uses, including lighting, power and heating, alone or in combination. This rate shall be mandatory for customers whose monthly demand exceeds 500.0 kW for any three months during the preceding 12 months. Any customer whose monthly maximum demand has fallen below 450.0 kW for 12 consecutive months may elect to take service on any other applicable schedule. This schedule is an option for customers whose monthly demands are between 200.0 kW and 499.9 kW; however, participation for one year in the rate is required.

CHARACTER OF SERVICE

Alternating current with regulated frequency of 60 hertz, three-phase, or a combination single and three-phase served through one meter, at a standard voltage not to exceed 480 volts, or as may be specified by the Electric Division.

TERRITORY

Within the area served by the City of Banning.

RATES

Charges are calculated for customer billing using the components shown below:

	Per Meter Per Month	
	Summer	Winter
Customer Charge	$340.00	$340.00
Demand Charge (to be added to Customer Charge)		
All kW of non-time related component, per kW	$ 8.50	$ 8.50
Plus all kW of on-peak billing demand, per kW	$18.08	N/A
Plus all kW of mid-peak billing demand, per kW	$ 2.88	$0.00
Plus all kW of off-peak billing demand, per kW	$ 0.00	$0.00

Energy Charge (to be added to the Customer and Demand Charges)

	Summer	Winter
All kWh of on-peak energy, per kWh	$.1098	N/A
Plus all kWh of mid-peak energy, per kWh	$.0710	$.0870
Plus all kWh of off-peak energy, per kWh	$.0506	$.0520

SPECIAL CONDITIONS

1. Time periods are defined as follows:

On-Peak	Noon to 9:00 p.m. summer weekdays except holidays
Mid-Peak	7:00 a.m. to Noon and 9:00 p.m. to 11:00 p.m. summer weekdays except holidays. 7:00 a.m. to 11:00 p.m. winter weekdays except holidays.
Off-Peak	All other hours

Holidays are New Year's Day (January 1), Washington's Birthday (third Monday in February), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Veterans Day (November 11), Thanksgiving Day (fourth Thursday in November), and Christmas (December 25).

2. Voltage will be supplied at one standard voltage.

3. MAXIMUM DEMAND: Maximum demands shall be established for on-peak, mid-peak, and off-peak periods. The maximum demand for each period shall be the measured maximum average kilowatt input, indicated or recorded by instruments to be supplied by the Electric Division, during any 15 minute interval, but (except for new customers or existing customers electing Contract Demand as defined in these Special Conditions) not less than the diversified resistance welder load computed. Where demands are intermittent or subject to violent fluctuations, a five minute interval may be used.

4. BILLING DEMAND: The Demand Charge shall include the following billing components. The Time Related Component shall be for the kilowatts of Maximum Demand recorded during the monthly billing period for each of the On-Peak, Mid-Peak, and Off-Peak time periods. The Non-Time Related Component shall be for the total kilowatts of demand recorded in the demand period with the highest Maximum Demand during the monthly billing period. Separate Demand Charges for the On-Peak, Mid-Peak, and Off-Peak time periods shall be established for each monthly billing period as applicable. The Demand Charge for each time period shall be based on the maximum demand for that time period occurring during the respective monthly billing period. The Maximum Demand shall be determined to the nearest 1/10 kW.

5. CONTRACT DEMAND: A contract demand will be established by the City, based on the applicant's demand requirements for any customer newly requesting service on this schedule and for any customer of record on this schedule who requests an increase or decrease in transformer capacity.

   A contract demand arrangement is available upon request for all customers of record on this schedule. The contract demand will be used only for purposes of establishing the minimum demand charge for facilities required to provide service under the rate and will not be otherwise used for billing purposes.

   The contract demand is based upon the nominal kilovolt-amperes rating of the City's serving transformer(s) or the standard transformer size determined by the City as required to serve the customer's stated measurable kilowatt demand, whichever is less, and is expressed in kilowatts.

6. MINIMUM DEMAND CHARGE: Where a contract demand is established, the monthly minimum demand charge shall be $1.00 per kilowatt of contract, but not less than $500.00.

7. EXCESS TRANSFORMER CAPACITY: Excess Transformer Capacity is the amount of transformer capacity requested by a customer in excess of that which the City would normally install to serve the customer's Maximum Demand. Excess Transformer Capacity shall be billed at $1.00 per KVA per month.

8. POWER FACTOR ADJUSTMENT: The charges will be adjusted each month for reactive demand. The Charge will be increased by $0.30 per kilovar of maximum reactive demand imposed on the City. The kilovars of reactive demand shall be calculated by multiplying the kilowatts of measured maximum demand by the ratio of the kilovar-hours to the kilowatt hours. Demand in kilowatts and kilovars shall be determined to the nearest unit. A device will be installed on each kilovar meter to prevent reverse operation of the meter.

9. TEMPORARY DISCONTINUANCE OF SERVICE: Where the use of energy is seasonal or intermittent, no adjustment will be made for a temporary discontinuance of service. Any customer prior to resuming service within twelve months after such service was discontinued will be required to pay all charges which would have been billed if service had not been discontinued.

10. SUPPLEMENTAL VISUAL DEMAND METER: Subject to availability, and upon written application by the customer, the City will, within 180 days, supply and install a City owned supplemental visual demand meter. The customer shall provide the required space and associated wiring beyond the point of interconnection for such installation. Said supplemental visual demand meter shall be in parallel with the standard billing meter delineated in Special Condition 3 above. The reading measured or recorded by the supplemental visual demand

meter are for customer information purposes only and shall not be used for billing purposes in lieu of meter readings established by the standard billing meter. If a meter having visual display capability is installed by the City as the standard billing meter, no additional metering will be installed pursuant to this Special Condition.

One of the following types of supplemental visual demand meters will be provided in accordance with provisions above at no cost to the customer: Dial Watt-meter, Recording Watt-meter, or Paper-Tape Printing Demand Meter.

If the customer desires a supplemental visual demand meter having features not available in any of the above listed meters, such as an electronic microprocessor-based meter, the City will provide such a supplemental visual demand meter subject to monthly charge, if the meter and its associated equipment have been approved for use by the City. Upon receipt from the customer of a written application the City will design the installation and will thereafter supply, install, and maintain the supplemental visual demand meter subject to all conditions stated in the first and last paragraph of this Special Condition. For purposes of computing the monthly charge, any such supplemental visual demand meter and associated equipment shall be treated as Added Facilities. Added investment for computing the monthly charges shall be reduced by the City's estimated total installed cost at the customer location of the Paper-Tape Printing Demand Meter offered otherwise herein at no additional cost.

The City shall have sole access for purposes of maintenance and repair to any supplemental visual demand meter installed pursuant to this Special Condition and shall provide all required maintenance and repair. Periodic routine maintenance shall be provided at no additional cost to the customer. Such routine maintenance includes changing charts, inking pens, making periodic adjustments, lubricating moving parts and making minor repairs. Non-routine maintenance and major repairs or replacement shall be performed on an additional cost basis with the customer reimbursing the City for such cost.

11. CONTRACTS: An initial three-year facilities contract may be required where an applicant requires new or added serving capacity exceeding 2,000 KVA.

12. AUXILIARY/EMERGENCY GENERATION EQUIPMENT: Auxiliary/ Emergency Generation Equipment is the customer-owned electrical generation equipment normally used for auxiliary, emergency, or standby electrical generation purpose Auxiliary/Emergency Generation Equipment may be used by a customer to serve that customer's load only during a Period of Interruption, an only when such loads are isolated from the City's system. Other than for Auxiliary/Emergency generation or service, all service under this rate schedule is applicable only for service supplied by the City.

13. REMOVAL FROM SCHEDULE: Customers receiving service under this schedule whose monthly Maximum Demand has registered below 450.0 kW for 12 consecutive months may be changed to another schedule.

14. ENERGY SURCHARGE: The charges in the above rate are subject to California State Energy surcharge tax and shall be adjusted accordingly.

CITY OF BANNING
Electric Division

SCHEDULE SLS

UNMETERED STREET LIGHTING SERVICE

APPLICABILITY

Applicable for unmetered lighting of public streets, highways and thorough-fares, including City owned and City operated public parks and parking lots which are opened to the general public.

TERRITORY

Within the area served by the City of Banning.

RATES

Customer Class	Monthly Charges Per kW of Lamp Load
Residential (Rate A)	$2.00
Small Commercial (Rate B)	$2.80
Large General & Industrial (Rate C)	$4.45
Time-of-Use (Rate TOU)	$6.00
Lights on abutting property	$6.00

SPECIAL CONDITIONS:

The above charges shall be placed on the City Utility bills.

CITY OF BANNING
Electric Division

SCHEDULE OLS

OUTDOOR LIGHTING SERVICE (SECURITY)

APPLICABILITY

Applicable to all customers for outdoor area security lighting service furnished from dusk to dawn, supplied from existing overhead facilities. The Division will install, own operate and maintain the complete lighting installation, including customer owned support.

TERRITORY

Within the area served by the City of Banning.

RATES

		Per Lamp Per Month
(Fixture installed on existing support)		
100 Watt Sodium Vapor	(9,500 Lumen)	$ 8.47
200 Watt Sodium Vapor	(16,000 Lumen)	11.97
250 Watt Sodium Vapor	(25,000 Lumen)	13.17

	Per Pole Per Month
Pole (Department owned wood pole installation)	
20' or 35' Wood Pole	$ 2.95

SPECIAL CONDITIONS

1. Service under this schedule will be supplied at a single-phase voltage from the Electric Department's existing overhead lines.

2. The above lamp rates are applicable to Department-owned outdoor area lighting equipment mounted on existing Department owned poles or on customer owned supports acceptable to the Department.

Schedule OLS (continued)

3. Lighting equipment will consist of a Department standard overhead outdoor sodium vapor luminaries with photo electric switch, support and one overhead service drop not to exceed 100'.

4. Mounting height of 175 watt lamp will be approximately 25 to 30 feet, and mounting height of 400 watt lamps will be approximately 30 feet.

5. A customer who requests more than one wood pole, or other than wood poles shall install the poles at the customer's expense. The standard sodium vapor luminaire will be provided and installed by the Department.

6. Customers who do not wish to pay monthly pole charge, may pay a non-refundable amount for the installation of standard wood pole or other pole as the customer desires. The pole will remain the property of the customer at termination of service.

7. A contract for a period of one year will be required for initial installation of facilities under this schedule, and will remain in effect from month to month thereafter subject to termination or cancellation under terms stated therein.

8. Lamp maintenance will be done during regular working hours as soon as reasonably possible after the customer has notified the Department of service failure. Monthly bills will not be adjusted because of a lamp outage.

9. Relocation of an outdoor area lighting installation at the customer's request or because of government requirements will be made providing the customer pays the entire cost of such relocation.

10. Billing for an installation will be to only one account. Prorated billings to more than one account for a unit, or a combination of units will not be made. If the customer prefers to pay on an annual basis, payment shall be done and payable in advance.

11. The Department's dusk to dawn, all night service is based on a lighting period of approximately 4,080 hours per year.

12. If the customer discontinues service during the first three years of service, there will be a $25.00 charge to remove the service and equipment.

13. Poles will be located in areas where they may be serviced by truck.

14. This rate is subject to power cost adjustment at the following rates:
    10 kWh per month per 1,000 lumen for mercury vapor units
    4 kWh per month per 1,000 lumen for sodium vapor units

CITY OF BANNING
Electric Division

SCHEDULE MS

MUNICIPAL SERVICE

APPLICABILITY

Applicable to City of Banning municipal service for all types of uses, including lighting, power and heating, alone or combined.

CHARACTER OF SERVICE

Alternating current with regulated frequency of 60 hertz single-phase, three-phase, or a combination of single and three-phase served through one meter, at a standard voltage not to exceed 240 volts, or as may be specified by the Electric Division.

TERRITORY

Within the area served by the City of Banning.

RATES

	Per Meter Per Month
Customer Charge	n/a
Energy Charge (to be added to Customer charge)	
All kWh, per kWh	$.0923

MINIMUM CHARGE

Municipal services are not assessed a minimum charge.

SPECIAL CONDITIONS

1. Voltage will be supplied at one standard voltage.

2. ENERGY SURCHARGE: The charges in the above rate are subject to California State Energy surcharge tax and shall be adjusted accordingly.

CITY COUNCIL AGENDA
CONSENT ITEM

DATE: **March 11, 2008**

TO: **Honorable Mayor and City Council**

FROM: **Chris Paxton, Director of Human Resources**

SUBJECT: **Contract Amendment, Clarification of City Manager Contract**

RECOMMENDATION: Approve City Manager Contract Amendment I as a matter of housekeeping and clarification of current compensation and benefits.

JUSTIFICATION: The City provided compensation and benefits package and current city manager employment agreement present inconsistencies within the existing executive management benefits program. Amending Section 2.0 Compensation, Subsection 2.4, Benefits, by adding subsection 2.4.20 will provide uniformity.

BACKGROUND: The City Manager's Employment Agreement was entered into on the 8th day of January, 2008. this agreement details operative and general provisions for work. Section 7, subsection 7.5, General Provisions, enables the City council and City Manager to amend the existing employment agreement in writing, thus eliminating interpretation as defined in subsection 7.11.

FISCAL DATA: The compensation and benefits for the position are accounted for within the existing FY 2008/09 Budget.

RECOMMENDED BY:

Chris Paxton
Director of Human Resources

APPROVED BY:

Brian Nakamura
City Manager

Amendment

EMPLOYMENT AGREEMENT
For the Position of City Manager
AMENDMENT I

Amending Section 2.0 Compensation, Subsection 2.4 Benefits, by adding subsection 2.4.20 to read as follows:

"The City Manager, unless otherwise stated within the Employment Agreement, shall be provided management benefits as granted to other non-sworn management employees, represented or unrepresented."

All other provisions of this contract remain unchanged.

CITY MANAGER

_____
Brenda Salas, Mayor

CITY OF BANNING

_____
Brenda Salas, Mayor

ATTEST

_____
Marie Calderon, City Clerk

APPROVED AS TO FORM

_____
Julie Hayward Biggs, City Attorney

CITY COUNCIL AGENDA
CONSENT ITEM

DATE: **March 11, 2008**

TO: **Honorable Mayor and City Council**

FROM: **Duane Burk, Director of Public Works**

SUBJECT: **Notice of Completion for Remediation of Substandard Safety Conditions at the Banning Community Center**

RECOMMENDATION: That the City Council accept the emergency construction at the Banning Community Center, including the removal of fold-up tables and benches, and facility reconstruction, as complete, and direct the City Clerk to record the Notice of Completion.

JUSTIFICATION: The immediate removal of the existing fold-up tables and benches, along with facility reconstruction, was necessary in order to provide a safe environment for staff and community members. The contractor has completed the work as per the City's Standard Specifications.

BACKGROUND: During a June, 2007 function held at the Community Center, there was a minor incident that caused a folding table to fall from the wall. Consequently, it had been deemed necessary for staff to obtain an emergency repair contract in order to protect staff and visitors from future injuries and thus reduce potential liability risk. City Council approval was necessary in order to override the formal bid process and was essential in order to expedite the repairs and disburse payment, and the emergency repairs were approved on October 23, 2007 through Resolution No. 2007-127 "Declaring that an Emergency Condition Exists at the City of Banning Community Center and Awarding the Emergency Construction Contract Required to Remediate the Existing Substandard Safety Conditions".

The contract was awarded to Whitmore Construction of Banning, CA in the amount of $44,000.00, which included a 10% construction contingency. The scope of work for the project included the removal and disposal of 18 existing fold-up tables and benches; the reframing and reconstruction of walls, including taping, texturing, priming, and painting; the removal of existing single doors; the installation of new double doors; and the extension of four exhaust vents.

FISCAL DATA: The total expense for this project was $43,340.00 and funding was available in Account No. 470-4000-413.90-15.

RECOMMENDED BY:

Duane Burk
Director of Public Works

APPROVED BY:

~~Randy Anstine~~ Brian Nakamura
City Manager

REVIEWED BY:

Bonnie Johnson
Director of Finance

WHEN RECORDED MAIL TO:

City Clerk's Office
City of Banning
City Hall, 99 E. Ramsey Street
Banning, California 92220

FREE RECORDING:
Exempt Pursuant to
Government Code §6103

NOTICE OF COMPLETION

REMEDIATION OF SUBSTANDARD SAFETY CONDITIONS AT THE BANNING COMMUNITY CENTER, LOCATED AT 789 N. SAN GORGONIO AVE.

THIS NOTICE OF COMPLETION IS HEREBY GIVEN by the City of Banning, a municipal corporation, pursuant to the provisions of Section 3093 of the Civil Code of the State of California, and is hereby accepted by the City of Banning pursuant to authority conferred by the City Council this March 11, 2008, and the grantees consent to recordation thereof by its duly authorized agent.

(1) That the City of Banning and **Whitmore Construction, Inc.** of Banning, Calif., the vendee, under the contract dated October 25, 2007, for the furnishing of labor, materials, tools, equipment and other services necessary for the remediation of substandard safety conditions at the Banning Community Center. The scope of work for this project included the removal and disposal of 18 existing fold-up tables and benches; the reframing and reconstruction of walls, including taping, texturing, priming, and painting; the removal of existing single doors; the installation of new double doors; and the extension of four exhaust vents.

(2) That the work of improvement was completed in December of 2007, and the Nature of Interest was to protect against future injury and reduce potential injury liability.

(3) That the City of Banning, a municipal corporation, whose address is Banning City Hall, 99 E. Ramsey Street, Banning, California 92220, is the owner of said work of improvement.

(4) That the said work of improvement was performed at 789 N. San Gorgonio Ave., Banning, California, 92220.

(5) That the original contractor for said improvement was Whitmore Construction, Inc., State Contractor's License No. 445152.

Dated: March 11, 2008

CITY OF BANNING
A Municipal Corporation

By_____
Duane Burk
Director of Public Works

APPROVED AS TO FORM:

_____
Burke, Williams & Sorensen, LLP
City Attorney

STATE OF CALIFORNIA)
) ss
COUNTY OF RIVERSIDE)

MARIE A. CALDERON, being duly sworn, deposes and says:

That she is the City Clerk of the City of Banning, which City caused the work to be performed on the real property hereinabove described, and is authorized to execute this Notice of Completion on behalf of said City; that she has read the foregoing Notice and knows the contents thereof, and that the facts stated therein are true based upon information available to the City of Banning, and that she makes this verification on behalf of said City of Banning.

Marie Calderon
City Clerk of the City of Banning

Subscribed and sworn to before me this

Notary Public in and for said County and State

STAFF REPORT
PUBLIC HEARING

DATE: **March 11, 2008**

TO: **Honorable Mayor and City Council Members**

FROM: **Eric S. Vail, Assistant City Attorney**

SUBJECT: **Expiration/Revocation of Unclassified Use Permit #01-47501 for a Professional Drag Racing Facility on APN Nos. 532-130-008 and 532-130-018**

RECOMMENDATION:

Staff respectfully recommends that the City Council:

1. Open the public hearing, receive staff report, allow the applicant to give testimony regarding the appeal, allow the public to comment on the appeal, receive rebuttal, close the public hearing, and open deliberations on the appeal; and

2. Adopt Resolution No. 2008-34 entitled: A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING, CALIFORNIA, AFFIRMING PLANNING COMMISSION RESOLUTION NO. 2008-05 REVOKING UNCLASSIFIED USE PERMIT #01-47501.

ALTERNATIVES:

Continuance:

"I move the City Council continue the public hearing for the Expiration/Revocation of Unclassified Use Permit #01-47501 for a Professional Drag Racing Facility to its March 25, 2008 meeting".

Denial:

"I move the City Council maintain the Unclassified Use Permit #01-47501 for a Professional Drag Racing Facility".

SUMMARY:

Unclassified Use Permit #01-47501 ("Permit") expired by its own terms on or before August 14, 2006. Due to ambiguity in two permit conditions regarding whether a revocation hearing was required, staff recommended that a revocation procedure be pursued for the Permit

rather than having staff declare the Permit to be expired. At a duly noticed Planning Commission hearing on January 28, 2008 the Planning Commission voted 4-0 to adopt Resolution No. 2008-05 revoking the Permit. Revocation confirmed expiration of the Permit, and terminated any interest or right granted by the Permit.

The revocation was based upon the same grounds that formed the conclusion that the Permit had expired: following the final extension of the Permit, the developer failed to perform construction or other appropriate evidence of use pursuant to the Permit. Even though the developer performed some clearing and grubbing on the site and completed an off-site extension of Barbour Street, that work was insufficient to support continued validity of the Permit. Revocation of the Permit also confirmed the termination of the Development Agreement entered into for the same parcels, as the Development Agreement stated that it would expire at the same time as the Permit.

Revocation of the Permit by the Planning Commission does not preclude future use of the site. Revocation does, however, reinforce the fact that the Permit, issued in 2001, is of no further force and effect. Any party wishing to establish a drag racing facility or other use on the site may do so by applying for and obtaining approval of the appropriate land use permits and complying with current environmental review standards, existing zoning and the City's newly updated General Plan.

FACTS:

On June 28, 2001, the Planning Commission approved Unclassified Use Permit #01-47501 to allow a professional drag racing facility and associated improvements on Assessors Parcel Numbers 532-130-008 (the old Photosonics site) and 532-130-018 (20 acre City owned site). The Permit was originally issued to All-American Racing ("AAR").[1] The project to be built pursuant to the Permit was known as "Drag City."

Drag City, as anticipated by the Permit, consisted of an at-grade drag strip running west-to-east. At its westernmost portion, the strip was to be bordered on the north and south by grandstands, concession stands, and restrooms creating a racing stadium. The strip was to run across two parcels of land,[2] with a return roadway to the north of the strip that served to get cars back to the garages that were to be built north of the stadium. There was to be parking to the south of the stadium. Finally, the Permit required Barbour Street, which at that time terminated at the entrance to the Municipal Airport, to be extended to the property on which Drag City was to be built. The development of Drag City was to take place in three stages, with the at-grade drag strip, southern portion of the stadium, and approximately 1300 parking spaces to be built in the first phase. Additional grandstands and more parking would be built in the second phase. The final phase included completion of overflow parking and development of an additional pit/garage area.

[1] All-American Racing, of which Andy and Ron Marocco were the principals, later assigned its interest to Banning Airport Associates ("BAA"), as described below.

[2] The old Photosonics parcel was purchased by a prior principal of BAA, but was not purchased by BAA. The City parcel was not transferred to BAA due to BAA's inability to perform the terms of its purchase and sale agreement with the City.

The Permit contains two provisions that are relevant at this time, Planning Condition 1 and Planning Condition 2.[3]

Condition 1 reads:

> "All conditions of approval attached to Unclassified Use Permit No. 01-47501 must be met within the time frames stipulated in each condition for each phase of development. In the event the subject Unclassified Use Permit is not exercised consistent with the time frame identified for each condition, the permit shall become subject to revocation.
>
> If no time frame is specified, the approval shall be for a period of one (1) year from the date of the Planning Commission's approval (expiration date to be July 2, 2002). All conditions of approval for each phase of development must be met on or before their respective expiration date, or, the project proponent may request an amendment to the conditions at least thirty (30) days prior to the expiration date; otherwise, the approval shall expire and become null and void."

Condition 2 reads in pertinent part:

> "Non-compliance to [sic] provisions of Unclassified Use Permit 01-47501 may result in the City initiating procedures to revoke the subject Unclassified Use Permit...."

On August 1, 2002, the Planning Commission adopted a resolution supporting the determination of staff that the Permit should be extended for one year. In accordance with Section 9112 of the Code that was in effect at the time of the Permit, UUP's were to be processed in the manner specified for conditional use permits. Pursuant to Section 9116.10 of the Municipal Code in effect at the time the Permit was approved, three such extensions were permissible, each good for one year. Specifically, that section stated:

> "The Community Development Director may, upon an application being filed thirty days prior to expiration and for good cause, grant preliminary extension of the time within which the C.U.P. is to be exercised pursuant to Section 9116.8 above. Such period shall not exceed twelve months from the date the extension is approved. In no instance shall more than three extensions be granted...."

On July 23, 2003, the City through Resolution No. 2003-34 granted to AAR a grading permit that complied with the terms of the Permit. It appears AAR performed some preliminary clearing and grubbing of the site at that time, but did not perform any grading pursuant to the grading permit.

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[3] There are actually two conditions titled "Planning Condition 2." The first of the two is cited here and implicated in the matter before the Commission.

On August 5, 2003, the City extended the Permit for an additional year and made some amendments to the conditions of the Permit. This was the second extension of the Permit and meant that the Permit was due to expire on August 14, 2004.

On October 28, 2003, the City Council approved Ordinance No. 1308, establishing a Development Agreement that served to govern the development of the drag racing facility and other improvements. Pursuant to Section 4.2 of the Development Agreement, its term would expire at the same time the Permit expired.

In early 2004 and concluding in May 2004, Barbour Street was extended from Hathaway east to the entrance of the site. This work was performed entirely off-site, and included the extension of the street, pipes under the street, and curbs and gutters. This work was required under one of the engineering conditions for the Permit and was a precursory step to construction and use of phase 1 of the Project. AAR oversaw the construction of the road and associated improvements, with partial funding for the road and landscaping improvements being provided by the Community Redevelopment Agency.[4]

In May 2004, AAR sought a third extension of the Permit. On July 30, 2004, this extension was granted based on the off-site improvements and AAR's assertion that the preparation of building plans was under way. In the letter granting the extension, the then-Interim Community Development Director wrongly informed AAR that this was the second extension of the Permit. Although the Barbour Street improvements had been completed by this time, the City's issuance of a further extension for the Permit is evidence that the City did not consider this street work to be sufficient to constitute "commencement of construction or other appropriate evidence of use"[5] such that the Permit would have been deemed to be "exercised"[6] and no longer subject to expiration. If this work was deemed sufficient, the City would not have granted an extension.

On January 21, 2005, the City was informed by Searles Company, LLC, that it was taking over the Drag City project. At approximately the same time, AAR was in the process of assigning all of its interest in the project and all related approvals -- including the Permit -- to Banning Airport Associates, LLC, ("BAA"), an entity formed by Searles Company to develop the project.

On August 9, 2005, the City Council and Redevelopment Agency approved an assignment and assumption agreement between AAR and BAA under which BAA took over the project. At the same time, AAR released all rights, obligations, and claims it had against the City.

[4] The RDA's contribution was $62,500 for roadway improvements and $25,000 for landscaping.
[5] *See* prior Banning Municipal Code section 9116.8.
[6] Id.

On August 14, 2005, the City granted to BAA what at the time was called the third and final extension of the Permit. The Permit was due to expire on August 14, 2006, and pursuant to Section 9116.10, no further extensions were allowable by law.[7]

On September 22, 2005, a second grading permit was issued for the site, this time to BAA. This grading permit was for work that went beyond the scope of the Permit. The Permit anticipated a project on two parcels; this grading permit was for a project that would extend eastward onto a third parcel.[8] The Permit anticipated an at-grade drag strip and a drag racing stadium that rose up from the ground; this grading permit called for the creation of a below-grade "bowl" around which the drag racing stadium would be built and from which cars would set off on their west-to-east course. Planning staff concluded that an amendment to the Permit would have been necessary prior to construction activities both to include the third parcel and to provide for the below-grade creation of the "bowl."

On December 13, 2005, the City, the Redevelopment Agency, and BAA entered into a Master Agreement that did three things: (1) terminated all existing agreements and leases between the entities (and AAR as BAA's predecessor);[9] (2) set forth the general terms for the sale of the City parcel to BAA; and (3) set forth the conditions for site assembly to be performed by the City in order that a business park be developed by BAA adjacent to Drag City. Other than the sale of the City parcel, the Master Agreement did not concern the development of Drag City.

On June 2, 2006, the City Attorney's office sent a letter discussing BAA's obligations to be met before the City would engage in site assembly under the Master Agreement -- this included purchase of the City parcel.

On July 25, 2006, the City and BAA entered into a Purchase and Sale Agreement under which the City would sell to BAA the parcel owned by the City adjacent to the Photosonics site and the Municipal Airport.

In August 2006, BAA and the Banning Chamber of Commerce held a groundbreaking at the Photosonics site to celebrate the commencement of construction on the Drag City project. The City was not involved in the planning of the groundbreaking but did provide a public address system and seating for the event.

Thereafter, BAA commenced clearing and grubbing pursuant to the grading permit issued in September 2005. This consisted of scraping the top level of the soil on the Photosonics parcel

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[7] In actual fact, this extension was the fourth and was itself not allowable under the Banning Municipal Code provisions existing at that time.

[8] This is sometimes called the "Scharff property" after the then-owners of the parcel. The Agency has completed the purchase of the parcel.

[9] The items terminated where: a Memorandum of Understanding in 2002; a Lease dated November 26, 2002, by which the City leased the City's parcel to AAR; a License Agreement dated November 26, 2002, by which AAR granted the City a license over project-related parking spaces to be developed; a Reimbursement Agreement dated November 26, 2002, under which the Agency agreed to reimburse AAR for a portion of the Barbour Street improvement cost; and a Cost Support Agreement dated June 25, 2004, under which the Agency agreed to reimburse AAR for Barbour Street landscape improvements.

to remove vegetation, rubbish, and rocks. The removed debris was left in large piles on the site. The site was left generally flat, but was not graded so as to be ready for development.

On November 30, 2006, the Federal Aviation Administration approved the release of the City parcel to BAA. At that time, the City was in the process of completing the removal of burrowing owls from the City parcel, a removal that was complete by February 2007. The owls were not on the Photosonics parcel and their presence would not have impeded BAA from proceeding with grading or other work on the Photosonics parcel had it elected to proceed. Indeed, BAA had delivered grading equipment to the Photosonics site.

In February and March of 2007, the City's Public Works Department inspected the Photosonics site and the City parcel and found that BAA had performed clearing and grubbing work and scraped a shallow layer of top soil without implementing the necessary grading-related dust or stormwater control measures and had not proceeded to substantially grade the site.

In Spring and early Summer 2007, the City attempted to get BAA to complete the purchase of the City Parcel. Specifically, City representatives and BAA met on March 5 to discuss the project and on March 8, 2007, the City Attorney's office sent a letter memorializing the agreement reached on March 5 that extended the escrow for the City parcel until April 13, 2007.

On April 16, 2007, the City Attorney's office sent another letter to BAA extending the close of escrow until May 14, 2007.

On July 27, 2007, the City Attorney's office sent a letter notifying BAA that BAA had failed to make the deposit required by the Purchase and Sale Agreement, that BAA was therefore in default of the Purchase and Sale Agreement, and that the City would only continue that agreement upon the satisfaction of three conditions -- provision of evidence of sufficient funding for the project, commencement of construction on the drag strip within 90 days of the sale of the parcel, and the City's right to repurchase the parcel if BAA failed in its construction obligation. This letter extended the close of escrow until July 31, 2007.

On August 2, 2007, the City sent a letter to BAA reiterating its support for the project as envisioned by BAA and informing BAA that the City was completing the purchase of the Scharff parcel.

On September 10, 2007, BAA having not even made the deposit necessary to keep the transaction alive,[10] the City Council voted to terminate the Master Agreement and the Purchase and Sale Agreement.

In September 2007, BAA, which had been established by Searles Company, was either purchased in whole by, or rights were assigned to, Andy Marocco and Ron Marocco. Messrs.

[10] BAA was responsible to make both an initial deposit of $163,750, and a second deposit of $491,250, the total of which represented the full purchase price of the parcel. BAA failed to make the initial deposit of $163,750. The City allowed BAA several attempts to fund the deposit, but BAA was unable to do so. BAA never demonstrated an ability to financially satisfy the Purchase and Sale Agreement.

Marocco were the owners of AAR, which had previously assigned its interest in the project to BAA, and were the original recipients of the Permit and the entitlements thereunder.

On October 11, 2007, the City was informed that Andy and Ron Marocco, the owners of AAR, had acquired BAA, the entity to whom they had assigned all of AAR's interest in the Permit back in 2005.

On October 23, 2007, the City and the Agency adopted resolutions formally terminating the Master Agreement and the Purchase and Sale Agreement. At this joint Council and Agency meeting Andy Marocco appeared before governing bodies and stated that he agreed that the Master Agreement and Purchase and Sale Agreement should be terminated.[11]

On November 2, 2007, Andy Marocco wrote a letter to the City regarding the continued existence of the Permit. Mr. Marocco, having been the original recipient of the Permit, correctly presumed that the termination of the Master Agreement and the Purchase and Sale Agreement did not in and of itself legally terminate the Permit, nor was such action intended to do so.

Thereafter, in response to inquiry from Messers. Marocco about the continued validity of the Permit, the City Attorney's office, in consultation with City Staff, determined that the Permit had expired due to the lack of work performed thereunder. A notification of this expiration was sent to Mr. Marocco at BAA. The City Attorney's office, noting that Condition 2[12] created a theoretical need to also revoke the Permit, determined that a hearing on the matter was necessary.

The Planning Commission held a revocation hearing on January 28, 2008. Prior to this hearing, the Public Works Department again reviewed the site and found no new work being performed. After hearing and receiving evidence from staff and BAA, the Planning Commission voted to revoke the Permit at this hearing.

On February 6, 2008, BAA submitted a letter requesting an appeal of the Planning Commission's decision to revoke the Permit.

ANALYSIS:

As a preliminary matter, the Permit pre-existed the Master Agreement and the Purchase and Sale Agreement. While the execution of the Master Agreement served to terminate several other agreements, it did not terminate or subsume the Permit. Thus, the Permit (and the Development Agreement) theoretically had continued force and effect even after the City and the Agency terminated the Master Agreement and Purchase and Sale Agreement.

[11] *See* video tape report of proceedings from October 23, 2007 Joint Council / RDA Board meeting.
[12] Cited above.

1. The Permit Has Expired by Force of Law and by Its Own Terms.

BAA's[13] failure to exercise its rights under the Permit and begin construction or other appropriate evidence of use resulted in the Permit expiring of its own accord. BAA was given not one year, but practically speaking **over 6 years** to exercise its rights under the Permit.

The final extension of the Permit was not authorized under the Municipal Code because the Code only provided for three (3) twelve-month extensions of the Permit. Even assuming for the sake of argument the validity of the final extension, the Permit expired on August 14, 2006. BAA's failure to commence construction or other appropriate evidence of use in reliance on the Permit by August 14, 2006, means that the Permit expired. Section 9116.8 of the Municipal Code in effect at the time read:

> "A Conditional Use Permit[14] shall be exercised by the commencement of construction or other appropriate evidence of use, as determined by the Planning Commission or its designee, within one year from the date of approval unless otherwise specified within the C.U.P. Upon the expiration of one year without such commencement of use, the Conditional Use Permit shall become null and void and of no further force or effect without further action by the City."

What is at issue, therefore is whether any activities undertaken by BAA constituted "construction or other appropriate evidence of use" within the meaning of the Municipal Code. The answers is that the activities undertaken are not adequate.

The extension of Barbour Street was not construction or other appropriate evidence of use because it was performed offsite, was partially funded by the Agency, and was a precursor to construction of phase 1 of the Project and not actual, meaningful construction, let alone use, of the Project. At the time the work was done, AAR and the City recognized that it was not construction or other appropriate evidence of use and therefore the City granted an extension of the Permit. Had the road work been construction or other appropriate evidence of use, it alone would have validated the permit and no extension would have been necessary.

The "groundbreaking" ceremony was not construction or other appropriate evidence of use, because it was a ceremonial event and the only work that followed it or preceded it was clearing and grubbing. A single ceremonial use cannot be considered to be "use" of the Project as required under the Permit or the Municipal Code.

With respect to clearing and grubbing, it consisted of scraping a shallow level of top soil on the parcel to remove vegetation, rubbish, and rocks, piling the debris, and leaving the site generally flat, but not graded so as to be ready for development.

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[13] For purposes of the analysis, we will treat BAA and AAR as a single entity.

[14] In accordance with Section 9112 of the Code that was in effect at the time of the Permit, UUP's were to be processed in the manner specified for conditional use permits. Thus, the City has always treated the Permit as a CUP for purposes of processing and Code Compliance, and we analyze it as such.

BAA contends that it has a vested right to develop Drag City, and that the City may not revoke the Permit because of this alleged vested right. This is erroneous. It has long been held in California that granting of a land use approval does not in and of itself confer an unlimited vested right to develop.[15] Instead, a vested right to develop arises where **actual building permits** for identifiable work have been issued and **substantial work** has been done and substantial costs have been incurred **in reliance on those building permits.**[16] This requires not "soft costs" or other preparatory public improvement work, but actual construction of the project anticipated by the land use approval. "[N]either the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure."[17]

Under this test, neither the extension of Barbour Street in 2004 nor clearing and grubbing in 2006 are applicable. The former is clearly preconstruction work on public improvements **done without a building permit**, and neither AAR nor the City considered it to be construction or other appropriate evidence of use, because the City granted a Permit extension soon after the work was complete. Clearing and grubbing likewise is preconstruction work **done without a building permit** that precedes actual reliance on a building permit. No work that substantially advanced the Drag City project was performed on the site. **The case law makes it clear: there is no vested right to develop where no building permit has issued, no matter how many other preliminary approvals have been received, or whether the property owner relied upon the those approvals and other city actions.**[18] Clearly, BAA does not have a vested right to develop Drag City.

Section 9116.8 of the Banning Municipal Code is entirely consistent with the common law rule of vested rights. Section 9116.8 essentially provides that a permit expires one year after it issues unless during that time the developer established a vested right to develop. "Construction or other appropriate evidence of use" is synonymous with the vested right requirement that a building permit be obtained and the developer substantially rely on that building permit.

BAA posits that the test for determining whether it has a vested right is whether it has a "reasonable investment-backed expectation." This is not the test to determine whether BAA has a vested right. **In fact, the courts have noted on several occasions that it is possible for a property owner to have a reasonable investment-backed expectation that they will be able to develop their property, and not have a vested right to develop.**[19] The reasonable investment-backed expectation test is actually a test used in the takings context, and BAA has mischaracterized the nature of the test. The test is actually "*whether his reasonable investment-backed expectations have been destroyed.*"[20] Not only is this an improper forum for a takings argument,[21] revoking the Permit does not destroy BAA's investment-backed expectations; it

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[15] See *Avco Community Developers, Inc. v. South Coast Reg'l Comm'n* (1976) 17 Cal.3d 785.
[16] *Avco*, 17 Cal.3d at 791, see also *Hafen v. County of Orange* (2005) 128 Cal.App.4th 133.
[17] *Avco*, 17 Cal.3d at 793.
[18] *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 322.
[19] *Long Beach Equities Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1039-1040.
[20] Id. [italics original].
[21] Id.

simply requires BAA to apply for a new permit, which may involve more expenses than BAA had originally contemplated. "Diminution in expected value, even if that loss is severe, does not constitute a taking."[22] Moreover, the documentation submitted by Mr. Marocco at the January 28, 2008 hearing that he alleged would show his "reasonable investment-backed expectation" simply shows the amount of money he alleges has been spent on this project by BAA. First, the only documents submitted to prove this point that actually show that BAA paid any money are the copies of are the three receipts from the City's Public Works Department. The remainder of the documents submitted by Mr. Marocco that supposedly prove the amount of money invested by BAA are either invoices or mere lists of "Drag City Development Costs" and "Costs of Basic Business Operations (2000-2008)" that do not prove amounts actually remitted to vendors by BAA. Additionally, even assuming for the sake of argument that BAA did spend the amount of money that Mr. Marocco alleges was spent, there is no evidence that this amount was reasonable or that BAA's expectations for development were reasonable. Not only does BAA put forth the wrong test to determine whether it has a vested right to develop, it also fails to satisfy the erroneous test it is arguing should be applied.

In addition, the 2005 grading permits approved by the City required below-grade grading to create a "bowl" on the parcels. This was a change from the work anticipated by the Permit, which only required at-grade work and no substantial digging and off-haul of soil. BAA's plans for the site required that the parking at the site would be changed, the drag strip would extend onto the Scharff parcel, the drag strip would start in the below-grade bowl instead of at grade, and the business park to be developed would be integrated into the plans for Drag City. BAA at the time acknowledged that the Permit would have to be substantially modified or reissued in light of BAA's proposed changes to the drag strip and to the rest of the Site. BAA never sought modification or re-issuance of the Permit to reflect these changes.

Because BAA failed to commence construction or other appropriate evidence of use on the project anticipated by the Permit, failed to propose the Permit modifications required to make the terms of the Permit comply with BAA's plans for the site, and otherwise showed no appropriate evidence of use under the Permit, the Permit became "null and void and of no further force or effect" per Section 9116.8 as of August 14, 2006.

2. Notwithstanding Expiration of the Permit, a Hearing is Proper.

As discussed above, Condition 2 creates ambiguity. Theoretically, non-occurrence of construction or other appropriate evidence of use required by the Permit would be "non-compliance to provisions" of the Permit requiring a revocation process. Thus, while the Permit has expired, the language of Condition 2 makes it arguable that revocation procedures are still necessary.

It was therefore determined that this revocation hearing should be held in accordance with Section 9116.11 of the Municipal Code (as in effect at the time the Permit was entered into). Section 9116.11 read:

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[22] Id.

"The commission may revoke or modify a Conditional Use Permit.... Prior to any modification or revocation of a conditional use permit the Planning Commission shall first hold a public hearing on the matter.

A revocable Conditional Use Permit may be revoked or modified and an irrevocable Conditional Use Permit may be modified by the commission if any one (1) of the following findings can be made:

...

(c) That the use for which the Conditional Use Permit was granted had ceased or was suspended for six (6) or more consecutive calendar months;

(d) That one or more of the conditions of the Conditional Use Permit have not been met;

...."[23]

BAA's failure to act on the site for a period of more than 6 months is sufficient grounds for revocation. BAA can be viewed to have failed in two ways: (1) BAA failed to perform construction or other appropriate evidence of use pursuant to the Permit; or (2) the Barbour Street extension or BAA's clearing and grubbing was construction or other appropriate evidence of use, but because that work terminated in Autumn 2006 and no further work has been done, BAA has ceased or suspended work for more than 6 months.

3. Issues Before the Council.

At this hearing, the City Council is called on to uphold the Planning Commission's revocation of the Permit. As a preliminary matter, the final extension of the Permit was not authorized under the Municipal Code because the Code only provided for three (3) twelve-month extensions of the Permit, and so the Permit expired on August 14, 2005. Even if the final extension is deemed to be valid, the work performed by BAA does not constitute construction or other appropriate evidence of use for the reasons cited above. The Council is therefore asked to uphold the Planning Commission's revocation of the Permit.

There are no other issues before the Council. The potential economic impacts of a drag strip project are irrelevant, as is any community support for the project. The Municipal Code allowed three extensions; they were given and have all expired. The Code required construction or other appropriate evidence of use for the Permit to remain valid; no such work has occurred. The Council should therefore uphold the Planning Commission's revocation of the Permit.

4. Result of Revocation.

[23] Additional grounds existed but were not relevant to the matter before the Commission and have been omitted from this discussion.

Revocation of the Permit fully and finally terminated any potential or theoretical rights still held by BAA. It remains the position of the City Attorney's office that those rights automatically terminated, but in an abundance of caution the Planning Commission was asked to formally revoke any interest remaining in the Permit.

Revocation also terminated the Development Agreement pursuant to the terms of the Development Agreement.

Revocation did not foreclose the possibility of a drag racing facility or other use on the site, but simply means that BAA must apply for a new permit and go through environmental review and conditioning of the project that will require the project to be consistent with the current General Plan and the current standards for development in the City.

INCORPORATION OF DOCUMENTS

The foregoing statement of facts and analysis are based on facts gathered by City Staff, legal research performed by the City Attorney's office, and the following documentation. Copies of these documents are hereby incorporated by reference into this staff report, and copies have been made available to the City Council for their review.

1. The Code of the City of Banning, California (1965)
2. Unclassified Use Permit No. 01-47501
3. Notice of Determination filed with the County Clerk for the County of Riverside in support of Unclassified Use Permit No. 01-47501
4. Ordinance No. 1308, adopted by the City Council on October 28, 2003, and approving Development Agreement No. 03-1504
5. Master Agreement, dated December 13, 2005
6. Purchase and Sale Agreement, dated July 25, 2006
7. Resolution No. 2007-115
8. Resolution No. 2007-113
9. Staff Report of August 6, 2002, time extension for UUP 01-47501
10. Letter of August 12, 2002, confirming extension for UUP 01-47501
11. Letter of April 10, 2003, regarding work under UUP 01-47501
12. Staff Report of April 22, 2003, regarding work under UUP 01-47501
13. Staff Report of April 26, 2003, regarding granting of a grading permit under UUP 01-47501
14. Letter of July 29, 2003, regarding extension of UUP 01-47501
15. Staff Report of August 5, 2003, regarding extension of UUP 01-47501
16. Letter of October 9, 2003, regarding extension of UUP 01-47501
17. Letter of May 21, 2004, regarding extension of UUP 01-47501
18. Letter of July 30, 2004, regarding extension of UUP 01-47501
19. Letter of January 21, 2005, regarding BAA beginning to take over the project from AAR
20. Letter of August 9, 2005, regarding extension of UUP 01-47501
21. Staff Report of August 9, 2005, regarding assignment and assumption by BAA of AAR rights, duties, and liabilities for Drag City project
22. Grading Permit No. 2005-06

23. Grading Permit No. 2003-07
24. Letter of October 23, 2006, regarding burrowing owl
25. Letter of March 8, 2007, regarding extension of escrow for BAA purchase of City parcel
26. Letter of April 10, 2007, regarding funding of BAA development of Drag City and business park
27. Letter of April 16, 2007, regarding extension of escrow for BAA purchase of City parcel
28. Staff Report of April 24, 2007, regarding status of Drag City project
29. Letter of May 17, 2007, regarding remediation of dust at site
30. Letter of July 19, 2007, regarding funding of BAA development of Drag City and business park
31. Letter of July 24, 2007, regarding funding of BAA purchase of City parcel
32. Letter of July 27, 2007, regarding BAA's default of the Purchase and Sale Agreement
33. Letter of August 2, 2007, regarding City's continued support of BAA's vision for the Drag City and business park projects
34. Letter of September 14, 2007, terminating Master Agreement and Purchase and Sale Agreement
35. Letter of September 14, 2007, terminating escrow under the Purchase and Sale Agreement
36. Letter of October 11, 2007, regarding sale of BAA to Andy and Ron Marocco
37. Letter of November 2, 2007, regarding continued viability of UUP 01-47501
38. Video tape report of proceedings from October 23, 2007 Joint Council / RDA Board meeting.
39. Staff Report of January 28, 2008, regarding revocation of UUP 01-47501.
40. Planning Commission Resolution 2008-05.

RECOMMENDED BY:

Eric Vail by GS
Eric Vail
Assistant City Attorney

RECOMMENDED BY:

Oscar W. Orci by GS
Oscar W. Orci
Community Development Director

REVIEWED BY:

Bonnie Johnson
Finance Director

APPROVED BY:

Brian Nakamura
City Manager

Exhibit:

1. Resolution No. 2008-34

UUP #01-47501
EXPIRATION /
REVOCATION

RESOLUTION
NO. 2008-34

EXHIBIT "1"

RESOLUTION NO. 2008-34

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BANNING, CALIFORNIA, DENYING BANNING AIRPORT ASSOCIATES, LLC'S APPEAL OF PLANNING COMMISSION RESOLUTION NO. 2008-05 REVOKING UNCLASSIFIED USE PERMIT #01-47501.

WHEREAS, on January 28, 2008, the Planning Commission held a duly noticed public hearing on the revocation of Unclassified Use Permit #01-47501 ("Permit"), which was granted by the Planning Commission on July 3, 2001 to All-American Racing ("AAR"), and which was later assigned to Banning Airport Associates ("BAA"), at which interested persons had an opportunity to testify in support of or in opposition to the revocation of the Permit; and

WHEREAS, the purpose of the Permit was to allow a project known as "Drag City" consisting of a professional drag racing facility and associated improvements on Assessors Parcel Numbers 532-130-008 and 532-130-018; and

WHEREAS, in accordance with Section 9112 of the Code that was in effect at the time of the Permit, Unclassified Use Permit's were to be processed in the manner specified for conditional use permits; and

WHEREAS, the Planning Commission had the authority per Section 9116.11 of the version of the Banning Municipal Code in effect at the time the expired Permit was granted and per Section 17.52.100 of the current version of the Municipal Code to revoke conditional use permits (including unclassified use permits); and

WHEREAS, at the January 28, 2008 Planning Commission meeting, the Planning Commission voted 4-0 to revoke the Permit, and adopted Resolution No. 2008-05 ["A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF BANNING, CALIFORNIA REVOKING UNCLASSIFIED USE PERMIT 01-47501]; and

WHEREAS, on February 6, 2008, BAA submitted a letter appealing the Planning Commission's decision to revoke the Permit; and

WHEREAS, on March 11, 2008, the City Council held a duly noticed public hearing where BAA's appeal of the Planning Commission's determination to revoke the Permit was heard.

THE CITY COUNCIL OF THE CITY OF BANNING DOES HEREBY FIND, DETERMINE AND RESOLVE AS FOLLOWS:

SECTION 1. FINDINGS.

The City Council, in light of the whole record before it, including but not limited to the recommendation of the City Attorney as provided in the Staff Report dated March 11, 2008, and

documents incorporated therein by reference, and any other evidence within the record or provided at the public hearing of this matter, hereby makes the following findings of fact:

1. On July 3, 2001, the Planning Commission conditionally approved the Permit.

2. The Permit holder, Banning Airport Associates, LLP ("BAA"), is the successor-in-interest to All-American Racing, to whom the Permit was originally granted.

3. The Permit contained the following two conditions, which were, respectively, Planning Condition 1 and Planning Condition 2:

> 1. All conditions of approval attached to Unclassified Use Permit #01-47501 must be met within the time frames stipulated in each condition for each phase of development. In the event he subject Unclassified Use Permit is not exercised consistent with the time frame identified for each condition, the permit shall become subject to revocation.
>
> If no time frame is specified, the approval shall be for a period of one (1) year from the date of the Planning Commission's approval (expiration date to be July 3, 2002). All conditions of approval for each phase of development must be met on or before their respective expiration date, or, the project proponent may request an amendment to the conditions at least thirty (30) days prior to the expiration date; otherwise, the approval shall expire and become null and void.
>
> 2. Non-compliance to provisions of Unclassified Use Permit #01-47501 may result in the City initiating procedures to revoke the subject Unclassified Use Permit. Further, if during the term of the permit the City determines based upon substantial evidence that permit activity is exercised as to be detrimental to the public health or safety, or so as to be a nuisance to other businesses in the general area, the permit shall be subject to revocation as outlined in Article 21 (Revocation of Permits) of the Banning Ordinance Code. [sic]

4. The Permit is governed by the version of the Municipal Code in existence at the time the Permit was granted in 2001. Subsequent changes to the Municipal Code may not be used to detract from the rights granted BAA under the Permit. The Planning Commission will therefore apply the version of the Municipal Code in existence at the time the Permit was granted to the facts of this case.

5. Section 9112 of the Code that was in effect at the time of the Permit required Unclassified Use Permit's to be processed in the manner specified for conditional use permits

6. Section 9116.8 of that version of the Municipal Code addressed the time period for the commencement of construction or use under a permit and read:

> A Conditional Use Permit[1] shall be exercised by the commencement of construction or other appropriate evidence of use, as determined by the Planning Commission or its designee, within one year from the date of approval unless otherwise specified within the C.U.P. Upon the expiration of one year without such commencement of use, the Conditional Use Permit shall become null and void and of no further force or effect without further action by the City.
>
> If after commencement of any related construction, work is discontinued, before completion, for a period of one year, then the Conditional Use Permit shall become null and void and of no further force or effect without further action by the City.

7. Section 9116.10 of that version of the Municipal Code addressed extensions of permits and read in relevant part:

> The Community Development Director may, upon an application being filed thirty days prior to expiration and for good cause, grant preliminary extension of the time within which the C.U.P. is to be exercised pursuant to Section 9116.8 above. Such period shall not exceed twelve months from the date the extension is approved. In no instance shall more than three extensions be granted.... The Community Development Director shall advise the Planning Commission of his/her approvals hereunder by report at the Planning Commission meeting immediately following such date of approval. Any approval granted hereunder shall become final five (5) days following date of such Planning Commission meeting unless modified or rejected by the Planning Commission.

8. Section 9116.11 of that version of the Municipal Code addressed extensions of permits and read in relevant part:

> The commission may revoke or modify a Conditional Use Permit as hereinafter provided. Prior to any modification or revocation of a conditional use permit the Planning Commission shall first hold a public hearing on the matter....
>
> A revocable Conditional Use Permit may be revoked or modified and an irrevocable Conditional Use Permit may be modified by the commission if any one (1) of the following findings can be made:

[1] The City and the developer have, from the time the Permit was sought treated the Permit as a CUP for purposes of processing and Code Compliance in accordance with Section 9112 of the Code that was in effect at the time of the Permit.

(a) That circumstances have changed so that one (1) or more of the findings contained in Section 9116.6 (Findings) can no longer be made;

(b) That the Conditional Use Permit was obtained by misrepresentation or fraud;

(c) That the use for which the Conditional Use Permit was granted had ceased or was suspended for six (6) or more consecutive calendar months;

(d) That one or more of the conditions of the Conditional Use Permit have not been met;

(e) That the use is in violation of any statute, ordinance, law, or regulation; or

(f) That the use permitted by the Conditional Use Permit is detrimental to the public health, safety or welfare or constitutes a nuisance.

9. On August 1, 2002, the Planning Commission adopted a resolution supporting the determination of staff that the Permit should be extended for one year, thus extending the life of the Permit for a second year.

10. On November 26, 2002, the Redevelopment Agency of the City of Banning ("Agency") and AAR entered into a Reimbursement Agreement under which AAR would construct certain improvements to Barbour Street and the Agency would partially fund the construction.

11. On July 23, 2003, the City through Resolution No. 2003-34 granted to AAR a grading permit consistent with the grading required by the Permit. AAR performed some preliminary clearing and grubbing of the site, but did not perform any grading pursuant to the grading permit. The clearing and grubbing that was done consisted solely of scraping the top level of the soil on the parcel to remove vegetation, rubbish, and rocks.

12. On August 5, 2003, the City extended the Permit for an additional year and made some amendments to the conditions of the Permit. This was the second extension of the Permit and it stated that the Permit was due to expire on August 14, 2004.

13. On October 28, 2003, the City Council approved Ordinance No. 1308, establishing a development agreement that served to govern the development of the Drag City. Pursuant to Section 4.2 of the Development Agreement, its term would expire at the same time the Permit expired.

14. In early 2004 and concluding in May 2004, Barbour Street was extended from Hathaway east to the entrance of the site. This work was performed entirely off-site, and included the extension of the street, pipes under the street, and curbs and gutters. While this work complied with Engineering Condition B.1 of the Permit, it was also done to satisfy AAR's obligations to the Agency under the Reimbursement Agreement.

15. Subsequent to the improvement of Barbour Street, on June 25, 2004, the Agency and AAR entered into a Cost Support Agreement under which the Agency committed additional funds to cover the costs of the Barbour Street improvements.

16. On July 30, 2004, a third extension (mistakenly identified as the second extension) was granted based on the off-site improvements and AAR's assertion that the preparation of building plans was under way. Based on this third extension, the Permit was due to expire on or about August 14, 2005.

17. In the Spring of 2005, AAR assigned all of its interest in the project and all related approvals -- including the Permit -- to Banning Airport Associates, LLC ("BAA").

18. On August 9, 2005, the City Council and Redevelopment Agency approved an assignment and assumption agreement between AAR and BAA under which BAA took over the project and at the same time, AAR released all rights, obligations, and claims it had against the City.

19. On August 14, 2005, the City granted to BAA a fourth and final extension (mistakenly called the third and final extension) of the then-expired Permit. Based on this fourth extension, the Permit was due to expire on or about August 14, 2006.

20. On September 22, 2005, a second grading permit was issued for the site, this time to BAA, which grading permit was for work that went beyond the scope of the Permit and anticipated modification to the Permit or the issuance of a new unclassified use permit.

21. Upon receipt of this grading permit, BAA commenced clearing and grubbing of the site pursuant to the grading permit issued in September 2005. This consisted of scraping the top level of the soil on the parcel to remove vegetation, rubbish, and rocks. The removed debris was left in large piles on the site. The site was left generally flat, but was not graded so as to be ready for development.

22. In August 2006, BAA and the Banning Chamber of Commerce held a groundbreaking at the site of the Drag City project to celebrate the commencement of construction on the Drag City project. The City was not involved in the planning of the groundbreaking but did provide a public address system and seating for the event.

23. Prior to the groundbreaking ceremony, BAA brought grading equipment onto the site. Some minor grading of the site had been performed for the ceremony, but the site remained substantially ungraded.

24. Subsequent to the groundbreaking, BAA performed some dust remediation work on the site. BAA at no time performed substantial grading of the site, and the site was not maintained in cleared and grubbed state.

25. In March 2007, BAA ceased performing dust remediation work on the site and has performed no further work on the site, although some grading equipment remains on the site.

SECTION 2. DETERMINATION OF APPEAL.

The City Council, in light of the whole record before it, including but not limited to the foregoing findings of fact, the recommendation of the City Attorney and Community Development Director as provided in the Staff Report dated March 11, 2008, and the documents incorporated therein by reference, and any other evidence within the record or provided at the public hearing on this matter, hereby denies BAA's appeal of the Planning Commission's determination to revoke the Permit.

PASSED, APPROVED, AND ADOPTED this 11th day of March, 2008.

_____
Brenda Salas, Mayor
City of Banning

APPROVED AS TO FORM AND LEGAL CONTENT:

_____
Burke, Williams & Sorensen, LLP
City Attorney

ATTEST:

_____
Marie Calderon, City Clerk
City of Banning

CERTIFICATION:

I, Marie A. Calderon, City Clerk of the City of Banning, California, do hereby certify that the foregoing Resolution, No. 2008-34, was duly adopted by the City Council of the City of Banning, California, at a regular meeting thereof held on the 11th day of March 2008, by the following vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

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